

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

STEPHEN M. MARSHALL and
IRMTRAUD MARSHALL

Bankruptcy No. X92-00035S

Debtor(s).

Chapter 7

MEMORANDUM OF DECISION AND ORDER RE: TRUSTEE'S MOTION FOR TURNOVER and

Two contested matters have been submitted to the court. Donald H. Molstad, case trustee, seeks a turnover of cash from the debtors. He also objects to certain of the debtors' claims of exemption. Hearing was held August 26, 1992, in Sioux City. These matters are core proceedings under 28 U.S.C. § 157(b) (2)(B) and (E).

FINDINGS OF FACT

Stephen M. Marshall (MARSHALL) and Irmtraud Marshall, husband and wife, filed their joint voluntary petition under chapter 7 of the Bankruptcy Code (Title 11) on January 6, 1992. They had executed their joint petition in their lawyer's office on January 1, 1992. Stephen Marshall has been and is self-employed as a newspaper distributor. At the time of filing, he was working under a contract with the Sioux City Journal (JOURNAL) to deliver its papers in the Denison area. Irmtraud Marshall worked for part of 1991 as a substance abuse counselor at Manning General Hospital. (Exhibit 2). During that year, she earned wages of \$9,931.34. (Exhibit 2). The couple maintained three bank accounts. One was a joint account at Crawford County Trust & Savings Bank; the second was in the name of S & I Distributing at the same bank. The third account, in Irmtraud Marshall's name, was at the Ida County State Bank and was titled "newspaper account."

The development of the relevant facts is somewhat hampered by the failure of either party to introduce into evidence the written contract between Stephen Marshall and the Journal. It appears from the testimony that the contract gives Marshall exclusive distribution rights for the Journal in the Denison area. Marshall's distribution methods include home delivery to Journal subscribers, delivery to sales outlets such as stores and newsstands, and sales through vending machines owned by the Journal. The Journal delivers the papers daily to Marshall who in turn distributes them to the above recipients. Marshall is billed monthly for the papers. He collects from the vending machines and deposits the proceeds of vending machine sales in his bank account or accounts. Subscribers, and perhaps the third-party sales outlets, pay either the Journal or Marshall. Home subscribers pay in advance. When Marshall receives advance payments from home subscribers or sales outlets, he deposits the money in his account or accounts. When home subscribers would pay the Journal in advance, the Journal would either forward the check to Marshall, and he would deposit it in his account, or the Journal would deposit the advance subscription payment in its account and credit Marshall's debt to it for the purchase of papers. Stephen Marshall believes that his newspaper distribution contract with the Journal has no value. This belief is based on his knowledge of the cost of obtaining similar routes.

After the execution of the petition and its filing five days later, Marshall continued to conduct his newspaper business. On January 6, the date of bankruptcy, Marshall deposited \$192.95 in the couple's joint account at the Crawford County Bank & Trust. (Exhibits 6 and 3). This deposit was derived from vending machine and sales outlet sales from the prior weekend. The closing balance on this account on January 6 was \$130.93.

Also on January 6, Marshall deposited \$800.23 in the newspaper account at the Ida County State Bank. (Exhibits 5 and 7). This account had a closing balance of \$801.80 on January 6. (Exhibit 5). The monies deposited were received as advance payment subscriptions on the Journal and from sales outlets and vending machine sales.

On the date of filing, Irmtraud Marshall had accrued gross wages of \$630.40 and net wages of \$545.24 at Manning General Hospital. (Exhibit 1). The couple had filed a joint federal tax return (form 1040) for 1991 which claimed a refund of \$1,144.64. (Exhibit 2). The return shows that \$16.61 had been withheld from Irmtraud's wages and that the couple was entitled to a \$1,484.00 earned income credit.

At the time of filing, Stephen Marshall owned a policy with United Benefit Life which had both annuity and life components. The annuity component is part of an H.R. 10 retirement plan. He also owned an Individual Retirement Account (IRA) with Mutual of Omaha.

In their initially filed Schedule C, debtors claimed as exempt their federal and state tax refunds in the anticipated amount of \$1,000.00. At that time, the returns had not yet been filed. Debtors also claimed as exempt the IRA, the United Benefit Life policy, Debtors' interest in the Sioux City Journal estimated to be of no value, and parts and machine inventory.

