

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF SOUTH DAKOTA**

**ROOM 211**

**FEDERAL BUILDING AND U.S. POST OFFICE**

**225 SOUTH PIERRE STREET**

**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**  
**BANKRUPTCY JUDGE**

**TELEPHONE (605) 224-0560**  
**FAX (605) 224-9020**

August 5, 1999

Trustee William J. Pfeiffer  
Post Office Drawer 1585  
Aberdeen, South Dakota 57401

Forrest C. Allred, Esq.  
Counsel for Debtor  
1001 First Avenue Southeast  
Aberdeen, South Dakota 57401

Subject: *In re Cara McLeod,*  
Chapter 7; Bankr. No. 99-10083

Dear Trustee and Counsel:

The matter before the Court is the Trustee's objection to Debtor's claim of exemption in two particular preferential transfers. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor may not exempt the transfers if they were voluntary.

**SUMMARY OF FACTS.** Cara McLeod (Debtor) filed a Chapter 7 petition on March 31, 1999. On her schedule of property claimed exempt, Debtor included two preferential payments. One was to her mother for \$700 and the other was to her sister for \$800. According to her statement of financial affairs, the payments were made March 5, 1999.

On May 11, 1999, Trustee William J. Pfeiffer objected to Debtor's claim of objections on the grounds that she could not declare these preferential transfers exempt. Debtor responded on May 24, 1999 by arguing that the Trustee could recover the preferential transfers and that she could then exempt the recovered payments.

A hearing was held May 25, 1999. The matter was continued to July 20, 1999 to allow a possible settlement. No settlement was

*In re McLeod*, Bankr. No. 99-10083  
August 5, 1999 letter decision  
page 3

reached. At the continued hearing, Debtor did not argue that the transfers to her family members were not preferential. Instead, she relied on *In re Charles J. and Jeanette A. Schomaker*, Bankr. No. 87-10040, slip op. (Bankr. D.S.D. Sept. 14, 1988) (absent evidence of fraud or bad faith, a debtor's proposed amendment to a schedule of exemptions cannot generally be timed-barred as long as the case is still open).

DISCUSSION. The \$1,500 in pre-petition payments were not property of the bankruptcy estate on the petition date. 11 U.S.C. § 541(a). Only property of the estate may be declared exempt. 11 U.S.C. § 522(b). Therefore, at the time Debtor filed her petition, she could not declare the payments to her family members exempt because the funds were not estate property.

It also does not appear that Debtor can declare the payments exempt under § 522(g) if Trustee Pfeiffer recovers the \$1,500 as voidable preferential transfers under § 547 or if Debtor recovers the preferences herself under § 522(h). Section 522(g)(1)(A) provides that property that a debtor voluntarily transferred pre-petition may not be exempted by the debtor when the trustee recovers the property under §§ 547 and 550. *Schieffler v. Beshears (In re Beshears)*, 182 B.R. 235, 239-41 (Bankr. E.D. Ark. 1995). See also *Glass v. Hitt (In re Glass)*, 60 F.3d 565 (9<sup>th</sup> Cir. 1995). Further, § 522(h) also incorporates § 522(g)(1). Therefore, a debtor cannot step into the case trustee's shoes using § 522(h) and avoid a preferential transfer if the debtor cannot exempt the property under § 522(g)(1). *Beshears*, 182 B.R. at 240-41.

Although there was no specific evidence offered on whether Debtor's repayment of the \$1,500 to family members was voluntarily, that is what appears to have happened. Therefore, Debtor will not be able to declare those payments exempt whether she or Trustee Pfeiffer recovers them as a preference.<sup>1</sup>

Attorney Allred and Trustee Pfeiffer shall consult. If Debtor's pre-petition debt repayments to her family members were voluntarily, Trustee Pfeiffer shall submit a proposed order sustaining his objections. If Debtor claims these debt repayments were not voluntarily, counsel for Debtor shall advise the Court by letter so that a continued hearing may be scheduled to receive

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<sup>1</sup> Trustee Pfeiffer will have to bring adversary proceedings against the family members to seek actual recovery of the alleged preferential transfers. The Court cannot presume that the family members do not have any defenses to the actions.

In re McLeod, Bankr. No. 99-10083  
August 5, 1999 letter decision  
page 3

evidence on that issue. See *Huebner v. Trapp (In re Huebner)*, 18 B.R. 193 (Bankr. Wis. 1982) (discussion of what constitutes a voluntary transfer); *Reaves v. Sunset Branch, National Bank of South Dakota (In re Reaves)*, 8 B.R. 177 (Bankr. D.S.D. 1981) (discussion of what constitutes a voluntary transfer); and *Davis v. Suderov (In re Davis)*, 169 B.R. 285, 295 (E.D.N.Y. 1994) (under § 522(g)(1)(A), burden of proof is on the debtor to show transfer was not voluntary).

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

**NOTICE OF ENTRY**  
Under F.R. Bankr.P. 9022(a)  
**Entered**

**AUG 05 1999**

**Charles L. Nail, Jr., Clerk**  
**U.S. Bankruptcy Court**  
**District of South Dakota**

INH:sh

CC: case file (docket original; copies to parties in interest)



I hereby certify that a copy of this document  
was mailed, hand delivered, or faxed this date  
to the parties on the attached service list.

**AUG 05 1999**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota

By     *KN*

Case: 99-10083 Form id: 122 Ntc Date: 08/05/1999 Off: 3 Page : 1  
Total notices mailed: 4

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Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321

— Curt R. Ewinger, PO Box 96, Aberdeen, SD 57402

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