

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In Re:	)	Case No. 89-50106
)	
	)	Adversary Case No. 92-5002
)	
L.D. ALDERSON,	)	Chapter 7
)	
Debtor.	)	MEMORANDUM OF DECISION RE:
	)	TURNOVER OF ESTATE PROPERTY
ESTATE OF CARL V. GULL,)	
ESTATE OF EUNICE I. GULL,)	
and DENNIS C. WHETZAL, as)	
Chapter 7 Trustee,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
UNITED STATES OFFICE OF)	
PERSONNEL MANAGEMENT (OPM), as)	
agent for the UNITED STATES)	
OF AMERICA, and L.D. ALDERSON,)	
DEBTOR,)	
)	
Defendants.)	

The matter before the Court is the Complaint to Require Turnover of Property of the Debtor's Estate filed by the Estate of Carl V. Gull and the Estate of Eunice I. Gull on behalf of the Bankruptcy Estate of Debtor L.D. Alderson. This is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute findings and conclusions as required by F.R.Bankr.P. 7052(a).

I.

The facts surrounding Debtor L.D. Alderson's claim of exemption in his civil retirement funds were originally set forth

in this Court's Memorandum of Decision Re: Claim of Exemptions entered August 27, 1991. Those that are material to the present matter are set forth below:

Debtor L.D. Alderson (Debtor) served in the military or was employed by the federal government for many years beginning in the early 1950's. His services were terminated on May 24, 1985. During his years of employment, he accumulated \$34,993.80 in civil service retirement benefits. Upon termination, he immediately became eligible to withdraw those funds. [In December 1993] he becomes eligible for payments under a civil service deferred annuity.

On May 8, 1989, Debtor filed a Chapter 12 petition for reorganization. On Schedule B-4 filed June 2, 1989, Debtor claimed the following property as exempt: homestead, \$30,000; cash, \$100; household goods, \$2,000; clothing & jewelry, \$300; vehicles, \$1,250; horses, \$5,000; farm equipment, \$1,500; and personal property, \$500. At that time, Debtor did not identify as property of the estate nor claim as exempt any interest he had in the civil service retirement funds that had accumulated.

By Order entered October 31, 1989, Debtor's case was converted to a Chapter 7 proceeding. In that Order, the Court directed Debtor to file within fifteen days his amended schedules and amended statement of financial affairs and to file within thirty days his final report and account as the Chapter 12 debtor-in-possession, as required by Bankr. Rs. 1007 and 1019. Debtor filed new schedules on December 26, 1989. On Schedule B-4 he claimed the same property exempt at the same values as before except he no longer declared any cash or household goods exempt. Again, Debtor did not identify as property of the estate nor claim exempt any interest he had in civil service retirement funds.

At a § 341 meeting of creditors held January 7, 1990, Debtor acknowledged that the retirement fund existed but he testified that his wife, via a power of attorney, had withdrawn the money while he was incarcerated. Debtor later provided Chapter 7 Trustee Dennis C. Whetzal (Trustee) with a copy of a power of attorney dated August 29, 1985 and signed "L.D. Alderson by Stephanie Claymore attorney in fact." Andrew Reid, Counsel for creditor Eunice I. Gull, individually and as the Administratrix of the Estate of Carl V. Gull (Gull), upon further investigation learned that Claymore had

attempted to withdraw the funds with a letter dated August 29, 1985 to the Office of Personnel Management (OPM) signed by her on Debtor's behalf. OPM, by letter dated September 12, 1985, informed her she could not withdraw the funds because the power of attorney on which Claymore relied was "not acceptable for negotiating civil service retirement [funds]."

Reid's communication with OPM also revealed that Debtor had corresponded with OPM on several occasions in mid-1985. On September 12, 1985, OPM informed Debtor of the amount of his retirement contribution and provided him with some pamphlets on how to estimate his deferred annuity benefits. Hence, as of that date, neither Debtor nor his present wife had withdrawn the accumulated retirement funds. Moreover, by letter dated August 30, 1985, OPM informed Debtor that the Bureau of Indian Affairs was seeking a setoff from his retirement funds of money which Debtor owed them for overdrawn annual leave. As of October 8, 1985, the status of the pending setoff had not been altered by any withdrawal of funds from Debtor's retirement account.

On February 6, 1990, Gull filed an Objection to Exemptions. Therein, Gull argued that some of the property which Debtor deemed exempt was not lawfully his. Further, Gull claimed that the value of personal property claimed exempt under S.D.C.L. § 43-5-4 exceeded the limits imposed by the statute. Finally, Gull argued Debtor had claimed his exemptions in bad faith and that under S.D.C.L. § 43-45-7 he should be disallowed any non absolute exemptions. By Order entered March 9, 1990, the Court found Debtor to be an absconding debtor since he had removed assets to Nebraska and it limited Debtor's exempt property to those absolute exemptions allowed by S.D.C.L. § 43-45-2. Debtor was further ordered to turnover to Trustee all of the estate owned or possessed by him at the time of filing or conversion, other than the property listed [in S.D.C.L. § 43-45-2] as absolutely exempt, including but not limited to . . . [a]ll cash and deposits of money with any savings and loan, banks, financial institution, or other entity.

. . . .

By Order entered March 21, 1990, Gull's motion for authorization for Gull to pursue property of the estate was granted. On May 24, 1990, Gull filed a motion for contempt due to Debtor's failure to comply with the March 9, 1990 Order, which directed Debtor to turnover certain property. In her brief in support of her motion,

Gull argued that cash and deposits which Debtor had failed to turnover included "those annuity monies deposited with the United States." A civil contempt order was entered September 18, 1990 because of Debtor's failure to comply with the March 9, 1990 turnover Order.

On September 18, 1990, the Court ordered the United States to turnover the pension funds to Trustee. The United States, by Motion filed February 1, 1991, sought to have the September 18, 1990 pension fund turnover Order vacated because of procedural irregularities. The Motion was granted and the September 18, 1990 Order has been vacated by Order entered [August 27, 1991] because turnover of the pension fund should have been sought by Gull with an adversary complaint rather than by motion.

. . . .

On December 18, 1990, Debtor filed a Claim of Exemptions. He acknowledged that he had not declared his "Civil Service Retirement benefits under 5 U.S.C.S. §8346(a)" as exempt in the past but he now asks the Court to declare that property exempt. The pleading was **not** served on all creditors and parties in interest.

Gull filed a response on January 14, 1991. She argues Debtor's claim of exemption in the pension funds should be denied because of Debtor's failure to comply with the Court's earlier turnover order and contempt order. Trustee responded to Debtor's Claim of Exemptions on January 17, 1991. He argues Debtor's claim of exemption in the pension funds is untimely because Debtor did not object to the Court's earlier order directing the United States to turnover those funds. The United States responded on January 22, 1991. It argues that Debtor may declare the property exempt under 11 U.S.C. § 522[d](10) and that the funds are not property of the estate pursuant to 11 U.S.C. § 541(c).

In that Memorandum of Decision Re: Claim of Exemptions and the accompanying Order, the Court concluded that Debtor should be denied any claim of exemption in his Civil Service Retirement fund because he had not properly noticed his amended claim of exemptions and, most important, because Debtor had exhibited bad faith in

filing the amended claim of exemptions. In a footnote in the Memorandum, the Court further stated:

The Court does not herein render a decision on whether Debtor's civil service retirement funds are property of the estate. Debtor has not raised the issue. See 11 U.S.C. § 522 (b) ("[A]n individual debtor may exempt **from property of the estate**") Moreover, the United States' argument in its response to Debtor's Claim of Exemption that the benefits are not estate property did not appropriately present the issue for resolution at this time because a determination of an interest in property must be sought by complaint. See. F.R.Bankr.P. 7001(2).

To resolve the questions unanswered in the contested matter on Debtor's claimed exemptions -- whether the Civil Service Retirement fund is property of the estate and whether OPM must turnover those funds -- the Estate of Carl V. Gull and the Estate of Eunice I. Gull (the "Gull Estates")¹ filed on January 21, 1992 a Complaint to Require Turnover of Property of the Debtor's Estate against the OPM. The complaint sought an order directing OPM to turnover to the case trustee Debtor's Civil Service Retirement fund that the Court had previously declared Debtor could not claim exempt.²

OPM answered the Complaint on February 24, 1992. OPM admits

¹ The Gull Estates are authorized to pursue property of the estate in the Trustee's stead pursuant to an Order entered March 21, 1990. When the objection to Debtor's claim of exemption in his civil service retirement funds was heard in the fall of 1991, Eunice I. Gull was still living. Attorney Reid now represents both Gull probate estates in this bankruptcy case.

