



The following constitutes the order of the Court.

Signed June 20, 2005


United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE: §
§
JOHN KENNETH McPHERSON and §
§
VICTORIA JEAN McPHERSON, §
§
Debtors. § CASE NO. 03-44457-DML-7

MEMORANDUM OPINION

Before the court is the question of whether a Georgia trust is a spendthrift trust and thus not property of this chapter 7 estate¹ pursuant to section 541(c)(2) of the Bankruptcy Code.² This matter is subject to the court’s core jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2).

Victoria Jean McPherson (“Debtor”), together with “her lineal descendants,” was named as beneficiary of a trust created on June 20, 1997 (the “Trust”). Trust ¶ 3(a) provides, in part,

¹ See generally 5 COLLIER ON BANKRUPTCY ¶ 541.11 (15th ed. rev. 2004).

² 11 U.S.C. §§ 101-1330 (2005), amended by 11 U.S.C. §§ 101-1532 (as enacted Apr. 20, 2005) (hereafter the “Code”).

that the “Trustees shall pay the net income from the property to or for the benefit of [Debtor], and her lineal descendants, in such amounts and proportions among them as the Trustees, in their sole discretion shall deem best.”

Trust ¶ 3(b) provides the Trustees with similar discretion to invade the principal of the Trust for the benefit of the beneficiaries. Pursuant to Trust ¶ 3(c) the Trust terminates upon Debtor’s death. The Trust neither provides Debtor with withdrawal rights³ nor does it contain an anti-alienation provision.

Trust ¶ 7 requires the Trustees annually to “furnish to each person then *entitled* to income from this trust” a statement of account (emphasis added). Under certain circumstances set forth in Trust ¶ 8(d), a beneficiary (including Debtor) may appoint a successor trustee for the Trust.

Pursuant to Trust ¶ 10(c) the Trust is to be construed under Georgia law. Under Georgia law “spendthrift provisions” in a trust are described as follows:

- (a) A spendthrift provision is a provision in a trust that the interest of the beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.

GA. CODE ANN. § 53-12-28(a) (2004).

Although the Trust contains no provision of the sort described in section 53-12-28(a), Debtor argues that the discretion left to the Trustees to pay income to or invade principal for the benefit of Debtor so limits Debtor’s ability to control funds of the Trust that the Trust should be

³ Trust ¶ 4 provides to Glenn Joseph McCloskey withdrawal rights, apparently to offset tax consequences he might suffer by reason of distributions from the Trust.

treated as a spendthrift trust. This would be a tenable argument under Texas law,⁴ but the parties have cited no Georgia case, and the court has found none, that adopts so liberal a rule as that applicable in Texas.⁵

Leaving aside the effect of language in the Trust that suggests distributions are mandatory and the effect of Debtor's potential right to select her own successor trustees, the Trust must be construed under Georgia law. In one of the few Georgia cases that deals with section 53-12-28(a) and has any bearing on the matter before this court, a Georgia bankruptcy court considered the question of whether certain trusts created as retirement accounts were property of the estate. *See In re Hipple*, 225 B.R. 808 (Bankr. N.D. Ga. 1996) (hereafter "*Hipple*"). Although the case was decided under a separate provision of Georgia law dealing with "bona fide pension or retirement trust[s]," the bankruptcy court noted that, because federal law mandated that a beneficiary's withdrawal rights not be restricted, one of the trusts – an IRA which contained a limited anti-alienation clause but did not restrict the beneficiary's withdrawal rights – would "not qualify as a traditional spendthrift trust under . . . § 53-12-28(a)" *Id.* at 815.

⁴ *See, e.g., Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1028 (5th Cir. 1999) ("Discretionary trusts are similar in effect to a *spendthrift trust* in that where a trustee has been invested with a discretionary power to give an interest in a trust fund to a named beneficiary, the beneficiary cannot alienate the funds nor can creditors reach the fund until the trustee's discretion has been exercised.") (emphasis in original); *In re Denton*, 169 B.R. 608, 611 (Bankr. W.D. Tex. 1994) ("Although no particular form of words is required for creation of a spendthrift trust, intention to establish it must clearly appear in the instrument that creates it in specific language declaring a spendthrift trust or in language from which such a trust *may reasonably be inferred*. . . . A beneficiary of a valid spendthrift trust cannot reach assets of the trust unless and until a trustee distributes them.") (emphasis added). *See also* TEX. PROP. CODE ANN. §§ 112.035(a)-(c) (2004).

