

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

Cite as: [Unpublished]

**Peter M. Gennrich, Trustee, Plaintiff, v.  
Matthew G. Mordhorst, Defendant**  
(In re Matthew G. Mordhorst, Debtor)  
Bankruptcy Case No. 98-34305-7, Adv. Case. No. 99-3121-7

United States Bankruptcy Court  
W.D. Wisconsin

May 31, 2000

Peter M. Gennrich, Lee, Kilkelly, Paulson & Kabaker, S.C., Madison, WI, for plaintiff.  
Roger Merry, Monroe, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

**MEMORANDUM DECISION**

The facts for this decision are taken directly from the Stipulation of Facts submitted by the parties. On August 25, 1998, Matthew Mordhorst ("the debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The debtor declared on his Schedule B that he had no property in the nature of "contingent or non-contingent interests in the estate of a decedent" and that he had no assets in the nature of "contingent and unliquidated claims of every nature." In September of 1998, Peter M. Gennrich was appointed trustee of the debtor's bankruptcy estate. At the first meeting of creditors, the debtor did not disclose that he had any assets "whether contingent or non-contingent, liquidated or unliquidated, in any estate of a decedent, or consisting of claims of any other nature." Based on the information in the debtor's schedules and the debtor's testimony at the first meeting of creditors, the trustee determined that there were no assets in the debtor's estate. On December 1, 1998, this court entered an Order of Discharge of the debtor, and on December 7, 1998, the court entered a Final Decree closing the case.

In 1992, the debtor's mother, Debra Mordhorst was killed in an automobile accident in the State of Illinois. At the time of the accident, the debtor was 19 years old and resided with his parents. After his mother's death, the debtor became estranged from his father, Gary Mordhorst, moved out of the family home, and began residing with his maternal grandmother. Currently, the debtor resides in Wisconsin on property owned by his maternal grandmother and remains estranged from his father. He has occasional contact with his sister Melanie.

In 1994, Gary Mordhorst hired the law firm of Demos & Burke of Chicago, Illinois to commence a wrongful death action in Cook County Circuit Court. The wrongful death action sought to recover damages for Debra Mordhorst's death under the Illinois Wrongful Death Act, 740 ILCS 180. The named plaintiff was Gary Mordhorst, individually and as special administrator of the Estate of Debra Mordhorst. The debtor first became aware of the wrongful death action to recover damages on account of his

mother's death on June 4, 1999 when he received a letter from the Demos & Burke law firm. The letter advised that the wrongful death action had been settled for \$1 million and proposed an equal division of the net proceeds between the debtor, his father and his sister.

After receiving the June 4, 1999 letter, the debtor advised his bankruptcy counsel, David Krekeler, of the wrongful death action. On June 23, 1999, during a conversation with Attorney Krekeler, the trustee first learned that the debtor was to receive proceeds from settlement of a wrongful death action. Attorney Krekeler told the trustee that he had advised the debtor that the settlement proceeds were property of the bankruptcy estate and must be disclosed to the court and the trustee. On June 29, 1999, Attorney Krekeler informed the trustee that he had been released from further employment by the debtor.

On June 29, 1999, the Cook County Circuit Court ordered distribution of the settlement proceeds to the next-of-kin, including the debtor. On July 6, 1999, the debtor received \$86,341.65 in partial satisfaction of his share of the settlement. The trustee learned of the partial distribution on July 19, 1999, and contacted the debtor the next day. The debtor informed the trustee that he had received proceeds from the wrongful death action and had spent approximately \$40,000 to acquire property for his towing business and refused to turnover the remaining proceeds to the trustee. On July 30, 1999, this court granted the trustee's motion to reopen the debtor's bankruptcy case. The debtor has spent virtually all of the proceeds he received on July 6, 1999. The remaining proceeds due the debtor were later paid to the trustee pending final resolution of the issues in this case.

The trustee argues that: (1) the debtor's right to recover damages in the wrongful death action was property of the estate under 11 U.S.C. §541(a), and therefore, the settlement proceeds in the wrongful death action are also property of the estate; (2) this court should order the debtor to turnover the settlement proceeds and the property he purchased with the proceeds pursuant to 11 U.S.C. §542(a); and (3) the debtor's discharge should be revoked pursuant to 11 U.S.C. §727(d)(2) because the debtor failed to report and deliver property of the bankruptcy estate to the trustee. The debtor contends that he had no property interest in the wrongful death action or the proceeds because he did not file a claim, and that his family's decision to allow him to share in the settlement proceeds was a gift. Further, the debtor argues that the proceeds held by the trustee should be paid to him.

