

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

MICHAEL LESLIE LOWE and
GAIL MARIE LOWE,

DEBTORS

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CASE NO. BK85-1778
Chapter 7

MEMORANDUM OPINION

This matter came on for a hearing on December 4, 1985, in North Platte, Nebraska, upon the trustee's objection to exemptions (pleading #10). The debtors, Michael Lowe and Gail Lowe, were represented by David C. Nuttleman of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., Gering, Nebraska. Leroy Anderson, Roeder & Anderson of North Platte, Nebraska, the trustee, appeared pro se. The parties agreed that the issue was basically one of law, that they would jointly file with the Court a stipulation of facts, and that they would prepare briefs both of which were received by February 18, 1986.

Facts

The debtor, Michael L. Lowe, was previously employed by the Union Pacific Railroad in North Platte, Nebraska, and sustained personal injuries. On June 25, 1982, the debtor entered into a "release and settlement agreement" with the Union Pacific Railroad. Under the agreement, he released and discharged the Union Pacific from all claims and causes of action related to his injuries. In consideration for this release, Union Pacific agreed to pay him \$90,000 with some deductions for payments previously made plus \$500 per month for a period of 25 years with any remainder upon his death to go to his estate.

The release and settlement agreement contain a clause, the language of which is as follows:

"No amount payable or to become payable under the terms of this agreement shall be subject to anticipation or assignment by Lowe or any other beneficiary thereof or to attachment by or to the interference or control of any creditor of any beneficiary or to be taken or reached by legal or equitable

process in satisfaction of any debt or liability of a beneficiary prior to its actual receipt by the beneficiary."

On May 20, 1983, and again on March 14, 1984, the debtor executed an assignment transferring all monies coming due under the aforesaid release and settlement agreement to the Alliance National Bank Company.

On August 8, 1985, the debtors, Michael L. Lowe and Gail M. Lowe, filed their joint voluntary Chapter 7 petition. Leroy Anderson was appointed trustee of the bankruptcy estate. On their schedules the debtors listed the \$500 payment from the Union Pacific Railroad on Schedule B-2(s), the annuity section. On their original Schedule B-4 filed with the petition, the debtors claimed the \$500 payment received from the Union Pacific Railroad as exempt pursuant to 42 U.S.C. §231(m). The trustee filed a timely objection to the debtor's claim of exemption. Thereafter on October 31, 1985, the debtors amended their schedules to claim the \$500 payment as exempt pursuant to §44-371 Revised Statutes of Nebraska.

Issues Presented

1. Are the monthly payments of \$500 from the Union Pacific Railroad to the debtor property of the bankruptcy estate within the meaning of 11 U.S.C. §541? Answer: Yes.
2. Are the monthly payments of \$500 from the Union Pacific Railroad to the debtor exempt under the provisions of Nebraska Revised Statute §44-371 (Reissue 1984)? Answer: Yes.

Conclusions of Law and Discussion

A. Payments are Property of Estate

Regarding the first issue the trustee argues that the debtors' interest is included in the bankruptcy estate and that the exclusion of 11 U.S.C. §541(c)(2) is inappropriate and inapplicable because the debtors' interest in the \$500 monthly payments from the Union Pacific Railroad is not an interest in a trust. Conversely, the debtors argue that Michael Lowe's interest in the monthly payments from the Union Pacific Railroad is excluded from the bankruptcy estate under 11 U.S.C. §541(c)(2) as a property interest subject to a restriction on the transfer of a beneficiary of the debtor in a trust that is enforceable under applicable non-bankruptcy law. In support of their position the debtors cite In the Matter of Leimer, 54 B.R. 587 (D.C. Neb. April 16, 1985), In Re Richardson, Case No. BK83-1051, Slip Op. (Bankr. Neb. April 16, 1984), No. CV84-0-263 (D.C. Neb. October 2, 1984), and First National Bank v. First Cadco Corporation, 189 Neb. 734, 205 N.W.2d 115 (1973) as examples of cases in which the Bankruptcy Court and U.S. District Court found spendthrift trust

within the meaning §541(c)(2). The debtors also cite various 4th Circuit, 10th Circuit and 11th Circuit ERISA cases and argue that the majority position is that spendthrift provisions under ERISA do protect pension plans and exclude them from being property of the estate. This Court does not agree with the debtors' last argument and believes the majority of courts have held that ERISA benefits are included in the debtors' estate. Moreover, the 8th Circuit has so ruled in the case In re Graham, 726 F.2d 1268, 11 B.C.D. 626, 10 C.B.C.2d, 111 (8th Cir. 1984), and this Court is required to follow this decision.

