UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re	:	**Case No. 98-05471-CH**
	:	
JOHN ALBERT WOOLLEY, and LINDA SUE WOOLLEY,	:	**Chapter 7**
	:	
Debtor.	:	
- -	:	
ANITA SHODEEN,	:	**Adv. No. 99-99132**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
LINDA SUE WOOLLEY, and W. R. BERKLEY CORPORATION,	:	
	:	
Defendants.	:	

- -

ORDER—MOTION FOR SUMMARY JUDGMENT

On July 6, 2000, a telephone hearing was held on the Defendant W. R. Berkley Corporation's Motion for Summary Judgment. Plaintiff/Trustee Anita Shodeen was represented by Mark D. Feldman; Defendant, W. R. Berkley Corporation, was represented by attorney Bruce J. McNeil; and Defendant/Debtor, Linda Woolley, was represented by Michael J. Jankins. At the conclusion of the hearing, the court took the matter under advisement. The court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding. 28 U.S.C. § 157(b)(2)(E). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

As a preliminary matter, the court notes that Local Bankruptcy Rule 14(h) requires a motion for summary judgment to be accompanied by a separate statement of material facts as to which the moving party contends that there is no genuine issue to be tried. A resistance to the motion for summary judgment should include a separate statement of facts to which the adverse party contends that there is a genuine issue to be tried.

The moving party in this matter, W. R. Berkley Corporation, did not provide such a separate statement. Local Rule 14(h) provides that "[f]ailure to comply with this rule by the moving party may result in the denial of the motion." However, Trustee did not identify any contested facts, nor did she raise a procedural objection grounded on the local rule. Because the parties appear to be in consensus on the facts of the matter, the court finds the following facts to be undisputed.

1. On December 21, 1998, Linda Sue Woolley and John Albert Woolley (hereinafter collectively the Woolleys) filed a joint petition for relief under Chapter 7 of the Bankruptcy Code.

2. At the time of the filing, John Albert Woolley was employed by Continental Western Insurance Company.

3. Continental Western Insurance Company is a member of the W.R. Berkley Corporation Profit Sharing Plan (hereinafter the Plan).

4. The Plan is qualified for favorable tax treatment under Section 401(a) of the Internal Revenue Code. The parties agree that the Plan is qualified under the Employee Retirement Security Act (hereinafter ERISA) and contains a provision providing that benefits may not be assigned or alienated.

5. John Albert Woolley is a current participant in the Plan through his employment with Continental Western Insurance Company.

6. The Woolleys scheduled the Continental Western 401k plan valued at $94,700 on Schedule B – Personal Property. The schedule indicated the property was owned individually, by the husband and not jointly or as community property.

7. The Woolleys scheduled the Continental Western 401k plan on Schedule C – Property Claimed as Exempt. The property was claimed exempt pursuant to Iowa Code § 627.6(8)(e).

8. On December 23, 1998, the Iowa District Court for Polk County entered a Decree of Dissolution of Marriage, case number CD58562, dissolving the Woolleys' marriage. The Woolleys submitted a Stipulated Dissolution of Marriage agreement to the court. The agreement resolved all the issues of the dissolution, including the division of property. The court incorporated the stipulation into the final decree.

9. The dissolution decree provided in relevant part:

> The petitioner [Linda Sue Woolley] is awarded 65 percent of the net value of the W.R. Berkley Corporation Profit Sharing Plan (the net value is determined by using the gross value of the Plan as of December 15, 1998 and subtracting the balance due on the outstanding loan therefrom) as of December 15, 1998.

10. The Plan's administrators determined the dissolution decree to be a "qualified domestic relation order" (hereinafter QDRO) as defined in the Internal Revenue Code, 26 U.S.C. §§ 401(a)(13) & 414(p) and ERISA § 206(d), codified at 29 U.S.C. § 1056(d).

11. On August 16, the trustee, Anita Shodeen (hereinafter Trustee), commenced this adversary proceeding seeking the turnover of Linda Sue Woolley's (hereinafter Debtor) share of the plan received pursuant to the property settlement agreement as property of her bankruptcy estate. The complaint names Debtor and the W. R. Berkley Corporation (hereinafter Berkley) as defendants.

