

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:

LAWRENCE M. BLOCK and
PATRICIA D. BLOCK,

Debtors.

EK 84-0-1530
CV 85-0-382

ORDER William L. Olson, Clerk

By Deputy

FILED
DISTRICT OF NEBRASKA

JUN 11 1986

This matter is before the Court upon the trustee's appeal of an order of the United States Bankruptcy Court for the District of Nebraska overruling the trustee's objection to the debtors' claim of exemption (filing 1). The Court finds that this is an appeal of a final order involving a core proceeding and that it has jurisdiction to hear the appeal. In re Olson, 730 F.2d 1109, 1109 (8th Cir. 1984) (test set forth for determining finality of Bankruptcy Court order). Bankruptcy Rule 8013 governs the standard of review and requires that a District Court adopt the factual findings of the Bankruptcy Court unless they are clearly erroneous. However, the District Court is not so restricted in reviewing the Bankruptcy Court's interpretation of the law. Bankr. Rule 8013; In re Cricker, 46 B.R. 229 (Bankr. N.D. Ind. 1985).

The subject matter of this appeal involves the proceeds of a Teacher's Annuity Contract which were placed in savings certificates for the benefit of the depositors' children, approximately four months before the depositors filed for protection under Chapter 7 of the bankruptcy laws. On March 1, 1974, an annuity contract was issued to Patricia Block. The contract matured in April of 1984 and after various tax deductions were made, the proceeds were delivered to Patricia Block. Mrs.

Block then used \$15,000.00 of the proceeds to purchase two savings certificates from the Nebraska State Savings and Loan Associations naming herself and Lawrence M. Block as co-trustees for the benefit of their children: Sandra Block, Larry Block, and Ronald Block. Defendants' Exhibits 3 and 4. On August 10, 1984, Patricia and Lawrence Block (debtors) filed for relief under Chapter 7 of the bankruptcy laws. They claimed that the savings certificates were exempt from the bankruptcy estate. The trustee filed an objection to the claimed exemption and after an evidentiary hearing the Bankruptcy Court concluded that the certificates were exempt. This appeal followed.

The issue for this Court to decide is whether the savings certificates were part of the debtors' estate at the time they were found to be exempt or whether ownership of the certificates had passed to the debtors' children. At the outset the trustee makes the argument that because the debtors failed to list the certificates on their schedule of assets as required by Bankruptcy Rule 4003 they should not be entitled to claim an exemption with respect to the savings certificates. The savings certificates were, however, listed on the Statement of Affairs for Debtors Not Engaged in Business and this Court agrees with the Bankruptcy Court that the certificates were satisfactorily disclosed.¹ The

¹The Court notes that the debtors' statement that the funds were placed in trust April 3, 1982, rather than April 3, 1984, did not prejudice the trustee in this matter; however, it could have been misleading in a preference action. Plaintiff's exhibit 1 at question 6; Plaintiff's Exhibit 2 9:22-25; 10:1-10.

trustee had notice and an opportunity to object, which he did.

See In re Frankina, 29 B.R. 983 (Bankr. E.D. Mich. 1983) (purpose of bankruptcy schedules is to give notice)

- The debtors in this case, by purchasing savings certificates imprinted with the language "Patricia D. Block and Lawrence M. Block, co-trustees for Sandra Block, Larry Block, and Ronald Block, beneficiaries," created a Totten Trust for the benefit of their children which was intended to be a testamentary device. In re Totten, 179 N.Y. 112, 71 N.E. 748 (1903). A Totten Trust is simply a savings deposit made by a person, of his own money, in his own name as trustee for the benefit of another. There is a presumption that such a trust is revocable at will during the life of the depositor. Neb. Rev. Stat. § 30-2703(c), comment (1984). It may be used as a testamentary instrument. In re Mims, 33 B.R. 95,96 (Bankr. M.D. Fla. 1983).

Unlike an intervivos trust, a Totten Trust does not create a split in ownership between the trustee and the beneficiaries. Id. The money in a Totten Trust is subject to the control of the depositors at all times and the depositor should be treated as the unrestricted owner.² In re Gillett, 55 B.R. 675, 679 (Bankr. S.D. Fla. 1985); Restatement of Trusts 2d, § 58, comment d (1959).

²The fact that the savings certificates have a maturity date of April 3, 1989, does not affect the depositors' ability to control the account since the certificates may be redeemed prior to maturity for the prescribed penalty.

Section 541(a) of the Bankruptcy Code includes within the bankruptcy estate "...all legal or equitable interest of the debtor in property as of commencement of the case..." The Bankruptcy Court properly treated the savings certificates as assets of the estate at the time the exemption was permitted.

The only remaining question is whether it was proper to treat the savings certificates as exempt. Section 522 of the Bankruptcy Code governs exemptions in bankruptcy. That section provides that property which is exempt under state law may be exempt from the bankruptcy estate of an individual debtor. 11 U.S.C. § 522(b). Subsection (g) of Section 522 limits Section 522(b) by excluding certain property from the exemption if such property was voluntarily transferred and concealed by the debtors. 11 U.S.C. § 522(g).

Under Nebraska law annuities and proceeds therefrom are exempt from the property of the estate.³ Neb. Rev. Stat. § 44-371

³44-371. Annuity contract, insurance proceeds and benefits; exempt from claims of creditors; exception. All proceeds, cash values, and benefits accruing under any annuity contract, or under any policy or certificate of life insurance payable upon the death of the insured to a beneficiary other than the estate of the insured, and under any accident or health insurance policy, issued before, on, or after August 30, 1981, shall be exempt from attachment, garnishment, or other legal or equitable process, and from all claims of creditors of the insured, and of the beneficiary if related to the insured by blood or marriage, unless a written assignment to the contrary has been obtained by the claimant. The provisions of this section shall not apply to any loan value in excess of five thousand dollars of an unmatured life insurance contract.

(1984). The Bankruptcy Court found, and this Court agrees, that the savings certificates are traceable to the annuity contracts. As such they are a form of cash proceeds exempt under the statute.

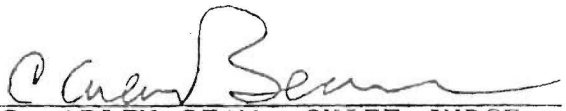
Finally, because the purchase of the savings certificates was not concealed and because ownership in the annuity proceeds was not transferred, there is no basis for limiting the exemption.

Based on the foregoing,

IT IS ORDERED that the decision of the United States Bankruptcy Court for the District of Nebraska to overrule the portion of the trustee's objection exempting the debtors' savings certificates (defendants' exhibits 3 and 4) from the bankruptcy estate should be and hereby is affirmed.

DATED this 11th day of June, 1986.

BY THE COURT:



C. ARLEN BEAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT