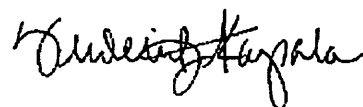


United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Frederick J. Kapala	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 50204	DATE	1/22/2008
CASE TITLE	<u>Johnson v. Natale, et al.</u>		

DOCKET ENTRY TEXT:

The judgment of the bankruptcy court is affirmed. This case is closed.



■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

Appellant, Richard G. Johnson, the debtor below, appeals from an order of the bankruptcy court granting the objection of appellee, Bernard J. Natale, the bankruptcy trustee, to an exemption claimed by appellant resulting in the denial of the exemption. The order was entered on August 23, 2007 and timely notice of appeal was filed on August 28, 2007. Jurisdiction is proper under 28 U.S.C. § 158 (a) (1) as the granting or denial of a claimed exemption is a final and appealable order. In re Yonikus, 996 F.2d 866, 867 (7th Cir. 1993).

On his bankruptcy Schedule B, appellant listed as “[o]ther personal property of any kind not already listed” a “[r]ight to receive portion of wife’s workman’s comp settlement” valuing this property at \$10,000. On his Schedule C, he claimed this property as exempt, pursuant to 820 ILCS 305/21¹ which provides “[n]o payment, claim, award or decision under this Act [the Workers Compensation Act 820 ILCS 305/1 et seq.] shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages.” He also argues that this property is exempt under 735 ILCS 5/12-1001 (g) (3) which exempts the debtor’s right to receive a “disability, illness or unemployment benefit.”² Notwithstanding the language of 820 ILCS 305/21, Illinois treats one spouse’s workers’ compensation award accruing during the marriage as “marital property” subject to being divided by the court presiding over dissolution of marriage proceedings “in just proportions considering all relevant factors.” 750 ILCS 5/503 (d); see In re DeRossett, 671 N.E.2d 654 (Ill. 1996).

Appellant obtained the right to receive a portion of his ex-wife’s workers’ compensation settlement proceeds pursuant to the terms of a marital settlement agreement entered in their dissolution of marriage case.

The question is whether the exemption for workers’ compensation benefits remains intact after the right to receive the benefits is awarded to a former spouse as part of a marital settlement agreement. The bankruptcy court, after reviewing the parties submissions, concluded “that the legal reality is that the character of the exemption is nonetheless altered when it is transferred from the injured party in the context of worker’s comp even to a spouse. Because what we are dealing with now is not worker’s compensation to compensate the injured party, but rather a property interest, which is being used to satisfy a marital property obligation.” Tr. 8/15/07 p. 4. The bankruptcy court went on to find that the property lost its character as exempt once it was transferred to appellant pursuant to the state court dissolution of marriage decree, which incorporated the marital settlement

STATEMENT

agreement.

“A debtor’s entitlement to a bankruptcy exemption is a question of law to be reviewed *de novo*.” Fowler v. Shadel, 400 F.3d 1016, 1017 (7th Cir. 2005). Illinois is a separate, not a community, property state. “A married person may receive, use and possess his or her own earnings . . . free from the interference of his or her spouse or the creditors of his or her spouse.” 750 ILCS 65/7. A married person may own property in his or her own right and deal with it to the same extent as an unmarried person. 750 ILCS 65/9. There does not appear to be any Illinois statute granting a non-injured spouse a right in the workers’ compensation award of a living injured spouse during the marriage.

Illinois designates property as “marital property” only for purposes of disposition of property incident to a dissolution of marriage. 750 ILCS 5/503 (a). For this purpose there is a presumption that all property (except as specified in the statute) acquired during the marriage is available to be apportioned equitably between the spouses upon dissolution. 750 ILCS 5/503 (b) (1). The “marital property” is to be divided by the court presiding over the dissolution proceedings “in just proportions considering all relevant factors.” 750 ILCS 5/503 (d). “Each spouse has a species of common ownership in the marital property which vests at the time the dissolution proceedings are commenced and continues only during the pendency of the action.” 750 ILCS 5/503 (e). “Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.” Id. As noted above, Illinois treats a spouse’s workers’ compensation award as marital property when dissolution proceedings are filed subjecting such an award to apportionment by the dissolution court.

The question whether the exemption of 820 ILCS 305/21 follows the workers’ compensation award when it is apportioned to the non-injured spouse pursuant to 750 ILCS 5/503 has been squarely addressed by a bankruptcy court in In re Barlow, No. 95-81817, 1996 WL 33401179 (Bankr. C.D. Ill. Jan. 23, 1996). In Barlow, the judgment of dissolution ordered the debtor’s former spouse to pay her a portion “of his net worker’s compensation settlement, if any, at the time he receives same.” Id. at * 1. Ms. Barlow claimed her right to receive this portion of her ex-husband’s award as exempt under 820 ILCS 305/21. The Barlow court stated “the DEBTOR has no right to claim an exemption in those benefits under this provision, notwithstanding her right to receive a portion of those benefits, as marital property under the judgment of dissolution. The exemption is personal to the Debtor’s non-filing former spouse and, absent an independent right of exemption, cannot be claimed by her in this bankruptcy proceeding.” Id.

