

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

In Re:	)	
BARBARA DALE SHENK MIDDLETON	)	
	)	
Debtor	)	Chapter 7
	)	Case No. 04-01475
_____	)	
	)	
ROY V. WOLFE III, TRUSTEE,	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding No.
	)	05-05015
BARBARA DALE SHENK MIDDLETON,	)	
Defendant	)	
	)	

**DECISION AND ORDER**

At Harrisonburg in said District this 14th\_ day of February, 2006:

The parties are before the court on the plaintiff's complaint to avoid the prepetition transfer of personal property of the debtor pursuant to 11 U.S.C. § 548(a)(1)<sup>1</sup>. The parties agree that there are no facts in dispute, and the parties submit the matter on briefs of their

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The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1) (2005).

respective positions.<sup>2</sup> The parties have briefed the issue of whether the actions of the debtor complained of constitute a “transfer” within the meaning of 11 U.S.C. §§ 544, 548 & 551. As outlined below, the court has reviewed the arguments of both parties and the issue is ripe for decision. For the reasons stated below, the court finds that a transfer occurred when the debtor converted her cash into a Roth IRA and a life insurance policy. This brings the case within 11 U.S.C. § 548(a)(1). The ultimate question is whether the debtor’s admitted intent to convert non exempt cash to exempt property is alone, sufficient evidence to permit the Trustee to prevail.

### **BACKGROUND**

On September 9, 2004, Barbara Dale Shenk Middleton, the debtor, filed a Chapter 7 petition for relief. On March 28, 2005, the Chapter 7 Trustee filed the present adversary proceeding against the debtor to avoid the transfer of \$14,500.00 made by the debtor while she was insolvent, and to preserve that transfer for the benefit of the bankruptcy estate.

On June 15, 2004, the debtor received \$27,500.00 from Carroll D. Middleton pursuant to a certain Property Settlement Agreement and Stipulation representing her portion of the proceeds from the sale of the marital residence formerly held as tenants-by-the-entirety.<sup>3</sup> On July 27, 2004, the debtor purchased a Roth Individual Retirement Account

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<sup>2</sup> The debtor stipulates in paragraph four (4) of the agreed statement of facts that as part of her prepetition planning she converted what would otherwise be non exempt cash as of the date of filing into assets which she could exempt under Virginia law. *See* Docket Entry No. 4.

<sup>3</sup> The Circuit Court of Page County, Virginia, entered a final decree of divorce on July 28, 2004.

from Modern Woodmen of America for the sum of \$3,000.00. On August 5, 2004, the debtor purchased a single-premium, whole life insurance policy from Modern Woodmen of America for the sum of \$11,500.00. The debtor is the sole owner of the insurance policy and the IRA. The cash surrender value of the insurance policy is \$11,585.00. The principal contributed to the IRA is guaranteed to be at least \$3,000.00. There are no tax consequences to the debtor for withdrawal of the funds and she is free to make a withdrawal of some or all of the money invested at any time. The beneficiary of the life insurance is the debtor's daughter. The contingent beneficiary in the event of the debtor's death for the Roth IRA is also the debtor's daughter. The debtor claims an exemption each in the IRA pursuant to Va. Code § 34-34<sup>4</sup> and in the insurance policy pursuant to Va. Code § 38.2-4118<sup>5</sup>.

## LAW AND DISCUSSION

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"Retirement plan" means a plan, account, or arrangement that is intended to satisfy the requirements of United States Internal Revenue Code §§ 401, 403 (a), 403 (b), 408, 408 A, 409 (as in effect prior to repeal by United States P.L. 98-369), or § 457. Whether a plan, account, or arrangement is intended to satisfy the requirements of one of the foregoing provisions shall be determined based on all of the relevant facts and circumstances including, but not limited to, the issuance of a favorable determination letter by the United States Internal Revenue Service, reports or returns filed with United States or state agencies, and communications from the plan sponsor to participants.

B. The interest of an individual under a retirement plan shall be exempt from creditor process to the extent provided under this section. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise.

Va. Code Ann. § 34-34 (IRC § 408 defines an individual retirement account or IRA).

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No money or other benefit, charity, relief or aid to be paid, provided or rendered by any [Fraternal benefit] society, shall be liable to attachment, garnishment or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment by the society.

