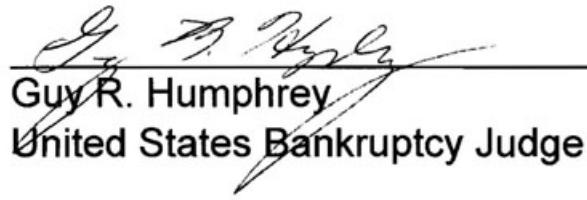


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.




Guy R. Humphrey
United States Bankruptcy Judge

Dated: August 18, 2010

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re: WILLIAM H. HIBBARD
SUSAN G. HIBBARD,

Debtors

Case No. 08-36322

Judge Humphrey
Chapter 7

Decision Denying Creditor Sherri Hibbard's Motion to Attach Exempt Property

This opinion concerns the effect and limitations of 11 U.S.C. § 522(c)(1) in allowing creditors seeking to collect domestic support obligations to pursue property exempted in a bankruptcy case. This court has jurisdiction pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference in this District. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

On December 11, 2008 the debtors, William and Susan Hibbard (the “Debtors”), filed a petition under Chapter 11 of Title 11 of the United States Code (Doc. 1). On January 8, 2010 an order was entered converting this case to Chapter 7 (Doc. 201). Ruth Slone was appointed as the Chapter 7 Trustee (the “Trustee”). The Trustee has been liquidating available assets for the creditors of this estate, including selling a 2003 GMC Denali, a 1999 Porsche, and a 2005 Mercedes Benz (Doc. 231).

Sherri Hibbard (the “Creditor”) has filed two proofs of claim in this case. Claim 16-1 is for \$252,872.72 as of February 3, 2010 and the basis for the claim is listed as alimony. This claim is filed as a priority claim for domestic support obligations (“DSO”) under 11 U.S.C. § 507(a)(1)¹. Claim 17-2 is an additional DSO claim for child support.²

On May 25, 2010, Ms. Hibbard filed a motion captioned *Creditor Sherri Hibbard’s Motion to Attach Exempt Property* (the “Motion”) (Doc. 255). The Debtors filed a response to the Motion on July 1, 2010 (Doc. 277) and the Creditor filed a reply on July 8, 2010 (Doc. 280). The Motion seeks an order from this court requiring (1) exempt funds currently being held by the Trustee be transferred directly to the Creditor; (2) “future exempt holdings by the Trustee be reviewed prior to being refunded to the Debtor”; and (3) exempt assets not otherwise collected or liquidated by the trustee “remain in their current state” – “not sold,

¹ Unless otherwise noted, all statutory references are to the Bankruptcy Code of 1978, as amended, 11 U.S.C. §§ 101-1532, cited hereinafter in this decision as “§ ____”.

² Claim 17-2 lists \$12,726.04 owed as of January 27, 2010, and \$9,389.62 as of May 11, 2010. However, the Creditor only scheduled \$3,686.31 of that claim as having priority status. The Debtors dispute certain portions of the Creditor’s DSO claims, but any issues regarding the amount of the Creditor’s claims, including their nature and priority status, are not presently before the court.

converted, transferred, or otherwise disposed of” – while this Chapter 7 case remains pending. For the reasons explained below, all of these requests are denied.

Section 522(c)(1) provides that “[u]nless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except . . . a debt of a kind specified in ~~section 523(a)~~ paragraph (1) or ~~523(a)(5) of this title~~ (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of kind specified in section 523(a)(5))[]” (italics and strikethrough added). The portion of the text in italics was added and the strikethrough was removed as an amendment to § 522(c) included within the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Section 523(a)(5) provides that a “domestic support obligation” is non-dischargeable. A “domestic support obligation” includes alimony and child support, whether pre-petition or post-petition. 11 U.S.C. § 101(14A).

The changes to § 522(c)(1) make clear that, regardless of any other applicable non-bankruptcy law, a DSO creditor, such as Ms. Hibbard, can pursue exempt assets. *Pasquina v. Cunningham (In re Cunningham)*, 513 F.3d 318, 323 (1st Cir. 2008). The changes in § 522(c)(1) were apparently in response to the Fifth Circuit’s decision in *In re Davis (Davis v. Davis)*, 170 F.3d 475 (5th Cir. 1999).³ In *Davis*, the Fifth Circuit en banc concluded that § 522(c)(1) did not allow the former wife of a debtor to seize and sell a homestead exempt under Texas law to

³ See William Brown, Lawrence R. Ahern, III and Nancy Fraas MacLean, *Bankruptcy Exemption Manual*, § 3:5 (2010) and Michaela M. White and James P. Caher, *The Dog That Didn’t Bark: Domestic Support Obligations and Exempt Property After BAPCPA*, 41 Fam. L. Q. 299, 310 n. 58 (Summer 2007).

collect a nondischargeable support obligation. The changes to § 522(c)(1) allow what is now known as a DSO creditor to pursue assets, regardless of the property being exempted in a bankruptcy case. The question becomes whom should pursue such assets and in what forum. The Creditor posits that the BAPCPA amendments to § 522(c) allow the Trustee to administer exempt assets with non-exempt equity. Alternatively, the Creditor appears to assert that the changes to § 522(c)(1) allow the bankruptcy court to administer such assets in some other manner.

In *In re Quezada*, the court concluded that the Trustee could not administer exempt homestead property for the benefit of DSO creditors. 368 B.R. 44 (Bankr. S.D. Fla. 2007). The court concluded that “§ 704(a)(1). . . precludes a trustee from selling exempt property” because that section limits the trustee to ““collect and reduce to money property of the estate. . . .” *Id.* at 48. Once property is claimed as exempt and the exemption is allowed, the property is no longer property of the estate. Other decisions have also concluded that § 522(c)(1) does not allow a trustee to pursue exempt assets. *In re Covington*, 368 B.R. 38 (Bankr. E.D. Cal. 2006) (Court determined, under the language of § 522(c)(1) prior to the BAPCPA amendments, the Trustee cannot administer exempt assets.); *In re Vandeventer*, 368 B.R. 50 (Bankr. C.D. Ill. 2007) (Chapter 7 Trustee could not administer exempt assets on behalf of a DSO creditor); *In re Duggan*, 2007 WL 2386577 (Bankr. M.D. Fla. Aug. 15, 2007) (A Chapter 7 trustee cannot liquidate exempt property.). Such a procedure would be inconsistent with the limitation a Chapter 7 trustee has to distribute property of the estate. 11 U.S.C. § 726. The court agrees with the apparently unanimous conclusion of the

bankruptcy courts that have addressed the issue that a Chapter 7 trustee cannot pursue exempt assets on behalf of a DSO creditor.⁴

The Creditor suggests this case is distinguishable because she seeks the attachment of proceeds of already exempted vehicles or other assets that – due to having non-exempt equity – were or could be liquidated by the Trustee for the benefit of the Debtors' unsecured creditors, with only the exempt portion of these proceeds distributed to her by the Trustee. This court recognizes that the Creditor – after a failed Chapter 11 case – seeks to collect these funds that might dissipate upon being refunded to the Debtors.

Section 726, combined with § 507, instructs Chapter 7 trustees that they are to distribute property of the estate first to allowed holders of DSOs, after first deducting the costs of administering those assets. The Creditor is asserting that she has such first priority DSO claims. Further, as stated, § 522(c)(1) makes it clear that such debts may even be collected from exempt property. Thus, if the Trustee is to distribute property of the estate first to such creditors and the Trustee has administered such property already and exempt assets are liable for such DSO obligations, then why shouldn't the Trustee distribute the exempt portions of proceeds to those DSO creditors? The answer simply is, as noted, § 704 provides no procedure for a trustee to administer assets which are not estate property and Title 11 has no other procedure available to administer the assets in a Chapter 7 case. Under § 726 the Trustee can only distribute property of the estate. While the court recognizes this relief is sought by the Creditor and not the Trustee, the distinction the Creditor makes does

⁴ In *In re Brossioit*, a portion of exempt homestead funds was held by the Chapter 7 Trustee. 2009 WL 4269439, at *1 (Bankr. N.D. Cal. Nov. 24, 2009). The court determined the disputed claim was not a DSO and therefore the issue of the role of a Chapter 7 trustee in distributing exempt funds was never directly addressed. *Id.* at *2.