⁵ Debtor cites the court to *Henderson v. Collins*, 267 S.E.2d 202 (Ga. 1980), for the proposition that Georgia courts construe spendthrift trusts as do courts in Texas. *Henderson*, however, involved a trust governed by Louisiana law, 267 S.E.2d at 776, and the court did not cite to, let alone interpret, Georgia Code section 53-12-28.

The *Hipple* Court turned to section 53-12-28(d), which deals specifically with pension and retirement trusts. Section 53-12-28(d) provides in pertinent part:

- (d) Notwithstanding any other provision in this Code section to the contrary, a spendthrift provision in a bona fide pension or retirement trust is valid and enforceable with reference to the entire interest of the beneficiary in the income or in the principal or in both, even if the beneficiary is also the settlor of the trust.

GA. CODE ANN. § 53-12-28(d).

The court determined that the commencement of the debtor’s chapter 7 case did not change the special nature of the trusts and that, *even though debtor’s right of withdrawal remained effective*, the “creditors should not receive a windfall merely because a debtor files bankruptcy.” *Hipple*, 225 B.R. at 815.

The Georgia bankruptcy court’s interpretation of section 53-12-28(a) *vis-à-vis* section 53-12-28(d) suggests to this court that the statute be construed strictly. This court will therefore apply the plain meaning rule⁶ and compare the language of the Trust to the language of the Georgia statute.

⁶ See *Tello v. Dean Witter Reynolds, Inc.*, No. 03-12545, 2005 U.S. App. LEXIS 9977, at *5-6 (11th Cir. June 1, 2005) (“[T]he starting point in construing a statute is the language of the statute itself. The ‘cardinal canon’ of statutory interpretation is ‘that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’”) (citations omitted); *Williams v. Ga. Dep’t of Human Resources*, 532 S.E.2d 401, 403 (Ga. 2000) (“In construing this statutory provision, both this Court and the court of appeals have looked to the plain meaning of the statutory language.”); *Tolbert v. Maner*, 518 S.E.2d 423, 425 (Ga. 1999) (discussing that scope of statute “must be limited in strict accordance with the statutory language used therein, and such language can never be extended beyond its plain and ordinary meaning”); *Oxford v. Carter*, 120 S.E.2d 298, 301 (Ga. 1961) (“The cardinal rule in the construction of legislative enactments is to ascertain the true intention of the [legislature] in the passage of the law. As a general rule, the use of plain and unequivocal language in a legislative enactment obviates any necessity for judicial construction, and indeed forbids an interpretation of the meaning of the words employed by the [legislature].”).

It is immediately apparent that the Trust contains no provision prohibiting Debtor's alienation of her rights to income or principal, whatever those rights may be. While the Trustees arguably have the absolute discretion to make no distributions of interest or principal, that is not sufficient under the letter of Georgia law to create a spendthrift trust. There is in the Trust no enforceable spendthrift provision. *See Speed v. Speed*, 430 S.E.2d 348, 349 (Ga. 1993) (interpreting section 53-12-28 in the context of a creditor spouse seeking alimony from the husband's trust in a divorce action and determining that "[w]ithout a spendthrift clause or some statutory prohibition, 'creditors can bring a bill in equity to reach the interest of a beneficiary under a trust'").

CONCLUSION

There being no "restriction on the transfer of [Debtor's] beneficial interest . . . in [the Trust] that is enforceable under applicable nonbankruptcy law,"⁷ the court holds that the Trust is property of Debtor's estate. The chapter 7 trustee is directed to take such steps as are necessary to take possession of the Trust for the benefit of creditors.

SO ORDERED.

END OF ORDER

⁷ Code § 541(c)(2).