2020 Harold R. Kemp Annual Family Law Symposium

What the Family Law Lawyer Needs To Know About Bankruptcy

Selected Statutory Provisions and Cases

Judge Alan M. Koschik, U.S. Bankruptcy Court
for the Northern District of Ohio

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Structure of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

CHAPTER 1 — GENERAL PROVISIONS (§§ 101 – 112)

CHAPTER 3 — CASE ADMINISTRATION (§§ 301 – 366)

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Selected Statutory Provisions

Automatic Stay

11 U.S.C. § 362(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title … operates as a stay, applicable to all entities, of--

> **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> **(4)** any act to create, perfect, or enforce any lien against property of the estate;
> **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> **(7)** the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; …

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--
…

> **(2)** under subsection (a)--
>
> > **(A)** of the commencement or continuation of a civil action or proceeding--
> >
> > > **(i)** for the establishment of paternity;
> > > **(ii)** for the establishment or modification of an order for domestic support obligations;
> > > **(iii)** concerning child custody or visitation;
> > > **(iv)** for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
> > > **(v)** regarding domestic violence;
> >
> > **(B)** of the collection of a domestic support obligation from property that is not property of the estate;
> > **(C)** with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a

judicial or administrative order or a statute;

Property of the Estate

11 U.S.C. § 541(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--
(A) under the sole, equal, or joint management and control of the debtor; or
(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

...

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--
(A) by bequest, devise, or inheritance;
(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(c)
(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--
(A) that restricts or conditions transfer of such interest by the debtor; or
(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

Exemptions

11 U.S.C. § 522(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection.

> **(2)** Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize. ***[Ohio has specifically not authorized this. Ohio debtors must use the Ohio state exemptions.]***
>
> **(3)** Property listed in this paragraph is--
>
> > **(A)** subject to subsections (o) and (p), **any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law** that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;
> >
> > **(B)** any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and
> >
> > **(C)** retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

R.C. 2329.66(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

> **(1)(b)** … the person's interest, not to exceed one hundred twenty-five thousand dollars, in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence. …

…

> **(10)**
>
> > **(a)** Except in cases in which the person was convicted of or pleaded guilty to a violation of section 2921.41 of the Revised Code and in which an order for the withholding of restitution from payments was issued under division (C)(2)(b) of that section, in cases in which an order for withholding was issued under section

2907.15 of the Revised Code, in cases in which an order for forfeiture was issued under division (A) or (B) of section 2929.192 of the Revised Code, and in cases in which an order was issued under section 2929.193 or 2929.194 of the Revised Code, and only to the extent provided in the order, and except as provided in sections 3105.171, 3105.63, 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's **rights to or interests in a pension, benefit, annuity, retirement allowance, or accumulated contributions, the person's rights to or interests in a participant account in any deferred compensation program offered by the Ohio public employees deferred compensation board, a government unit, or a municipal corporation**, or the person's other accrued or accruing rights or interests, as exempted by section 143.11, 145.56, 146.13, 148.09, 742.47, 3307.41, 3309.66, or 5505.22 of the Revised Code, and the person's rights to or interests in benefits from the Ohio public safety officers death benefit fund;

(b) Except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's **rights to receive or interests in receiving a payment or other benefits under any pension, annuity, or similar plan or contract, not including a payment or benefit from a stock bonus or profit-sharing plan** or a payment included in division (A)(6)(b) or (10)(a) of this section, on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the person and any of the person's dependents, except if all the following apply:

> **(i)** The plan or contract was established by or under the auspices of an insider that employed the person at the time the person's rights or interests under the plan or contract arose.
> **(ii)** The payment is on account of age or length of service.
> **(iii)** The plan or contract is not qualified under the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

(c) Except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, **the person's rights or interests in the assets held in, or to directly or indirectly receive any payment or benefit under, any individual retirement account, individual retirement annuity, "Roth IRA," account opened pursuant to a program administered by a state under section 529 or 529A** of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended, or education individual retirement account that provides payments or benefits by reason of illness, disability, death, retirement, or age or provides payments or benefits for purposes of education or qualified disability expenses, to the extent that the assets, payments, or benefits described in division (A)(10)(c) of this section are

attributable to or derived from any of the following or from any earnings, dividends, interest, appreciation, or gains on any of the following:

> **(i)** Contributions of the person that were less than or equal to the applicable limits on deductible contributions to an individual retirement account or individual retirement annuity in the year that the contributions were made, whether or not the person was eligible to deduct the contributions on the person's federal tax return for the year in which the contributions were made;
> **(ii)** Contributions of the person that were less than or equal to the applicable limits on contributions to a Roth IRA or education individual retirement account in the year that the contributions were made;
> **(iii)** Contributions of the person that are within the applicable limits on rollover contributions under subsections 219, 402(c), 403(a)(4), 403(b)(8), 408(b), 408(d)(3), 408A(c)(3)(B), 408A(d)(3), and 530(d)(5) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended;
> **(iv)** Contributions by any person into any plan, fund, or account that is formed, created, or administered pursuant to, or is otherwise subject to, section 529 or 529A of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

(d) Except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's rights or interests in the assets held in, or to receive any payment under, **any Keogh or "H.R. 10" plan** that provides benefits by reason of illness, disability, death, retirement, or age, to the extent reasonably necessary for the support of the person and any of the person's dependents.

(e) The person's rights to or interests in any assets held in, or to directly or indirectly receive any payment or benefit under, **any individual retirement account, individual retirement annuity, "Roth IRA," account opened pursuant to a program administered by a state under section 529 or 529A** of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended, or education individual retirement account **that a decedent, upon or by reason of the decedent's death, directly or indirectly left to or for the benefit of the person, either outright or in trust or otherwise**, including, but not limited to, any of those rights or interests in assets or to receive payments or benefits that were transferred, conveyed, or otherwise transmitted by the decedent by means of a will, trust, exercise of a power of appointment, beneficiary designation, transfer or payment on death designation, or any other method or procedure.

(f) The exemptions under divisions (A)(10)(a) to (e) of this section also shall apply or otherwise be available to an alternate payee under a qualified domestic relations order (QDRO) or other similar court order.

(g) A person's interest in any plan, program, instrument, or device described in divisions (A)(10)(a) to (e) of this section shall be considered an exempt interest even if the plan, program, instrument, or device in question, due to an error made in good faith, failed to satisfy any criteria applicable to that plan, program, instrument, or device under the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

(11) The person's right to receive spousal support, child support, an allowance, or other maintenance to the extent reasonably necessary for the support of the person and any of the person's dependents;

...

(13) Except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, personal earnings of the person owed to the person for services in an amount equal to the greater of the following amounts:

(a) If paid weekly, thirty times the current federal minimum hourly wage; if paid biweekly, sixty times the current federal minimum hourly wage; if paid semimonthly, sixty-five times the current federal minimum hourly wage; or if paid monthly, one hundred thirty times the current federal minimum hourly wage that is in effect at the time the earnings are payable, as prescribed by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 206(a)(1), as amended;

(b) Seventy-five per cent of the disposable earnings owed to the person.

...

(18) The person's aggregate interest in any property, not to exceed one thousand seventy-five dollars, except that division (A)(18) of this section applies only in bankruptcy proceedings.

Exemptions from Execution, Garnishment, Attachment, or Sale

Ohio Revised Code Section 2329.66

The amounts in column 6 have been adjusted based on the consumer price index during calendar years 2016, 2017, and 2018. These amounts have been rounded to the nearest $25 and are to be used to satisfy a judgment or order under RC 2329.66 from April 1, 2019 through March 31, 2022.

RC 2329.66 Subsection	Statutory amount (prior to April 1, 2010)	Revised amount (from April 1, 2010 through March 31, 2013)	Revised amount (from April 1, 2013 through March 31, 2016)	Revised amount (from April 1, 2016 through March 31, 2019)	Revised amount (from April 1, 2019 through March 31, 2022)
(A)(1)(a) exempted property	$20,200	$21,625 $125,000 (3/27/13)[1]	$132,900	$136,925	$145,425
(A)(1)(b) personal residence	$20,200	$21,625 $125,000 (3/27/13)	$132,900	$136,925	$145,425
(A)(2) one motor vehicle	$3,225	$3,450	$3,675	$3,775	$4,000
(A)(3) cash	$400	$425	$450	$475	$500
(A)(4)(a) Household items – individual item	$525	$550	$575	$600	$625
(A)(4)(a) Household items – aggregate value	$10,775	$11,525	$12,250	$12,625	$13,400
(A)(4)(b) Jewelry	$1,350	$1,450	$1550	$1,600	$1,700
(A)(5) Professional books or trade tools	$2,025	$2,175	$2325	$2,400	$2,550
(A)(12)(c) Award for bodily injury	$20,200	$21,625	$23,000	$23,700	$25,175
(A)(18) Aggregate property	$1,075	$1,150	$1225	$1,250	$1,325

[1] The 129th General Assembly enacted House Bill 479 that adjusted the amounts in RC 2329.66(A)(1)(a) and (b) effective March 27, 2013.

Priority Expenses and Claims

11 U.S.C. § 507(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

...

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

...

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition; ...

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

Nondischargeable Debts

11 U.S.C. § 523(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

…

(5) for a domestic support obligation; [or]

…

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

11 U.S.C. § 1328(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a) *[**note the absence of section 523(a)(15)**];*

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

Selected Cases

Selected Supreme Court and Sixth Circuit Cases

Butner v. U.S., 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d. 136 (1979): Property rights, including property rights in the assets of a bankruptcy estate, are determined by reference to state law.

Suhar v. Bruno (In re Neal), 541 Fed.Appx. 609 (6th Cir. 2013): In prepetition separation agreement incorporated into decree of dissolution, future debtor-wife assumed certain debts and assets. Husband, who never filed bankruptcy, received marital home encumbered by a mortgage. Trustee filed fraudulent transfer action against husband to recover value of marital debts assumed for less than reasonably equivalent value. Husband was not contractually liable on many of the debts assumed by wife, and argued that wife keeping them conferred no value on him that trustee could recover as fraudulent. Bankruptcy court and Sixth Circuit rejected this argument and held that trustee could recover from husband as fraudulent transfer—reasonable value of nondebtor-husband's half of marital credit card debt, even that on which husband was not contractually liable, plus surplus from husband keeping home equity offset by wife keeping pension.

- "Marital" debt can include debt on which one spouse or the other is not contractually liable. Such debts still must be included in determining whether spouse received "reasonably equivalent value," within the meaning of the Bankruptcy Code's fraudulent transfer provision, 11 U.S.C. § 548, if a trustee seeks to avoid transfers made pursuant to an agreed marital dissolution decree. *[**Query whether the same rule would apply to a contested judgment of divorce.**]*

Selected Judge Koschik Cases

Corzin v. Lawson (In re Lawson), 570 B.R. 563 (Bankr. N.D. Ohio 2017) (copy attached): After entry of state court order approving a separation agreement, but before entry of a divorce decree or entry or execution of qualified domestic relations order (QDRO) to divide retirement plan assets, debtor-wife filed chapter 7 bankruptcy petition. Chapter 7 trustee sought to "step into the shoes of the debtor" and execute QDRO directing retirement plan administrator to distribute funds in nondebtor former husband's retirement account to bankruptcy estate instead of to debtor-wife. Court held:

- The state court's judgment entry established vested property rights of the parties and those could be claimed as exempt.
- Even if judgment entry had not yet been entered, Ohio law grants a contingent interest in all marital property to both spouses upon the filing of the divorce. That interest can be claimed as exempt, and the proceeds of such an interest (i.e., the actual assets if such assets are awarded to the debtor in the divorce proceeding) maintain that exemption.
- Retirement plan was ERISA-qualified and was subject to enforceable restriction on transfer and was thus not excluded from the estate by operation of 11 U.S.C. § 541(c)(2).

Gertz v. Warner (In re Warner), 570 B.R. 582 (Bankr N.D. Ohio 2017) (copy attached): Debtor-wife filed divorce complaint against nondebtor-husband prior to her filing bankruptcy petition. No domestic relations court order establishing rights in the nondebtor-husband's federal government Thrift Savings Plan account had been entered as of the petition date. Chapter 7 trustee asserted that he could attach the debtor's rights to receive her share of the TSP account whenever the state court ultimately awarded it. Court held:

- Debtor already had beneficial interest, as the expressly designated beneficiary, in her nondebtor-husband's TSP account even if she had no legal interest in the assets therein yet. This beneficial interest was excluded from the estate pursuant to 11 U.S.C. § 541(c)(2) as a beneficial interest in a trust subject to an anti-alienation provision.
- Under Ohio domestic relations law, R.C. 3105.171(B), debtor acquired a contingent interest in all marital property upon the filing of the divorce complaint. This interest was properly claimed as exempt under both Ohio's exemption statute and under the federal bankruptcy exemption for retirement accounts, 11 U.S.C. § 522(b)(3)(C), which applies even when a state has otherwise limited debtors in that state to the state exemptions.
- TSP statute expressly listed and limited the distinct classes of parties that can be a payee under a qualifying retirement benefits court order (QRBCO) (analogous to a QDRO), and neither creditors nor bankruptcy trustees are on that list. Trustee's ability to "step into the shoes" of the debtor did not overcome express statutory limitation.

In re Jeffers, 572 B.R. 681 (Bankr. N.D. Ohio 2017) (copy attached): Nondebtor wife moved for relief from stay to pursue QDRO in state court. Divorce decree that included award of certain assets in husband's retirement accounts to wife was entered in 2012 but no QDRO was entered prior to the debtor-husband's bankruptcy filing in 2014. At time of motion, claims bar date had passed in debtor-husband's chapter 13 case and nondebtor-wife's proof of claim did not mention assets in retirement accounts, and chapter 13 plan had been confirmed. Debtor argued that motion should be denied as attempt to collect a claim that was not provided for in the plan and was after the bar date (and could be discharged in chapter 13). Court granted relief from stay, holding:

- Pursuant to McCafferty v. McCafferty, 96 F.3d 192 (6th Cir. 1992), property division in state court domestic relations order was not in the nature of a debt at all, but was a division of property, and therefore rules regarding timely filed claims and the binding effect of the chapter 13 plan confirmation on all creditors were immaterial.
- Nondebtor wife's equitable interest in the 401(k) plan assets was established by domestic relations order prior to bankruptcy even without a follow-on QDRO, and Ohio state law imposes a constructive trust on those assets that rendered them not even part of the bankruptcy estate, pursuant to 11 U.S.C. § 541(d).

Corzin v. Lawson (In re Lawson)

United States Bankruptcy Court for the Northern District of Ohio, Eastern Division

March 31, 2017, Decided

Case No. 15-50618, Chapter 7, Adversary Proceeding No. 15-05094

Reporter
570 B.R. 563 *; 2017 Bankr. LEXIS 884 **

In re CARLA M. LAWSON, Debtor. HAROLD A. CORZIN, Trustee, Plaintiff, v. CARLA M. LAWSON, et al., Defendants.

Case Summary

Overview

HOLDINGS: [1]-Debtor's interest in the "403(b) Plan" account and the assets therein by virtue of her status as a beneficiary under the Plan were excluded from property of the bankruptcy estate, by operation of *11 U.S.C.S. § 541(c)(2)*; [2]-In addition, debtor's contingent interest in the Plan account assets that arose by virtue of her divorce filing in Ohio state court was subject to exemption pursuant to *11 U.S.C.S. § 522(b)(3)(C)* and *Ohio Rev. Code Ann. § 2329.66(a)(10)*; [3]-Among a number of specific matters, the court concluded that the January 8, 2015 Judgment Entry constituted a domestic relations order of the State Court vesting debtor with right to an equal division of the Plan assets between her and her divorcing spouse.

Outcome

The court entered a separate form of judgment granting summary judgment in favor of the United States and debtor consistent with the Memorandum Decision, granting their respective motions for summary judgment, and denying the Trustee's Motion.

Counsel: **[**1]** For Harold A. Corzin, Plaintiff (15-05094-amk): Michael J. Moran, Gibson & Moran, Cuyahoga Falls, OH.

For Carla M. Lawson, Defendant, Cross-Claimant (15-05094-amk): Peter G. Tsarnas, Goldman & Rosen, Ltd., Akron, OH.

For Todd Osborne, Defendant (15-05094-amk): John C. Collins, John C. Collins Co. LPA, Akron, OH.

Todd Osborne, Cross Defendant (15-05094-amk), Pro se.

For Carla M. Lawson, Debtor (5:15bk50618): Marc P Gertz, Debtor, Goldman & Rosen, Ltd, Akron OH; Peter G. Tsarnas, Goldman & Rosen, Ltd., Akron OH.

For Harold A. Corzin, Trustee (5:15bk50618): Michael J. Moran, Trustee, Gibson & Moran, Cuyahoga Falls OH; Harold A. Corzin hcorz03, Akron OH.

Judges: ALAN M. KOSCHIK, United States Bankruptcy Judge.

Opinion by: ALAN M. KOSCHIK

Opinion

[*566] MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Harold A. Corzin, the duly-appointed Chapter 7 trustee

(the "Trustee") in the underlying bankruptcy case in which this adversary proceeding arises, has filed a complaint for declaratory and injunctive relief regarding the right, title, and interest of the parties in the 403(b) custodial account (the "Plan") of defendant Todd A. Osborne ("Osborne"), the husband of debtor Carla M. Lawson (the "Debtor"). The Debtor had filed a **[**2]** complaint for divorce against Osborne prior to filing her Chapter 7 petition. As of the petition date, the Ohio domestic relations court with jurisdiction over the divorce action, the Stark County Court of Common Pleas Family Court Division (the "State Court"), had entered an order styled as a "judgment entry" approving a property settlement between the Debtor and her husband, but not a formal qualified domestic relations order ("QDRO") as defined in the *Employee Retirement Income Security Act*, *29 U.S.C. §§ 1001-1461* ("ERISA"). The Trustee asserts that this particular posture allows him to stand in the shoes of the Debtor and ultimately receive the Debtor's share of the funds from the Plan upon completion of the divorce without running afoul of either the ERISA-required anti-alienation provision of the Plan itself or the exemptions applicable to qualified tax-advantaged retirement accounts under Ohio and federal bankruptcy law.

The Debtor and the United States of America (the "United States"), on behalf of its defendant agency, the Internal Revenue Service (the "IRS"), each filed answers substantively contesting the Trustee's claims. Osborne also filed a pro forma answer but did not substantively contest **[**3]** the Trustee's claims and did not take part in the subsequent summary judgment briefing or oral argument that is the subject of this Memorandum Decision.

The following motions are currently before the Court: First, the Trustee's motion for summary judgment (Docket No. 26) (the "Trustee Motion"); second, the United States' motion for partial summary judgment (Docket No. 27) (the "United States Motion");[1] and third, the Debtor's motion for summary judgment (Docket No. 31) (the "Debtor Motion"). The Trustee Motion, United States Motion, and Debtor Motion were each filed on April 1, 2016. On April 15, 2016, the Trustee filed responses to both the Debtor Motion and United States Motion (Docket Nos. 33 and 35, respectively), and the United States and the Debtor each responded to the Trustee Motion (Docket Nos. 36 and 37, respectively). The parties each filed replies in support of their respective position on April 22, 2016. (Docket Nos. 38-41.) At the **[*567]** request of the parties, the Court conducted an oral argument on May 9, 2016.

The collection of issues presented by the eleven briefs and subsequent oral argument in this matter can be summarized as follows:

> (1) Whether the State Court's **[**4]** order in the Debtor's divorce case constitutes a domestic relations order, and whether it provided the Debtor a beneficial interest in her husband's Plan even though that order is not a QDRO as defined by ERISA;
> (2) Whether the Debtor had a beneficial interest in the Plan by virtue of her status as Osborne's designated beneficiary and/or his spouse;
> (3) Whether an Ohio debtor has a present interest in a share of her spouse's 403(b) retirement plan account pursuant to Ohio's domestic relations law upon filing a divorce action;
>
> (4) Whether the Debtor's interest in her husband's Plan is property of her bankruptcy estate pursuant to *11 U.S.C. § 541*, or is excluded from property of the estate pursuant to *11 U.S.C. § 541(c)(2)*;
>
> (5) Whether any interest obtained by the Debtor prior to the entry of a QDRO can be exempted from her bankruptcy estate pursuant to *11 U.S.C. § 522*; and
> (6) Whether it is legally permissible for a panel trustee of a bankruptcy estate to obtain a QDRO under ERISA and related provisions of the Tax Code, in lieu of the divorcing debtor spouse, to effect an assignment of benefits in a 403(b) plan account owned by the debtor's non-filing ex-spouse to the debtor's bankruptcy estate administered by the trustee.

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[1] The complaint against the United States was dismissed on grounds of ripeness on June 16, 2016. However, the United States has not been dismissed as a party and its motion for partial summary judgment implicates matters that are ripe for adjudication, not the Trustee's claims under *11 U.S.C. § 505* that were unripe. The United States Motion therefore was not withdrawn following entry of the order dismissing the complaint against the United States. At oral argument, the Court suggested that, at minimum, the memoranda of the United States in support of its Motion and in opposition to the Trustee's Motion served as *amicus curiae* briefs. No party to this adversary proceeding objected to the Court's consideration of the United States Motion and the legal memoranda filed by the United States.

JURISDICTION AND [**5] VENUE

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. Venue is proper pursuant to 28 U.S.C. § 1409(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), (E), and (O).

SUMMARY JUDGMENT STANDARD

In bankruptcy cases, including adversary proceedings, a party may move for summary judgment at any time before 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders otherwise. Fed. R. Bankr. P. 7056 (otherwise incorporating Fed. R. Civ. P. 56); *see also* Fed. R. Bankr. P. 9014(c). When a party so moves, the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Celotex Corporation v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A Plaintiff movant must establish all essential elements supporting its claim in this fashion; a defendant must establish that any one (or more) essential elements of Plaintiff's claim fails, or establish all elements of one or more of defendant's affirmation defenses, in order to obtain a defense judgment by summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Evidence presented **[**6]** in support of summary judgment is viewed in the light most favorable to the non-moving party "drawing **[*568]** all reasonable inferences in its favor." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, if a moving party meets its burden to establish a lack of genuine dispute as to a material fact, the burden then shifts to the non-moving party to "come forward with evidence which would support a judgment in its favor." Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(e). In responding in this way to a motion for summary judgment, the non-moving party may not rely on a "mere scintilla of evidence" in support of its opposition to the motion. There must be enough evidence presented in which a jury could reasonably find for the non-moving party. Zenith, 475 U.S. at 586.

In this adversary proceeding, and on the cross-motions for summary judgment currently before the Court, the parties are of the unanimous opinion that summary judgment is appropriate here without the need for a trial. The Court agrees. The disputes before the Court concern only the correct legal conclusions based on undisputed facts.

UNDISPUTED FACTS AND PROCEDURAL HISTORY

The parties submitted a substantial stipulated record for the Court to take under advisement, including exhibits. (Docket No. 24.) The following facts are derived from those **[**7]** stipulations, stipulated exhibits (which include, *inter alia*, the State Court's docket through June 2, 2015), and this Court's own docket.

The Debtor married Todd A. Osborne, also a defendant in this action, on or about May 16, 1998. She filed a complaint for divorce against him in the State Court on March 7, 2014.

Osborne is employed by Summa Akron City Hospital/Summa Health System ("Summa"). Through that employment, he holds an interest, as a plan participant, in a retirement plan known as the Summa Health 403(b) Plan (as previously defined, the "Plan"). A copy of the Plan document was stipulated as an exhibit. (Docket No. 24 at ¶8 and Ex. B.) Section 13.9 of the Plan provides as follows:

> None of the benefits, payments, proceeds, claims, or rights of any Participant or Beneficiary hereunder shall be anticipated, encumbered, or in any other manner alienated or assigned by a Participant or Beneficiary, nor shall they be subject to any legal process, bankruptcy proceedings, or the interference or control of any creditor, spouse or divorced spouse, or other person except for the creation, assignment or recognition of a right to any benefit payable with respect to a Participant pursuant to a Qualified **[**8]** Domestic Relations Order, as defined in Section 206(d)(3) of ERISA.

Osborne opened his Plan account on or about July 8, 1999. The Debtor is not and has never been employed by Summa, and has never made any direct contributions into Osborne's Plan account.

Osborne, who is still living, has designated the Debtor as the primary beneficiary of his interest in the Plan

account, and Jessie Lawson as sole contingent beneficiary. (Docket No. 24 at ¶12 and Ex. C.)

On January 6, 2015, the State Court held a hearing on the divorce proceeding during which Osborne's counsel read into the record the terms of the separation agreement negotiated by and between the Debtor and Osborne, which included an equal division of the assets in the Plan account between the Debtor and Osborne. (Docket No. 15 at ¶16.) The parties have stipulated to the accuracy of a transcript of those proceedings. (Docket No. 24 at ¶15 **[*569]** and Ex. E.) Two days later, on January 8, 2015, Judge Rosemarie A. Hall of the State Court entered an order styled as a "Judgment Entry," which is a stipulated exhibit here (Docket No. 24 at ¶17 and Ex. F) (the "Judgment Entry"), stating that "the proposed shared parenting plan and separation agreement are approved, adopted, **[**9]** and incorporated into the final decree. The final decree and shared parenting plan shall be filed within 21 days." *Id.* The final decree and shared parenting plan were not filed within 21 days. In fact, they still had not been filed as of March 20, 2015, the day the Debtor filed her Chapter 7 petition commencing her bankruptcy case. (Docket No. 24 Ex. D.)

Harold A. Corzin was duly appointed as the chapter 7 trustee for the bankruptcy estate of the Debtor following the filing of the Debtor's petition.

The Trustee filed his complaint in this adversary proceeding (the "Complaint") on August 20, 2015. The Trustee alleged that the Debtor's "equitable claim to an equal division and distribution of the marital property" is property of the estate (Compl. ¶ 8), and that the Trustee was entitled to an order directing distribution of such property interest to the Trustee. (Compl. ¶ 9). The Trustee's complaint further asks this court "to enter its order authorizing and empowering the trustee to execute a QDRO directing distribution of such funds to the estate and compelling the defendant, Todd Osborne, to join in such [QDRO]." (Compl. ¶ 12.)

Osborne, *pro se*, filed his answer on September 22, 2015. **[**10]**

The Debtor filed her answer and crossclaim against Osborne on September 23, 2015.

The United States, after an extension, filed its answer on October 2, 2015.

Osborne, by then with assistance of counsel, filed his reply to the Debtor's crossclaim on October 13, 2015.

Following a further pretrial after the close of discovery, the Court entered a scheduling order setting simultaneous deadlines for dispositive motions, response briefs, and replies. The Court informed Osborne that his participation in the dispositive motion briefing was not required by the Court in light of the fact that the Trustee and the Debtor were battling over the one-half share of his Plan account already awarded to the Debtor, his ex-spouse, by the State Court. In fact, Osborne did not file or respond to any dispositive motions. The Trustee and Debtor each filed a motion for summary judgment; the United States filed a motion for partial summary judgment and a separate motion to dismiss the claims in the complaint against itself.[2] The Trustee responded to both the Debtor's and the United States' Motions. The Debtor and United States each responded to the Trustee's Motion. The parties' reply briefs followed.

At the request **[**11]** of the parties, the Court held an oral argument on the cross-motions for summary judgment on May 9, **[*570]** 2016. At the conclusion of the oral argument, the Court took the matter under advisement.

LEGAL ANALYSIS

As in all bankruptcy cases of individual debtors, the Court must determine what legal or equitable interests the Debtor had in property as of the commencement of her case, which interests in her property became property of the bankruptcy estate that the Trustee may administer, and which of those assets may be exempted from the estate and claims of the Debtor's creditors. More specifically, the Court here is called upon to answer those questions with respect to the Debtor's

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[2] The United States' motion to dismiss was confined to the Trustee's direct claims against the IRS for tax determination under *11 U.S.C. § 505*. The Trustee responded to this motion to dismiss stating that he did not object to the dismissal, although he would have considered it more expedient to deal with the tax issues in the same proceeding as the bankruptcy issues. The Court granted the United States' motion to dismiss on June 19, 2016, specifically on the ground that the claims in the Complaint against the IRS directly for determination of tax liability under *11 U.S.C. § 505* were not ripe for decision. (The United States had asserted multiple additional grounds for dismissal.) The United States' separately-filed motion for summary judgment was unaffected by this dismissal, since it concerned the separate issues in the Complaint that are ripe for adjudication.

rights to her share of her husband's retirement account after filing a divorce action but before effectuating a division of that account via a transfer of assets authorized by the entry of a QDRO. The peculiar circumstances of this case have caused these questions to be extraordinarily complex.

The Court undertakes these inquiries in this case by examining the distinct forms of interests various parties argue the Debtor had in the Plan assets as of the commencement of the case. First, whether the Debtor had a beneficial **[**12]** interest in the Plan assets, either by virtue of her designation by Osborne as a beneficiary, her status as Osborne's spouse, and/or the entry by the State Court of its January 8, 2015 Judgment Entry, which approved the division of the Plan assets between the Debtor and Osborne. Second, whether the Debtor had acquired a present interest in the Plan assets, or as the Trustee argues, a mere equitable claim to a distribution from marital assets, pursuant to Ohio domestic relations law. The proper legal characterization of these distinct rights informs the further inquiries about what is or is not excluded from property of the bankruptcy estate and what property of the bankruptcy estate is exempt.

I. The Debtor's Beneficial Interest in the Plan's Assets Is Not Property of the Estate.

A. The State Court's January 8, 2015 Judgment Entry Constitutes a "Domestic Relations Order."

The Judgment Entry states that "the proposed divisions of assets and debts is fair and equitable," and that the proposed separation agreement was "approved" and "adopted." (Docket No. 24 at ¶17 and Ex. F.) The State Court issued this order after a hearing in open court in which the agreed property division was read into **[**13]** the record. (Docket No. 24 at ¶¶15-16 and Ex. E.) The Judgment Entry also granted the divorce of the couple and directed the Debtor's divorcing spouse to attend a parenting seminar. *Id.* While the Judgment Entry provided that its terms would be incorporated into a future final decree, it did not provide for a stay of its effectiveness. Moreover, unlike the situation in *In re Greer, 242 B.R. 389, 394-95 (Bankr. N.D. Ohio 1999)*, the Judgment Entry here was signed by a state court judge, not a magistrate whose decision could "only become effective when actually adopted by a court of competent jurisdiction." *Id. at 394*. The fact that the parties failed to file the contemplated final decree within 21 days as ordered does not change the fact that the State Court had already entered an order that approved the division of property and required that the ultimate final decree be consistent with and incorporate the Judgment Entry. The fact that the Judgment Entry would be incorporated into the later final decree did not in any way condition its effectiveness. Indeed, the Judgment Entry conclusively determined that the final decree would be required to incorporate its terms, including the agreed upon division of property. This **[*571]** division included an even split of **[**14]** the Plan assets.

Therefore, the Court concludes that the January 8, 2015 Judgment Entry constitutes a domestic relations order of the State Court vesting the Debtor with right to an equal division of the Plan assets between her and her divorcing spouse.

B. The State Court Judgment Entry Vested the Debtor With the Rights of a Beneficiary in the Plan.

The Trustee argues that nothing short of a QDRO could vest a non-participant spouse with non-alienable rights to her spouse's retirement plan in which he was the employee and the plan participant. The Trustee relies primarily on *In re Burgeson, 504 B.R. 800 (Bankr. W.D. Pa. 2014)* (Deller, C.J.) in advancing this position. *Burgeson* concerned a debtor who had filed a divorce action against her husband thirteen months before filing her bankruptcy petition. Her husband was a participant in his employer's pension plan and she, like the Debtor here, had never been employed by her husband's employer.

As of the petition date, the *Burgeson* debtor had not obtained either an adjudication of her claim for equitable distribution of marital assets or a divorce decree. *Id. at 802*. The debtor had certainly not yet obtained a QDRO transferring to her assets from her husband's pension plan. *Id. at 803*. Moreover, the court found **[**15]** the debtor had "not proven or alleged that either her Ex Husband or the Pension's terms designate[d] her as a beneficiary." *Id. at 804*.

The Trustee exaggerates the *Burgeson* reasoning so as to apply it to the facts of this case. *Burgeson* does not state that a QDRO is required to vest a divorcing debtor with a beneficial interest in her spouse's retirement plan. Rather, *Burgeson* observed that debtors obtain such interests when they obtain either a QDRO or an order "delineating the debtor's ownership interest in the

pension plan prior" to the petition date. *Id. at 804* (emphasis added).

Moreover, the bankruptcy court in *In re Dively, 522 B.R. 780 (Bankr. W.D. Pa. 2014)* (Deller, C.J.) — authored by the same bankruptcy judge who decided *Burgeson* — distinguished *Burgeson* by emphasizing the significance of a domestic relations order adjudicating a property division, even if it does not immediately implement that division. In *Dively*, the domestic relations court had entered a pre-petition domestic relations order that was not a QDRO, but nevertheless set forth and approved the property settlement between the parties. *Dively* elaborated on the distinction as follows:

> In both *Burgeson* and *Urmann [523 B.R. 472 (W.D. Pa. 2014)]*, the trustee was permitted to recover pension or retirement funds titled in the name of the non-debtor **[**16]** ex-spouse only. The reason why the trustee in those cases was permitted to liquidate the assets was because the debtors in *Burgeson* and *Urmann* had no pre-petition vested right to the pension or retirement interests at issue. This conclusion in *Burgeson* and *Urmann* was supported by the fact that the debtors in those cases had neither a QDRO issued in their favor, *nor were they parties to a marital settlement agreement (or order of court)* that provided for the equitable distribution of the retirement accounts to them as of the filing of their respective bankruptcy cases.

Dively, 522 B.R. at 786 (emphasis added).