not change the result because this court would still be ordering the Chapter 7 trustee to disburse funds on exempt property. Once an exemption is claimed and the period for objecting to such an exemption expires or the court resolves any such objection determining that such property is exempt, that property is no longer is property of the estate. *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) (“To help the debtor obtain a fresh start, the Bankruptcy Code permits him to withdraw from the estate certain interests in property”); *Owen v. Owen*, 500 U.S. 305, 308 (1991) (“An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.”); *Holland v. Star Bank, N.A. (In re Holland)*, 151 F.3d 547, 548 n. 2 (6th Cir. 1998) (citing the *Owen* definition of “exemption”) and *In re Kimble*, 344 B.R. 546, 550 (Bankr. S.D. Ohio 2006) (same). Thus, as soon as an exemption becomes effective, the exempt funds or property are no longer property of the estate and upon being removed or withdrawn from the estate, the Trustee can not administer that property or distribute the exempt proceeds to creditors because the Trustee can only administer property of the estate under § 704 or distribute it under § 726.

Quezada is somewhat different among the cases addressing the effect of the BAPCPA amendment to § 522(c)(1). While concluding a trustee lacks authority to administer exempt assets, it further concluded that § 522(c)(1) “grants DSO creditors a federal right of action against exempt property.” *Quezada*, 368 B.R. at 49. Since Title 11 provides such a substantive right, the court concluded it is within the bankruptcy court’s “arising under” jurisdiction under 28 U.S.C. § 1334(b). *Id.* See also *Vandeenter*, 368 B.R. at 54 (“The [Quezada] court responded that the statutory bar to a trustee administering exempt

property does not deprive the bankruptcy court of jurisdiction under 28 U.S.C. § 1334(b) if the domestic support obligation creditor seeks to enforce her claim in the bankruptcy court.”).

The court agrees § 522(c)(1) creates a federal right under Title 11 that preempts otherwise applicable non-bankruptcy law limitations on executions against exempt property. However, to the extent Quezada suggests and the Creditor argues that the bankruptcy court could administer exempt assets in a Chapter 7 – in a procedure separate from the role of a Chapter 7 trustee – the court finds no procedure provided by statute or court rule for a bankruptcy court to administer such assets. For better or worse, Title 11 provides only one method for the distribution of funds to creditors in a Chapter 7 case – through a Chapter 7 trustee.

Section 522(c)(1) can best be understood to allow DSO creditors to pursue remedies under applicable non-bankruptcy law in a state court (or other appropriate forum) against property that was determined to be exempt in a bankruptcy case. Section 522(c)(1) effectively removes an exemption claimed in the bankruptcy case as a defense to such a collection. This exception in § 522(c)(1) materially distinguishes DSO and certain creditors holding non-dischargeable tax debt from most other creditors, who cannot pursue non-dischargeable debts against exempt assets during or after the bankruptcy case. See *In re Waters*, 2007 WL 1834901, at *2 (Bankr. M.D. Ala. June 25, 2007) (“Section 522(c)(1) does nothing more than remove the bar of section 522(c), which provides that property which is exempt from the estate is not liable to the claims of creditors even after the bankruptcy case is closed.”).

However, while the court finds that Congress did create a federal right under Title 11 that preempts otherwise applicable non-bankruptcy law, the court does not find that such right equates to creating a cause of action in favor of DSO creditors to collect from exempt assets in the bankruptcy court. The court recognizes that state court procedures may be cumbersome and that the Creditor's collections efforts have been curtailed by the Debtors' converted Chapter 11 case. It is also beyond peradventure that DSO creditors received special consideration from Congress when BAPCPA was enacted. *Ruppel*, 368 B.R. at 44; See e.g. § 507(a)(1) (With limited exception, DSO claims receiving first priority for distribution of estate funds); § 362(b)(2) (expanding the automatic stay exceptions for DSO creditors); § 704(c) (expanding a Chapter 7 trustee obligations for notice to DSO creditors);⁵ § 1307(c)(11) (failure to pay post-petition DSO creditors cause for dismissal of a Chapter 13 case); § 1325(a)(8) (failure to pay post-petition DSO's is required to confirm a Chapter 13 plan). Nevertheless, for this court to find that a private right of action exists for a DSO creditor within the bankruptcy court, the statute would need to be clearer in its intent. *Id.*⁶