I. At the time of his bankruptcy, the debtor had the right to recover damages under the Illinois Wrongful Death Act for the death of his mother. The debtor, as next-of-kin of the decedent, is statutorily entitled to a share of the recovery. The debtor's argument, that he had no property interest because he did not file a wrongful death claim for the death of his mother, is without merit. While the debtor characterizes the payment of a portion of the settlement proceeds to him as a gift from his family, it was, as a matter of law, an entitlement that existed upon the death of his mother.

Illinois law governs what property interest the debtor had in the wrongful death claim. The Bankruptcy Code defines property of the estate as "all legal or equitable interests of the debtor as of the commencement of the case." 11 U.S.C. §541(a). In In the Matter of Williams, 197 B.R. 398, 402 (Bankr. M.D. Ga. 1996, J. Hershner), the court stated:

A debtor's bankruptcy estate includes causes of action existing at the time of the commencement of the case. The trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed. This includes causes of action which the debtor fails to disclose in his bankruptcy schedules.

Id. Any cause of action belonging to the debtor at the time of his bankruptcy is property

of the estate. *See also In the Matter of Yonikus*, 974 F.2d 901, 904 (7<sup>th</sup> Cir. 1992) (holding that at the time of the debtor's bankruptcy, his potential personal injury claim was property of the estate).

The Illinois Wrongful Death Act provides:

Every such action shall be brought by and in the names of the personal representatives of such deceased person, and except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the economic and non-economic damages resulting from such death, to the surviving spouse and next of kin of such deceased person.... The amount recovered in any such action shall be distributed by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each surviving spouse and next of kin of such deceased person in the proportion, determined by the court, that the percentage of dependence of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person.

740 ILCS 180/2. The Illinois Wrongful Death Act makes clear that while only the personal representative of the decedent's estate can bring suit under the Illinois Wrongful Death Act for the wrongful death of the decedent, the ultimate recovery would belong to the others designated in the statute. Only Gary Mordhorst, as personal representative of Debra Mordhorst's estate, could bring an action under the Illinois Wrongful Death Act, but the persons who can recover under the Act include the surviving spouse and next of kin of the decedent. In *In re Estate of Finley*, 601 N.E.2d 699, 701 (Ill. 1992), the court stated that "the phrase 'next of kin' for purposes of the Wrongful Death Act, are those blood relatives of decedent in existence at decedent's death who would take decedent's property if decedent had died intestate." Under the Illinois Probate Act, if the decedent dies intestate with a surviving spouse and descendants, the decedent's estate is divided one-half to the surviving spouse and one-half to the decedent's descendants per stirpes. *See* 755 ILCS 5/2-1(a). Therefore, the debtor, his sister Melanie and his father Gary were entitled to recover for the wrongful death of Debra Mordhorst.

Next of kin under the Illinois Wrongful Death Act is not limited to minor children of the decedent. Illinois case law has repeatedly held that adult children of a decedent could recover under the Illinois Wrongful Death Act. *See In re Estate of Keeling*, 478 N.E.2d 871, 872 (Ill. App. 1985). Moreover, dependency upon the decedent is not limited to financial dependency, but also includes loss of society. *See In re Estate of Wiese*, 533 N.E.2d 1183, 1185 (Ill. App. 1989); *Adams v. Turner*, 555 N.E.2d 1040, 1042 (Ill. App. 1990).

The Illinois Wrongful Death Act specifically provides that a wrongful death recovery is for the benefit of the surviving spouse **and** the next of kin. The debtor is among the next of kin of Debra Mordhorst. The debtor did not become estranged from his father and move out of the family home until after the death of his mother. Therefore, under Illinois law, the debtor was dependent upon his mother.