Section 541(a) of the Code provides that the commencement of a case under Title 11 creates an estate which includes "all legal and equitable interests of the debtor in property as of the commencement of the case" notwithstanding any provision that restricts or conditions the transfer of the interest. Specifically 11 U.S.C. §541(a) provides in pertinent part:

"(a) The commencement of a case under §301, 302 or 303 of this Title creates an estate. Such an estate is comprised of all of the following property, wherever located:

"(1) Except as provided in subsections (b) and (c)(2) of this section, all legal and equitable interests of the debtor in property as of the commencement of the case."

The legislative history of this section clearly establishes Congressional intent that the bankruptcy estate be as all encompassing as the language indicates.

"The scope of the paragraph is broad. It includes all kinds of property, including tangible and intangible property, causes of action and all other forms of property specified in §70(a) of the Bankruptcy Act....It includes as property of the estate all property of the debtor, even that needed for a fresh start."

S. Rep. No. 989, 95th Congress, 2d Sess. 823, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5868; H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977), reprinted in U.S. Code Cong. & Ad. News 6322-24.

An exception to this broad definition of the estate is set forth in paragraph (c) of Section 541. Section 541(c)(1) provides generally that restrictions on the transfer of the debtor's interest in property will not prevent inclusion of such a property interest in the estate. Subparagraph (2) states the following exception to the rule:

"A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title." 11 U.S.C. §541(c)(2).

Essentially, this provision provides that a beneficial interest held by a debtor under a valid trust agreement that contains a spendthrift clause is not to be considered property of the estate within the meaning of 11 U.S.C. §541. This is an express exclusion which prevents certain property from becoming an asset of the bankruptcy estate. Courts have recognized that the Section 541(c)(2) exclusion must be narrowly construed:

"By contrast to the expansive definition to be given to the term property of the estate under 541(a)(1), the legislative history of 541(c)(2) indicates that the exclusion provided therein was to be narrowly construed." In Re McLean, 41 B.R. 893, 897, 11 C.B.C.2d 406 (Bankr. S.C. 1984).

Congress only intended by §541(c)(2) to preserve the status of traditional spendthrift trusts as recognized by state law, enjoyed under the Bankruptcy Act. 2 Bankr. Dev. J. 292 (1985). In Re Graham, *supra*, page 627.

The legislative history of §541(c)(2) indicates that Congress envisioned exempting from property of the estate the debtor's interest in a spendthrift trust protected under state law from the reach of his creditors. Specifically a House Report on this section of the Bankruptcy Code states:

"The Bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable state law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settler of the trust. House of Representatives Report No. 595, 95th Congress, 2d Session 5 reprinted in 1978 United States Code Congressional and Administrative News 5963, 6136."

Courts which have analyzed and interpreted §541(c)(2) are in solid agreement that a debtor's interest in a valid spendthrift trust is not included as property of this bankruptcy estate. In Re Graham, 726 F.2d 1268, 1273 (8th Cir. 1974); Matter of Goff, 706 F.2d 574, 580-582, (5th Cir. 1983); In the Matter of Leimer, 54 B.R. 587 (D.C. 1985).

The validity of the restriction on the transfer of a trust interest is a matter to be determined under Nebraska law. An examination of Nebraska law reveals that spendthrift trusts are recognized as valid and enforceable against creditors of the beneficiary. First National Bank of Omaha v. Cadco Corporation, 189 Neb. 734, 205 N.W.2d 115, (1973). In the case at bar, the agreement between the debtor and the Union Pacific Railroad contains language and a provision that arguably could come within the provisions of the §541(c)(2) restriction. However, the trustee asserts that the language cannot be a valid spendthrift trust provision because the underlying agreement itself really constitutes a structured settlement of a lawsuit and cannot be construed to be a trust because the elements for a trust delineated in Nebraska case law do not exist. Namely, the trustee asserts that the structured settlement is not a trust because: (1) the parties did not intend to create a trust relationship, Rankin v. City National Bank of Crete, 182 Neb. 224, 153 N.W.2d, 869 (1967); (2) there is no separation of the legal and equitable interest in the payments, Abbott v. Continental National Bank of Lincoln, 169 Neb. 147, 98 N.W.2d 804, (1959); (3) that the payments at all times were owned and were property of debtor, Messinger v. Johnson, 162 Neb. 360, 76 N.W.2d 267 (1956) and (4) there is no fiduciary obligation created or set up on behalf of the Union Pacific Railroad, Schurman v. Pegau, 136 Neb. 628, 286 N.W. 921, (1939).