⁵ However, as commentators have noted, the notice requirements of § 704(c) do not include a procedure to notice DSO creditors that a trustee intends to liquidate exempt property. Michaela M. White and James P. Caher, *The Dog That Didn't Bark: Domestic Support Obligations and Exempt Property After BAPCPA*, 41 Fam. L. Q. 299, 300 (Summer 2007). Further, no procedure exists to distribute the exempt portion of liquidated property or to allow a DSO creditor to pursue such rights directly within the jurisdiction of the bankruptcy court.

⁶ See *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000) (Section 524 does not provide a private right of action for violation of the discharge injunction). Pertuso relied on the Supreme Court standard for finding a private right of action for breach of a federal statute:

In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court identified four factors that are to be considered in determining whether a private right of action exists for breach of a federal statute. The factors to be considered are these: (1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted; (2) whether there is any explicit or implicit indication of congressional intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law. *Id.* at 78, 95 S.Ct. 2080. "The most important inquiry," as the Court subsequently

The Creditor's request that exempt assets remain in their "current state" during the pendency of this Chapter 7 case is both procedurally and substantively faulty. First, procedurally such a request is injunctive in nature and requires an adversary proceeding because, as explained, Chapter 7 does not provide for such relief. See Bankruptcy Rule 7001(7). Substantively, as previously explained, § 522(c)(1) allows the Creditor to pursue exempt assets under applicable non-bankruptcy law. To the extent exemptions have not been allowed in certain assets, the assets remain property of the estate and subject to the limits of the automatic stay. The Debtors have obligations to preserve such estate property without a specific order. See generally 11 U.S.C. § 727(a)(2)(B) ("The court shall grant the debtor a discharge, unless . . . the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed . . . property of the estate, after the date of the filing of the petition."). If certain assets are abandoned by the Trustee and removed from the Debtors' estates, in rem actions against those assets may proceed under non-bankruptcy law. 11 U.S.C. § 362(b)(2)(B). Thus, because the Bankruptcy Code is clear as to the Debtors' obligations with respect to property of the estate, this court finds no substantive basis to issue a "comfort order" instructing the Debtors to preserve property of the estate.

explained in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), "is whether Congress intended to create the private remedy sought by the plaintiffs."

Id. at 421. It is true DSO creditors are part of a class that Congress intended to protect and some remedy was intended. However, § 522(c)(1) is insufficient in its language to suggest Congress intended to allow DSO creditors to pursue exempted assets within a bankruptcy court of limited jurisdiction. Moreover, outside the normal procedures of Chapter 7, domestic relations issues are typically left for the state courts.

Finally, the Debtors have argued that the Creditor cannot pursue exempt assets because this case might be dismissed. The court disagrees with this conclusion. As a practical matter, after the Debtors filed their memoranda, the United States Trustee filed an adversary proceeding requesting an order from this court denying the Debtors' discharge, but the complaint does not request dismissal of the case (Doc. 283; Adv. No. 10-3254, Adv. Doc. 1). Further, as described in this decision, the Trustee has and is continuing to administer property of the estate for the benefit of creditors. Accordingly, it does not appear that any party is seeking the dismissal of this case or that the case will be dismissed. In any event, § 522(c)(1) limits the ability of a creditor to pursue exempt assets “[u]nless the case is dismissed,” not if a case might be dismissed. Further, § 522(c)(1) is an exception to the general rule that “property exempted . . . is not liable during or after the case.” (italics added). Section 522(c)(1) is not conditioned upon a case that might be dismissed. Accordingly, the court determines that the Creditor may pursue exempt assets “during or after” the case irrespective of whether the case might be dismissed in the future.

The court will simultaneously enter an order on this decision.

Copies to:

Default List

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