

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

In Proceedings  
Under Chapter 7

SHIRLEY A. DAVIS,

Case No. 02-33410

Debtor(s).

OPINION

This case presents a question of first impression in this District, calling upon the Court to decide whether a creditor may oppose the chapter 7 trustee's objection to the debtor's claim of exemption by asserting that the debtor is entitled to exempt certain property even though the debtor has declined to pursue the claimed exemption.

The chapter 7 debtor, Shirley Davis, filed a schedule of exemptions claiming that a \$28,613.76<sup>1</sup> state court judgment entered in her favor prior to bankruptcy for her attorney fees and costs in post-dissolution of marriage proceedings was exempt under 735 ILCS 5/12-1001(g)(4)<sup>2</sup> as a "[j]udgment for

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It appears that the judgment amount remaining due and owing may have been reduced by partial payment by the debtor's former spouse, Danny Kurtz. The amount of the reduction is not clear from the record. However, the amount of the judgment is not critical to the Court's decision and, therefore, the Court will make no attempt to clarify this issue at this time.

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Illinois has opted out of the federal scheme of exemptions. 735 ILCS 5/12-1201. The pertinent state statute provides:

The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:

. . . .

(g) The debtor's right to receive:

[m]aintenance.” The trustee objected to the claim of exemption, contending that the judgment for attorney fees and costs did not qualify as maintenance since it was not based on the respective financial status of the divorced parties but instead was a sanction levied by the state court judge against Danny Kurtz, and his girlfriend, Carol Musser, based on their misconduct during the post-dissolution litigation.

On January 15, 2003, the Court conducted a hearing on the trustee’s objection to the debtor’s claim of exemption. The trustee appeared at the hearing by counsel, Donald Samson. The debtor did not oppose the trustee’s objection to her claim of exemption. She filed no written response and did not appear at the hearing in person or by her attorney of record, Randall Steele. However, Earl Vaugniaux, the attorney who represented the debtor in the post-dissolution litigation, appeared as a creditor and opposed the trustee’s objection.<sup>3</sup> Mr. Vaugniaux argued that the attorney fees in question were awarded to the debtor as support and were properly claimed as exempt by the debtor. The sole question before the Court at this time is whether a creditor has standing to challenge the trustee’s objection to the debtor’s claim of exemption by asserting the debtor’s entitlement to the exemption when the debtor has declined to do so.

The Bankruptcy Code establishes a statutory scheme for collecting the assets of a chapter 7 debtor, for protecting exempt assets to ensure the debtor’s “fresh start,” and for distributing non-exempt assets to the debtor’s creditors. The filing of a bankruptcy petition vests virtually all of the debtor’s existing interests

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(4) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

735 ILCS 5/12-1001(g)(4).

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There is no contention that Mr. Vaugniaux appeared as the debtor’s counsel or for her benefit at this hearing.

in property, whether legal or equitable, in the bankruptcy estate. 11 U.S.C. 541(a)(1); *Matter of Yonikus*, 996 F. 2d 866, 869 (7<sup>th</sup> Cir. 1993). Once the bankruptcy petition is filed, it becomes the trustee's duty to maximize the estate and to liquidate the assets in the manner most beneficial to the creditors. 11 U.S.C. § 704(1); *Matter of Luongo*, 259 F. 3d 323, 340 (5<sup>th</sup> Cir. 2001); 6 Collier on Bankruptcy ¶ 704.02[1], [3] (15<sup>th</sup> ed. rev. 2003). The debtor cedes her standing to prosecute pre-petition claims by filing a bankruptcy petition. *In re Polis*, 2001 WL 185481 at \*2 (N.D. Ill. 2001). Upon filing, only the trustee may evaluate and administer the estate's property. *Id.*<sup>4</sup> The debtor, however, may remove certain assets from that property that comprises the bankruptcy estate by filing a list of assets that she claims as exempt. 11 U.S.C. § 522(b), (l). The Bankruptcy Code grants this right to the debtor. *Id.*; *Luongo*, 259 F. 3d at 340. In addition, if the debtor does not file a list of exempt property, a dependent of the debtor may file such a list, or claim property as exempt on behalf of the debtor. 11 U.S.C. § 522(l); Fed. R. Bankr. P. 4003(a). The property claimed as exempt is not automatically exempt and does not revert to the debtor simply by filing a list of exempt property. *Polis*, 2001 WL 185481 at \*2. Instead, a party in interest has thirty days from the conclusion of the meeting of creditors to object to a claimed exemption. 11 U.S.C. § 522(l); Fed. R. Bankr. P. 4003(b). If a timely objection is raised, the Court must rule on its validity. *Polis*, 2001 WL 185481 at \*2. The burden is on the objector to prove that the exemptions are not properly claimed. Fed. R. Bankr. P. 4003(c).