² Debtor owes the United States \$171.92 for repayment of unearned annual leave and \$9,530.00 for a non dischargeable restitutionary payment arising from a criminal conviction for fraud. All interested parties have agreed that the issue of whether the United States may offset payment of those claims will be addressed in a separate action.

that \$34,993.80 was withheld from Debtor's salary as a federal employee in compliance with 5 U.S.C. § 8334(a)(1). OPM stated it was not a party to nor had timely notice of the contested matter in which the Court held Debtor could not claim his Civil Service Retirement fund exempt and, therefore, argues that the exemption issue is not res judicata. OPM further argued that the Gull Estates failed to include two necessary parties in the action: Debtor and the Chapter 7 Trustee.

An initial pre-trial telephonic conference was held March 10, 1992. Appearances included Andrew B. Reid for the Gull Estates, Assistant U.S. Attorney Thomas A. Lloyd for OPM (appeared in person), Chapter 7 Trustee Dennis C. Whetzal, Debtor L.D. Alderson (pro se), and Assistant U.S. Trustee Charles L. Nail, Jr. Counsel for OPM agreed to allow Plaintiffs to file an amended complaint to include Trustee Whetzal and Debtor as necessary parties. A Stipulation for Amendment of Complaint signed by Attorney Reid and Assistant U.S. Attorney Lloyd was filed April 20, 1992.

An amended complaint was filed April 28, 1992. Trustee Whetzal was added as a plaintiff. Debtor L.D. Alderson was added as a defendant. The amended complaint and attachments elaborated on the earlier complaint by stating Debtor could withdraw the retirement funds upon application to OPM until the fund vests when he reaches age sixty-two.

Debtor responded to the amended complaint on May 26, 1992. He acknowledges that OPM holds the retirement funds on his behalf but

argues the funds are "exempt" under 11 U.S.C. § 541(c).³

A second pre-trial conference was conducted telephonically on June 24, 1992. Appearances included Andrew B. Reid for Plaintiffs-Gull Estates, Trustee Whetzal, Debtor L.D. Alderson, Assistant U.S. Attorney Thomas A. Lloyd for OPM (appeared in person), and Bruce J. Gering for the United States Trustee. The parties stated the material facts were not in dispute and they agreed to brief two issues: first, whether the fund held by OPM is property of the bankruptcy estate and second, whether Debtor may exempt that fund.

By Order entered June 26, 1992, the parties were directed to file their respective memorandums of law on or before July 27, 1992 and to file their responsive memorandums on or before August 3, 1992. Upon receipt of all memorandums and responses, the matter was taken under advisement.⁴

³ Debtor most likely meant that his Civil Service Retirement fund was "excluded" from the bankruptcy estate since § 541(c) addresses excluded property, not "exempt" property.

⁴ Debtor filed his memorandum on July 27, 1992. The Gull Estates and OPM filed their respective memorandums on July 28, 1992. By letter to the Court dated July 25, 1992, Attorney Reid explained that the Gull Estates' memorandum was late because he had to redraft the document to include a recent decision of the United States Supreme Court. OPM filed its responsive memorandum on July 31, 1992. Debtor filed his responsive memorandum on August 10, 1992 and explained it was late because the Gull Estates' original memorandum was late. Debtor also filed a separate motion asking the Court to strike the Gull Estates' original memorandum because it was late. All memorandums were accepted and filed by the Court.

II.

PROPERTY OF THE ESTATE.

Property of a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

The scope of [this section] is broad. It includes all kinds of property, including tangible and intangible property, cause of action . . . and all other forms of property specified in Section 70(a) of the Bankruptcy Act [I]t includes as property of the estate all property of the debtor, even that needed for a fresh start.

S.Rep. No. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5868; H.R.Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977), *reprinted in* 1978 U.S.Code Cong. & Ad.News. 6322-24 (cited in Samore v. Graham (In re Graham), 725 F.2d 1268, 1270 (8th Cir. 1984)(other provisions overruled by Patterson v. Shumate, 112 S.Ct. 2242 (1992)). Congress intended the § 541(a) to be "as all-encompassing as the language indicates." Graham, 725 F.2d at 1270.