The January 8, 2015 Judgment Entry was not a final decree, but ERISA does not distinguish between final decrees and other domestic relations orders; it distinguishes only between domestic relations orders and qualified domestic relations orders. *Compare 29 U.S.C. § 1056(d)(3)(B)(i)* **[*572]** *with 29 U.S.C. § 1056(d)(3)(B)(ii)*. A domestic relations order is a sufficient independent basis for a spouse to obtain a vested beneficial interest in an ERISA-qualified plan. "A person awarded a lump-sum distribution from an ERISA plan pursuant to a divorce decree has a direct interest in plan funds while the plan reviews the DRO to determine whether it constitutes a QDRO." *Nelson v. Ramette (In re Nelson), 322 F.3d 541, 544 (8th Cir. 2003)*. A **[**17]** domestic relations order, therefore, vests the spouse with rights protected by ERISA. The QDRO, by contrast, is necessary to take the next step of transferring the assets into the spouse's name in her own qualified plan or individual retirement account. As explained by the Ninth Circuit Court of Appeals, "[t]he QDRO provisions of ERISA do not suggest that [an alternate payee] has *no* interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained." *In re Gendreau, 122 F.3d 815, 819 (9th Cir. 1997)* (quoted by *Nelson, 322 F.3d at 544*).

For this reason, regardless of other facts or circumstances, the Debtor in this case became an ERISA-qualified beneficiary of the Plan no later than January 8, 2015, when the State Court entered its Judgment Entry, which constitutes a domestic relations order directing the equal division of the Plan assets that are marital property of the Debtor and her ex-husband, Todd Osborne.

C. The Debtor Was Already a Beneficiary of the Plan Before Obtaining a Domestic Relations Order Because She Was a Named Beneficiary and Because ERISA Requires Spouses To Be Beneficiaries in Qualified Retirement Plans Unless Those Rights Are Expressly Waived.

While the State Court's Judgment Entry **[**18]** accorded the Debtor vested rights as a beneficiary of the Plan, the circumstances of the Debtor's case and her husband's Plan provide her with a separate, independent basis to establish herself as a vested beneficiary of the Plan account at the time of the bankruptcy filing. The parties have stipulated that Osborne expressly designated her as a beneficiary of the Plan. In addition, no formal or express designation of a participant's spouse as a beneficiary is required. *See, e.g., 29 U.S.C. § 1055(a)* (all ERISA-qualified plans must provide for qualified joint and survivor annuities whenever a vested participant does not die before the date benefits begin, and for a qualified preretirement annuity when the participant spouse dies before the starting date and his or her spouse survives). The Summa Plan contains such a provision automatically designating the spouse of a married plan participant as that participant's beneficiary at Section 6.1(b) of the Plan:

> Each Participant may file with the Committee a written designation of the Beneficiary or Beneficiaries to receive payment on his death. If the Participant is married, his Spouse shall be the Beneficiary 100% of his Vested Accrued Benefit ... payable in a single sum, **[**19]** unless the Participant designates an alternate beneficiary and his Spouse consents to that designation in a Qualified Waiver.

"Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to an annuity." *Boggs v. Boggs, 520 U.S. 833, 844, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997)*. ERISA contains detailed provisions regarding the form of written waiver required for a spouse to surrender her statutorily mandated benefits, which must among other things be witnessed by a plan representative or notary public. *See 29 U.S.C. § 1055(c)(2)(A)*. **[*573]** Section II.jj of the Plan, describing a Qualified Waiver, follows the restrictive framework required by ERISA. (Docket No. 24 at ¶8 and Ex. B.)

In both ERISA and the Plan, such automatic beneficiary designations are couched in terms of beneficial interests payable upon death. However, it is evident from provisions relating to the rights of divorcing spouses that the automatic beneficiary designations apply in that context as well. ERISA's qualified domestic relations order provision, which is the mechanism for distributing a court-approved marital share of a retirement account to a divorcing spouse, *see Gendreau, 122 F.3d at 819*, incorporates the requirements of *29 U.S.C. § 1055* as well, generally treating a former spouse similarly to a surviving spouse. *See, **[**20]** e.g., 29 U.S.C. § 1056(d)(3)(F)*.

Therefore, separate and apart from the Judgment Entry, the Debtor's status as Osborne's spouse and his designee as beneficiary were independently sufficient to cause the Debtor to be a vested beneficiary of the Plan on the day she filed her voluntary petition commencing this chapter 7 case.

D. The Debtor's Beneficial Interest in the Plan Assets Is Excluded from the Estate Pursuant to *11 U.S.C. § 541(c)(2)*.

The Bankruptcy Code provides that "a restriction on the transfer of a beneficial interest of the debtor in a trust[3] that is enforceable under applicable nonbankruptcy law is enforceable in a [bankruptcy case]." *11 U.S.C. § 541(c)(2)*. This provision, expressly referenced in *Bankruptcy Code Section 541(a)* as an exception to the property constituting the estate, "entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *Patterson v. Shumate, 504 U.S. 753, 758, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992)*. All ERISA pension plans are required to include such a clause: "Each pension plan shall provide that benefits provided under the plan may not be assigned **[*574]** or alienated." *29 U.S.C. § 1056(d)(1)*. The Summa 403(b) Plan includes such a clause at Section 13.9 thereof, prohibiting any assignments or other transfers of benefits by either participants or beneficiaries **[**21]** of the Plan. (Docket No. 24 Ex. B at 53.) *Patterson* and *11 U.S.C. § 541(c)(2)* form the backbone of the United States' primary argument in its motion for partial summary judgment and supporting briefing, which urges that the Debtor's interest in the Plan cannot be included in property of her bankruptcy estate and distributed to creditors by the Trustee.

The QDRO mechanism in ERISA is set forth in the many subparagraphs of *29 U.S.C. § 1056(d)(3)*. If an order qualifies as a QDRO, then the anti-alienation provision required by *29 U.S.C. § 1056(d)(1)* would not prohibit the distribution of plan assets to an alternate payee who was either a divorcing spouse or surviving

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[3] The Trustee's briefing does not expressly contest the status of the Plan's 403(b) custodial accounts as being held in trust within the meaning of *11 U.S.C. § 541(c)(2)*. However, the United States disclosed a split in authority on that issue in its brief. In *In re Adams, 302 B.R. 535 (6th Cir. B.A.P. 2003)*, a divided bankruptcy appellate panel held that assets in 403(b) plan custodial accounts became property of the bankruptcy estate notwithstanding *11 U.S.C. § 541(c)(2)*, in substantial part because *29 U.S.C. § 1103(b)(5)* excepts 403(b) plan custodial accounts from the general requirement of *29 U.S.C. § 1103(a)* that "all assets of an employee benefit plan shall be held in trust by one or more trustees." *Id.*; *see Adams, 302 B.R. at 542*. However, in *In re Quinn, 327 B.R. 818 (W.D. Mich. 2005)*, the district court agreed with the dissent in *Adams* and held that the debtor's interest in his retirement plan had sufficient functional characteristics of a trust to be "tantamount to a trust" and were, in any event, excluded from the estate pursuant to *11 U.S.C. § 541(c)(2)* as interpreted by the U.S. Supreme Court in *Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992)*. *Quinn, 327 B.R. at 829*; *see also Morter v. Farm Credit Services, 937 F.2d 354, 358 (7th Cir. 1991)* ("The proper inquiry under *section 541(c)(2)*, then, is not whether the accumulated funds are in a 'traditional' spendthrift trust, but whether the retirement plan bars the beneficiary and his creditors from reaching the funds. If it does, the plan is tantamount to a spendthrift trust under state law.") While the *Adams* panel makes an interesting textualist argument, the Court views the *Quinn* decision, and the *Morter* decision on which it relied, as more closely aligned with the Supreme Court's decision in *Patterson*, which expressly reads *11 U.S.C. § 541(a)(2)* to apply to "any interest in a *plan or trust*" subject to an enforceable transfer restriction, specifically including the anti-alienation provision ERISA requires in ERISA-qualified plans. *Id. at 758*.

child. However, it is important to emphasize that the QDRO mechanism is an exception to the general anti-alienation rule.[4] Of course, if the domestic relations court had already entered a QDRO, the Debtor would clearly be treated as a beneficiary within the meaning of ERISA. "A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of [ERISA] a beneficiary under the Plan." *29 U.S.C. § 1056(d)(3)(J)*; *see also Nelson, 322 F.3d 541, 544 (8th Cir. 2003)*. The Trustee concedes that if the domestic relations court had already entered **[**22]** a QDRO, her interest in the Plan account assets would be excluded and the Trustee would not have brought this action. (Docket No. 35 at 3.)

In the Court's view, the rule of *Patterson* applies to this case as well. *Patterson* held that *Section 541(c)(2)*'s exclusion of trusts containing restrictions on transfers enforceable under applicable nonbankruptcy law from property of the estate extends to a debtor's interests as a plan participant in an ERISA-qualified retirement account. *Patterson's* reasoning, however, was not limited to plan participants, but rather extended to "*any* interest [held by a debtor] in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *Patterson v. Shumate, 504 U.S. at 758* (emphasis added). Indeed, the statute itself refers to "a *beneficial* interest of the debtor in a trust." *11 U.S.C. § 541(c)(2)* (emphasis added).

Moreover, the line of cases from the Western District of Pennsylvania cited favorably by the Trustee support this conclusion. *In re Dively* held that the interest of a debtor, who had obtained a divorce decree dividing marital assets, in her spouse's pension plan was "conceivably outside the scope of 'property of the estate.'" *Dively, 522 B.R. at 786*. The bankruptcy court in *Dively* did not make a **[**23]** final ruling on the exclusion or exemption of the debtor's interests in the pension assets from the estate, but denied the trustee's motion on the basis that the debtor *might* be entitled to such an exclusion or exemption:

> Simply stated, if Ms. Dively's pension interests fall under the umbrella of *11 U.S.C. §§ 541(c)(2)*, *522(b)(3)(C)*, *522(d)(10)(E)* or *522(d)(12)*, the assets would be excluded from "property of the estate" and the trustee in this case may not make any claim to the assets for the benefit of creditors. *See Nelson v. Ramette (In re Nelson), 322 F.3d 541 (8th Cir.2003)*. Rather, Ms. Dively may retain **[*575]** such funds to augment her fresh start after her bankruptcy case is administered and closed.

Id. at 785. On appeal, the district court went further and held that the funds were indeed properly excluded from the bankruptcy estate. *Walsh v. Dively, 551 B.R. 570, 576 (W.D. Pa. 2016)*.

Therefore, the Court concludes that the beneficial interest of the Debtor in Osborne's 403(b) Plan, established both by the State Court's Judgment Entry of January 8, 2015, as well as Osborne's designation of the Debtor as beneficiary and the self-executing spousal beneficiary designation provisions of the Plan as required by ERISA, is excluded from property of the bankruptcy estate pursuant to *11 U.S.C. § 541(c)(2)*, as interpreted by the U.S. Supreme Court in *Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992)*.

II. The Debtor's Contingent Interest in [24] a Share of the Plan Assets Under Ohio Domestic Relations Law Is Exempt From the Trustee's Administration Under Both Ohio and Federal Exemption Statutes.**

The Trustee's initial argument in his Motion and Complaint is that the Debtor has no vested beneficial rights in the Plan that are excepted from the bankruptcy estate pursuant to *Section 541(c)(2)* because *(1)* the Debtor is not a Plan beneficiary while her now ex-husband remains living, (2) the Judgment Entry does not constitute a domestic relations order, or any order at all, and (3) even if the Judgment Entry were an order, it was incapable of granting the Debtor a vested beneficial interest in the Plan because it was not a QDRO. The Court has rejected those arguments in Section I, *supra*, and on that basis has concluded that the Debtor's beneficial interest in the Plan is excluded from the bankruptcy estate. This conclusion could, and perhaps should, end the Court's inquiry.

However, the Trustee's now rejected premise led to his argument that even though the Debtor had no vested beneficial right to assets in the Plan, she nevertheless had an equitable claim to a distribution of Plan assets, along with other marital assets, as a divorcing, but not yet divorced spouse. **[**25]** The Trustee asserts that this equitable claim is property of the bankruptcy estate

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[4] See Section III, *infra*, regarding the Trustee's argument that the Court can and should grant him leave to seek from the state court entry of a QDRO naming him as a beneficiary of the Plan on the grounds that he has squeezed his feet into the Debtor's shoes.

notwithstanding Section 541(c)(2)'s exclusion of vested rights in an ERISA-qualified retirement plan. The Trustee further contends that this equitable claim to a distribution of marital assets is not exempt pursuant to 11 U.S.C. § 522. In order to address the Trustee's arguments comprehensively, the Court analyzes the Debtor's rights in the Plan assets as a divorcing spouse and the extent to which such rights are exempt under Section 522.

A. Upon the Filing of Her Divorce Action, the Debtor Acquired a Contingent Interest in Her Husband's Retirement Plan As a Marital Asset Pursuant to Ohio Domestic Relations Law.

In Ohio divorce proceedings, "the court shall ... determine what constitutes marital property and what constitutes separate property ... [and] shall divide the marital and separate property equitably between the spouses." R.C. 3105.171(B). When undertaking this determination, "the court has jurisdiction over all property, excluding the social security benefits of a spouse ... in which one or both spouses have an interest." *Id.* "Marital property" includes, *inter alia*, "[a]ll real and personal property that currently is owned by either or both of the spouses, **[**26]** including, but not limited to, the retirement benefits of the spouses, **[*576]** and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i). The parties have stipulated that Osborne opened his account in the Plan after he married the Debtor and that all of his contributions to the Plan were made during their marriage. The Plan assets therefore constitute marital assets. The State Court treated them as such.

Ohio bankruptcy courts have interpreted these statutes to mean that upon a spouse filing for divorce, each spouse acquires a contingent interest in all marital property of the marriage. *In re Greer, 242 B.R. 389, 395-96 (Bankr N.D. Ohio 1999)*; *In re Street, 395 B.R. 637, 643-44 (Bankr. S.D. Ohio 2008)*; *see also In re Dzielak, 435 B.R. 538, 546 (Bankr. N.D. Ill. 2010)* (applying Illinois law).[5] This contingent interest arises pursuant to state domestic relations law independent of any vested beneficial interest arising from ERISA, the terms of the retirement plan, and/or a domestic relations order. It applies to all of the marital property, regardless of the name in which such property may be titled, and is not limited to retirement plan assets. However,

> such a property interest is limited. Specifically, given the fact that neither spouse is assured of receiving any specific item of 'marital property,' the Court holds that upon a spouse filing **[**27]** for divorce, and until a formal distribution of the parties' property is made, the interest of the spouse acquires in the other's separately titled property is strictly contingent, therefore subject to later divestment if the state court with jurisdiction over the parties' property does not enter an order awarding the property to a non-title holding spouse. The effect of this is that although contingent interests are clearly property of the bankruptcy estate pursuant to § 541(a), the contingency of the interest may prevent the bankruptcy trustee from ever utilizing the property for the benefit of the bankruptcy estate given the fact that federal law clearly holds that the extent to which an interest in property is limited in the hands of the debtor, it is equally limited in the hands of the bankruptcy estate.

In re Greer, 242 B.R. at 396-97 (citations omitted).

The Trustee argues that the divorce complaint creates a mere equitable *claim* and thereby attempts to separate the divorcing debtor's rights from the nature of the underlying assets. This sleight of hand suggests that the divorcing debtor's rights are reduced to claims -- essentially either choses in action or accounts receivable -- assets that would **[**28]** require their own designation in an applicable exemption statutes in order to be exempt.

However, Ohio domestic relations law instead creates in both spouses a contingent interest in the underlying marital property itself. While this interest is contingent, it is not speculative; it is a present interest in each item of marital property. *Greer* and *Street*, with which this Court completely agrees, hold that the filing of a divorce proceeding in Ohio gives rise, pursuant to R.C. 3105.171(B), to a contingent *interest* in the marital property on the part of both spouses, not just a generalized equitable *claim*. *Greer* found that "it was the intention under Ohio law to confer upon a spouse an interest in any property that is or would qualify as 'marital property,' **[*577]** regardless of whether such

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[5] In *Dzielak*, the court noted specifically that the debtor did not raise the argument that her potential interest in the retirement plan at issue was not property of the bankruptcy estate pursuant to Section 541(c)(2). *435 B.R. at 546*. Although silent on the point, the same seems to be true in *Greer* and *Street* where the opinions do not address the issue.

property was separately titled." *Id. at 396*. Since "neither spouse is assured of receiving any specific item of 'marital property,' ... the interest a spouse acquires in the other's separately titled property is strictly contingent," *id.*, but it does exist. Thus, "upon the commencement of the divorce proceeding ... [the debtor] obtained an interest in the retirement plan and retained that interest as of the petition date, entitling **[**29]** her to utilize the exemption." *Street, 395 B.R. at 643*.[6]

In this case, where the Debtor filed her bankruptcy petition after filing her divorce action, the Debtor had just such a present, contingent interest in the marital property, in particular the Plan assets, as of the commencement of this case.[7] Therefore, the Trustee cannot avoid the question of whether the Debtor's interest in that property is subject to exemption.

B. The Debtor's Contingent Interest in the Plan Is Exempt Under Both Ohio and Federal Exemption Statutes Applicable In This Bankruptcy Case.