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Although Mr. Vuagniaux suggests that the trustee has failed in his duty to collect a valuable asset of the estate, he has not moved for removal of the trustee nor sought authority to collect the judgment in lieu of the trustee. Of course, any recovery by Mr. Vuagniaux would be for the benefit of all creditors. *See, e.g.*, 6 Collier on Bankruptcy, *supra*, at 704-6, -8 & n.22 .

The trustee contends that Mr. Vuagniaux is prohibited from opposing the trustee's objection because only the debtor, or a dependent of the debtor, may claim property exempt. By corollary, the trustee argues, a creditor may not challenge the trustee's position that property is non-exempt since the creditor would have to assume the debtor's role to do so. Citing his responsibility to maximize the return for all creditors, the trustee argues that an individual creditor should not be allowed to thwart the trustee's efforts to collect and distribute estate assets equitably among all creditors. Rather, the trustee urges that Mr. Vuagniaux is limited to challenging the debtor's right to discharge the debt she owes him, or her eligibility to receive a discharge of all her debts, by availing himself of the remedies found in 11 U.S.C. §§ 523 and 727.

The Court finds merit in the trustee's argument. Although the Court's research has uncovered no case authority expressly on point, a fact that is not surprising given the anomalous stance adopted by Mr. Vuagniaux as a creditor of the estate, 11 U.S.C. § 522(l) plainly states that only the debtor or her dependent may claim property as exempt. The debtor here, when faced with the trustee's objection, has declined to pursue her claim that the judgment is exempt. A creditor may not take her place to do so.

The Court is not persuaded otherwise by Mr. Vuagniaux, who raises a multi-pronged argument to side-step the issue of his standing to assert the debtor's claim of exemption. First, he contends that the trustee's objection to the exemption should be overruled because the judgment for attorney fees is in the nature of support.<sup>5</sup> However, the question of whether the judgment is in the nature of support, and

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The Court is puzzled by Mr. Vuagniaux's conviction that exempting the debtor's right to collect the judgment will benefit him. If the right to collect the judgment is found to be exempt, any funds collected by the debtor will be beyond the reach of the debtor's creditors even if the debtor is denied a discharge. *See* 11 U.S.C. § 522(c).

therefore exempt under 735 ILCS 5/12-1001(g)(4), need only be reached if the Court finds that Mr. Vuagniaux has standing to claim an exemption on the debtor's behalf. The trustee has made a *prima facie* showing that the judgment was not in the nature of support because it was not based on findings of the relative financial conditions of the divorced parties.<sup>6</sup> The debtor has not refuted this argument. The Court need not resolve whether the award was determined by economic considerations because only the debtor or her dependent may assert entitlement to the exemption and they have failed to do so.

Next, Mr. Vuagniaux contends that the debtor's discharge should be denied based on her conduct during the post-dissolution of marriage litigation and on falsehoods in her bankruptcy petition, statements and schedules. This argument however, is the subject of a pending adversary case<sup>7</sup> and is irrelevant to the matter before the Court.