DISCUSSION

Bankruptcy Rule 7056 incorporates Federal Rule of Civil Procedure 56 and provides for summary judgment in adversary proceedings in bankruptcy cases. Rule 56 of the Federal Rules of Civil Procedure states in pertinent part:

> Rule 56. Summary Judgment
>
> . . .
>
> (b) For Defending Party. A party against whom a claim . . . is asserted may, at any time, move for summary judgment in the party's favor as to all or any party thereof.
>
> . . .
>
> (c) Motions and Proceedings Thereon . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). The substantive law identifies the facts that are material to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242, 106 S.Ct. 2505, 2510 (1986). Those facts must be construed in the light most favorable to the party opposing the summary judgment motion. Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57 (1986); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990). The court is not to weigh the evidence, but determine whether there is a genuine issue of fact for trial. Johnson, 906 F.2d at 1237.

A matter is material to the bankruptcy "if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." Palantine National Bank of Palantine, Illinois, (In re Olson), 916 F.2d 481, 484 (8th Cir. 1990) quoting In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984) (discussing materiality in the context of false oaths). "An issue of material fact is genuine if it has a real basis in the record." Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) citing Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986).

In this case, there appears to be no dispute as to the relevant facts. At issue is whether Debtor’s interest in the pension fund, that she acquired through the dissolution decree two days after filing the bankruptcy petition, is property of the bankruptcy estate. A matter concerning estate property is undoubtedly material to the bankruptcy. Whether or not property is included in the bankruptcy estate presents a question of law.

Ramsay v. Dowden (In re Central Arkansas Broadcasting Co., 68 F.3d 213, 214 (8th Cir. 1995). The court concludes that resolution of this issue is proper upon a motion for summary judgment.

Trustee commenced this action to recover the interest in the Plan that Debtor received pursuant to the dissolution decree entered by the Iowa District Court of Polk County. Trustee claims that Debtor's interest in the Plan is a result of a property settlement received within 180 days of the bankruptcy filing, and pursuant to § 541(a)(5)(B), it is property of Debtor's bankruptcy estate.

Berkley argues that Debtor's interest in the Plan is not property of the estate because the Plan is ERISA qualified and contains an enforceable anti-alienation provision. According to Berkley, Debtor cannot transfer her benefits, and therefore her interest in the Plan is excluded from the estate pursuant to § 541(c)(2).

Trustee counters that ERISA's restriction on transfer of benefits applies only to plan participants. Under the QDRO, Debtor is an alternate payee and as such, Trustee claims that she is not restrained by the Plan's anti-alienation provisions. Therefore, Trustee argues that Debtor's interest in the Plan is part of the bankruptcy estate.

The filing of a bankruptcy petition creates an estate comprised of all "legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Congress intended the scope of § 541(a) to be broad. United States v. Whiting Pools, Inc., 462 U.S. 198, 204 (1983); N.S. Garrott & Sons v. Union Planters Nat. Bank of Memphis, (In re N.S. Garrott & Sons), 772 F.2d 462, 466 (8th Cir. 1985). In certain instances, the bankruptcy estate includes interests in property that the debtor

acquires after the commencement of the case. 11 U.S.C. § 541(a)(5). Section 541(a) provides in relevant part:

> (a) …Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date–
>
> (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree…

11 U.S.C. § 541(a)(5)(B).

However, the reach of the bankruptcy estate is not without bounds. The United States Supreme Court has determined that Congress intended to exclude from the estate some minor interests of the debtor in property of others such as a lien or bare legal title. Whiting Pools, 462 U.S. at 205 n.8. Section 541(b) lists interests that property of the estate does not include. Further and most important to this matter, "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2).

The United States Supreme Court has determined that the anti-alienation provision, mandatory in an ERISA-qualified pension plan, 29 U.S.C. § 1056(d)(1), constitutes a "restriction on transfer" of a "beneficial interest" in a trust. Patterson v. Shumate, 504 U.S. 753, 759 (1992). In Shumate, the debtor was a participant in an ERISA-qualified pension plan. The Chapter 7 trustee claimed the debtor's beneficial interest in the plan as property of the bankruptcy estate, and filed an adversary proceeding seeking turnover the property to the estate. After determining that the plain language of § 541(c)(2) encompassed federal as well as state law, the Supreme Court

held that the “anti-alienation provision required for ERISA qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of § 541(c)(2)’s exclusion of property from the bankruptcy estate.” Id., at 60. The Eighth Circuit subsequently reversed its position on the issue, and now holds that a debtor’s interest in an ERISA-qualified pension plan may be excluded from the bankruptcy estate. See, Iannacone v. Northern States Power Co.(In re Conlan), 974 F.2d 88 (8th Cir. 1992).

In the current case, the parties agree that the Plan is ERISA-qualified. Section 13.5 supplies the anti-alienation provision. It provides that “[a]ny benefits payable under the Plan may not be assigned or hypothecated and to the extent permitted by law, no such benefits may be subject to legal process or attachment for the payment of any claim against any person entitled to receive the same, except in the case of a Plan loan.” The parties agree that the foregoing provision is enforceable under applicable nonbankruptcy law.