The debtors acknowledge that the agreement does not constitute your "garden variety" spendthrift trust established pursuant to a decedent's will or an intervivos trust agreement. However, debtors assert that the agreement contains similar spendthrift trust language which the District Court and the Bankruptcy Court in the Richardson case found to be a spendthrift trust. Debtors point to the fact that Mr. Lowe had no right to any funds during the term of the agreement except of the right to receive the monthly payment of \$500 and the fact that a creditor could not have garnished, attached or levied upon the fund being held by the Union Pacific Railroad until said funds were actually disbursed to Mr. Lowe. There is also no provision in the agreement for a termination of the payments until the entire proceeds of the agreement are paid out on a monthly basis. Debtors submit, therefore, that this constitutes a "trust fund" which could not be reached by the trustee since it is subject to a valid spendthrift provision which under Nebraska law is enforceable and does provide spendthrift protection to continue throughout the terms of the agreement.

The Nebraska Supreme Court has not often addressed the question of when a spendthrift trust is created, and most of the cases deal with situations of a trust established pursuant to a will. Quite apart from the issue of what language is necessary to create a valid spendthrift provision, the dispute between the parties here centers on whether or not the language must be pursuant to a trust. The Nebraska Supreme Court has held that

there is no enforceable spendthrift trust provision if a trustee is given no duty other than to hold legal title to property and the beneficiary has a right to secure legal title. In such a case, the Court has stated that to allow spendthrift protection would in effect allow the debtor to establish a spendthrift trust for herself. First National Bank of Omaha v. First Cadco Corporation, supra. See also Flanagan v. Olderog, 118 Neb. 745, 226 N.W. 316 (1929). Similarly, one of the widely recognized exceptions to the enforceability of a spendthrift trust provision is that a person may not create a spendthrift trust for his own benefit. Restatement of Trust, Second, Section 156 (1959).

In the present case, an examination of the release and settlement agreement fails to disclose that the parties had an intention to create a trust relationship. Even though the Union Pacific Railroad is holding funds for the debtor and Mr. Lowe has no right to any of the funds during the term of agreement except for the right to receive the monthly payment there seems to be no question that the debtor has the legal and equitable ownership of those payments. This Court holds that there was no trust created, and the payments are property of the estate.

B. Exemption of Monthly Payments Under State Exemptions

In their Chapter 7 petition, the debtors have claimed as exempt all benefits under the "Release and Settlement Agreement" entered into between the debtor, Michael Lowe, and the Union Pacific Railroad Company pursuant to the provisions of Nebraska Revised Statute §44-371. That statute provides:

"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 do not apply to any loan value in excess of \$5,000.00 of an unmaturred life insurance contract." R.R.S. §44-371 (Reissue 1984).

It is the trustee's position that these monthly payments are not exempt as an annuity because the Nebraska legislature placed this provision within the statutory section which deals with the regulation of insurance companies doing business in the state and

did not intend the term "annuities" to be stretched to apply to contract payments made by non-insurance companies. Although the term "annuity" is not defined in the statute, trustee requests this Court to restrict the definition of annuity to include only a contract payment made by a licensed insurance corporation regulated by the State of Nebraska and under the supervision of the Director of the Department of Insurance. No showing of case support nor reference to the legislative history of §44-371 was offered to support the trustee's position and this Court finds the placement of the statutory section to be nondeterminative of the legislature's intent on this issue. Moreover, the amount claimed under the exemption is not at issue here since the Governor of Nebraska this year vetoed LB 635, which was a legislature attempt to limit amounts claimed under the annuity section. Apparently, the legislature felt that the section as it exists presently was unlimited and attempted to limit the amounts; however, they failed.

Black's Law Dictionary, 5th Edition, 1979, defines annuity as "a right to receive fixed, periodic payments, either for life or for a term of years." Private annuity is defined as "a contract for periodic payments to the annuitant from private as distinguished from public or life insurance company." The monthly payments being received by debtor are benefits under a private annuity contract.

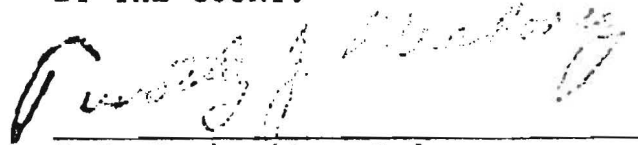
Accordingly, this Court holds that the monthly payments received under the agreement between the debtor and the Union Pacific Railroad do constitute property of the estate pursuant to 11 U.S.C. §541(a) but that the debtors may exempt the monthly payments as benefits accruing under an annuity contract per Nebraska R.R.S. §44-371 (Reissue 1984).

Trustee's objection overruled.

Journal entry to follow.

DATED: May 22, 1986.

BY THE COURT:



U.S. Bankruptcy Judge

Copies to:

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