An individual debtor may exempt certain interests in property from the estate. *See 11 U.S.C. § 522*. Initially, there are two alternative categories of exemptions that debtors may choose, the so-called "state" exemptions available to any debtor (bankrupt or not) by state law, or the "federal" exemptions set out in *11 U.S.C. § 522(d)*. However, as permitted by *11 U.S.C. § 522(b)(2)*, Ohio has specifically provided that Ohio-domiciled debtors are not eligible to claim the federal exemptions under *11 U.S.C. § 522(d)*. *R.C. 2329.662*. Therefore, the exemptions applicable to individual debtors in Ohio are uniformly those set forth in *11 U.S.C. § 522(b)(3)*, which incorporates Ohio's exemption statutes.[8] Those exemptions include an exemption, with no dollar limitation, for **[**30]** a debtor's "rights to or interest in a pension, benefit, annuity, retirement allowance, or accumulated contributions," *R.C. 2329.66(A)(10)(a)*, and a debtor's "rights or interests in the assets held in, or to directly or indirectly receive any payment or benefit under, any individual retirement account [or] individual retirement annuity." *R.C. 2329.66(A)(10)(c)*. These exemptions expressly apply to any "alternate payee under a qualified domestic relations order (QDRO) or other similar court order." *R.C. 2329.66(A)(10)(f)*.

[*578] Moreover, in all bankruptcy cases in which the debtor uses the *Section 522(b)(3)* exemptions, regardless of what state exemptions may be provided and incorporated by *11 U.S.C. § 522(b)(3)(A)*, the Bankruptcy Code also allows a debtor to exempt "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under *section 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a) of the Internal Revenue Code of 1986*." *11 U.S.C. § 522(b)(3)(C)*. It is undisputed that the Summa Health 403(b) Plan meets this definition.

The contingent interest created by *R.C. 3105.171(B)* is the fatal flaw in the Trustee's argument that the Plan assets are property of the bankruptcy estate and are not exempt. The Trustee's central contention is that the Debtor did *not* have an interest in the Plan assets themselves, **[**31]** which the Trustee concedes would be exempt. (Docket No. 35 at 3.) Instead, the Trustee argues that the Debtor had a domestic relations law claim for equitable distribution of marital assets, which was at that point sufficiently undifferentiated and inchoate that it was not specifically an interest in the Plan assets. Thus, for instance, in the Trustee's reply (Docket No. 40), he argues that the United States mischaracterizes the claim asserted by the Trustee. The Trustee "seeks a determination that the equitable claim to a portion of Plan assets is property of the estate."

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[6] The bankruptcy court in *In re Dzielak, 435 B.R. 538 (Bankr. N.D. Ill. 2010)*, noted that there are some states, such as Connecticut and New York, in which the mere commencement of a dissolution action does not create a legal or equitable interest in either spouse with respect to the other spouse's property. *Id. at 547* (distinguishing such states from Illinois, the law of which does create such an interest upon the commencement of a divorce action). However, under the law of Ohio, as in Illinois, such an interest arises as of the commencement of a divorce action.

[7] For the reasons set forth in Section I of this Memorandum Opinion, the Debtor actually had more than a present contingent interest in the Plan assets. She had a vested beneficial interest in half of those Plan assets. The point here is that even if she did not have such vested beneficial interest -- either because she was not named a beneficiary, the Judgment Entry had not been previously entered, or for any other legal or factual reason -- Ohio domestic relations law would have given her upon filing the divorce action a present contingent interest in marital property capable of exemption if such assets qualified under applicable exemption statutes.

[8] The applicable state exemptions may vary if a debtor has not lived in Ohio for the 730 days preceding the petition. *See 11 U.S.C. § 522(b)(3)(A)*. Because that has not been alleged to be the fact in this case, the Debtor is eligible for the exemptions provided in *R.C. 2329.66*.

(Docket No. 40 at 1.) "The Trustee is not seeking the funds, only Debtor's claim." *Id.* But the Trustee goes on to state, in his own further elaboration of his example, precisely the problem with this sophistry. "[T]he Trustee is not seeking this Court to assign Debtor's interest in the Plan assets. Only her claim to whatever portion of marital assets, which include the Plan assets, that the state court deems appropriate to award." *Id.* at 3. "Debtor's equitable claim could be for a boat, a certificate of deposit, or stock depending on what the assets of the marriage happened to be." *Id.* at 2. Indeed it could. But to the extent such unliquidated **[**32]** equitable claim for distribution ultimately is for exempt assets, it does not become a claim for nonexempt assets simply by virtue of the fact that the divorce had been filed as of the date of the petition, but no QDRO had yet been entered.

The structure of 11 U.S.C. § 522(b)(3) is highly revealing of Congress' policy with respect to the paramount importance of retirement funds not coming into bankruptcy estates: Sections 522(b)(3)(A) and (b)(3)(C) stand at the same level. In other words, even if a state were to (a) require individual debtors to use the § 522(b)(3) exemptions, as Ohio does, and (b) did not include in its own state statutes an exemption for retirement funds held in tax-exempt accounts pursuant to the applicable Internal Revenue Code sections, the Bankruptcy Code would nevertheless exempt such assets. Moreover, since retirement funds exempt under *I.R.C. 401*, 403, *408*, 408A, 414, 457, or 501(a) are also included in the so-called federal exemptions applicable in some states at the election of the debtor, *see* 11 U.S.C. § 522(d)(12), the ultimate lesson of the Bankruptcy Code exemption scheme is that no matter what laws a state might enact and no matter what decision a debtor might make in states where debtors may decide between state and federal exemptions, retirement funds governed by **[**33]** those provisions of the Internal Revenue Code will be exempt.

Therefore, even if the contingent interest created by Ohio domestic relations law exists separate and apart from the Debtor's excluded beneficial interest in the Plan account as a result of the Debtor's marital status, her designation as a beneficiary, or **[*579]** her rights pursuant to the Judgment Entry, the Debtor may nevertheless exempt that interest from the bankruptcy estate.

C. The Pennsylvania Cases Relied Upon by the Trustee Are Both Distinguishable and Unpersuasive.

The Trustee cites two cases, both from the Western District of Pennsylvania and from the same line of caselaw, in support of his position. The foundational case of the Trustee's argument is In re Burgeson, 504 B.R. 800 (Bankr W.D. Pa. 2014). In *Burgeson*, many facts were similar to the facts here: a divorce proceeding had been filed but no qualified domestic relations order had been entered therein when the spouse, who was not a participant in the pension plan at issue, filed bankruptcy. The same facts also presented themselves in Urmann v. Walsh, 523 B.R. 472 (W.D. Pa. 2014). Both cases arose from a trustee's objection to exemptions claimed by debtors in ERISA plan assets. In *Burgeson*, the exact type of pension plan at issue was not specified, but the strong **[**34]** implication is that it was a traditional defined benefit pension plan. In *Urmann*, the plan at issue was a 401(k) plan. Urmann, 2014 Bankr. LEXIS 1673, 2014 WL 1491328 at *1.

Pennsylvania domestic relations law also appears to follow the same rule as Ohio's with respect to the interests that arise in marital property when a divorce is filed. *See* In re McCulley, 150 B.R. 358, 361 (Bankr. M.D. Pa. 1993) ("the date of entitlement to a spouse with regard to marital property is on the date the divorce is filed").

In both *Burgeson* and *Urmann*, the court held, as the Trustee would have this Court hold, that the debtor had only a claim for equitable contribution under the state's domestic relations law and that such claim was not actually an interest in pension plan assets subject to ERISA anti-alienation protections that the Bankruptcy Code would respect via 11 U.S.C. § 541(c)(2), and more important, not subject to bankruptcy exemptions available under 11 U.S.C. § 522(d)(10) or (d)(12). (Pennsylvania allows debtors to utilize the federal exemptions, and the debtors in both *Burgeson* and *Urmann* did so.)

There is one potentially notable distinction between these Pennsylvania cases and this one: in both Burgeson and Urmann, the debtor was not a beneficiary under the plan at issue.[9] This was essential to both holdings. In *Burgeson*,

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[9] The debtor's lack of beneficiary status in *Urmann* is not expressly restated in the district court decision, but was found as fact in the bankruptcy court decision below it and was undisturbed on appeal. *See* In re Urmann, 2014 Bankr. LEXIS 1673, 2014 WL 1491328, *3 (Bankr. W.D. Pa. Apr. 15, 2014).

> Because no QDRO existed **[**35]** as of the Petition Date, and the Debtor was not a participant nor named as a beneficiary of the Pension, the Debtor had no beneficiary interest in the Pension as of the Petition Date; rather, at the time of filing the bankruptcy petition, the Debtor had an interest in a claim for equitable distribution.

Id. at 805. The *Urmann* court expressly followed the logic of *Burgeson*. *See Urmann, 523 B.R. at 479*.

In the instant case, the parties have stipulated that the Debtor in this case is the designated beneficiary of Osborne's interest in his Plan account. As such, even before the entry of a qualified domestic relations order, the Debtor here had a beneficial interest in the Plan assets as of the petition date. Moreover, such a beneficial interest was created by a domestic relations order (even if it was not a **[*580]** QDRO) entered by the State Court prior to the Debtor's bankruptcy filing. *See, e.g., In re Gendreau, 122 F.3d 815 (9th Cir. 1997)* ("The QDRO provisions of ERISA do not suggest that [an alternate payee] has no interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained.") Therefore, *Burgeson* and *Urmann* are distinguishable on their facts.

The Court is also unconvinced by the reasoning of **[**36]** *Burgeson* and *Urmann*. While *Burgeson* and *Urmann* found their respective debtor's lack of beneficiary status to be an essential issue, *Greer* and *Street* did not turn on the beneficiary status of the nonparticipant spouse. They concluded, instead, that the present, contingent interests in marital assets obtained by operation of domestic relations law upon filing a divorce complaint were sufficient to be considered for exemption under applicable statutes based on the nature of each specific marital asset, not an abstract claim for distribution. The Court adopts the analysis of the two Ohio bankruptcy courts instead of that of the courts from the Western District of Pennsylvania. Even if the Debtor in this case had not already been a beneficiary of the Summa Plan, she would have nevertheless gained a contingent interest in the Plan account assets upon the filing of the divorce action, an interest this Court has already concluded is exempt under *11 U.S.C. § 522(b)(3)(C)* and *R.C. 2329.66(A)(10)*.

III. Even if the Debtor Had Only a Claim for Equitable Contribution, the Court Cannot Compel the Debtor or the State Court to Issue a QDRO With the Trustee as Direct Payee.

The Trustee appears to be aware of the difficulty posed by the exemption **[**37]** issue. Perhaps this is why his Complaint and his legal argument in support of his Motion make an additional extraordinary demand: that the Court enter an order "authorizing and empowering the trustee to execute a QDRO directing distribution of such funds to the estate and compelling the defendant, Todd Osborne, to join in such Qualified Domestic Relations Order." (Compl. ¶ 12.) In later briefing, the Trustee argues that this will defeat the debtor's exemption rights: "The United States argues that Debtor's exemption rights will defeat any claim the Trustee may have to a portion of the Pension Plan. However ... the issuance of a QDRO to the Trustee avoids this issue." (Docket No. 35 at 6.) "The Trustee is asserting his interest in Debtor's equitable claim to a portion of marital assets. If successful, the Trustee will seek to liquidate this claim by having the state court issue a QDRO directly to the Trustee. Debtor will never have any interest in the Plan to which an exemption can attach." (Docket No. 40 at 5.)

Bankruptcy courts generally avoid invasions into family law matters out of consideration of court economy, judicial restraint, and deference to our state court colleagues and **[**38]** their established expertise in such matters. *In re White, 851 F.2d 170, 173 (6th Cir. 1988)* (quoting *In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985)*). However, in addition to general doctrinal reasons for not intruding upon the domestic relations court process, ERISA does not authorize a QDRO to a creditor or a creditor's representative.

The Court's equitable powers end where express statutory limits begin. Under ERISA, a QDRO can only create or recognize the right of an "alternate payee." *29 U.S.C. § 1056(d)(3)(B)(i)(I)*. "Alternate payee" is a defined term in the same statute. "The term 'alternate payee' means any spouse, former spouse, child, or other dependent **[*581]** of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." *29 U.S.C. § 1056(d)(3)(K)*.

The Trustee argues that his status a trustee gives him the ability to "stand in the shoes" of the Debtor to obtain a QDRO pursuant to *11 U.S.C. § 541* and *In re Dively*. (Docket No. 35 at 4.) *Dively* determined that "the fact that a bankruptcy trustee is not specifically identified as

an 'alternate payee' or 'beneficiary' under ERISA is of no moment," *522 B.R. at 784*, because of *11 U.S.C. § 105(a)* (empowering bankruptcy courts to issue any "order, process, or judgment that is necessary or appropriate to carry out **[**39]** the provisions of [the Bankruptcy Code]") and *29 U.S.C. § 1144(d)*, which provides that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." *Dively* proceeded to hold that court authorization for the trustee to seek a QDRO was an "order, process, or judgment" under *Section 105*, and that ERISA did not preclude it. *Id. at 784*.

The Court does not find *Dively* persuasive on this issue. It is true that *29 U.S.C. § 1144(d)* does not limit the application of *11 U.S.C. § 105(a)*. But that truism ignores a more fundamental point: the Court's equitable powers under *Section 105(a)* are inherently limited. "While endowing the court with general equitable powers, *section 105* does not authorize relief inconsistent with more specific law." *In re Rohnert Park Auto Parts, Inc., 113 B.R. 610, 615 (B.A.P. 9th Cir. 1990)*; *see also In re Dues, 98 B.R. 434, 437 (Bankr N.D. Ind. 1989)* ("*Section 105* ... may only be used as a basis for the court's action where other applicable law does not address the situation."). The Court cannot use its equitable powers to add a new category of persons eligible to be alternate payees under ERISA when that list is already set forth in federal statute.

CONCLUSION

The Debtor's interest in the Summa 403(b) Plan account and the assets therein by virtue of her status as a beneficiary under the Plan were excluded from property of the bankruptcy estate, by **[**40]** operation of *11 U.S.C. § 541(c)(2)*. In addition, the Debtor's contingent interest in the Plan account assets that arose by virtue of her divorce filing in Ohio state court was subject to exemption pursuant to *11 U.S.C. § 522(b)(3)(C)* and *R.C. 2329.66(A)(10)*.

The Court will enter a separate form of judgment granting summary judgment in favor of the United States and the Debtor consistent with this Memorandum Decision, granting their respective motions for summary judgment, and denying the Trustee's Motion. This decision resolves all claims asserted by the Plaintiff Trustee against Defendants the Debtor, the United States/IRS, and Osborne. The crossclaim asserted by the Debtor against Osborne is not resolved by this decision and remains pending. The Court finds that there is no just reason for delay, pursuant to *Fed. R. Civ. P. 54(b)* and *Fed. R. Bankr. P. 7054*, to enter final judgment on the Trustee's claim while the Debtor's crossclaim remains pending. Judgment on the Trustee's claims in this adversary proceeding will not be deemed entered until the separate form of judgment has been docketed by the Clerk.

This document was signed electronically on March 31, 2017, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: March 31, 2017

/s/ Alan M. Koschik

ALAN M. KOSCHIK

U.S. **[**41]** BANKRUPTCY JUDGE

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in B.R.]

[*none] SUMMARY JUDGMENT IN FAVOR OF DEBTOR DEFENDANT CARLA M. LAWSON AND DEFENDANT THE UNITED STATES OF AMERICA ON THE CROSS-MOTIONS FOR SUMMARY JUDGMENT FILED BY PLAINTIFF TRUSTEE HAROLD A. CORZIN, THE DEBTOR, AND THE UNITED STATES OF AMERICA

Consistent with the Memorandum Decision (Docket No. 44) concerning the cross-motions for summary judgment filed Plaintiff Harold A. Corzin, Trustee (Docket No. 26), Defendant Debtor Carla M. Lawson (Docket No. 31), and Defendant The United States of America (Docket No. 27), all filed April 1, 2016, and the findings and conclusions stated therein,

IT IS HEREBY ORDERED THAT:

1. The Plaintiff Trustee Harold A. Corzin's Motion for Summary Judgment is **DENIED**.

2. The Defendant Debtor Carla M. Lawson's Motion for Summary Judgment is **GRANTED**.

3. The United States of America's Motion for Summary Judgment is **GRANTED**.

4. The interests of Defendant Debtor Carla M. Lawson in the Summa 403(b) Plan held by her ex-husband,

Defendant Todd Osborne, are **DECLARED** to be **EXCLUDED** from the Debtor's bankruptcy estate pursuant to *11 U.S.C. § 541(c)(2)*.

5. To the extent any interest of the Debtor in Osborne's Summa 403(b) Plan is property of the estate notwithstanding *11 U.S.C. § 541(c)(2)*, such interests are **[**42] EXEMPT** pursuant to *11 U.S.C. § 522(b)(3)(C)* and *RC 2329.66(A)(10)*.

6. Judgment is hereby entered against the Plaintiff Trustee with respect to his claim for execution of a Qualified Domestic Relations Order to effectuate transfer of the Debtor's interests in Defendant Osborne's Summa 403(b) Plan.

7. The crossclaim asserted by Defendant Debtor Carla M. Lawson against Defendant Todd. Osborne is not resolved by this judgment and remains pending.

8. The Court finds that there is no just reason for delay, pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure* and *Rule 7054 of the Federal Rules of Bankruptcy Procedure*, to enter final judgment on the Trustee's Complaint notwithstanding the fact that the Defendant Debtor's crossclaim against Defendant Osborne remains pending.

9. Each party to this adversary proceeding shall bear their own costs and attorneys' fees.

This document was signed electronically on March 31, 2017, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: March 31, 2017

/s/ Alan M. Koschik

ALAN M. KOSCHIK

U.S. Bankruptcy Judge

End of Document

Gertz v. Warner (In re Warner)

United States Bankruptcy Court for the Northern District of Ohio, Eastern Division

April 14, 2017, Decided

Case No. 14-52325, Chapter 7, Adversary Proceeding No. 15-05115

Reporter
570 B.R. 582 *; 2017 Bankr. LEXIS 1043 **

In re MARGARET KATIE WARNER, Debtor. MARC P. GERTZ, Trustee, Plaintiff, v. MARGARET KATIE WARNER, et al., Defendants.

Case Summary

Overview

HOLDINGS: [1]-The fact that debtor was and had at all relevant times been the beneficiary of her husband's Thrift Savings Plan (TSP) Account was sufficient for the court to conclude that debtor had a beneficial intent in his TSP Account within the meaning of the TSP Statute as of the commencement of her bankruptcy case; [2]-The beneficial interest of debtor in her husband's TSP account was excluded from property of the bankruptcy estate pursuant to *11 U.S.C.S. § 541(c)(2)*, as interpreted by Patterson; [3]-Debtor had a contingent interest in a share of the TSP account assets under Ohio domestic relations law that was exempt from the Trustee's administration under both Ohio and federal exemption statutes; [4]-Among other things, the court concluded that it could not use its equitable powers to add a new category of persons eligible to be alternate payees under *5 C.F.R. § 1653.2*.

Outcome

The court entered a separate form of judgment granting the United States' motion for partial summary judgment and denying the Trustee's motion for summary judgment.

Counsel: For Marc P. Gertz, Plaintiff, Trustee (15-05115-amk): Peter G. Tsarnas **[**1]** , LEAD ATTORNEY, Goldman & Rosen, Ltd., Akron, OH.

For Margaret Katie Warner, Defendant (15-05115-amk): Gregory L. Hail, Holland & Muirden, Akron, OH.

For Carlos Warner, Defendant (15-05115-amk): Anthony J. DeGirolamo, Canton, OH.

For Margaret Katie Warner, aka Katie Warner, aka Maragret K Murdoch, Debtor (14-52325-amk): Gregory L Hail, Holland & Muirden, Akron, OH.

For Marc P. Gertz, Trustee: Peter G. Tsarnas, Goldman & Rosen, Ltd., 11 South Forge Street, Akron, OH.

Judges: ALAN M. KOSCHIK, United States Bankruptcy Judge.

Opinion by: ALAN M. KOSCHIK

Opinion

[*583] MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Marc P. Gertz, the duly-appointed Chapter 7 trustee (the "Trustee") in the underlying bankruptcy case in which this adversary proceeding arises, has filed a **[*584]** complaint for declaratory and injunctive relief regarding the right, title, and interest of the parties in the federal

Thrift Savings Plan ("TSP") custodial account of defendant Carlos Warner. Mr. Warner is the husband of debtor Margaret Katie Warner (the "Debtor"). The Debtor filed a complaint for divorce against Mr. Warner prior to her Chapter 7 petition. As of the petition date, the **[**2]** Ohio domestic relations court had not entered any domestic relations order approving a property settlement between the Debtor and her husband, including any "qualifying retirement benefits court order" ("QRBCO") (more fully defined, *infra*). The Trustee asserts that this posture allows him to stand in the shoes of the Debtor, and ultimately receive the funds from the TSP account to be distributed to the Debtor in the divorce, without running afoul of either the anti-alienation provision of the TSP's governing statute, or the exemptions applicable to tax-advantaged retirement accounts under Ohio law and federal bankruptcy law. The Debtor and the United States of America (the "United States"), on behalf of its defendant agency, the Internal Revenue Service (the "IRS"), each filed answers contesting the Trustee's claims.

Currently before the Court are the motion for partial summary judgment by the United States (Docket No. 15)[1] (the "United States Motion") and the motion for summary judgment by the Trustee (Docket No. 17) (the "Trustee Motion"), both filed on March 11, 2016. On March 25, 2016, the United States filed a response to the Trustee Motion and the Trustee filed a response to the **[**3]** United States Motion (Docket Nos. 18 and 19, respectively). The United States and Trustee each filed replies in support of their position on April 1, 2016. (Docket Nos. 20 and 23, respectively.) At an April 4, 2016 preliminary hearing on the motions, the Debtor's counsel announced that the Debtor had chosen not to provide additional briefing and would rest on the briefs of the United States filed in opposition to the Trustee's Motion, as well as the United States' Motion, which essentially sought judgment in the Debtor's favor. At the request of the parties, the Court later conducted an oral argument on May 9, 2016.

The collection of issues presented by the six briefs and subsequent oral argument in this matter can be summarized thus:

> (1) Whether the Debtor had a beneficial interest in the TSP account by virtue of her status as Mr. Warner's designated beneficiary;
>
> (2) Whether Ohio domestic relations law grants a debtor a present interest in all or a portion of her spouse's retirement plan assets upon the filing of a divorce action;
>
> (3) Whether a debtor's interest in a spouse's TSP account after filing for divorce but prior to the entry of a QRBCO is property of the estate pursuant to *11 U.S.C. § 541* **[**4]** , or is excluded from property of the estate pursuant to *11 U.S.C. § 541(c)(2)*;
>
> (4) Whether a debtor's interest in a spouse's TSP account after filing for divorce but prior to the entry of a QRBCO can be exempted from the bankruptcy estate pursuant to *11 U.S.C. § 522*; and
>
> **[*585]** (5) Whether it is legally permissible for a bankruptcy estate trustee to use a QRBCO under the TSP's enabling statute to effect an assignment of benefits in a TSP custodial account to bankruptcy estate administered by such trustee.

JURISDICTION AND VENUE

This Court has jurisdiction over this adversary proceeding pursuant to *28 U.S.C. § 1334* and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. Venue is proper pursuant to *28 U.S.C. § 1409(a)*. This is a core proceeding pursuant to *28 U.S.C. § 157(b)(2)(B)*, *(E)*, and *(O)* and the Court has authority to enter a final judgment.

SUMMARY JUDGMENT STANDARD

In bankruptcy cases, including adversary proceedings, a party may move for summary judgment at any time before 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders otherwise. *Fed. R. Bankr. P. 7056* (otherwise incorporating *Fed. R. Civ. P. 56*), *see also Fed. R. Bankr. P. 9014(c)*. When a party so moves, **[**5]** the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also*

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[1] The complaint against the United States was dismissed on grounds of ripeness on June 16, 2016. However, the United States has not been dismissed as a party and its motion for partial summary judgment implicates matters that are ripe for adjudication, not the Trustee's claims under *11 U.S.C. § 505* that were unripe. The United States Motion therefore was not withdrawn or mooted by the order dismissing the complaint against the United States.

Celotex Corporation v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A Plaintiff movant must establish all essential elements supporting its claim in this fashion; a defendant must establish that any one (or more) essential elements of Plaintiff's claim fails, or establish all elements of one or more of defendant's affirmation defenses, in order to obtain a defense judgment by summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Evidence presented in support of summary judgment is viewed in the light most favorable to the non-moving party "drawing all reasonable inferences in its favor." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, if a moving party meets its burden to establish a lack of genuine dispute as to a material fact, the burden then shifts to the non-moving party to "come forward with evidence which would support a judgment in its favor." Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(e). In responding in this way to a motion for summary judgment, the non-moving party may not rely on a "mere scintilla of evidence" in support of its opposition to the motion. There must be enough evidence presented in which a jury could reasonably find for the non-moving party. Zenith, 475 U.S. at 586.

In this **[**6]** adversary proceeding, and on the cross-motions for summary judgment currently before the Court, the parties are of the unanimous opinion that summary judgment is appropriate here without the need for a trial. The Court agrees. The disputes before the Court concern only the correct legal conclusions based on undisputed facts.

UNDISPUTED FACTS AND PROCEDURAL HISTORY

The parties submitted a substantial stipulated record for the Court to take under advisement, including exhibits. (Docket No. 12.) The following facts are derived from those stipulations, stipulated exhibits, and the Court's own docket.

[*586] The Debtor married Carlos Warner, also a defendant in this action, on or about August 20, 2005. She filed a complaint for divorce against him in the Domestic Relations Division of the Summit County Court of Common Pleas (the "State Court") on August 12, 2013.

Mr. Warner works as a public defender for the Office of the Federal Public Defender for the Northern District of Ohio, and is thus an employee of the United States Government. Through that employment, he is a participant in the Thrift Savings Plan ("TSP"), which is a defined-contribution retirement plan for federal employees. Mr. Warner has **[**7]** contributed a custodial account in his name held within the TSP. As of September 3, 2013, when Mr. Warner filed an Affidavit of Property with the State Court, he estimated that the balance in his TSP account was $101,000. (Docket No. 12 at ¶ 14 and Ex. C.) In the affidavit, Mr. Warner described the account as a "401K" account. *Id.*

Mr. Warner opened his TSP account on or about September 19, 2005, thirty days after he married the Debtor. The Debtor has never made any direct contributions into Mr. Warner's TSP account.

Mr. Warner, who is still living, has designated the Debtor as the primary beneficiary of his interest in the TSP account.

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on September 4, 2014. Marc P. Gertz was duly appointed the Chapter 7 trustee for the estate of the Debtor pursuant to designation of the United States Trustee.

The Trustee filed his complaint in this adversary proceeding on October 13, 2015. In it, he alleged that the "equitable claim to an equal division and distribution of the marital property" is property of the estate (Compl. ¶ 8), and that the Trustee was entitled to an order directing distribution of such property interest to the Trustee. (Compl. ¶ 9). The **[**8]** Trustee's complaint further asks this Court "to enter its order authorizing and empowering the trustee to execute a QDRO directing distribution of such funds to the estate and compelling the defendant, Todd Warner, to join in such Qualified Domestic Relations Order."[2] (Compl. ¶ 12.)

The United States filed its answer on November 10, 2015. The Debtor filed her answer on November 19, 2015. Mr. Warner filed an answer much later, on March 7, 2016, but did not materially participate in this adversary proceeding.

Following a further pretrial after the close of discovery,

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[2] The Court presumes that the Trustee meant to refer to a QRBCO, not a "qualified domestic relations order" or "QDRO," which is the domestic relations transfer device applicable to private pension and retirement plans governed by ERISA. *See* pages 9-10, *infra*.

the Court entered a scheduling order setting simultaneous deadlines for stipulations, dispositive motions, response briefs, and replies. The Court informed Mr. Warner that his participation in the dispositive motion briefing was not necessary, and Mr. Warner did not file or respond to any dispositive motions. The United States and the Trustee each filed dispositive motions, filed responses to each other's motion, and filed replies in support of their own. The United States also filed, on April 1, 2016, its Motion to Dismiss the Second Claim for Relief in the Trustee's Complaint directed directly at the United States **[**9]** IRS.[3]

[*587] At the request of the parties, the Court held an oral argument on the cross-motions for summary judgment on May 9, 2016. At the conclusion of the oral argument, the Court took the matter under advisement.

LEGAL ANALYSIS

As in all bankruptcy cases of individual debtors, the Court must determine what legal or equitable interests the Debtor had in property as of the commencement of her case, which interests in her property became property of the bankruptcy estate that the Trustee may administer, and which of those assets may be exempted from the estate and claims of the Debtor's creditors. More specifically, the Court here is called upon to answer those questions with respect to the Debtor's rights to her share of her husband's retirement account after filing a divorce action but before effectuating a division of that account via a transfer of assets authorized by a QRBCO, the form of order specifically provided for division of TSP accounts in divorce cases by the governing statute and regulations.

The Court undertakes these inquiries in this case by examining the distinct forms of interests various parties argue the Debtor had as of the commencement of the case in the TSP account assets. **[**10]** First, whether the Debtor had a beneficial interest in the TSP account assets by virtue of her designation by Mr. Warner as a beneficiary. Second, whether the Debtor had acquired a present interest in the Plan assets, or as the Trustee argues, a mere equitable claim to a distribution from marital assets pursuant to Ohio domestic relations law. The proper legal characterization of these distinct rights informs the further inquiries about what is or is not property of the bankruptcy estate and what property of the bankruptcy estate is exempt.

I. The Debtor's Beneficial Interest in the TSP Account Assets Is Not Property of the Estate.

A. The Debtor Is a Beneficiary of Mr. Warner's TSP Plan Account Because She Is, and Was at All Relevant Times, the Designated Beneficiary.

The parties have stipulated that Mr. Warner expressly designated the Debtor as a beneficiary of the TSP account pursuant to *5 U.S.C. § 8424(c)*. (Docket No. 12 at ¶10.) Unlike private retirement plans governed by the *Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461* ("ERISA"), the TSP's analogous, but not identical, governing statute, which is codified primarily at *5 U.S.C. §§ 8431-8440f*, but also in other provisions within Chapter 84 of Title 5, *5 U.S.C. §§ 8401 et seq.* (the "TSP Statute"), does not expressly require a spouse to be **[**11]** a plan participant's beneficiary.

This case varies slightly in this respect from the facts of *In re Lawson, Adv. Proc. No. 15-05094, Docket No. 44, 570 B.R. 563, 2017 Bankr. LEXIS 884 (Bankr. N.D. Ohio Mar. 31, 2017)* (Koschik, J.), in which the Court relied not only on the actual beneficiary designation, but also ERISA's statutory imperative that spouses be deemed presumptive beneficiaries. *Lawson*, Docket No. 44 at 12-13. Nevertheless, while the TSP Statute lacks this feature, the fact that the Debtor is and has at all relevant times been the beneficiary of Mr. Warner's TSP Account is sufficient for the **[*588]** Court to conclude that the Debtor had a beneficial intent in Mr. Warner's TSP Account within the meaning of the TSP Statute as of the commencement of the Debtor's bankruptcy case. Indeed, the parties' stipulations makes that legal conclusion clear. (Docket No. 12 at ¶ 10.)

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[3] The United States' motion to dismiss was confined to the Trustee's direct claims against the IRS for tax determination under *11 U.S.C. § 505*. The Trustee did not oppose the motion to dismiss. The Court granted the United States' motion to dismiss on June 16, 2016, specifically on the ground that the claims in the Complaint against the IRS directly for determination of tax liability under *11 U.S.C. § 505* were not ripe for decision. (The United States had asserted multiple additional grounds for dismissal.) The United States' separately-filed motion for summary judgment was unaffected by this dismissal, since it concerned the separate issues in the Complaint that are ripe for adjudication.

B. The Debtor's Beneficial Interest in the TSP Account Assets Is Excluded From the Bankruptcy Estate Pursuant to *11 U.S.C. § 541(c)(2)*.

The Bankruptcy Code provides that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a [bankruptcy case]." *11 U.S.C. § 541(c)(2)*. This provision, expressly referenced in *Bankruptcy Code Section 541(a)* as an exception to the property constituting the estate, "entitles a debtor **[**12]** to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *Patterson v. Shumate, 504 U.S. 753, 758, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992)*. The Thrift Savings Fund[4] is such a trust subject to an anti-alienation clause. *5 U.S.C. § 8437(g)* expressly provides that the Thrift Savings Fund holds employee and member funds in trust for such members. Another provision of *Section 8437* provides that "sums in the Thrift Savings Fund may not be assigned or alienated and are not subject to execution, levy, attachment, garnishment, or other legal process." *5 U.S.C. § 8437(e)(2)*. *Patterson* and *11 U.S.C. § 541(c)(2)* form the backbone of the United States' primary argument in its motion for partial summary judgment and supporting briefing, which urges that the Debtor's interest in Mr. Warner's TSP account are properly excluded from property of her bankruptcy estate and may not be distributed to creditors by the Trustee.

There are exceptions to the anti-alienation provision of *5 U.S.C. § 8437(e)(2)* provided for in *Section 8437(e)(3)*. The only one of these that is potentially relevant to the issues currently before the Court is amounts payable to other persons under *5 U.S.C. § 8467*. That section provides that the TSP may pay funds from an employee's, member's, or annuitant's account "to another person if **[**13]** and to the extent expressly provided for in the terms of—(1) any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." *5 U.S.C. § 8467(a)(1)*. Federal regulations promulgated related to that section further introduce the concept of a "qualifying retirement benefits court order" previously defined as a ("QRBCO"). *5 C.F.R. § 1653.2*.[5] This regulation, which no party to this adversary proceeding has challenged, states that to be enforceable against the TSP, a retirement benefits court order must meet certain requirements. It further contains a list of certain characteristics that an order cannot have if it is to be honored by the **[*589]** TSP as a QRBCO. The QRBCO mechanism is analogous, but not identical, to the "qualified domestic relations order" (QDRO) mechanism in ERISA. *Compare 5 C.F.R. 1653.2 with 29 U.S.C. § 1056(d)(3)*. *See also In re Lawson*, Adv. Proc. No. 15-05094, Docket No. 44 at 2, 12, and 15 (Bankr. N.D. Ohio Mar. 31, 2017) (Koschik, J.).