Trustee does not claim John Woolley’s interest in the Plan as a plan participant is property of the estate. The parties diverge at whether Debtor’s interest received pursuant to the QDRO is subject to the anti-alienation provision of the Plan. Trustee claims that the anti-alienation provision restricts only plan participants. As an “alternative payee” Debtor is not subject to the restriction, and her interest in the Plan is property of the bankruptcy estate. Trustee relies on Johnston v. Mayer (In re Johnston), 218 B.R. 813 (Bankr. E.D. Va. 1998).

In Johnston, the debtor received a portion of her ex-husband's ERISA qualified-pension plan pursuant to a settlement agreement and a qualified domestic relations order entered in the Circuit Court. Id. at 814. Prior to the distribution of any of the pension funds, the debtor filed a petition for bankruptcy relief. Id. After a hearing on the trustee's objection to exemption, the bankruptcy court found that the funds were not in the ERISA plan, but payable from the plan to the debtor. Id. at 817. The court determined that the funds were not protected by applicable nonbankruptcy law because the debtor was an alternate payee and not a plan participant or beneficiary. Id. Therefore, upon disbursement, the funds became property of the estate. Id.

The facts of the case before this court are dissimilar from those in Johnston, in that Debtor's QDRO was entered post-petition and is silent on distribution of funds to Debtor. Nonetheless, the court need not distinguish the cases factually because it must respectfully disagree with the Johnston court's analysis.

This court believes that the United States Supreme Court has provided ample guidance to resolve this matter. In Boggs v. Boggs, 520 U.S.C. 833 (1997), a case addressing the pre-emption and anti-alienation provisions of ERISA in the context of a testamentary device, Justice Kennedy, writing for the majority, provided an overview of ERISA's design. Justice Kennedy wrote:

> The principal object of the statute is to protect plan participants and beneficiaries. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans"). Section 1001(b) states that the policy of ERISA is "to protect ... the interests of participants in employee benefit plans and their beneficiaries." Section 1001(c) explains that ERISA contains certain safeguards and protections which help guarantee the "equitable character and the soundness of [private pension] plans"

> in order to protect "the interests of participants in private pension plans and their beneficiaries." The general policy is implemented by ERISA's specific provisions. Apart from a few enumerated exceptions, a plan fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." § 1104(a)(1). The assets of a plan, again with certain exceptions, are "held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." § 1103(c)(1). The Secretary of Labor has authority to create exemptions to ERISA's prohibition on certain plan holdings, acquisitions, and transactions, but only if doing so is in the interests of the plan's "participants and beneficiaries." § 1108(a)(2). Persons with an interest in a pension plan may bring a civil suit under ERISA's enforcement provisions only if they are either a participant or beneficiary. Section 1132(a)(1)(B), for instance, provides that a civil action may be brought "by a participant or beneficiary ... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."
>
> ERISA confers beneficiary status on a nonparticipant spouse or dependent in only narrow circumstances delineated by its provisions. For example, as we have discussed, § 1055(a) requires provision of a surviving spouse annuity in covered pension plans, and, as a consequence, the spouse is a beneficiary to this extent. Section 1056's QDRO provisions likewise recognize certain pension plan community property interests of nonparticipant spouses and dependents. A QDRO is a type of domestic relations order that creates or recognizes an alternate payee's right to, or assigns to an alternate payee the right to, a portion of the benefits payable with respect to a participant under a plan. § 1056(d)(3)(B)(i). A domestic relations order, in turn, is any judgment, decree, or order that concerns "the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant" and is "made pursuant to a State domestic relations law (including a community property law)." § 1056(d)(3)(B)(ii). A domestic relations order must meet certain requirements to qualify as a QDRO. See §§ 1056(d)(3)(C)-(E). QDRO's, unlike domestic relations orders in general, are exempt from both the pension plan anti-alienation provision, § 1056(d)(3)(A), and ERISA's general pre-emption clause, § 1144(b)(7). In creating the QDRO mechanism Congress was careful to provide that the alternate payee, the "spouse, former spouse, child, or other dependent of a participant," is to be considered a plan beneficiary. §§ 1056(d)(3)(K), (J). These provisions are essential to one of REA's [Retirement Equity Act] central purposes, which is to give enhanced protection to the spouse and dependent children in the event of divorce or separation, and in the event of death [of] the surviving spouse. Apart from these detailed provisions, ERISA does not confer beneficiary status on nonparticipants by reason of their marital or dependent status.