Va. Code Ann. § 38.2-4118. *See* § 38.2-4100 (defining Fraternal benefit society).

This Court has jurisdiction over the parties and subject matter of this proceeding under 28 U.S.C. §§ 151, 157, and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(H), which the Court may hear and determine. Venue is proper in this District under 28 U.S.C. § 1409(a).

The debtor argues that at the time of the purchases she intended to file a petition under Chapter 7 and to claim an exemption in the IRA and insurance on her “Schedule C” to preserve the assets for her own benefit.<sup>6</sup> The debtor argues that the term “transfer”, as defined<sup>7</sup> in the Code does not apply in this situation because the IRA and insurance policy purchased with the cash still belong to the debtor, and thus no alienation of a cash-equivalent asset has occurred. The debtor claims that the transaction cannot be defined as a transfer because a requisite party to the claimed transfer, the transferee, is not present. The Trustee counters this argument with the proposition that two (2) transferees are present: Modern Woodmen of America received \$11,500.00 in exchange for an insurance policy, and the debtor’s daughter received a payable death benefit of \$37,675.00 in exchange for nothing.

The Code defines a transfer in very broad terms as “*every mode . . . of . . . parting*

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<sup>6</sup> In short, the debtor acknowledges that she engaged in prepetition planning intending to exclude assets from the claims of creditors.

<sup>7</sup> “The term ‘transfer’ means--  
(A) the creation of a lien;  
(B) the retention of title as a security interest;  
(C) the foreclosure of a debtor's equity of redemption; or  
(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with--  
(i) property; or  
(ii) an interest in property.”  
11 U.S.C. § 101(54) (2005).

*with property or with an interest in property.*” 11 U.S.C. § 101(54) (2005 Pre-BAPCPA)<sup>8</sup> (emphasis added). In addition, for the debtor to transfer property, the debtor must first have an interest in the property. 2 COLLIER ON BANKRUPTCY ¶ 101.54[2] (Alan N. Resnick & Henry J. Sommer eds., 15 ed. rev.). The parties do not dispute that the debtor was the rightful owner of the cash received from the Property Settlement Agreement. Nor do the parties dispute that within the ninety (90) day presumptive period of insolvency preceding the petition, the debtor gave her cash property to Modern Woodsmen in payments of \$3,000.00 and \$11,500.00.<sup>9</sup> In exchange for these payments the debtor received two separate and distinct property items from Modern Woodsmen, an IRA and a life insurance policy.

The plain meaning of “transfer” as defined in the Code clearly encompasses each of the “modes” of the debtor parting with her property and her interest in property, both her act of giving her cash to Modern Woodsmen and assigning her beneficiary interests in the IRA and insurance to her daughter. The operative word in the definition of *transfer* in the Code

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<sup>8</sup> Most provisions of Bankruptcy Abuse Prevention and Consumer Protection Act will not apply to cases filed before October 17, 2005, thus the pre-BAPCPA definition of transfers applies to this case filed on September 9, 2004. BAPCPA § 1501, 109 P.L. 8, 1406 (2005).

<sup>9</sup> The debtor also named her daughter as beneficiary of her life insurance and as contingent beneficiary of the IRA in the event of the debtor’s death. The Trustee argues that these acts by the debtor are additional transfers because the debtor parted with her remainder interests from the bundle of sticks of property rights inherent in the IRA and the insurance. It is settled that the debtor’s interests in property are created under and defined by state law, and the court must determine what property becomes property of the estate according to state law. Butner v. United States, 440 U.S. 48, 55, (1979). The Trustee is attempting to set aside the transfers as fraudulent or as an exchange of the asset for less than reasonably equivalent value. Suffice to say, there was a property interest assigned by the debtor to her daughter arising from the bundle of sticks of property rights inherent in the IRA and insurance, which are completely contingent upon the demise of the debtor. The court declines to entertain the academic exercise of tracing the defeasible fees or evaluating the assignments or showing that they qualify as interests in property under Virginia law. This is a zero-sum game for the trustee. If the debtor prevails on her state law exemption claim, the entire fee simple is exempt, including the remainderman interest of the beneficiary. Presumably, the beneficiary assignments involved are revocable, and should the trustee prevail on his avoidance action, he would liquidate the subject contracts with Modern Woodsmen to pay creditors, dissolving any contingent interests. At the very least, the trustee, as estate administrator, would succeed to the policy, whereby he could revoke the assignments to the debtor’s daughter.