The trustee objected to these claims. The National Bank of Iowa objected to debtors' claims of exemption in the parts and machinery inventory. On April 17, 1992, the court sustained the objection of the Bank. On May 26, 1992, the court held a hearing on the trustee's objections. Donald H. Molstad appeared as trustee. No one appeared for the debtors. Following hearing, the court issued a ruling sustaining the trustee's objections to the claims of exemption in the Mutual of Omaha IRA, the debtor's or debtors' interest in the Sioux City Journal, and the claim to the United Benefit Life annuity. The court further ruled that \$1,000.00 of the expected tax refund was exempt to Irmtraud Marshall, but that the balance of the then-expected refund, \$144.64, was not exempt. The court stated that its ruling was without prejudice to the debtors' amending their schedules to claim as exempt any life insurance component of the United Benefit Life plan. Neither party filed post-trial motions as to the ruling. Neither the debtors nor the trustee appealed.

On June 3, 1992, the debtors filed amended schedules including an amended Schedule C, "Property Claimed as Exempt." In their amendment, the debtors again claimed these same items, among others, as exempt, under the same Iowa Code sections. The trustee reiterated his objections.

The trustee also filed a motion seeking turnover of the cash acquired by the debtors just prior to the bankruptcy filing. This cash is represented by the bank deposit of January 6, 1992, in the amount of \$192.95 and the balance of \$801.80 on deposit in the Ida County State Bank on the same date. The trustee also seeks turnover of the non-exempt portion of the tax refund and Irmtraud Marshall's accrued wages as of the date of filing--\$545.24. Debtors resist the trustee's motion.

DISCUSSION

Exemptions

All of the issues presently before the court, save one, were determined by the court in its ruling issued May 26, 1992. The court sustained the trustee's objections to the debtors' claims of exemption in the IRA, in the contract with the Sioux City Journal, and in the United Benefit Life "annuity." The court found the tax refund to be exempt to Irmtraud Marshall to the extent of \$1,000.00 but not exempt in the amount of \$144.64. Because of uncertainty over the nature of the claim as to the United Benefit Life policy, the court stated in its ruling that "[t]his ruling is without prejudice to debtors' amending to claim life insurance exemption in United Benefit Life Plan." (Order, Docket no. 33). The uncertainty was created because in their original claim, debtors described the policy as an annuity, but claimed it as exempt as life insurance under Iowa Code § 627.6(6) .

The court, having rendered a final judgment on the earlier claims of exemption, and there having been no appeals, finds the parties are bound by that decision. Thus, the debtors are barred by the doctrine of claim preclusion from asserting further claims to exemption in these properties. See, Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979). It appears that the debtors, in their amended Schedule C, seek nothing more than to re-assert the claims that have been

denied. The trustee's further objection will, therefore, be sustained.

As to the United Benefit Life plan, Stephen Marshall has testified that it is a life policy. It also has an annuity component. It is the trustee's burden to show that the plan is not exempt or what portion is not exempt. He has failed to do so. The trustee's objection to the exemption of this asset will, therefore, be overruled.

Turnover

The trustee seeks turnover of \$994.75 in newspaper sales proceeds deposited by the debtors in bank accounts at the time of the filing of the case. He also seeks turnover of \$545.24 in wages owed to Mrs. Marshall at the time of filing by her employer and turnover of \$144.64, the non-exempt portion of the federal tax refund.

The Iowa Code provides an individual debtor with a \$1,000.00 exemption in accrued wages and tax refunds as of the date of the filing of bankruptcy. Iowa Code § 627.6(9)(c). Because Mrs. Marshall has been allowed a \$1,000.00 exemption in tax refunds, she may not claim the accrued wages as exempt. The wages were owed at filing and are, therefore, property of the estate. There is no claim by Irmtraud Marshall that she did not receive these wages. Indeed, they appear to have been deposited in the joint account on January 10. (Exhibit 3). Therefore, the trustee's motion for turnover of these wages will be granted.