Boggs, 520 U.S. at 845-47.

The Supreme Court in Boggs makes it quite clear that under ERISA an alternate payee pursuant to a QDRO will be considered a plan beneficiary. Any argument based on a distinction between an alternate payee under a QDRO and a plan beneficiary cannot prevail.

In this case, the Plan contains the requisite anti-alienation provision. Section 13.5 provides:

> No Assignment. Any benefits payable under the Plan may not be assigned or hypothecated and to the extent permitted by law, no such benefits may be subject to legal process or attachment for the payment of any claim against any person entitled to receive the same, except in the case of a Plan loan. Notwithstanding the foregoing, the Plan will comply with a "qualified domestic relations order" as determined in accordance with Section 13.12 of the Plan and any Federal tax lien or other judgment or settlement permitted by Section 401(a)(13) of the Code.

This anti-alienation provision makes no distinction between a plan participant and a beneficiary. It speaks in terms of benefits payable, and restricts the transfer of the same.

Trustee argues that even if Debtor is to be treated as a beneficiary, a beneficiary is not restricted by the anti-alienation provision in the Plan. Trustee cites In re Yaeger, 1998 WL 356888 *9 (Bankr. D. Minn. 1998) for this proposition. In Yaegar, the bankruptcy court first determined that the plan in question was not ERISA qualified, therefore, the debtor's beneficiary interest in his deceased father's pension plan was not excluded from the bankruptcy estate. Also, the restriction on transfer was directed only to the employee participant and not a beneficiary. Then in an alternative holding, the court went further, adopting the view that ERISA "§ 206(d)(1) does not apply to restrict the transferability of pension plan interests held by nonparticipating beneficiaries." Id. Here again, this court must respectfully disagree.

The Minnesota bankruptcy court acknowledged that the issues before it were complex and inadequately briefed. The parties were granted an opportunity to review the decision and request an evidentiary hearing. The court based its alternate holding on the Eigth Circuit case, Lyman Lumber Co. v. Hill 877 F.2d 692 (8th Cir. 1989). Lyman and its progeny hold that a "spouses beneficiary interest can be divested … pursuant to a property settlement in a divorce judgment." Id.; See also Mohamed v. Kerr, 53 F.3d 911 (8th Cir. 1995) (interest in group life insurance in an employee benefit plan covered by ERISA) and Hill v. AT&T Corp., 125 F.3d 646 (8th Cir. 1997) (interest in ERISA-governed pension plans, life insurance, and profit sharing plans).

It is important to note that in Lyman, the Eight Circuit determined that "[n]one of ERISA's express provisions addresse[d] the issue presented" in the case. Lyman Lumber Co., 877 F.2d at 692. The court looked to "federal common law principles" and did not address 29 U.S.C. § 1056(d)(1) (ERISA § 206(d)(1)).

Further, the United States Supreme Court rejects the proposition that a beneficiary is not covered by the anti-alienation provision. In Boggs, the court stated, "Respondents' logic would even permit a spouse to transfer an interest in a pension plan to creditors, a result incompatible with a spendthrift provision such as § 1056(d)(1)." Boggs, 520 U.S. at 852. It is clear from the foregoing statement that the Supreme Court holds that a beneficiary is restricted by the anti-alienation provisions of ERISA. It follows that if a beneficiary cannot transfer a pension plan interest to creditors, a bankruptcy trustee cannot acquire the interest for the benefit of creditors.

The court concludes that Debtor received an interest in property pursuant to a property settlement agreement within 180 days of filing the bankruptcy petition. The interest was a beneficial interest in a trust and subject to a restriction on transfer enforceable under applicable nonbankruptcy law. Therefore, the interest would not have been property of the bankruptcy estate had it been an interest of the debtor at the commencement of the case. The court finds that Debtor did not receive any of the pension funds within the 180-day period. See NCNB Financial Services v. Shumate, 829 F.Supp. 178, 180 (W.D. Va. 1993) ("once the actual line of receipt is crossed … ERISA no longer protects the funds despite their origin in an ERISA-qualified pension plan"); see also Tenneco Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688, 691 (4th Cir. 1983) (no provision of ERISA protects funds from garnishment under the facts in the record, although the funds originated in an ERISA account). Accordingly, Berkley's motion for summary judgment must be granted.

ORDER

IT IS THEREFORE ORDERED that Defendant, W.R. Berkely Corporation's Motion for Summary Judgment is GRANTED and defendant shall have judgment dismissing the complaint.

Dated this __________ day of January, 2001.

____
RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT