FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

November 13, 1998

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MARY L. HANNAH, Debtor.	BAP No. WO-98-020
JANICE LOYD, Trustee, Plaintiff - Appellant, v. COMMUNITY FIRST STATE BANK, as Trustee of the Nelle Annette Testamentary Trust for Mary Hannah, and MARY L. HANNAH, Defendants - Appellees.	Bankr. No. 95-17853 Adv. No. 97-1246 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, PUSATERI, and BOULDEN, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

Chapter 7 trustee Janice D. Loyd ("the Bankruptcy Trustee") appeals from a summary judgment order declaring pursuant to 11 U.S.C. § 541(c)(2) that the interest of debtor Mary L. Hannah ("the Debtor") in a trust was not property of her bankruptcy estate. For the reasons set forth below, we reverse the bankruptcy court's order and remand for further proceedings.

---

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

I. Background

The Debtor's grandmother, a Nebraska resident, died in May 1987, willing certain property to the Debtor in a trust ("the Trust"). The will, executed in April 1992 and probated in a Nebraska state court, created several trusts and provided that:

> [M]y trustee shall hold the property in trust for a period of 10 years from and after my death. The trustee shall distribute each year the income from the trust to the beneficiary of the trust. The trustee shall also have the power to spend principal, if necessary, for medical treatment, hospital and doctor bills and related medical expenses for the beneficiary. At the end of the 10 year period, the trust shall terminate and be distributed to the designated beneficiary, or in the event of the beneficiary's death, to his or her issue, Per Stirpes. It being my specific intention that I have created three separate trusts . . . all of which are to be administered under these terms and conditions.

A bank was named in the will to be the trustee of the Trust, and its successor was later succeeded by Community First State Bank ("the Trustee Bank"). The Trustee Bank was given the power to hold, invest, sell, and otherwise deal with the property placed in the Trust, and to make distributions to the Debtor. Almost $68,000, apparently in cash, was deposited in the Debtor's Trust. No information was presented about the circumstances under which the will was made or the Debtor's condition at that time.

The Debtor received quarterly distributions of income from the Trust from 1990 through 1994. In 1995, she borrowed money from the Trustee Bank and assigned to it her right to receive distributions from the Trust. In 1995 and 1996, income from the Trust was paid to the Trustee Bank. The loan has been paid off.

The Debtor filed a chapter 7 bankruptcy petition in December 1995. The ten-year term of the Trust would have ended in about May 1997, and since the parties have not indicated otherwise, we assume the Debtor is still alive. Believing the Debtor's interest in the Trust to be property of her bankruptcy estate, the Bankruptcy Trustee demanded that the Trustee Bank turn the Trust property over to her, but it refused. In July 1997, the Bankruptcy Trustee filed a

turnover complaint, pursuant to § 542(a), seeking to recover the Trust property from the Trustee Bank. She also named the Debtor as a defendant because the Debtor claimed to have an interest in the Trust property.

The parties stipulated to these facts and filed opposing motions for summary judgment. Relying on the Nebraska Supreme Court's decision in *Lancaster County Bank v. Marshel*, 264 N.W. 470 (Neb. 1936), the bankruptcy court concluded the Trust was a spendthrift trust excluded from the bankruptcy estate by § 541(c)(2). The court based this conclusion on its view that *Marshel* declared that placing property in the hands of a trustee "without more, sufficiently evidenced [the grandmother's] intent to place the trust corpus beyond [the Debtor's] power to alienate, or [the Debtor's] creditors to seize." The court did note that it was "not privy to the circumstances under which [the grandmother's] will was made, nor to the condition of [the Debtor]."

II. Jurisdiction and Standard of Review

A Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As none of the parties has opted to have the appeal heard by the District Court for the Western District of Oklahoma, they are deemed to have consented to our jurisdiction. 10th Cir. BAP L.R. 8001-1(d).

The Bankruptcy Trustee seeks review of an order granting summary judgment. Fed. R. Bankr. P. 7056 makes Fed. R. Civ. P. 56 apply to adversary proceedings in bankruptcy court. The United States Court of Appeals for the Tenth Circuit has stated:

> We review the grant or denial of summary judgment de novo, applying the same legal standard used by the [trial] court pursuant to Fed. R. Civ. P. 56(c). Summary judgment is appropriate 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. When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the [trial] court.

Wolf v. Prudential Ins. Co. of America, 50 F.3d 793, 796 (10th Cir. 1995) (citations and internal quotation marks omitted).

III. Discussion

According to the bankruptcy court, the Debtor conceded that her right to the income distributable from the Trust as of the date she filed for bankruptcy and until 180 days thereafter was property of her bankruptcy estate pursuant to 11 U.S.C. § 541(a)(5)(A). This concession apparently arises from the view that she received a new "bequest, devise, or inheritance" each time the Trust made a distribution to her, but that she otherwise had no interest in the Trust on the date she filed for bankruptcy. This view is mistaken. What the Debtor received by "bequest, devise, or inheritance" was the right for ten years to receive the income from the Trust and to have medical expenses paid for her from the Trust principal if necessary, and the right to receive the remaining principal at the end of the ten years so long as she was still alive. She did not receive a new "bequest, devise, or inheritance" every time the Trust distributed property to her. All her distribution rights, "equitable interests of the debtor in property as of the commencement of the case," § 541(a)(1), are the property that became property of the estate on the filing date unless they were excluded from the estate by § 541(c)(2). Relying on the Debtor's concession, though, the bankruptcy court declared that it would determine only whether the Trust corpus was property of the estate.

Section 541(c)(2) reads: "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." The bankruptcy

court correctly concluded that it must look to and apply Nebraska trust law to determine whether the Debtor's interest in the Trust was restricted so that the Bankruptcy Trustee could not transfer it. *See Duval v. Portner (In re Portner)*, 109 B.R. 977, 987 (Bankr. D. Colo. 1989).

But before turning to Nebraska law, we think some historical background of the development of spendthrift trusts will help place that law in the proper context. By the early 1800's in England, the courts allowed a testator to place property in trust for the benefit of a married woman and beyond her or her husband's power to alienate or encumber, but otherwise no trust beneficiary could be protected in that way. *See Jones v. Harrison*, 7 F.2d 461, 463 (8th Cir. 1925); Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 Neb. L. Rev. 179, 184 (1993). Nevertheless, in *Nichols v. Eaton*, 91 U.S. 716, 725-27 (1875), the United States Supreme Court indicated, in dicta, that spendthrift provisions should generally be effective in this country because the protection was similar to the exemptions states provided to debtors, creditors would have notice of the trust provisions because wills and testamentary trusts were recorded, and the settlor of the trust should be able to attach to a gift conditions for the protection of the beneficiary. *See* Emanuel, 72 Neb. L. Rev. at 188. After that decision, many American states, by either case law or statute, began to give effect to spendthrift provisions in trusts. *See Jones v. Harrison*, 7 F.2d at 463; Emanuel, 72 Neb. L. Rev. at 181 & n. 14. Given this history, however, it should not be surprising that, in 1959, the Restatement of Trusts stated the general rule to be that "creditors of the beneficiary of a trust can by appropriate proceedings reach his interest and thereby subject it to the satisfaction of their claims against him." Restatement (Second) of Trusts § 147

(1959).[1] The Restatement then describes exceptions to this general rule, the most common of which are probably spendthrift trusts, trusts for support, and discretionary trusts, where the trustee has complete discretion whether to pay any trust assets to or apply them for the beneficiary. *Id*. at §§ 152, 154, & 155. For these exceptions to apply, the Restatement seems to require that the terms of the trust expressly impose the restrictions on the beneficiary's interest. Absent such provisions, the general rule applies and the beneficiary's creditors can reach his or her interest. In *Jones v. Harrison*, the Eighth Circuit indicated that American courts might have felt free to rely simply on the fact the trust had been created as establishing spendthrift protection for the beneficiary's interest, but given the English history, instead required some additional fact that showed the settlor indeed intended to protect the trust assets from the beneficiary's creditors and his or her own actions. 7 F.2d at 464-65. The Circuit then determined that relevant additional facts did exist in that case. *Id*. at 465-66. Thus, despite dicta suggesting that the fact of placing property in trust should give it spendthrift protection, the Eighth Circuit did not base its holding on that suggestion.

