

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

IN RE:) In Proceedings
) Under Chapter 7
JAMES MICHAEL KEITH and)
NIKIE JEAN-MARIE HOBBA KEITH,) BK No. 91-51237
)
Debtors.)

OPINION

Debtors, James and Nikie Keith, filed a joint petition for Chapter 7 bankruptcy relief on December 23, 1991, claiming as exempt property \$15,000 from a personal injury cause of action and a loss of consortium claim, both of which arose as a result of Nikie's involvement in an automobile accident. Under the Illinois personal property exemption statute, § 12-1001 of the Illinois Code of Civil Procedure,¹ a debtor may claim as exempt "[t]he debtor's right to receive. . . a payment, not to exceed \$7,500 in value, on account of personal bodily injury of the debtor or an individual of whom the debtor was a dependent." Ill. Rev. Stat. ch. 110, ¶ 12-1001(h)(4)(1991). Debtors contend that Nikie may exempt \$7,500 of any award she receives from her personal injury claim and that James may likewise exempt \$7,500 of any award he receives from his loss of consortium claim. The trustee objects to the exemption for James, arguing that an award for loss of consortium is not exempt because it is not a payment on account of personal bodily injury and, therefore, the debtors are only entitled to an exemption in

¹Illinois has exercised its right under § 522(b)(1) of the Bankruptcy Code, 11 U.S.C. § 522(b)(1) (1991), to limit an Illinois debtor's choice of exemptions to those provided by state law. Ill. Rev. Stat. ch. 110, ¶ 12-1201 (1991); In Re Rigdon, 133 B.R. 460, 462 n.2 (Bankr. S.D. Ill. 1991).

the total amount of \$7,500.

Illinois recognizes a spouse's right to recover for the loss of consortium he or she suffers as a result of personal injuries incurred by the other spouse. Dini v. Naiditch, 20 Ill.2d 406, 430, 170 N.E.2d 881, 892-93 (1960). Consortium includes not only material services, but also the companionship, happiness and sexual intimacy each spouse provides for the other. Dini, 20 Ill.2d at 427, 170 N.E.2d at 891.

Whether an award for loss of consortium may be exempt under § 12-1001(h) (4) as a payment on account of the personal bodily injury of (1) the debtor, or (2) an individual of whom the debtor was a dependent, are issues of first impression in Illinois. Neither the Illinois Code of Civil Procedure nor Illinois case law defines or illuminates the meaning of "personal bodily injury." The legislative history of § 12-1001 also provides a dearth of information about the statute. See S.B. 1247, 82d Ill.Gen.Assem., 1981 Senate Debates, Oct. 16, 1981, at 10; 1982 House Debates, June 17, 1982, at 605.

There are no reported cases in which a court has denied an exemption for loss of consortium. Federal courts in at least six states have addressed this issue, and each has held that an award for loss of consortium is exempt under its state's respective personal injury exemption statute. In Re Hartney, No. 690-01283, 1990 WL 250985 (N.D. Ohio 1990); Niedermayer v. Adelman, 90 B.R. 146 (D. Md. 1988); In Re Keyworth, 47 B.R. 966, 972-73 (D. Colo. 1985); Matter of Young, 93 B.R. 590 (Bankr. S.D. Ohio 1988); In Re Starr, 101 B.R. 274 (Bankr. E.D. Okla. 1988); In Re Loyd, 86 B.R.

663 (Bankr. W.D. Okla. 1988); In Re Carlson, 40 B.R. 746 (Bankr. Minn. 1984); Matter of Lynn, 13 B.R. 361 (Bankr. W.D. Wis. 1981) (addressing the federal exemption statute, 11 U.S.C. § 522(d)(11)(D)).

Three of the six states, Maryland, Colorado, and Minnesota, have personal injury exemption statutes significantly different from the Illinois statute, so case authority from those states is not helpful to the issues at hand.² In the remaining three states, courts from Oklahoma and Wisconsin have addressed the issue of whether a debtor's award for loss of consortium constitutes a payment on account of the personal bodily injury of an individual of whom the debtor was a dependent, while the Ohio federal courts have addressed the issue of whether a debtor's award for loss of consortium constitutes a payment on account of the personal bodily injury of the debtor.