The evidence shows that the \$192.95 was held in cash by the debtors and was deposited in their bank account on the date of filing. The evidence also shows that \$800.23 was deposited in the newspaper account on January 6, 1992, and that the closing balance for that account on that date was \$801.80. These funds were property of the estate. The evidence also shows that after filing, the debtors continued to make use of their checking accounts just as though no bankruptcy had been filed. (Exhibits 3, 4 and 5). In the couple's joint account at Crawford County Trust & Savings Bank, the honoring of presumably pre-petition checks reduced the balance to \$29.51 on January 7, one day after debtors had made the deposit of \$192.95. (Exhibit 3). Based on post-petition deposits, the "newspaper account" at Ida County State Bank continued to increase through deposits until January 22, 1992, when it began to decline. It was not until January 28, 1992, that it dropped below \$801.80. (Exhibit 5). After bankruptcy, the debtors continue to augment and deplete the balances by further deposits and withdrawals.

Trustee's theory of recovery is that the debtors deposited in their accounts money which was property of the estate, and that they must now turn the money over to the trustee. There is no question that the deposit of \$192.95 and the account balance of \$801.80 were estate property on January 6, 1992. The accrued wages to which Mrs. Marshall was entitled on the date of filing was also property of the estate.

Trustee has not shown what money was on deposit in the two relevant bank accounts on the date of trial. He has shown that money which was property of the estate was deposited or was on deposit in the accounts on the date of filing. The evidence further shows that the debtors made use of the funds deposited in the continued operation of their business. Moreover, debtors have not shown that the money is no longer available. Further, Irmtraud deposited her accrued, pre-petition wages in one of the accounts after receiving them post-petition. Neither party introduced evidence to show how the deposits in question were used. It is likely that some was disbursed by the banks to honor checks issued by the debtors prior to filing. The debtors may or may not have benefited from such payments. It is equally likely that some of the money was transferred by the banks to honor checks issued by the debtors as post-petition consideration. The debtors surely benefited from such transfers to the detriment of their pre-petition creditors. Unfortunately, the court is not able to determine precisely how the money was used. The debtors are largely responsible, although probably innocently, for the depletion of the pre-petition assets. They continue to operate the newspaper business, using the bank accounts while ignoring the rights of the estate in those accounts, perhaps believing, mistakenly, that the money was not property of the estate. It would be inappropriate for the debtors to benefit in any way from use of estate assets. Debtors, if they wanted to continue to use the accounts, should have segregated the pre-petition assets so the estate's interest in them would be protected. Debtors were responsible for turning over estate assets upon filing. 11 U.S.C. § 521(4). They will not be relieved from this obligation because the funds existing at the time of filing have been depleted due to their actions. They will be ordered to turn over funds as follows:

the \$801.80 which had been on deposit in the Ida County State Bank on January 6, 1992;

the \$545.24 deposited in the joint account at the Crawford County Trust & Savings Bank on January 10, 1992; and

\$29.51 representing the balance in the joint account on January 7, 1992.

The latter amount is the lowest balance in the account after clearance of what were presumably pre-petition checks which cleared on January 6 and 7. Since there is little basis on which to find that these checks were used to pay post-petition expenses, the trustee's remedy, if one is available, would be against the transferees.

The court does not find any merit in the debtors' argument that the newspaper collections which were deposited on January 6 were held in trust by the debtor until he delivered the newspapers. These deposits were made up of cash collections for newspapers sold pre-petition and from pre-paid subscriptions. As to the latter, these are nothing more than consumer deposits for goods to be delivered in the future.

IT IS ORDERED that debtors shall turn over to the trustee, Donald H. Molstad, the sum of \$1,376.55;

IT IS FURTHER ORDERED that debtors shall turn over to the trustee the \$144.64 non-exempt portion of the federal tax refund;

IT IS FURTHER ORDERED that the trustee's objection to the debtors' claim of exemption in the United Benefit Life plan is overruled.

IT IS FURTHER ORDERED that the trustee's remaining objections to the debtors' claims of exemption are sustained. Judgment shall enter accordingly.

SO ORDERED ON THIS 2nd DAY OF SEPTEMBER, 1992.

William L. Edmonds
Bankruptcy Judge