

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

In re Mark L. Wildman and Sandra K. Wildman, Debtors
Bankruptcy Case No. 93-30564-13

United States Bankruptcy Court
W.D. Wisconsin

April 12, 1996

Roger Merry, Monroe, WI, for debtors.
William A. Chatterton, Ross & Chatterton, Madison, WI, Trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

Debtor Sandra Wildman received a \$300,000 settlement in early 1995 for claims against the drunk driver who killed her husband. The chapter 13 trustee moves for turnover of \$60,000 to pay her creditors in full. The trustee's motion resurrects a three-year-old battle over the exemptions taken by Sandra Wildman.

On February 26, 1993, the Wildmans filed a petition for relief under chapter 7. Less than a month later, Mark Wildman was killed by a drunk driver in an automobile accident. On amended schedules, Sandra Wildman claimed an exemption in proceeds from three life insurance policies totaling \$170,000. The chapter 7 trustee and one unsecured creditor objected to the claimed exemptions. On September 17, 1993, this court approved a stipulation and entered an order dismissing both objections.

Sandra Wildman converted her case to chapter 13 on December 13, 1993. On her amended schedules, filed on January 5, 1994, Ms. Wildman again listed as exempt the \$170,000 in life insurance proceeds but also listed a \$500,000 exemption for "Insurance claim & bad faith claim against Guy Carlson & ins. company" under Wis.Stats. 815.18(3)(i)1c&d, and \$25,000 for "Mark Wildman's claim for bodily injury from accident" under Wis.Stat. 815.18(3)(i)c. She made no express exemption claim for wrongful death proceeds, which are separately exempted under Wis.Stats. 815.18(3)(i)1.b. up to an amount "reasonably necessary for the support of the debtor and the debtor's dependents." ⁽¹⁾ Neither the trustee nor creditors objected to these claimed exemptions within the time allowed by Bankruptcy Rule 4003(a).

Ms. Wildman filed an amended chapter 13 plan on February 25, 1994. The amended plan provided that funds recovered on her claims against the drunk driver, to the extent they exceeded claimed exemptions, would be distributed under the plan. It was confirmed on April 25, 1994.

On March 10, 1994, Ms. Wildman commenced a suit against the drunk driver in Rock County Circuit Court, which was later settled for the policy limit of \$300,000.

On October 18, 1995, the trustee received a letter from a creditor's attorney that began, "It is my understanding that Sandra Wildman has received a very substantial recovery in a wrongful death claim, which has been settled in Rock County Circuit Court," and closed, "[I]t seems inappropriate that any of the creditors should go unpaid." On October 24, 1995, the trustee wrote to Roger Merry, Ms. Wildman's attorney, requesting turnover of \$60,000 to pay her plan in full. Mr. Merry responded by letter dated November 20, 1995, stating that no moneys were due the trustee because the settlement did not exceed the exemption.

On January 22, 1996, the trustee filed a notice and motion for turnover of \$60,000 of the \$300,000 in proceeds. The trustee argues that because Ms. Wildman cited the wrong exemption statute for the settlement proceeds, she did not in fact exempt the proceeds. The trustee also argues that Ms. Wildman fraudulently concealed the lawsuit by not citing the correct state exemption on her schedules, and that the failure to report the settlement was a continuation of the fraud. Neither argument has merit.

This issue is controlled by 11 U.S.C. § 522(l) and Bankruptcy Rule 4003(b) and (c). Under § 522(l), property listed as exempt is exempt if no party objects.⁽²⁾ The trustee has 30 days from the meeting of creditors or the last filed amended or supplemental schedule, whichever occurs last, to object to an exemption.⁽³⁾ Rule 4003(b). The 30-day period is exemption-specific, providing a new period for amended exemptions but not for previously scheduled exemptions that remain unchanged in the amended schedules. In re Kazi, 985 F.2d 318 (7th Cir. 1993). The objecting party has the burden of proving that the exemption is not valid. Rule 4003(c).

In a 1992 decision, the Supreme Court construed § 522(l) and Rule 4003(b) literally, holding that so long as the allotted time for the trustee to object has expired, it is irrelevant that the debtor's listed exemption is not well-grounded in statutory authority. Taylor v. Freeland & Kronz, 503 U.S. 638, 644-45, 112 S.Ct. 1644, 1648-49, 118 L.Ed.2d 280 (1992). The facts of Taylor are instructive and on point: Emily Davis declared bankruptcy while she was pursuing an employment discrimination claim against Trans World Airlines. Davis claimed as exempt property the money she expected to win in her discrimination suit, but did so for an amount far in excess of that allowed under the particular statute cited. Whether this error was inadvertent or purposeful is not clear from the decision and, as it turns out, was immaterial to the court's decision. The trustee did not catch the error, but did write a letter to the debtor and her attorneys, asking for more details about the lawsuit and stating that he considered the potential proceeds of the lawsuit to be property of Davis' bankruptcy estate. In response, Davis described the procedural posture of the case and expressed optimism that they might settle with TWA for \$110,000. The trustee decided to drop his objection to the exemption because he thought the lawsuit would be considerably less successful than the debtor expected. When the case settled for \$180,000, the trustee apparently reviewed Davis' file, noticed the patent error in the one exemption, and filed a motion for turnover of \$23,000 to pay creditors in full on the grounds that Davis had no statutory basis for the claimed exemption. Davis conceded that she did not have a right to exempt more than a small portion of the settlement under either state law or the federal exemptions. Nevertheless, the Court held that under Bankruptcy Rule 4003(b), the trustee's failure to timely object to the scheduled exemption waived his right to challenge the exemption:

"By negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.' The Bankruptcy Court did not extend the 30-day period. Section 522(l) therefore has made the property exempt. Taylor cannot contest the exemption at this time whether or not Davis had a colorable statutory basis for claiming it."