If an order qualifies as a QRBCO, then the anti-alienation provision of *5 U.S.C. § 8437(e)(2)* would not prohibit the distribution of plan assets to an alternate payee who was **[**14]** either a divorcing spouse or surviving child. However, it is important to emphasize that the QRBCO mechanism is an exception to the general anti-alienation rule.[6] The Trustee concedes that if the domestic relations court had already entered a QDRO (or, presumably, a QRBCO), *11 U.S.C. § 541(c)(2)* would apply and the transfer restrictions would be enforceable. (Docket No. 19 at 5.)

In the Court's view, the rule of *Patterson* applies to this case as well. While *Patterson* involved an anti-alienation provision in an ERISA retirement plan, the reasoning of *Patterson* applies with equal force to funds in the Thrift Savings Plan, even though the TSP is not governed by ERISA. *See, e.g., In re O'Neal, 462 B.R. 324, 331 (Bankr. D. Mass. 2011)* (citing *Patterson* and proceeding to hold that "[f]unds held in a federal Thrift Savings Plan likewise are statutorily protected against assignment or attachment, and are excluded from the bankruptcy estate."). The TSP shares many functional

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[4] The Thrift Savings Fund is a specific fund within the Treasury of the United States established by *5 U.S.C. § 8437(a)*, and it is where the assets attributable to members' custodial accounts are held. The Court observes that although the United States became involved in this action as a named defendant subject to tax determination claims asserted against the IRS, a division of the Treasury of the United States, it also has an incidental, but important interest in this adversary proceeding as, essentially, the sponsor, fiduciary, and custodian of the TSP, a portion of whose assets the Trustee seeks to obtain for the bankruptcy estate in this case.

[5] *See generally 5 C.F.R. §§ 1653.1-1653.5*.

[6] *See* Section III, *infra*, regarding the Trustee's argument that the Court can and should grant him leave to seek from the State Court entry of a QRBCO naming him as a beneficiary of Mr. Warner's TSP account on the grounds that he has squeezed his feet into the Debtor's shoes.

characteristics with ERISA plans. Most significantly for the issues currently before the Court, both the TSP and ERISA contain mandatory anti-alienation provisions, *compare* 5 U.S.C. § 8437(e)(1) *with* 29 U.S.C. § 1056(d)(1) (TSP directly provides that benefits may not be assigned or alienated, while ERISA requires all ERISA-qualified pension plans to provide **[**15]** that the benefits may be assigned or alienated). The TSP also provides for tax treatment of the Thrift Savings Fund as a trust under *Section 401(a) of the Internal Revenue Code*, 5 U.S.C. § 8440, similar to many ERISA plans, such as the familiar 401(k) plans provided by many private employers. While both ERISA and the TSP Statute are extraordinarily complex and detailed, and there are doubtless other points on which they differ, the anti-alienation and trust provisions are similar enough that the Court is comfortable applying caselaw on ERISA to the TSP on those issues. This matters here because caselaw on ERISA is considerably more extensive and developed than caselaw specifically on the TSP Statute. The United States' counsel acknowledged this at oral argument, and the Court's subsequent research confirms as much.

Patterson held that Section 541(c)(2)'s exclusion of trusts containing restrictions on transfers enforceable under applicable nonbankruptcy law from property of the estate extends to a debtor's interests as a plan participant. *Patterson's* reasoning, however, was not limited to plan *participants*, but rather extended to "*any* interest [held by a debtor] in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy **[**16]** law." Patterson v. Shumate, 504 U.S. at 758 (emphasis added). Indeed, the statute itself refers to "a *beneficial* interest of the debtor in a trust." 11 U.S.C. § 541(c)(2) (emphasis added).

[*590] Therefore, the Court concludes that the beneficial interest of the Debtor in her husband's TSP account is excluded from property of the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2), as interpreted by the U.S. Supreme Court in Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992).

II. The Debtor Has a Contingent Interest in a Share of the TSP Account Assets Under Ohio Domestic Relations Law That Is Exempt From the Trustee's Administration Under Both Ohio and Federal Exemption Statutes.

The Trustee's initial argument in his Motion and Complaint is that the Debtor has no vested beneficial rights in the Plan that are excepted from the bankruptcy estate pursuant to Section 541(c)(2) because the State Court has not entered a QRBCO, Mr. Warner remains living, and the Debtor had no other interest in the TSP account assets. The Court has rejected those arguments in Section I, *supra*, and on that basis has concluded that the Debtor's beneficial interest in the Plan is excluded from the bankruptcy estate. This conclusion could, and perhaps should, end the Court's inquiry.

However, the Trustee's now rejected premise led to his argument that even though **[**17]** the Debtor had no vested beneficial interest to assets in the Plan, she nevertheless had an equitable claim to a distribution of TSP account assets, along with other marital assets, as a divorcing, but not yet divorced spouse. The Trustee asserts that this equitable claim is property of the bankruptcy estate notwithstanding Section 541(c)(2)'s exclusion of beneficial interests in a trust subject to an anti-alienation clause. The Trustee further contends that this equitable claim to a distribution of marital assets is not exempt pursuant to 11 U.S.C. § 522. In order to address the Trustee's arguments comprehensively, the Court analyzes the Debtor's rights in the TSP account assets as a divorcing spouse and the extent to which such rights are exempt under Section 522.

A. Upon the Filing of Her Divorce Action, the Debtor Acquired a Contingent Interest in Her Husband's Retirement Plan As a Marital Asset Pursuant to Ohio Domestic Relations Law.

In Ohio divorce proceedings, "the court shall ... determine what constitutes marital property and what constitutes separate property ... [and] shall divide the marital and separate property equitably between the spouses." R.C. 3105.171(B). When undertaking this determination, "the court has jurisdiction over **[**18]** all property, excluding the social security benefits of a spouse ... in which one or both spouses have an interest." *Id.* "Marital property" includes, *inter alia*, "[a]ll real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i). The parties have stipulated that Mr. Warner opened his TSP account after he married the Debtor (Docket No. 12 at ¶¶ 5 and 8), so all of his contributions to his TSP account were made during their marriage.

The Trustee argues that the divorce complaint creates a mere equitable *claim* and thereby attempts to separate the divorcing debtor's rights from the nature of the underlying assets. This sleight of hand suggests that the divorcing debtor's rights are reduced to claims -- essentially either choses in action or accounts receivable -- assets that would require their own designation in an applicable exemption statutes **[*591]** in order to be exempt. The Trustee's central contention is that the Debtor did not have an interest in the TSP account assets themselves, which the Trustee concedes would be exempt. **[**19]** (Docket No. 24 at 8.) Instead, the Trustee argues that the Debtor had a domestic relations law claim for equitable distribution of marital assets, which was at that point sufficiently undifferentiated and inchoate that it was not specifically an interest in the Plan assets. "Without a divorce decree or the issuance of a QDRO, the claim for retirement benefits are [sic] nothing more than a claim for equitable distribution." (Docket No. 17 at 9.) "Debtor has nothing more than an equitable claim." (Docket No. 24 at 7.) Thus, according to the Trustee's argument, "the Trustee is *not* demanding turnover of any portion of the Thrift Savings Plan." (Docket No. 17 at 10.) The Trustee contends that he is simply seeking to liquidate a domestic relations law claim—an equitable claim arising under Ohio state law—that he further contends could, somehow, be satisfied by a distribution of assets from a TSP trust account that is otherwise protected from the claims of creditors by federal law.

However, Ohio bankruptcy courts have interpreted R.C. 3105.171(B) to mean that upon a spouse filing for divorce, each spouse acquires a contingent *interest* in the marital property, not merely a generalized equitable *claim*. In re Greer, 242 B.R. 389, 395-96 (Bankr N.D. Ohio 1999); In re Street, 395 B.R. 637, 643-44 (Bankr. S.D. Ohio 2008); **[**20]** *see also* In re Dzielak, 435 B.R. 538, 546 (Bankr. N.D. Ill. 2010) (applying Illinois law).[7] This contingent interest arises pursuant to state domestic relations law independent of any vested beneficial interest arising from the TSP Statute or, in other cases, from ERISA, the terms of a retirement plan, and/or a domestic relations order. It applies to all of the marital property, regardless of the name in which such property may be titled, and is not limited to retirement plan assets. However,

> such a property interest is limited. Specifically, given the fact that neither spouse is assured of receiving any specific item of 'marital property,' the Court holds that upon a spouse filing for divorce, and until a formal distribution of the parties' property is made, the interest of the spouse acquires in the other's separately titled property is strictly contingent, therefore subject to later divestment if the state court with jurisdiction over the parties' property does not enter an order awarding the property to a non-title holding spouse. The effect of this is that although contingent interests are clearly property of the bankruptcy estate pursuant to § 541(a), the contingency of the interest may prevent the bankruptcy trustee from ever utilizing the **[**21]** property for the benefit of the bankruptcy estate given the fact that federal law clearly holds that the extent to which an interest in property is limited in the hands of the debtor, it is equally limited in the hands of the bankruptcy estate.

In re Greer, 242 B.R. at 396-97 (citations omitted).

While this interest is contingent, it is not speculative; it is a present interest in each item of marital property. *Greer* found that "it was the intention under Ohio law to confer upon a spouse an interest in any property that is or would qualify as 'marital property,' regardless of whether such **[*592]** property was separately titled." *Id. at 396*. Since "neither spouse is assured of receiving any specific item of 'marital property,' ... the interest a spouse acquires in the other's separately titled property is strictly contingent," *id.*, but it does exist.

In this case, where the Debtor filed her bankruptcy petition after filing her divorce action, the Debtor had just such a present, contingent interest in the marital property, in particular the TSP account assets, as of the commencement of this case.[8] Therefore, the Trustee cannot avoid the question of whether the Debtor's

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[7] In *Dzielak*, the court noted specifically that the debtor did not raise the argument that her potential interest in the retirement plan at issue was not property of the bankruptcy estate pursuant to Section 541(c)(2). 435 B.R. at 546. Although silent on the point, the same seems to be true in *Greer* and *Street* where the opinions do not address the issue.

[8] For the reasons set forth in Section I of this Memorandum Opinion, the Debtor actually had more than a present contingent interest in the TSP account assets. She had a vested beneficial interest in those assets. The point here is that even if she did not have such vested beneficial interest, for example if she were not a named beneficiary, Ohio domestic relations law would have nevertheless given her upon filing the divorce action a present contingent interest in marital property capable of exemption if such assets qualified under applicable exemption statutes.

interest in that property is subject to exemption. **[**22]**

B. The Debtor's Contingent Interest in the Plan Is Exempt Under Both Ohio and Federal Exemption Statutes Applicable in this Bankruptcy Case.

An individual debtor may exempt certain interests in property from the estate. *See* 11 U.S.C. § 522. Initially, there are two alternative categories of exemptions that debtors may choose, the so-called "state" exemptions available to any debtor (bankrupt or not) by state law, or the "federal" exemptions set out in 11 U.S.C. § 522(d). However, as permitted by 11 U.S.C. § 522(b)(2), Ohio has specifically provided that Ohio-domiciled debtors are not eligible to claim the federal exemptions under 11 U.S.C. § 522(d). R.C. 2329.662. Therefore, the exemptions applicable to individual debtors in Ohio are uniformly those set forth in 11 U.S.C. § 522(b)(3), which incorporates Ohio's exemption statutes.[9] Those exemptions include an exemption, with no dollar limitation, for a debtor's "rights to or interest in a pension, benefit, annuity, retirement allowance, or accumulated contributions," R.C. 2329.66(A)(10)(a) and a debtor's "rights or interests in the assets held in, or to directly or indirectly receive any payment or benefit under, any individual retirement account [or] individual retirement annuity," R.C. 2329.66(A)(10)(c). These exemptions expressly apply to any "alternate payee under a qualified domestic **[**23]** relations order (QDRO) or other similar court order." R.C. 2329.66(A)(10)(f). Ohio law provides a further exemption, also with no dollar limitation, for "[a]ny other property that is specifically exempted from execution, attachment, garnishment, or sale by federal statutes other than [the Bankruptcy Code." R.C. 2329.66(A)(17).

Moreover, in all bankruptcy cases in which the debtor uses the Section 522(b)(3) exemptions, regardless of what state exemptions may be provided and incorporated by 11 U.S.C. § 522(b)(3)(A), the Bankruptcy Code also allows a debtor to exempt "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under *section 401*, 403, *408*, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. § 522(b)(3)(C). The TSP statute expressly provides that "the Thrift Savings Fund shall be treated as a trust described **[*593]** in *section 401(a)* of [the Internal Revenue Code]," thereby meeting that definition. 5 U.S.C. § 8440(a)(1).

The contingent interest created by R.C. 3105.171(B) is the fatal flaw in the Trustee's argument that the Debtor did not have an interest in the TSP account assets as of the date of her petition in which she could claim an exemption. Because the contingent interest arises upon the filing of a complaint for divorce and is not dependent on any later order of **[**24]** any court, "upon the commencement of the divorce proceeding ... [the debtor] obtained an interest in the retirement plan and retained that interest as of the petition date, entitling her to utilize the exemption." Street, 395 B.R. at 643.[10] The same result occurs here.

Therefore, even if the contingent interest created by Ohio domestic relations law exists separate and apart from the Debtor's excluded beneficial interest in the Plan account as a result of her designation as a beneficiary, the Debtor may nevertheless exempt that interest from the bankruptcy estate.

The structure of 11 U.S.C. § 522(b)(3) is highly revealing of Congress' policy with respect to the paramount importance of retirement funds not coming into bankruptcy estates: Sections 522(b)(3)(A) and (b)(3)(C) stand at the same level. In other words, even if a state were to (a) require individual debtors to use the § 522(b)(3) exemptions, as Ohio does, and (b) did not include in its own state statutes an exemption for retirement funds held in tax-exempt accounts pursuant to the applicable Internal Revenue Code sections, the Bankruptcy Code would nevertheless exempt such assets. Moreover, since retirement funds exempt under *I.R.C. §§ 401*, 403, *408*, 408A, 414, 457, or 501(a) are also included in the so-called federal exemptions applicable in some **[**25]** states at the election of the debtor, *see* 11 U.S.C. § 522(d)(12), the ultimate lesson

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[9] The applicable state exemptions may vary if a debtor has not lived in Ohio for the 730 days preceding the petition. *See* 11 U.S.C. § 522(b)(3)(A). Because that has not been alleged to be the fact in this case, the Debtor is eligible for the exemptions provided in R.C. 2329.66.

[10] The bankruptcy court in In re Dzielak, 435 B.R. 538 (Bankr. N.D. Ill. 2010) noted that there are some states, such as Connecticut and New York, in which the mere commencement of a dissolution action does not create a legal or equitable interest in either spouse with respect to the other spouse's property. Id. at 547 (distinguishing such states from Illinois, the law of which does create such an interest upon the commencement of a divorce action). However, under the law of Ohio, as in Illinois, such an interest arises as of the commencement of a divorce action.

of the Bankruptcy Code exemption scheme is that no matter what laws a state might enact and no matter what decision a debtor might make in states where debtors may decide between state and federal exemptions, retirement funds governed by those provisions of the Internal Revenue Code will be exempt. The incidental timing of a divorce complaint, a bankruptcy filing, and/or the entry of a divorce decree, domestic relations order, QDRO, or QRBCO does not change the result.

C. The Pennsylvania Cases Relied Upon by the Trustee Are Both Distinguishable and Unpersuasive.

The Trustee cites two cases, both from the Western District of Pennsylvania and from the same line of caselaw, in support of his position. The foundational case of the Trustee's argument is *In re Burgeson, 504 B.R. 800 (Bankr W.D. Pa. 2014)*. In *Burgeson*, many facts were similar to the facts here: a divorce proceeding had been filed but no qualified domestic relations order had been entered therein when the spouse, who was not a participant in the pension plan at issue, filed bankruptcy. The same facts also presented themselves in *Urmann v. Walsh, 523 B.R. 472 (W.D. Pa. 2014)*. Both cases arose from a trustee's **[*594]** objection to exemptions claimed by debtors in **[**26]** ERISA plan assets. In *Burgeson*, the exact type of pension plan at issue was not specified, but the strong implication is that it was a traditional defined benefit pension plan. In *Urmann*, the plan at issue was a 401(k) plan. *Urmann, 2014 Bankr. LEXIS 1673, 2014 WL 1491328 at *1*.

Pennsylvania domestic relations law also appears to follow the same rule as Ohio's with respect to the interests that arise in marital property when a divorce is filed. *See In re McCulley, 150 B.R. 358, 361 (Bankr. M.D. Pa. 1993)* ("the date of entitlement to a spouse with regard to marital property is on the date the divorce is filed").