We turn now to a consideration of Nebraska law. Like the bankruptcy court and the parties, we have found no Nebraska statute concerning the manner of creating or the validity of spendthrift trusts. As indicated, the bankruptcy court concluded that the Debtor's interest in the Trust was excluded from her bankruptcy estate based on the Nebraska Supreme Court's decision in *Lancaster County Bank v. Marshel*. After carefully reviewing that case, we are convinced the bankruptcy court misinterpreted an isolated statement in the case when it

---

[1] According to one commentator, four states—New York, Tennessee, Illinois, and Washington—deem all trusts to be spendthrift as a rule of construction, although at least two and perhaps three of them allow the settlor to reject that rule through a provision in the trust. Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 Wash. U.L.Q. 1, 3-4 & n. 9 (1995).

concluded that Nebraska courts will treat all trusts as spendthrift trusts.

Marshel involved an action to foreclose a real estate mortgage on a debtor's interest in real property placed in trust under her father's will. *Lancaster County Bank v. Marshel*, 264 N.W. 470, 471 (Neb. 1936). Following a trial, the lower court concluded the trust was a spendthrift trust and the mortgage was void. *Id*. at 472. The creditor claimed the beneficiary was entitled to the use and possession of, and the rents and profits from the real estate during her life. *Id*. But the will had placed two tracts of real property in trust, and the debtor was to "have the use and possession of, *or* the rents and profits accruing from" one tract during her life, and her sister the same for the other tract. *Id*. at 472 (emphasis added). If either sister died leaving surviving issue, her issue would receive the tract of which she had enjoyed the beneficial use. *Id*. at 472-73. If one sister died before the other and left no issue, the surviving sister would have the use of or rents from the deceased sister's tract and the tract would go to her issue, if any, on her death. *Id*. at 473. If both sisters died without issue, the trustees were to sell both tracts and distribute the proceeds to the father's heirs, determined according to Nebraska intestacy law. *Id*. One of the trustees of the trust was the president and a stockholder in a bank, and the debtor gave that bank a mortgage on her interest in the trust to secure payment of her husband's pre-existing debts. *Id*. at 474-75.

Based on these facts, the Nebraska Supreme Court ruled the trust gave spendthrift protection to the debtor's interest. In reaching this conclusion, the court first determined the debtor was entitled to either the possession and use of the real estate or the rents and profits from it, but not both at the same time, and decided the will gave the trustees the power to elect which she should enjoy during her life. *Id*. at 474-75. Then the court said:

> From the will as an entirety, and the circumstances surrounding the same, it appears that the object and purpose of the alternative benefits

> provided for [the debtor] were by and through the exercise of the power of election vested in the trustees to protect this devisee against the result of her own acts, and to protect the interests of the remaindermen against damage to their rights by the acts of [the debtor], such as waste committed by her, or committed by others with her authority or consent. In other words, it was the plain intent of the testator that, by a proper exercise of the powers vested in his trustees by the terms of his will, his daughter would at all times be protected against her own improvidence and incapacity, and would be certain of receiving the support which the trust estate, properly managed, would assure her. These features, at least so far as the trustees were concerned, under the facts in this case, amounted to the creation of a spendthrift trust.

Id. at 475. The court followed this reasoning with a recitation of various applicable legal principles, including the following: "'The fact of placing property in the hands of a trustee evidences an intent on the part of the testator to put it beyond the power of the beneficiary to alienate, or his creditors to seize.' *Jones v. Harrison*, 7 [F.2d] 461, 464 [(8th Cir. 1925)]." This sentence was the primary support for the bankruptcy court's ruling. However, if this single fact was sufficient in the Nebraska Supreme Court's view to place spendthrift restrictions on trust assets, its *Marshel* opinion would have been much shorter. This statement alone would have determined the case. Instead, much like the Eighth Circuit in *Jones v. Harrison*, the court determined a number of other facts supported the ultimate conclusion that the trust under consideration was a spendthrift one. In fact, immediately before quoting this statement from the Eighth Circuit's decision, the court also quoted the following from it:

> "It is now well established that no particular form of words is necessary to create the restriction. Nor is it necessary that the restriction be expressed directly in the language of the will. On the other hand, courts look at all of the provisions of the will, and the circumstances under which it was made, including the condition of the beneficiary, and, if the intent to restrict is reasonably plain from a consideration of all these features, courts will give effect to that intent." *Jones v. Harrison*, [7 F.2d at] 464.