Excluded from the bankruptcy estate is property of the debtor that is subject to a restriction on transfer that is enforceable under applicable nonbankruptcy law. 11 U.S.C. § 541(c)(2). "Applicable nonbankruptcy law" includes both state spendthrift trust laws as well as non bankruptcy federal laws. Patterson, 112 S.Ct. at 2246-47; In re Green, 967 F.2d 1216 (8th Cir. 1992). To exclude property from the estate, the nonbankruptcy law must impose a "restriction on the transfer" of a debtor's "beneficial" interest in a trust. Patterson, 112 S.Ct. at 2247.

A. Federal Law. Title 5 of the United States Code regulates government organization and employees. Chapter 83 of that title governs retirement for employees. Subchapter III [§§ 8331-8351] governs Civil Service Retirement⁵ and sets forth how retirement funds for government employees shall be accumulated and paid out. Section 8346(a) of Title 5 provides:

The money mentioned by this subchapter [on Civil Service Retirement] is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of [Title 5], or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

It is on this section that OPM and Debtor rely to argue that Debtor's interest in his Civil Service Retirement fund is excluded from property of the estate because the fund is not assignable or subject to legal process.

With three exceptions, § 8346(a) states Civil Service Retirement funds are not assignable or subject to legal process. The three exceptions are subsections (h) and (j) of § 8345, which are not applicable here,⁶ and "as otherwise may be provided by Federal laws." The question thus becomes whether a federal law exists that gives Debtor control over his Civil Service Retirement funds sufficient to constitute an exception to the proscriptions

⁵ Other federal employees' or past employees' retirement funds may be governed by Chapter 84 of Title 5, the Federal Employees' Retirement System.

⁶ Neither 5 U.S.C. § 8345(h), which states a annuitant may assign his payments with OPM approval, nor § 8345(j), which states benefits may be paid to another upon court order related to a divorce, annulment, or legal separation, are applicable here.

set forth in § 8346(a).

Section 8342(a) of Title 5 states that a former federal employee who has been separated from service for at least thirty-one consecutive days, has not been reemployed, is not currently nor will be entitled to an annuity within thirty-one days, and files an application with OPM may be paid his lump-sum credit by OPM. The lump-sum credit payment is subject to court orders relative to divorces, annulments, and legal separation, and may be offset by funds owed to the federal government. See 5 U.S.C. §§ 8342 and 5 C.F.R. 831.

From the evidence presented, Debtor was eligible to seek that lump-sum credit payment at the time his petition was filed and may still do so until thirty-one days before he becomes entitled to an annuity. He was eligible at the time of his petition because he was no longer employed by the federal government and he was several years away from eligibility for a Civil Service Retirement annuity. The Gull Estates argue § 8342(a) modifies § 8346(a) sufficient to give Debtor, and thus the bankruptcy estate, a present right to the Civil Service Retirement fund. OPM argues that § 8342(a) does not modify the anti-alienation provisions of § 8346(a) because Debtor's ability to get the lump-sum credit payment is very restricted.

B. Discussion. One legal interest that the bankruptcy estate acquired under § 541(a) when Debtor filed his petition was Debtor's present right to obtain a lump-sum credit payment of his Civil Service Retirement fund from OPM. Since nothing in 5 U.S.C. §§ 8342(a) or 8346(a) restricted Debtor's ability to get those

funds at that time, there was nothing that restricted Trustee's ability to hold and exercise that right on behalf of the bankruptcy estate. See First Northwestern Trust Company of South Dakota v. Internal Revenue Service, 622 F.2d 387, 393 (8th Cir. 1980). While creditors may not reach Debtor's Civil Service Retirement fund because of the limitations imposed by § 8346(a), those limitations do not extend to Debtor's request for a lump-sum credit payment under § 8342(a) because § 8346(a) specifically recognizes exceptions "as otherwise may be provided by Federal laws." Accordingly, the Court concludes that § 8342(a) is an exception to § 8346(a) that prevents § 8346(a) from being considered a federal law that excludes Debtor's Civil Service Retirement fund from property of the bankruptcy estate.

B. State Spendthrift Trust Law.

Courts have recognized spendthrift provisions in trusts created under South Dakota law when the beneficiary was not entitled to an outright distribution of trust assets, Horsley v. Maher, 89 B.R. 51, 53 (D.S.D. 1988); when the settlor of the trust was not also the beneficiary, Farmers State Bank v. Janish, 410 N.W.2d 188, 190 (S.D. 1987); or when the beneficiary has no present interest or right in the trust income. First Northwestern Trust Company, 622 F.2d at 393.