The federal courts in Oklahoma held that a spouse's award for loss of consortium is exempt because it is that spouse's interest in the other spouse's personal injury claim. The Oklahoma exemption statute

²Unlike the Illinois statute, the statutes of these three states do not refer to personal bodily injury, but instead use more general terms--"injuries to the person" or "personal injuries"--such that loss of consortium easily falls within the purview of those statutes. Maryland exempts "[m]oney payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings." Md. Cts. & Jud. Proc. Code Ann. § 11-504(b)(2)(1987); see Niedermayer, 90 B.R. at 147. Colorado exempts "[t]he proceeds of any claim for damages for personal injuries suffered by any debtor except for obligations incurred for treatment of any kind for such injuries or collection of such damages." Colo. Rev. Stat. § 13-54102(1)(n)(1984); see Keyworth, 47 B.R. at 972. Minnesota exempts "[r]ights of action for injuries to the person of the debtor or of a relative whether or not resulting in death." Minn. Stat. § 550.37, subd.22 (1984); see Carlson, 40 B.R. at 748.

exempts a debtor's "interest in" any claim for personal bodily injury.³ The Oklahoma courts observed that a loss of consortium action derives from a personal injury action, Loyd, 86 B.R. at 664, and reasoned that a special's recovery for loss of consortium is that special's "interest in" the other spouse's claim for personal bodily injury so as to be exempt under the Oklahoma statute. Id.; Starr, 101 B.R. at 275-76.

The Wisconsin bankruptcy court reached a similar decision in Lynn. In that case, the debtors, Wayne and Catherine Lynn, claimed as exempt under § 522(d)(11)(D) of the Bankruptcy Code a payment Catherine received in settlement of her loss of consortium claim. Lynn, 13 B.R. at 361. Catherine's claim was based on Wayne's personal injury suit. Section 522(d)(11)(D) exempts "a payment, not to exceed \$7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent." 11 U.S.C. § 522(d)(11)(D)(1980).

The Lynn court determined that "under Wisconsin law, an award based on loss of consortium is 'on account of' the spouse's personal bodily injury." Lynn, 13 B.R. at 363 (quoting 11 U.S.C. § 522(d)(11)(D)(1980)). The court thus held that "[a]n award for loss of

³Oklahoma exempts "[s]uch person's interest in a claim for personal bodily injury . . . for a net amount not in excess of Fifty Thousand Dollars (\$50,000.00), but not including any claim for exemplary or punitive damages." Okla. Stat. tit. 31, § 1(A)(21)(1978); see Starr, 101 B.R. at 275; Loyd, 86 B.R. at 664. In contrast, the Illinois statute is more limited in that it does not exempt every payment received on account of bodily injury. Rather, it only exempts those payments received on account of the bodily injury of two types of individuals, namely, the debtor or an individual of whom the debtor was a dependent.

consortium because of a personal injury to the spouse is a payment 'on account of personal bodily injury . . . of the debtor or an individual of whom the debtor is a dependent' and therefore may be exempted pursuant to 11 U.S.C. § 522(d)(11)(D)." Id. (quoting 11 U.S.C. § 522(d)(11)(D)(1980)).

The issue in Lynn was whether the loss of consortium payment was on account of the personal bodily injury of an individual, Wayne, of whom the debtor, Catherine, was a dependent. See id. Although the Lynn court did not discuss whether Catherine was a dependent of Wayne, "dependent" is defined under § 522 of the Bankruptcy Code as including a "spouse, whether or not actually dependent." 11 U.S.C. § 522(a)(1)(1980). Consequently, a spouse need not prove actual dependency to come under the federal exemption statute.

Illinois courts have observed that while a spouse's loss of consortium claim is independent of the personal injury claim on which it is based, it is also derivative in that the spouse's loss of consortium results from the injuries incurred by the other spouse. See Blagg v. Illinois F.W.D. Truck & Equipment Co., 143 Ill.2d 188, 196-201, 572 N.E.2d 920, 924-926 (1991). Thus, as in the Wisconsin and Oklahoma decisions, a special's loss of consortium may be said to be on account of the personal bodily injury of the other spouse. For this reason, the Court holds that a spouse's award for loss of consortium is a payment on account of the other special's personal bodily injury for purposes of § 12-1001(h)(4).

The Illinois exemption statute, unlike the federal exemption statute, does not provide a definition of "dependent" and consequently

does not automatically characterize one spouse as a dependent of the other spouse. As a result, under Illinois law, a debtor with a loss of consortium claim must show that he or she was a dependent of the other injured spouse in order to claim the exemption. If the debtor proves such dependency, then the debtor may claim as exempt any award he or she receives for a loss of consortium claim up to the \$7,500 statutory limit.