264 N.W. at 475-76. If the fact of the trust alone were enough, courts would not need to look at the rest of the will or the circumstances under which it was made. We believe the *Marshel* court's view was that placing property in trust was *some* evidence of an intent to prevent alienation or seizure, but that some additional

fact must also be shown before the trust will be recognized as a spendthrift one.

We note that while later Nebraska decisions have cited *Marshel* to support the proposition that spendthrift restrictions are valid in Nebraska, none has cited it to support the view that all trusts are spendthrift trusts. *See, e.g., First Nat'l Bank v. First Cadco Corp.*, 205 N.W.2d 115, 118 (Neb. 1973); *Beals v. Croughwell*, 299 N.W. 638, 641 (Neb. 1941). Furthermore, the Nebraska Supreme Court frequently refers to the Restatement of Trusts in cases involving trusts, indicating it would be likely to rely on § 147 of the Restatement (Second) of Trusts if faced with facts like those before us. *See, e.g., In re Estate of West*, 560 N.W.2d 810, 813 (Neb. 1997) (quoting from Restatement (Second) of Trusts § 2 at 6 (1959)); *Jones v. Shrigley*, 33 N.W.2d 510, 515-16 (Neb. 1948) (quoting from Restatement of Trusts § 99 at 269 (1935)); *Marshel*, 264 N.W. at 474 (quoting from Restatement of Trusts § 69 (1935)); *Smith v. Smith*, 517 N.W.2d 394, 399 (Neb. 1994) (citing Restatement (Second) of Trusts § 187, comment j (1959) with "accord" signal). While the Nebraska cases frequently indicate courts construing a will should look at the circumstances existing when the will was executed as well as the language used in the will, an approach that is broader than the Restatement's apparent suggestion that only the will's language should be considered, we do not believe the single statement in *Marshel* is sufficiently clear to support the conclusion that Nebraska courts also reject the Restatement's general rule that creditors can reach a beneficiary's interest in a trust.

The bankruptcy court also cited some language from the trust as evidence of an implied intent to create a spendthrift trust, stating:

> "It is reasonably plain to the Court that by restricting [the Debtor] from access to the corpus of the trust for ten years, by providing that [the Debtor] was to receive only distributions of income from the trust during that time, and by granting the trustee discretion to spend principal only for [the Debtor's] necessary medical expenses, [the Debtor's grandmother] intended for [the Debtor] to have nothing she could dispose of, or in other words, that [the grandmother] intended to impose a spendthrift restriction on the [Debtor's] Trust."

Here, the bankruptcy court relied on nothing other than the fact the property was placed in the Trust to support the conclusion the Debtor could not transfer it and her creditors could not reach it. Unlike the situation in *Marshel*, the Debtor's interest in the Trust was to remain with her and her issue; no provision was included to say what should happen if she died without surviving issue before the Trust terminated. In fact, we see nothing in the language of the will indicating that the Debtor's grandmother had any intent to protect the Debtor's interest in the Trust from her creditors or her own improvidence.

However, the parties submitted their dispute to the bankruptcy court on stipulations and opposing motions for summary judgment. As recognized by the bankruptcy court, the stipulations included nothing about the circumstances under which the will was made or about the Debtor's condition at the time. The Nebraska cases clearly indicate that these circumstances must be considered along with the will's language in determining whether the Debtor's grandmother intended to establish a spendthrift trust. *See Marshel*, 264 N.W. at 475. Obviously, at the least the Debtor could have provided the court with evidence concerning her own condition at the time the will was executed. Consequently, since necessary and available information was omitted, the materials presented were insufficient to establish that either party was entitled to summary judgment as a matter of law. We conclude we must reverse the bankruptcy court's order and remand this case for proceedings consistent with this finding.

IV. Conclusion

For these reasons, the order of the United States Bankruptcy Court for the Western District of Oklahoma is REVERSED and the matter is REMANDED for further proceedings in accord with this opinion.