In both *Burgeson* and *Urmann*, the court held, as the Trustee would have this Court hold, that the debtor had only a claim for equitable contribution under the state's domestic relations law and that such claim was not actually an interest in pension plan assets subject to ERISA (or other federal) anti-alienation protections that the Bankruptcy Code would respect via *11 U.S.C. § 541(c)(2)*, and more important, not subject to bankruptcy exemptions available under *11 U.S.C. § 522(d)(10)* or *(d)(12)*. (Pennsylvania allows debtors to utilize the federal exemptions, and the debtors in both *Burgeson* and *Urmann* did so.)

There is one potentially notable distinction between these Pennsylvania cases and this one: in both *Burgeson* and *Urmann*, the debtor **[**27]** was not only not a participant in the respective pension plan at issue in each case, she was not a beneficiary under the plan at issue, either.[11] This was essential to both holdings. In *Burgeson*,

> Because no QDRO existed as of the Petition Date, and the Debtor was not a participant nor named as a beneficiary of the Pension, the Debtor had no beneficiary interest in the Pension as of the Petition Date; rather, at the time of filing the bankruptcy petition, the Debtor had an interest in a claim for equitable distribution.

Id. at 805. The *Urmann* court expressly followed the logic of *Burgeson*. *See Urmann, 523 B.R. at 479*.

The parties have stipulated that the Debtor in this case is the designated beneficiary of Mr. Warner's interest in his TSP account. As such, even before the entry of a QRBCO, the Debtor here had a beneficial interest in the Plan assets as of the petition date. Therefore, *Burgeson* and *Urmann* are distinguishable on their facts.

The Court is also unconvinced by the reasoning of *Burgeson* and *Urmann*. While *Burgeson* and *Urmann* found their respective debtor's lack of beneficiary status to be an essential issue, *Greer* and *Street* did not turn on the beneficiary status of the nonparticipant spouse. They concluded, instead, that the **[**28]** present, contingent interests in marital assets obtained by operation of domestic relations law upon filing a divorce complaint were sufficient to be considered for exemption under applicable statutes based on the nature of each specific marital asset, not an abstract claim for distribution. The Court adopts the analysis of the two Ohio bankruptcy courts instead of that of the courts from the Western District of Pennsylvania. Even if the Debtor in this case had not already been a beneficiary of the TSP, she would have nevertheless gained a contingent interest in the TSP account assets **[*595]** upon the filing of the divorce action, an interest this Court has

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[11] The debtor's lack of beneficiary status in *Urmann* is not expressly restated in the district court decision, but was found as fact in the bankruptcy court decision below it and was undisturbed on appeal. *See In re Urmann, 2014 Bankr. LEXIS 1673, 2014 WL 1491328, *3 (Bankr. W.D. Pa. Apr. 15, 2014)*.

already concluded is exempt under 11 U.S.C. § 522(b)(3)(C) and R.C. 2329.66(A)(10) and (17).

III. Even if the Debtor Had Only a Claim for Equitable Contribution, the Court Cannot Compel the Debtor or the State Court to Issue a QRBCO With the Trustee as Direct Payee.

The Trustee appears to be aware of the difficulty posed by the exemption issue. Perhaps this is why his Complaint and his legal argument in support of his Motion make an additional extraordinary demand: that the Court enter an order "authorizing and empowering the trustee to execute a QDRO [sic] directing distribution of such **[**29]** funds to the estate and compelling the defendant, Carlos Warner, to join in such Qualified Domestic Relations Order." (Compl. ¶ 12.)

Bankruptcy courts generally avoid invasions into family law matters out of consideration of court economy, judicial restraint, and deference to our state court colleagues and their established expertise in such matters. *In re White, 851 F.2d 170, 173 (6th Cir. 1988)* (quoting *In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985)*). However, in addition to general doctrinal reasons for not intruding upon the domestic relations court process, the TSP Statute does not authorize a QRBCO to a creditor or a creditor's representative.

The Court's equitable powers end where express statutory limits begin. A QRBCO "can require a payment *only* to a spouse, former spouse, child or dependent of a participant." 5 C.F.R. 1653.2(a)(4) (emphasis added).

The Trustee argues that his status a trustee gives him the ability to "stand in the shoes" of the Debtor to obtain a QRBCO pursuant to 11 U.S.C. § 541 and *In re Dively*. (Docket No. 17 at 9.) *Dively* determined that "the fact that a bankruptcy trustee is not specifically identified as an 'alternate payee' or 'beneficiary' under ERISA is of no moment," *522 B.R. at 784*, because of 11 U.S.C. § 105(a) (empowering bankruptcy courts to issue any "order, process, or judgment that is necessary or appropriate **[**30]** to carry out the provisions of [the Bankruptcy Code]") and 29 U.S.C. § 1144(d), which provides that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." *Dively* proceeded to hold that court authorization for the trustee to seek a QDRO was an "order, process, or judgment" under Section 105, and that ERISA did not preclude it. *Id. at 784*. Similar logic might apply to the TSP Statute if *Dively* were correct.

However, the Court does not find *Dively* persuasive on this issue. It is true that 29 U.S.C. § 1144(d) does not limit the application of 11 U.S.C. § 105(a). But that truism ignores a more fundamental point: the Court's equitable powers under Section 105(a) are inherently limited. "While endowing the court with general equitable powers, *section 105* does not authorize relief inconsistent with more specific law." *In re Rohnert Park Auto Parts, Inc., 113 B.R. 610, 615 (B.A.P. 9th Cir. 1990)*; *see also In re Dues, 98 B.R. 434, 437 (Bankr N.D. Ind. 1989)* ("*Section 105* ... may only be used as a basis for the court's action where other applicable law does not address the situation."). The Court cannot use its equitable powers to add a new category of persons eligible to be alternate payees under 5 C.F.R. § 1653.2 when that list is already set forth in that regulation.

CONCLUSION

The Debtor's interest in Mr. Warner's TSP account and the assets therein by **[*596]** virtue of her status as a beneficiary **[**31]** were excluded from the estate by operation of 11 U.S.C. § 541(c)(2). In addition, the Debtor's contingent interest in the TSP account assets that arose by virtue of her divorce filing in Ohio state court was subject to exemption pursuant to 11 U.S.C. § 522(b)(3)(C) and R.C. 2329.66(A)(10) and (17).

The Court will enter a separate form of judgment granting the United States' motion for partial summary judgment and denying the Trustee's motion for summary judgment.

IT IS SO ORDERED.

Dated: April 14, 2017

/s/ Alan M. Koschik

ALAN M. KOSCHIK

U.S. Bankruptcy Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in B.R.]

[*none] SUMMARY JUDGMENT IN FAVOR OF DEBTOR DEFENDANT MARGARET KATIE WARNER AND DEFENDANT THE UNITED STATES OF AMERICA ON THE CROSS-MOTIONS FOR

SUMMARY JUDGMENT FILED BY PLAINTIFF TRUSTEE MARC P. GERTZ AND THE UNITED STATES OF AMERICA

Consistent with the Memorandum Decision (Docket No. 29) concerning the cross-motions for summary judgment of Plaintiff Marc P. Gertz, Trustee (Docket No. 17) and Defendant The United States of America (Docket No. 15), both filed on March 11, 2016, and the findings and conclusions stated therein,

IT IS HEREBY ORDERED THAT:

1. The Plaintiff Trustee Marc P. Gertz's Motion for Summary Judgment is **DENIED**.

2. The Defendant The United States of America's Motion for Summary Judgment is **GRANTED [**32]** .

3. The interests of Defendant Debtor Margaret Katie Warner in the TSP account held by her ex-husband, Defendant Carlos Warner, are **DECLARED** to be **EXCLUDED** from the Debtor's bankruptcy estate pursuant to *11 U.S.C. § 541(c)(2)*.

4. To the extent any interest of the Debtor in Carlos Warner's TSP account is property of the estate notwithstanding *11 U.S.C. § 541(c)(2)*, such interests are **EXEMPT** pursuant to *11 U.S.C. § 522(b)(3)(C)* and *RC 2329.66(A)(10)* and *(17)*.

5. Judgment is hereby entered against the Plaintiff Trustee with respect to his claim for execution of a Qualified Retirement Benefits Court Order to effectuate transfer of the Debtor's interests in Defendant Carlos Warner's TSP account.

6. Each party to this adversary proceeding shall bear their own costs and attorneys' fees.

This document was signed electronically on April 14, 2017, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: April 14, 2017

/s/ Alan M. Koschik

ALAN M. KOSCHIK

U.S. Bankruptcy Judge

End of Document

In re Jeffers

United States Bankruptcy Court for the Northern District of Ohio, Eastern Division

June 30, 2017, Decided

Case No. 14-52328, Chapter 13

Reporter
572 B.R. 681 *; 2017 Bankr. LEXIS 1820 **

In re MARK D. JEFFERS, Debtor.

Case Summary

Overview
HOLDINGS: [1]-A debtor's ex-wife was entitled to an order under *11 U.S.C.S. § 362(d)* which lifted the stay that was imposed when her ex-husband declared Chapter 13 bankruptcy so she could proceed in an Ohio court to obtain a qualified domestic relations order enforcing provisions in her divorce decree which awarded her half the money in her ex-husband's cash balance plan and a portion of the money that was in her ex-husband's 401(k) plan; [2]-Money in those plans which the debtor was ordered to pay his ex-wife was not property of his bankruptcy estate under *11 U.S.C.S. § 541* because his ex-wife was the equitable owner of those funds, and there was "cause" under *§ 362(d)* for lifting the stay because it was preventing his ex-wife from gaining access to the funds; [3]-There was no merit to the debtor's claim that the debt he owed his ex-wife was discharged under *11 U.S.C.S. § 523(a)(15)*.

Outcome
The court stated that it would enter an order granting the ex-wife's motion for relief from the automatic stay.

Counsel: **[**1]** For Mark David Jeffers, Debtor: Bruce Hall, Medina, OH.

Trustee: Keith Rucinski, Chapter 13 Trustee, Akron, OH.

Judges: ALAN M. KOSCHIK, United States Bankruptcy Judge.

Opinion by: ALAN M. KOSCHIK

Opinion

[*682] MEMORANDUM DECISION ON MOTION FOR RELIEF FROM STAY

Before the Court is the Motion for Relief From Stay to Proceed in Domestic Relations Court (Docket No. 79) (the "Motion") filed by Lisa Jeffers (the "Movant"), the former wife of debtor-respondent Mark D. Jeffers (the "Debtor"). The Movant asks the Court to lift the automatic stay, pursuant to *11 U.S.C. § 362(d)*, to allow her to proceed in state court to obtain a qualified domestic relations order ("QDRO") entitling her to distribution of certain funds from her former husband's retirement plans, including a "Cash Balance Plan through Hewitt Associates" and his 401(k) plan with Frontier Communications. For the reasons set forth herein, the Motion will be granted.

JURISDICTION

This Court has jurisdiction to enter a final judgment in this contested matter pursuant to *28 U.S.C. § 1334* and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under *28 U.S.C. § 157(b)(2)(G)* and *(O)*.

FACTUAL BACKGROUND

The material facts are neither complex nor **[**2]** disputed.

On August 8, 2012, the Lorain County, Ohio Court of Common Pleas' Domestic Relations Division entered a final decree of divorce between the Debtor and the Movant. Among other property division provisions, that decree provided as follows:

> [The Movant] shall receive a Qualified Domestic Relations Order entitling [her] to an interest in the [Debtor's] Cash Balance Plan through Hewitt Associates. This plan shall be evaluated by QDRO Consultants and any necessary Qualified Domestic Relations Order shall be prepared by QDRO

> Consultants . . . . [The **[*683]** Movant's] interest shall be an amount equal to the actuarial equivalent of fifty percent (50%) of the marital portion of the [Debtor's] accrued benefit under the Plan as determined by QDRO Consultants.
> . . . .
>
> [The Debtor] shall retain as his own, free and clear from any claim of [the Movant], his 401 (K) with Frontier Communications except that there shall be transferred from the Frontier Communications 401(K) the sum of Thirty-Three Thousand Nine Hundred Twelve and 00/100 Dollars ($33,912.00) to equalize the division of [the Movant's] IRA [with Fidelity] and [the Debtor's] 401(K). [The Movant's] share of [33,912.00) shall be credited with **[**3]** gains and debited with losses which occur between the date of the filing of this Judgment Entry Decree of Divorce and the date of transfer by the Plan Administrator.

While it is unclear whether any such order was ever prepared during the two years between the entry of the divorce decree and the Debtor's chapter 13 bankruptcy filing on September 4, 2014, the parties agree that no qualified domestic relations order (QDRO) was ever entered by the state court.

On October 22, 2014, the Movant filed a proof of claim that did not include amounts related to the division of the Debtor's retirement plans. The Movant's proof of claim did reference an unknown amount of "stock," apparently in reference to a separate obligation under the divorce decree to divide equally certain Frontier Communications stock options. The claims bar date passed on January 14, 2015. The Court confirmed the Debtor's chapter 13 plan on October 23, 2015.

On December 14, 2015, the Movant filed the instant motion for relief from stay authorizing her to proceed in domestic relations court for the purposes of allowing that court to enter one or more QDROs necessary to effectuate a division of the Debtor's retirement accounts, **[**4]** as well as to receive a share of the Frontier Communications stock options and $4,000 in connection with the sale of the marital residence. (Mot. at 2.) The Debtor filed a response that simply registering his objection. (Docket No. 82.) The Court held a preliminary hearing on January 7, 2016. At the hearing, the Court denied the motion in part, denying it to the extent it dealt with the proceeds from the sale of the marital residence, since that issue had been previously resolved by an agreed order. The Court's order (Docket No. 83) also scheduled further briefing on the issue of the Movant's request to proceed to a QDRO in domestic relations court, as well as on the issue of the Frontier Communications stock options. Pursuant to that order, and the Court's January 26, 2016 Scheduling Order (Docket No. 84), the Movant submitted a brief in support of her Motion (Docket No. 87) on February 29, 2016, and the Debtor submitted a brief in opposition (Docket No. 88) on March 31, 2016.

The Court held oral argument on the Motion on April 7, 2016. At that hearing, the Movant voluntarily withdrew the Motion with respect to the Frontier Communications stock options. The Court heard the arguments **[**5]** of both parties and then scheduled further supplemental briefing before taking the matter under advisement. (Docket No. 89.) The Movant filed her supplemental brief in support (Docket No. 91) on May 6, 2016. The Debtor filed his supplemental brief in opposition (Docket No. 92) on May 27, 2016. The Court then took the matter under advisement.

LEGAL ANALYSIS

A. Standard For Relief From Stay Pursuant to *11 U.S.C. § 362(d)*.

The Movant's Motion seeks relief from the automatic stay pursuant to *Section 362(d) of the Bankruptcy Code* **[*684]** so that she may return to the state domestic relations court and obtain a QDRO in order to obtain a share of the Debtor's retirement accounts consistent with the prepetition divorce decree in the parties' divorce action notwithstanding the Debtor's pending chapter 13 bankruptcy case. While motions for relief from stay are common before this Court, the Motion is not a typical one. Instead of a secured lender seeking relief so as to pursue its collateral during the pendency of a bankruptcy case, here the Movant argues that she has equitable rights to certain property whose legal title is held by the Debtor.

The Movant seeks relief "for cause," pursuant to *11 U.S.C. § 362(d)(1)*, which provides that relief from the stay may be granted "for cause, **[**6]** including the lack of adequate protection of an interest in property of such party in interest." "Cause" is not defined by the Bankruptcy Code. *In re Bogdanovich, 292 F.3d 104, 110 (2d Cir. 2002)*. It may include lack of adequate protection as set forth in the statute, but that is not the only basis for finding cause to grant relief from stay. 3

COLLIER ON BANKRUPTCY ¶ 362.07[3] (16th ed. 2013). Cause may exist in a wide variety of circumstances, such as when nonbankruptcy litigation affecting multiple parties was ready for trial when the bankruptcy stay was imposed, *In re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986)*, or to allow an embezzlement victim to pursue embezzled property held by a debtor. *In re Newpower, 233 F.3d 922, 935 (6th Cir. 2000)* (Batchelder, J., concurring, but writing for the court on the issue of relief from stay). As noted by the Movant in her supplemental brief (Docket No. 91), the determination of cause for relief from stay in these peculiarly specific circumstances lies with the bankruptcy court's discretion on case-by-case basis. *In re Laguna Associates Ltd. Partnership, 30 F.3d 734, 737 (6th Circ. 1994)*; *In re J&M Salupo Development Co., Inc., 388 B. R. 809, 812 (Bankr. N.D. Ohio 2008)*. "'[C]ause' is a broad and flexible concept which permits a bankruptcy court, as a court of equity, to respond to inherently fact-sensitive situations." *In re River Estates, Inc., 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003)* (citation omitted). "In determining whether cause exists the bankruptcy court should base its decision on the hardships imposed on the parties with an eye towards **[**7]** the overall goals of the Bankruptcy Code." *In re Combs, 435 B.R. 467, 471 (Bankr. E.D. Mich. 2010)* (quotation omitted).

Here, the question of relief from stay depends ultimately on whether the Movant does or does not have a legal or equitable right to a portion of the Debtor's retirement funds superior to that of the Debtor, or whether any claims she holds against the Debtor have sufficient validity and priority so as to justify relief from stay. The answer to the Motion's ultimate question, therefore, depends on the Court's analysis of the party's substantive rights to the retirement accounts in light of the divorce decree, the bankruptcy filing, the Movant's proof of claim, and the confirmation of the Debtor's chapter 13 plan.