The remaining issue of whether a loss of consortium award constitutes a payment on account of the personal bodily injury of the debtor, i.e., whether the loss of consortium is itself a personal bodily injury, was addressed by the Ohio bankruptcy court in In Re Young. Ohio has a statute similar to Illinois' personal injury exemption statute. Ohio exempts "[a] payment, not to exceed five thousand dollars, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the person or an individual for whom the person is a dependent." Ohio Rev. Code § 2329.66(A)(12)(c)(1988); see Young, 93 B.R. at 593-94. Relying on the principle that a court should liberally construe exemptions in favor of the debtor, the Young court held that the debtor wife, who had filed a claim for loss of consortium, had "suffered a personal bodily injury within the meaning of the Ohio exemption statute" and, therefore, could exempt \$5,000 of the settlement she received in satisfaction of her claim. Young, 93 B.R. at 595; see Hartney, 1990 WL 250985, at *2.⁴

⁴Although the Ohio District Court in Hartney agreed with Young, the Hartney court did not discuss the issue in any detail.

The reasoning behind the Young holding is exceedingly weak for three reasons. First, the Young court relied on the premise that, under Ohio law, the essence of a special claim for loss of consortium is the "direct hurt" that spouse has suffered as a result of the injuries incurred by the other spouse. Young, 93 B.R. at 594 (quoting Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio St. 2d 65, 72, 258 N.E.2d 230, 234 (1970)). While this is true, the Young court did not explain how or why the debtor's loss of consortium injury can thus be characterized as a personal bodily injury of the debtor.

Second, the Young court emphasized that, pursuant to Ohio law, one spouse may recover for loss of consortium even though the injury to the other spouse is not a physical injury. Id. (relying on Adkins v. General Motors Corp., 556 F.Supp. 452, 458 (S.D. Ohio 1983)). The type of injury incurred by the other spouse, however, is not relevant to whether the spouse claiming an exemption for loss of consortium has suffered a personal bodily injury. Significantly, the Ohio courts have narrowly interpreted the Ohio personal injury exemption statute such that it only exempts those payments compensating bodily injury, physical trauma or disability. Hartney, 1990 WL 250985, at *1-2.

Third, the court in Young failed to explain exactly why loss of consortium is a personal bodily injury. As alluded to earlier, it is not hard to view loss of consortium as an injury or even a personal injury. It is more difficult, however, to comprehend loss of consortium as a personal bodily injury. A bodily injury "[g]enerally refers only to [an] injury to the body, or to sickness or disease contracted by the injured as a result of [the] injury," Black's Law

Dictionary 175 (6th ed. 1990), or to any "[p]hysical pain, illness or . . . impairment of physical condition," id. at 786. The Young court defined loss of consortium as consisting of "'society, services, sexual relations and conjugal affection which includes companionship, comfort, love and solace.'" Young, 93 B.R. at 594 (quoting Clouston, 22 Ohio St. 2d at 66, 258 N.E.2d at 231). Even the Young court did not define loss of consortium in such a way that it encompasses a bodily injury. The court at no point explained this essential problem, a problem which is particularly acute in light of the Ohio courts' historically narrow interpretation of the Ohio personal injury exemption statute. It is inconsistent to interpret that statute narrowly in the context of the person directly injured, but broadly in the context of the person claiming the loss of consortium.

For these reasons, the Court chooses not to follow the reasoning or holding in Young. Instead, this Court holds that an award for a debtor's loss of consortium is not a payment on account of the personal bodily injury of the debtor under § 121001(h)(4). No doubt the spouse who has suffered the loss of consortium has incurred an injury, even a severe and devastating injury. Nevertheless, absent some convincing authority to the contrary, the Court is not persuaded that loss of consortium constitutes a bodily injury as required by the statute.

It is true that "[e]xemptions are to be broadly construed in favor of the debtor." In Re Terry, 41 B.R. 508, 509 (Bankr. N.D. Ill. 1984). A court, however, cannot so broadly construe an exemption as to ignore or defeat the actual and specific language of the statute.

Based on this Court's holding, any recovery James receives for his

loss of consortium claim is not exempt, under § 121001(h)(4), as a payment on account of the personal bodily injury of James himself, the debtor. Nevertheless, because James' award for his loss of consortium claim is a payment on account of the personal bodily injury of an individual, Nikie, of whom the debtor, James, may have been a dependent, James' award for loss of consortium would be exempt if he could show that he was a dependent of Nikie. The debtors have not argued that James is dependent on Nikie. Therefore, the Court will hold a further hearing at which time the debtors may present evidence regarding James' dependency upon Nikie. In deciding this issue, the Court will use the interpretation and definition of "dependent" developed in In Re Rigdon, 133 B.R. 460 (Bankr. S.D. Ill. 1991).

For the foregoing reasons, the Court reserves ruling on the trustee's objection to the exemption until after the hearing on the dependency issue.

See written order entered this date.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: May 18, 1992