As discussed above, Debtor was entitled to an outright distribution of his Civil Service Retirement fund at the time his

petition was filed. In other words, he had a **present** right in the trust income. Under § 541(a), the bankruptcy estate obtained that present right. Accordingly, the Court concludes that 5 U.S.C. § 8346(a), as modified by 5 U.S.C. § 8342(a), does not constitute a spendthrift trust provision under South Dakota law that is sufficient to keep Debtor's present right to the lump-sum credit payment of his Civil Service Retirement fund out of the bankruptcy estate.

III.

ALLOWED EXEMPTION.

Having concluded that Debtor's interest in the lump-sum credit payment of his Civil Service Retirement Fund is property of the estate, the remaining question that OPM and Debtor want answered is whether Debtor may exempt that interest from the estate. That question was answered in the Court's Memorandum of Decision Re: Claim of Exemptions and Order entered August 27, 1991, and will remain the law of the case. Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 815-16 (1988). "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Id. at 816 (quoting Arizona v. California, 460 U.S. 605, 618 (1983) (dictum)). Accordingly, Debtor may not claim as exempt any present interest he has in his Civil Service Retirement fund.

An order will be entered declaring Debtor's present interest in his Civil Service Retirement fund to be property of the bankruptcy estate under 11 U.S.C. § 541(a) and directing OPM to turnover Debtor's lump-sum credit payment to Trustee pursuant to 5 U.S.C. § 8342(a).

Dated this ____ day of December, 1992.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

In Re:	)	Case No. 89-50106
)	
	)	Adversary Case No. 92-5002
)	
L.D. ALDERSON,	)	Chapter 7
)	
Debtor.)	
	)	ORDER DECLARING PRESENT
	)	INTEREST IN CIVIL SERVICE
ESTATE OF CARL V. GULL,	)	RETIREMENT FUND PROPERTY
ESTATE OF EUNICE I. GULL,	)	OF THE ESTATE AND DIRECTING
and DENNIS C. WHETZAL, as	)	TURNOVER OF FUND TO TRUSTEE
Chapter 7 Trustee,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
UNITED STATES OFFICE OF)	
PERSONNEL MANAGEMENT (OPM), as)	
agent for the UNITED STATES)	
OF AMERICA, and L.D. ALDERSON,)	
DEBTOR,)	
)	
Defendants.)	

In recognition of and compliance with the Memorandum of Decision Re: Turnover of Estate Property entered this day,

IT IS HEREBY DECLARED Debtor L.D. Alderson's present interest in his Civil Service Retirement fund is property of the bankruptcy estate under 11 U.S.C. § 541(a) to the extent that he was entitled to obtain said funds as a lump-sum credit payment under 5 U.S.C. § 8342(a) at the time he filed his petition; and

IT IS HEREBY ORDERED that the Office of Personnel Management of the United States government (OPM) shall turnover to Chapter 7 Trustee Dennis C. Whetzal Debtor's lump-sum credit payment under 5 U.S.C. § 8342(a).

So ordered this 1st day of December, 1992.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By _____

(SEAL) Deputy

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

In Re:	)	Case No. 89-50106
)	
	)	Adversary Case No. 92-5002
)	
L.D. ALDERSON,	)	Chapter 7
)	
Debtor.)	
	)	ORDER DENYING DEBTOR'S
	)	REQUEST TO STRIKE SUMMARY
ESTATE OF CARL V. GULL,	)	JUDGMENT BRIEF OF PLAINTIFFS
ESTATE OF EUNICE I. GULL,)	
and DENNIS C. WHETZAL, as)	
Chapter 7 Trustee,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
UNITED STATES OFFICE OF)	
PERSONNEL MANAGEMENT (OPM), as)	
agent for the UNITED STATES)	
OF AMERICA, and L.D. ALDERSON,)	
DEBTOR,)	
)	
Defendants.)	

The matter before the Court is Debtor's request filed August 10, 1992 to "deny" [strike] the Summary Judgment Brief of Plaintiffs Estate of Carl V. Gull and Estate of Eunice I Gull on the grounds that the Plaintiffs' brief was untimely filed.

Upon consideration of the pleading and good cause not having been shown,

IT IS HEREBY ORDERED that Debtor's request that Plaintiffs' brief be struck is DENIED.

So ordered this 1st day of December, 1992.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy

(SEAL)