B. The Movant's Interest in the Debtor's Retirement Accounts are Property Rights, Not Claims of a Creditor.

While outcomes in bankruptcy cases largely depend on the provisions of the Bankruptcy Code, many aspects of bankruptcy cases, frequently critical aspects, depend on applicable state law. Most fundamental among those is that property interests are created and defined by state law and bankruptcy courts do not disturb them unless some federal interest requires a different result. *Butner v. United States, 440 U.S. 48, 55, **[*685]** 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)*.

This case involving the Debtor's **[**8]** ex-wife's rights to portions of the Debtor's retirement accounts depends largely on the holding in *In re McCafferty: McCafferty v. McCafferty, 96 F.3d 192 (6th Cir. 1992)*. In *McCafferty*, the lower courts had ruled that because the nondebtor spouse's rights under prepetition divorce decree was not a support obligation excepted from discharge pursuant to *11 U.S.C. § 523(a)(5)*,[1] and instead represented a "property division," the spouse's right to the debtor's retirement account was dischargeable. However, the Sixth Circuit's decision to reverse in favor of the nondebtor spouse turned on a more fundamental legal point than the dischargeability rules in *11 U.S.C. § 523*: While the debtor-husband's obligation to turn over the pension assets was not in the nature of support, *under Ohio law it was also not even in the nature of a "debt."* The divorce decree did not create a debt from the ex-husband to the ex-wife; it created a property interest in favor of the wife in the assets awarded to her by that decree. *McCafferty at 197*. Furthermore, the divorce decree, by operation of Ohio law, impressed a constructive trust upon such property, imposing a duty to convey the property to the spouse now entitled to it. *Id. at 198*.

While not using the phrase "constructive trust," the Supreme Court of Ohio had expressly **[**9]** stated, in a decision shortly before the Sixth Circuit decided *McCafferty*, that a separate property interest in a pension awarded by a final decree of divorce would not become property of the bankruptcy estate of the other spouse if he were to file a bankruptcy petition. *Erb v. Erb, 75 Ohio St.3d 18, 22 n.3, 661 N.E.2d 175 (1996)*; *see also McCafferty at 199* (analyzing *Erb*). While state courts might not have the power to bind federal bankruptcy courts to a particular interpretations of the Bankruptcy Code, they *are* the final authorities on the common law of property in their own states. The Sixth Circuit cited *Erb* as providing strong support for its conclusion that the nondebtor-spouse was the "equitable owner" of the portion of the pension benefits

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[1] The law applicable to the *McCafferty* case predated the adoption of the Bankruptcy Reform Act of 1994, ***Pub. L. 103-394, 108 Stat. 4106***, which included the addition of ***11 U.S.C. § 523(a)(15)*** to the Code. ***Section 523(a)(15)*** causes domestic relations claims other than support claims to be nondischargeable as well, at least in chapter 7 cases. The impact of this amendment on *McCafferty's* continual vitality and applicability to this case is discussed in Section D, *infra*.

she had been awarded prepetition. McCafferty at 199. Since property in which the debtor holds only legal title, but not an equitable interest, becomes property of the estate only to the extent of the bare legal title, *11 U.S.C. § 541(d)*, the nondebtor ex-spouse retained her equitable ownership of the assets awarded to her notwithstanding the bankruptcy.

The facts of this case are identical in all material respects: a divorce decree was entered prior to the bankruptcy awarding one spouse an interest in the pension assets of the other as a property **[**10]** settlement; the obligor spouse filed for bankruptcy after the entry of the divorce decree but before distributing the pension assets; the debtor now seeks to discharge the obligation to consummate the property settlement. As in *McCafferty*, the prepetition divorce decree created a separate property interest in the assets in the person of the nondebtor ex-spouse, and the nondebtor ex-spouse's equitable interest in the assets, by operation of *11 U.S.C. § 541(d)*, simply **[*686]** never became property of the bankruptcy estate.

Therefore, pursuant to McCafferty (and Erb), the Movant had a separate property interest in the portion of the Hewitt Associates Cash Balance Plan and the Frontier Communications 401(K) plan awarded to her via the final decree of divorce entered prepetition. She was the equitable owner of those funds at the time the Debtor filed his petition, and the beneficiary of a constructive trust imposed on those assets by operation of Ohio law. By operation of *11 U.S.C. § 541(d)*, that equitable interest never became property of the Debtor's bankruptcy estate. Moreover, pursuant to Ohio law, the Movant's interest in those retirement accounts are not property of the Debtor.

C. The Confirmation of the Debtor's Chapter 13 Plan [11] is Immaterial to the Relief From Stay Motion.**

The Debtor further argues that the Movant's motion for relief from stay is barred by the prior confirmation of his chapter 13 plan and Section 1327 of the Bankruptcy Code, which provides that the "provisions of a confirmed plan bind the debtor and each creditor," 11 U.S.C § 1327(a), and that except as otherwise provided in the plan or the confirmation order, confirmation of a chapter 13 plan vests all property of the estate in the debtor free and clear of any claim or interest of any creditor provided for by the plan. 11 U.S.C § 1327(b)-(c). The Debtor invokes the holding of United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010), which states that where "a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate," id. at 276, and will therefore be bound by the plan.

The central flaw in the Debtor's reliance on this rule is that the Movant is not seeking any relief that would violate the terms of the confirmed plan. The automatic vesting provisions of 11 U.S.C. § 1327(b) and (c) vest property of the estate in the debtor, but do not define property of the estate; that remains the province of *11 U.S.C. § 541*. Similarly, a chapter 13 plan cannot simply identify property that is not **[**12]** property of the estate, provide that such property shall vest in the debtor upon confirmation, and rely on a lack of objections to effectuate that result. Pursuant to 11 U.S.C. § 1322(b)(9), the plan may provide for vesting of property of the estate in the debtor or any other entity upon confirmation or at a later time; the reverse, however, is not the case. A proceeding to recover money or property from a third party must be by adversary proceeding. *See* Fed. R. Bankr. P. 7001(1). Moreover, an action to recover property, even one resolved by default, requires legal grounds supporting a judgment.

In addition, the confirmed plan in this case does not purport to vest the Movant's interests in the retirement accounts in the Debtor. The Debtor's actual unstated position is that the Debtor has no property interest of her own in the accounts, and therefore had only a claim against them that she failed to raise through the claims resolution and plan confirmation processes. As discussed above, however, the equitable ownership of those assets passed to the Movant by virtue of the final decree entered in the state court pursuant to applicable state domestic relations law. Therefore, her right to those assets was unaffected by the plan or the **[**13]** confirmation order. To whatever extent she was entitled to a QDRO prior to confirmation, she still **[*687]** is. That is a matter for the same state court that entered the final divorce decree in the first place.

D. The 1994 Amendments to the Bankruptcy Code Concerning Nondischargeability of Non-Support Domestic Relations Claims in Chapter 7, but Not Chapter 13, Did Not Abrogate the Sixth Circuit's Holding in *In re McCafferty* and Is Also Immaterial to the Relief From Stay Motion.

The Debtor argues that *McCafferty* is no longer good law for the proposition that a division of a retirement account in a prepetition divorce decree is impervious to the impact of a spouse's bankruptcy case, discharge, or reorganization plan. The Debtor argues that the addition of *Section 523(a)(15)* to the Bankruptcy Code by the Bankruptcy Reform Act of 1996, *Pub. L. 103-394, 108 Stat. 4106*, legislatively overruled *McCafferty's* holding.

Section 523(a)(15) provides that:

> "any debt . . . to a spouse, former spouse or child of the debtor and not [a domestic support obligation already excepted from discharge from *Section 523(a)(5)*] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record"

is not discharged. Such debts are commonly referred to as "property settlements," although that phrase may at times be misleading or even **[**14]** inaccurate.

While this provision expands the list of nondischargeable claims for a divorcing or divorced nondebtor spouse, *Section 1328 of the Bankruptcy Code* takes this benefit away in chapter 13 cases, such as the present one, by only excluding from discharge certain claims identified by *Section 523(a)*, including domestic support obligation debts under *Section 523(a)(5)*, but excluding the newer exception found in *Section 523(a)(15)* for non-support domestic relations claims. The latter discharge exception -- which applies to what are commonly, but perhaps at times misleadingly, referred to as domestic relations "property settlements" -- applies only in chapter 7 cases. The Debtor argues, therefore, that Congress has "occupied the field" for cases filed after the effective date of the Bankruptcy Reform Act of 1994 with respect to the discharge of non-support "debts" a debtor owes a spouse for portions of his retirement accounts. The Debtor suggests that Congress has decided that while such claims are dischargeable in chapter 7 cases, they are not in chapter 13. The question is, therefore: To what extent were the relevant holdings of the Sixth Circuit Court of Appeals in *McCafferty* abrogated for chapter 13 cases, such as this one, by the 1994 amendments to the Bankruptcy **[**15]** Code, which enacted *11 U.S.C. § 523(a)(15)*?

While the Sixth Circuit decided *McCafferty* in 1996, the underlying bankruptcy case was filed on October 28, 1993, so the pre-1994 Reform Act Bankruptcy Code was the controlling version for the purposes of that case and the Sixth Circuit, quite appropriately, ignored *Section 523(a)(15)*. That section, first added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994, *Pub. L. 103-394, 108 Stat. 4106*, and since revised, currently provides that:

> "a discharge under *section 727*, *1141*, *1228(a)*, *1228(b)*, or *1328(b)* of [the Bankruptcy Code] does not discharge an individual debtor from any debt ... to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation **[*688]** agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit."

11 U.S.C. §523(a)(15). A general chapter 13 discharge pursuant to *11 U.S.C. § 1328(a)*, however, will nevertheless discharge such a debt.

In *McCafferty*, a chapter 7 individual debtor filed an adversary complaint against his former wife seeking to discharge determination regarding his obligation to turn over to her a portion of his state government pension pursuant **[**16]** to a final decree of divorce entered by an Ohio domestic relations court seven months prior to the bankruptcy filing. Given the absence of *Section 523(a)(15)* in the Bankruptcy Code at the time, there was no statutory provision governing the dischargeability of debts incurred by the debtor in connection with divorce or separation other than debts in the nature of support.[2] Since the Bankruptcy Code allows for discharge of any debts not specifically excepted from discharge, the bankruptcy court and district court in *McCafferty* both ruled that the obligation was dischargeable, since it was not in the nature of a support award. The Sixth Circuit agreed that it was not in the nature of a support award and therefore could not be held nondischargeable on that basis. But, as discussed in Section B, *supra, McCafferty* nevertheless reversed the bankruptcy and district courts and ruled that the debtor's obligation to turn over the funds remained enforceable -- and not discharged notwithstanding the bankruptcy.

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[2] ***11 U.S.C. § 523(a)(5)***, rendering domestic support awards nondischargeable, did exist in the Bankruptcy Code at the time, but the bankruptcy, district, and Sixth Circuit courts in *McCafferty* all agreed that that provision did not apply. *See id. at 195*.

The Debtor misunderstands the legal theory underpinning *McCafferty*, and the Ohio Supreme Court decision (*Erb*) upon which it relies. This misunderstanding is what may inform the Debtor's argument that the addition **[**17]** of *Section 523(a)(15)*'s exception to discharge in chapter 7 cases, but not chapter 13 cases, makes a difference. The confusion stems from the fact that *McCafferty's* and *Erb's* holding is that the nondebtor spouse obtains a vested property right in a defined share of the debtor's retirement account upon entry of the divorce decree. By contrast, *Section 523(a)* deals solely with the dischargeability of *debts*. "The term debt means liability on a claim." *11 U.S.C. § 101(12)*. Claims are a "right to payment" or "right to an equitable remedy for breach of performance." *11 U.S.C. § 101(5)*. While claims are defined broadly, they are distinct from property rights. *See* *In re Skorich: Ford v. Skorich, 482 F.3d 21, 26 (1st Cir. 2007)*. Property rights are fixed by state law, *see Butner*, and they do not vary based upon amendment to the provisions of the Bankruptcy Code governing nondischargeability of certain debts.

The difference between the chapter 7 case in *McCafferty* and the chapter 13 case here is irrelevant. In both pre-1994 chapter 7 cases (like *McCafferty*) and contemporary chapter 13 cases (like this one), "debts" incurred incident to property settlements in divorce or separation agreements were and continue to be dischargeable. The issue is what is a "debt"? The addition of *Section 523(a)(15)* to the Bankruptcy Code in 1994 did not change **[**18]** Ohio's domestic relations law and did not create a federal interest requiring a different result within the rule of *Butner*, certainly not one making divorce obligations *easier* to escape in bankruptcy than existed before the 1994 amendments.

[*689] This Court finds that the introduction of *11 U.S.C. § 523(a)(15)* in 1994 did not abrogate *McCafferty*, and that the facts of *McCafferty* are nearly squarely on point with the facts of this case, even though the procedural posture is different. For *McCafferty* to be abrogated, at least within Ohio, the underlying property or domestic relations law of Ohio would need to change, or Congress would need to make a rule superseding it for the purposes of defining property of the estate and of the debtor. *11 U.S.C. § 523(a)(15)* is not such a rule, even by implication; it affects only dischargeability, not the definition of property of the estate.

Moreover, a careful reading of the divorce decree in this case reveals that the division of the retirement accounts was a division of property rights, not the creation of a debt or claim on account of, or to compensate for, the parties' disparate property rights. The Movant was granted a fifty percent share of the Debtor's Hewitt Associates Cash Balance Plan. **[**19]** While the actual transfer of the assets awaits entry of a QDRO (after relief from stay), the lack of a QDRO in no way prevents the vesting of the parties' property rights. *See* *In re Lawson: Corzin v. Lawson, No. 15-5094, 570 B.R. 563, 2017 Bankr. LEXIS 884, 2017 WL 1207521, *9 (Bankr. N.D. Ohio Mar. 31, 2017)* (even prior to the entry of a final decree of divorce, Ohio domestic relations law creates in each spouse a present contingent interest in all property of the marriage); *In re Warner: Gertz v. Warner*, No. 15-5115, 2017 WL 1379341, *6 (Bankr N.D. Ohio Apr. 14, 2017) (same). Moreover, a percentage division of a retirement account implies that each party will enjoy gains and suffer losses -- the epitome of ownership.

The division of the Frontier Communications 401(k) makes the property rights attributes (as opposed to the alternative debt/claim attributes) even clearer. Here, the domestic relations court did not divide the plan evenly, but rather awarded the Movant a share of $33,912, which "shall be *credited with gains and debited with losses* which occur between the date of the filing of this Judgment Entry Decree of Divorce and the date of transfer by the Plan Administrator." The Debtor owes the Movant no debt,[3] dischargeable or otherwise; he holds *her assets* in trust for her benefit.

E. The Movant's Interest in Her Property Rights in the Debtor's Retirement Accounts Is Not Being Adequately Protected and, [20] Therefore, Cause Exists for Granting Her Motion for Relief From Stay.**

The Movant's property rights in the Debtor's retirement funds are being held hostage by the automatic stay. The Debtor has no legal rights to them, nor does the estate. Therefore, cause exists pursuant to *11 U.S.C. § 362(d)(1)* to grant relief from the automatic stay to allow the Movant to proceed in state court to obtain the QDRO necessary to obtain the distribution of her assets from their current custodian. The Motion will, therefore, be granted.

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[3] The fact that the right to a division of the retirement accounts is not a debt of the Debtor -- or a claim of the Movant -- explains why it was not included in the Movant's proof of claim and, more important, why it did not have to be.

CONCLUSION

In light of the foregoing, the Court will enter a separate order consistent with this Memorandum Decision granting the Motion for Relief from Stay (Docket No. 79).

This document was signed electronically on June 30, 2017, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: June 30, 2017

/s/ Alan M. Koschik

ALAN M. KOSCHIK

U.S. Bankruptcy Judge

ORDER GRANTING MOVANT LISA JEFFERS'S MOTION FOR RELIEF FROM STAY

Consistent with the Memorandum Decision (Docket No. 96) concerning the Motion for Relief from Stay to Proceed in Domestic Relations Court (Docket No. 79), filed by Lisa Jeffers (the "Movant"), entered by this Court on June 30, 2017, and the findings and conclusions **[**21]** stated therein,

IT IS HEREBY ORDERED THAT:

1. The Movant's Motion for Relief from Stay to Proceed in Domestic Relations Court, is **GRANTED** pursuant to *11 U.S.C. § 362(d)(1)*. entry on the record.

2. The Movant is specifically entitled to return to the Lorain County Court of Common Pleas, Domestic Relations Division, and seek entry of a Qualified Domestic Relations Order or Orders necessary to enforce the division of debtor Mark D. Jeffers's (the "Debtor") retirement accounts consistent with that court's previously-entered divorce decree in the Movant's divorce case with the Debtor.

IT IS SO ORDERED.

Dated: June 30, 2017

/s/ Alan M. Koschik

ALAN M. KOSCHIK

U.S. Bankruptcy Judge.

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