Appellant argues Barlow is wrongly decided. He notes Barlow cites only a Wyoming bankruptcy court opinion, In re Johnson, 184 B.R. 141 (Bankr. D. Wyo. 1996), in support of the conclusion that the right to receive the workers’ compensation benefits is personal to the non-debtor spouse. Johnson did not deal with workers’ compensation benefits but a homestead exemption claimed in property in which the non-debtor spouse did not have an ownership interest. Johnson found the non-debtor spouse could not claim a homestead exemption from the bankruptcy estate in property she did not own. Appellant argues that, like the debtor in Barlow, his right to receive a portion of his ex-wife’s workers’ compensation benefits by virtue of the marital settlement agreement gave him an ownership interest in those benefits making Johnson inapposite and, therefore, Barlow’s reliance on it misguided.

Appellant contends that, rather than Barlow, the reasoning in In re Lummer, 219 B.R. 510 (Bankr. S.D. Ill. 1998), which found that a debtor could claim an exemption in her right to receive a part of her former spouse’s pension benefits, should be applied in this case. 735 ILCS 5/12-1006 (a) exempts a “debtor’s interest in or right, whether vested or not, to the assets held in or to receive pensions, annuities, benefits, distributions, refunds of contributions, or other payments under a retirement plan.” Lummer concluded that 735 ILCS 5/12-1006 (a) exempted the pension benefits awarded by the dissolution judgment. Lummer stated: “the language of

STATEMENT

§ 12-1006 (a) [is] unequivocal in protecting any interest a debtor may have in the assets of a pension or retirement plan and any right to receive benefits, distributions, or other payments under such a plan. Had the Illinois legislature wished to restrict the coverage of this section to debtors who earn pension rights as the fruit of their own labor, it could have done so easily.” *Id.* at 512 (emphasis in original). The court continued “the statute is drawn broadly and is devoid of any suggestion that its scope excludes debtors who have come into their pension rights derivatively.” *Id.* Appellant argues this reasoning should apply equally to workers’ compensation benefits apportioned in a marital settlement agreement.

To be a “retirement plan” there must be “a trust or equivalent arrangement segregating the assets until retirement.” *In re Schoonover*, 331 F.3d 575, 577 (7th Cir. 2003). “That assets freely usable for current consumption may be traced to public benefits does not make them a tax-qualified ‘retirement plan’ and thus does not support an exemption under § 12-1006.” *Id.* The desire to preserve funds so they will be available to support a person in retirement lies behind the exemption of retirement plans. The ability to use these funds is deferred and cannot be reached by the participant without significant penalty. For qualified plans under the Internal Revenue Code, a spouse (except in very limited circumstances) has an interest in the other spouse’s retirement plan benefits in that payment of such benefits must be in the form of a qualified joint and survivor annuity unless the nonparticipant spouse consents in writing to a different type of distribution. *See* 26 U.S.C. §§ 401 (a) (11) and 417 (a) (2) (A). This right exists during the marriage and does not only arise when a court in a divorce proceeding apportioned it.

A workers’ compensation benefit does not have these types of characteristics. The benefits (or at least a portion of them) are immediately available, there is no segregation into a “trust or equivalent arrangement”, and the non-injured spouse has no interest in the injured spouse’s benefits absent an order in a dissolution of marriage proceeding. These factors make *Lummer* distinguishable.

Appellant did not have an interest in his spouse’s workers’ compensation benefits prior to the filing of the dissolution action and could not have claimed an exemption in it at that time. Nothing in the workers’ compensation statute or the dissolution of marriage statute indicates that a transfer of the benefit pursuant to a dissolution would include a transfer of the exemption. If as a part of the dissolution apportionment, appellant had been awarded a car owned by his spouse, he would not have been able to claim her exemption in that vehicle. 735 ILCS 5/12-1001 (c). Only if he had his own exemption in it on receipt would he be able to exempt the property. Similarly, in the absence of his own independent basis for an exemption in this award, appellant cannot claim an exemption in his right to receive part of his ex-wife’s workers’ compensation award.

For the foregoing reasons, the judgment of the bankruptcy court is affirmed.

1. Pursuant to 11 U.S.C. § 522 (b) (1) Illinois has prohibited its residents from using the federal exemptions provided by 11 U.S.C. § 522 (d). 735 ILCS 5/12-1201. Accordingly, Illinois law governs the availability of exemptions to a bankruptcy debtor.
2. The parties acknowledge that the result will be the same whether the court applies 820 ILCS 305/21 or 735 ILCS 5/12-1001 (g) (3) in its analysis.