is “parting”. “Every” is an inclusive modifying article upon “mode”, as in every member of a class without exception<sup>10</sup>. The property owner merely need part, or be parted, in any meaningful way with the property to effect a transfer, i.e., by abandonment, gift, sale, exchange, garnishment, taking, etc. The Code does not require that there be two parties to consummate a transfer, and the supporting arguments and authority of the debtor do not persuade the court otherwise.<sup>11</sup> The court finds no ambiguity here: the purchase of the IRA and life insurance policy constitute a transfer of property when the debtor parted with her money.

#### CONCLUSION:

Based on the foregoing, the court finds that the transactions entered into by the debtor constitute a transfer as that term is defined pursuant to § 101(54). Accordingly, it is

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<sup>10</sup> WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 448 (1988).

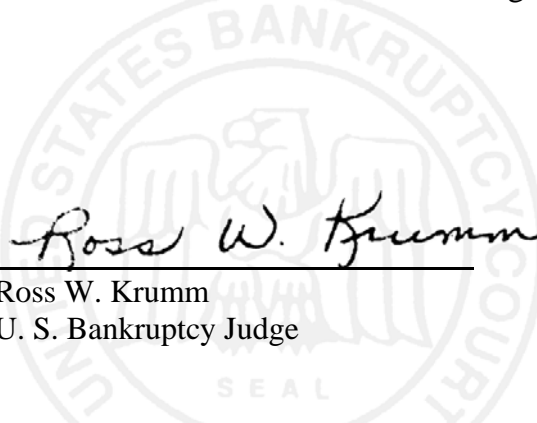
<sup>11</sup> The debtor erroneously inserts “and” between the disjunctive alternatives in *Black’s Law Dictionary* definition of “to dispose of” -- “to alienate or direct the ownership of property . . . [and] to pass into the control of someone else”. Def. Brief 1. The debtor logically implies that both alienation “and” passage to another party are required for a disposal. The debtor need tinker no further along in that sacred reference work past the conjunction “or”. Alienation alone qualifies as a mode of disposing of property. Again, the mere act of parting with property is enough “to dispose of” it. In addition, the debtor neglected to check subsequent authority on In re Levine, 139 B.R. 551 (Bankr. M.D. Fla. 1992), a case noted in her brief. In that adversary proceeding, the trustee sought to avoid a fraudulent transfer after the debtor converted non-exempt assets into exempt assets under Florida law. The bankruptcy court in Levine found that no transfer had occurred because the debtor retained control of the assets throughout the conversion. *Id.* at 553. The Court of Appeals for the Eleventh Circuit reversed the decision of the bankruptcy court, finding that the debtor’s act of parting with cash in exchange for an annuity contract constituted a transfer. Levine v. Weissing (In re Levine), 134 F.3d 1046, 1049 (11th Cir. 1998). Interestingly, a review of the Shepard’s Citations Service on Lexis-Nexis does not reveal adverse authority for the published adversary proceeding to which the debtor in the case *sub judice* refers.

**ORDERED:**

That the transactions complained of by the trustee to convert non exempt cash to a Roth IRA and a life insurance policy are DEEMED transfers pursuant to 11 U.S.C. § 101(54). It is further

**ORDERED:**

That the complaint of the Trustee to avoid the transfer of personal property of the debtor, to recover the personal property and to object to the debtor's claimed exemptions is CONTINUED to 10:00 a.m. on March 1, 2006 in the Bankruptcy Courtroom, Third Floor, U.S. Courthouse, 116 N. Main St., Harrisonburg, Virginia.



*Ross W. Krumm*

Ross W. Krumm  
U. S. Bankruptcy Judge

Copies of this order are directed to be sent to the Counsel for the Debtor, Arthur L. Goff, Esq., 1698 Richmond Road, Amissville, VA 20106 ; and to the Trustee, Roy V. Wolfe III, Esq., P.O. Box 111, Harrisonburg, VA 22803.