The trustee here attempts to distinguish Taylor on grounds that, unlike the trustee in Taylor, he was not put on notice:

In the instant case, no Rule 4003(b) objection was filed because the debtor had not claimed the wrongful death action as exempt. Objection is not required unless the exemption claim--as was the case in Taylor--raises a "red flag"; that is, unless the exemption claimed contains unambiguous language indicating that the debtor is asserting an exemption claim that would exceed the maximum statutory allowance. A Rule 4003(b) objection might have been necessary if the debtor had listed an exemption for the wrongful death action. But because the debtor did not claim such an exemption, it raised no "red flag" sufficient to trigger the limitation period and Rule 4003(b).

(Trustee's Brief at 7). Assuming that the trustee is correct--that under current Wisconsin law, Ms. Wildman incorrectly exempted her lawsuit proceeds--there are still two fatal problems. First, Taylor cannot reasonably be read as narrowly as the trustee would like. Taylor clearly puts the burden on the trustee to object to listed exemptions whether they are patently or latently questionable, and there is no doubt that the exemption the trustee challenges was listed. More fundamentally, however, the trustee's argument does not survive its foundational premise. In essence, the trustee argues that the \$500,000 exemption listed under Wis.Stat. § 815.18(i)1.d., for payment in compensation of loss of future earnings, raised no red flags, but a claim for the same amount made under § 815.18(i)1.b., for wrongful death, would have blinked like a neon sign. This argument is illogical. Unlike the debtor in Taylor, Ms. Wildman's exemption as listed was not capped by a dollar amount but rather by a flexible standard, at an "amount reasonably necessary for the support of the debtor and the debtor's dependents." *That same standard applies regardless of whether she listed her claim under § 815.18(i)1.b. or § 815.18(i)1.d.* The trustee chose not to object on that basis, although he resurrects it now and insists that it is the controlling standard. To buttress his argument, he contends that because Ms. Wildman's children are nearing college-age, they will no longer be dependents and thus will soon be ineligible for consideration under the exemption. Further, he argues, she has already received an exemption of \$170,000 for Mark Wildman's life insurance proceeds, though given his failure to object to that exemption in January, 1994, it is unclear why the exemption is material now, just as it is inexplicable why the fact that Ms. Wildman's children are approaching the age of emancipation is an issue now when it wasn't just two years ago, when she listed as exempt an amount far in excess of her settlement recovery.

If anything, the trustee in Taylor had a stronger argument. It was clear in Taylor that the trustee would have been successful had he timely objected, because the exemption was patently wrong. Here, Ms. Wildman could have legitimately exempted the \$500,000 under the wrongful death exemption, subject only to a challenge that the amount was not "reasonably necessary." The trustee offers no explanation as to why the basis of Ms. Wildman's recovery is material to the calculation of what is "reasonably necessary," which is an independent standard unrelated to the specific exemption. If the trustee had questioned the amount in January of 1994, "he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object, see Rule 4003(b). Having done neither, [he] cannot now seek to deprive [the debtor] of the exemption." Taylor, 503 U.S. at 644, 112 S.Ct. at 1648.

The trustee's bad faith argument similarly lacks merit. There is simply no evidence of concealment in Ms. Wildman's schedules or in her behavior since confirmation of her plan. The trustee concedes that at all times he was aware of the pending suit. He concedes that although he was not cognizant of the exact basis of her claims, at all times he was aware that she expected to recover several hundred thousand dollars. In fact, Ms.

Wildman overestimated the amount she would recover when she listed her exemptions. That overestimate was the "red flag" that the trustee now claims was never raised.

It is unnecessary, given Taylor, to respond in depth to the cases primarily relied upon by the trustee. Two are clearly distinguishable on their facts, involving debtors whose failure to list claims as assets constituted patent concealment. In re St. Angelo, 189 B.R. 24 (Bkrcty. D.R.I. 1995)(debtor purposely hid 5-year-old, pre-petition lawsuit until it settled); In re Yonikus, 996 F.2d 866 (7th Cir. 1993)(debtor found to have "knowingly and fraudulently" concealed a pre-petition claim until its independent discovery by the trustee). The other case heavily relied upon by the trustee, In re Stainforth, 116 B.R. 127 (Bkrcty. W.D.Wis. 1990)(Utschig, J.), concerned facts somewhat similar to ours, but it was decided before Taylor and its holding is placed squarely in doubt by Taylor.

An order consistent with this opinion, which stands as my findings of fact and conclusions of law in this matter, may be issued.

END NOTES:

1. Wis.Stat. § 815.18(i) allows the debtor to exempt the following:

1. Any of the following payments:

a. A payment to the debtor under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of that individual's death, to the extent reasonable necessary for the support of the debtor and the debtor's dependents.

b. A payment resulting from the wrongful death of an individual of whom the debtor was a dependent, in an amount reasonable necessary for the support of the debtor and the debtor's dependents.

c. A payment, not to exceed \$25,000, resulting from personal bodily injury, including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.

d. A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent in an amount reasonable necessary for the support of the debtor and the debtor's dependents.

2. 11 U.S.C. § 522(l) provides:

The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. *Unless a party in interest objects, the property claimed as exempt on such list is exempt.* (emphasis added)

3. Bankruptcy Rule 4003(b) provides:

The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.