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In contrast, Mr. Vuagniaux may stand to benefit if the right to collect the judgment is found not to be exempt. Here, the trustee will proceed to collect the judgment, to sell the right to collect the judgment to a willing purchaser, or to abandon the right if he deems it of inconsequential value to the bankruptcy estate. Under these scenarios, all creditors would receive a pro rata share of any recovery by the trustee whether or not the debtor is discharged. If the trustee were to abandon the right to collect the judgment, the right of collection will re-vest in the debtor as a non-exempt asset, and any funds she collects will be subject to in rem claims if the debtor is discharged and to claims against her personally if her discharge is denied.

Of course, unless the debtor is denied a discharge, Mr. Vuagniaux may not proceed against her personally to collect her pre-petition obligation to pay his attorney fees.

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The trustee also argues persuasively that the portion of the judgment jointly attributable to Carol Musser, a sum that appears to total \$17,250.00 according to the September 12, 2002 order of the state court, cannot be for attorney fees and costs related to the acquisition of maintenance because it would be impossible for Carol Musser to be a party responsible for paying maintenance to the debtor.

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Mr. Vuagniaux has filed adversary case 02-3302 against the debtor in this Court, complaining under 11 U.S.C. §§ 727(a)(2)(A) and (a)(4)(A) that the debtor should be denied a discharge in bankruptcy.

Mr. Vuagniaux then argues that the judgment rendered against Dan Kurtz and Carol Musser is a non-dischargeable debt. The Court notes first that the dischargeability of the judgment is not germane to the question of whether it is property that the debtor may exempt. Even so, Mr. Vuagniaux has not filed a complaint under any subsection of 11 U.S.C. § 523 and it would seem an exercise in futility to do so. The debt in question is the obligation of Dan Kurtz and/or Carol Musser to pay the debtor for attorney fees and costs she incurred, and Dan Kurtz and Carol Musser are not debtors in this bankruptcy case. As to the debtor's personal obligation to pay Mr. Vuagniaux for his legal services, that debt is not the subject of the disputed exemption. In addition, it is not a debt that is owed "to a spouse, former spouse or child of the debtor," 11 U.S.C. § 523(a)(5), and therefore fails to fall within the exception to discharge carved out in 11 U.S.C. § 523(a)(5). *See* 4 Collier on Bankruptcy, *supra*, ¶ 523.11[4].

Finally, Mr. Vuagniaux asserts that the judgment for attorney fees is not property of the debtor's bankruptcy estate under 11 U.S.C. §§ 541(a) and (d) because the debtor only holds legal title to the judgment while equitable title is vested in Mr. Vuagniaux as the beneficiary of a constructive trust. Under this theory, the trust res, consisting of the judgment for attorney fees and costs, is excluded from the bankruptcy estate, the question of whether the judgment is exempt property becomes irrelevant, and Mr. Vuagniaux is free to pursue Dan Kurtz and Carol Musser to collect the judgment.

While Mr. Vuagniaux raises a novel argument, the Court finds it to be premature and not properly raised. At this juncture, the existence of a constructive trust has not been established and the Court cannot discern from the record how, or if, such a trust would arise. Moreover, the imposition of a constructive trust is an equitable remedy, requiring that an adversary case be filed to seek redress. Fed. R. Bankr. P. 7001(7). The Court reaches its decision on Mr. Vuagniaux's standing to challenge the trustee's objection

to exemption without foreclosing Mr. Vuagniaux from bringing an action to establish that the judgment, or the right to collect it, is held in constructive trust for his benefit and therefore is excluded from property of the estate.

For the reasons stated in this opinion, the Court finds that Mr. Vuagniaux lacks standing to challenge the trustee's objection to the debtor's claim of exempt property because the right to claim the exemption remains exclusively the province of the debtor or the debtor's dependent.

Counsel for the trustee shall serve a copy of this Order by mail to all interested parties who were not served electronically.

SEE WRITTEN ORDER.

ENTERED: May 12, 2003

/s/ Kenneth J. Meyers  
UNITED STATES BANKRUPTCY JUDGE