Although the debtor was not aware of the wrongful death action at the time of his bankruptcy, under Illinois law, he did have an interest in the action. That interest became property of the bankruptcy estate upon the filing of the bankruptcy case. Because the debtor never scheduled his interest in the wrongful death action, it remained property of the estate even after the trustee filed a "no asset" report and the case was closed. Section §554(c) of the Bankruptcy Code provides:

Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

11 U.S.C. §554(c). The operation of §554(c) is known as technical abandonment. *See In re DeVore*, 223 B.R. 193, 197 (9<sup>th</sup> Cir. B.A.P. 1998, J. Brandt). For technical abandonment to occur, three requirements must be met: "(1) the asset must have been scheduled on the bankruptcy petition or any amendments, (2) the asset must not have been administered, and (3) the case must have been closed." *In re Figlio*, 193 B.R. 420, 423 (Bankr. D.N.J. 1996, J. Gindin). *See also Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8<sup>th</sup> Cir. 1991); *In re Arista Devices Corp.*, 94 B.R. 26, 32-33 (E.D.N.Y. 1988, J. Dearie); *In re Harris*, 32 B.R. 125, 127 (Bankr. S.D. Fla. 1983, J. Britton); *In re Pace*, 146 B.R. 562, 564 (9<sup>th</sup> Cir. B.A.P. 1992, J. Mac Donald). There was no technical abandonment in this case, and the right to recover for the wrongful death remained property of the estate under 11 U.S.C. §554(d). <sup>(1)</sup> *See In re Harris*, 32 B.R. at 127.

II. The trustee seeks to order the debtor to turnover the settlement proceeds and the property he purchased with the proceeds, pursuant to 11 U.S.C. §542(a). Section 542(a) provides:

Except as provided in subsection (c) or (d) of this section, an entity other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. §542(a).

In the Seventh Circuit, even if the debtor or some other entity no longer has the property in his possession, the debtor is still required under §542(a) to turnover the property or the value of the property. *See In the Matter of USA Diversified Products, Inc.*, 100 F.3d 53, 56 (7<sup>th</sup> Cir. 1996). Therefore, if the debtor no longer has the settlement proceeds in his possession, he is still required to turn over the value of the proceeds to the trustee.

The trustee seems to be asking this court to trace the settlement proceeds to property purchased by the debtor and to require the debtor to turn over this property as well. Such tracing is not required. *See In re Carlson*, 231 B.R. 640, 659 (Bankr. N.D. Ill. 1999, J. Schmetterer) (entering a judgment for the value of the property to be turned over rather than engaging in some tracing mechanism). In *Carlson*, Judge Schmetterer found that funds concealed from the trustee must be turned over to the estate, even though the person who concealed the funds no longer had them in his possession. *Id.* The debtor's obligation, in this case, need not be satisfied from specific property purchased, although that property may be reached by execution or some similar remedy if a judgment against the debtor is not otherwise satisfied. Therefore, I will order judgment against the debtor in the amount of \$86,341.65, the amount of the wrongful death proceeds received by the debtor but not turned over to the bankruptcy estate.

III. The trustee seeks revocation of the debtor's discharge under 11 U.S.C. §727(d)(2) because the debtor failed to report and to deliver the settlement proceeds. Section 727(d)(2) provides:

On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section

if...the debtor acquired property that is property of the estate, or became entitled to acquire property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee....

11 U.S.C. §727(d)(2).

While there is a split of authority on the standard of proof for establishing fraud, other courts in the Seventh Circuit have adopted the preponderance of the evidence standard. *See generally In re Reese*, 203 B.R. 425, 430 (Bankr. N.D. Ill. 1997, J. DeGunther). That is the standard to be applied to bankruptcy controversies unless a higher standard is specified in the Bankruptcy Code or the applicable substantive law. *See Grogan v. Garner*, 498 U.S. 279 (1991). Since non-bankruptcy law does not apply to the requirements of §727(d)(2) and no other standard is prescribed by the Bankruptcy Code, a preponderance of the evidence will control the outcome of this issue.

The question then is whether the debtor knowingly and fraudulently failed to report or deliver the estate property. In *In re Yonikus*, 974 F.2d 901, 905 (7<sup>th</sup> Cir. 1992), the Seventh Circuit outlined the standard for determining whether a debtor acted with fraudulent intent:

To find the requisite degree of fraudulent intent, the court must find the debtor knowingly intended to defraud the trustee, or engaged in such reckless behavior as to justify the finding of fraud.... The trustee may prove the debtor's fraud by evidence of the debtor's awareness of the omitted asset and by showing that the debtor knew that failure to list the asset could seriously mislead the trustee or that the debtor acted so recklessly in not reporting the asset that fraud is implied.

Id.

The stipulated facts show that it is more likely than not that the debtor possessed fraudulent intent while failing to report and deliver the settlement proceeds to the trustee. After learning of his entitlement to one third of the settlement proceeds, the debtor contacted his bankruptcy counsel, David Krekeler, and was informed that any recovery was property of the bankruptcy estate. Attorney Krekeler contacted the trustee and informed him of the wrongful death action, of the debtor's entitlement to the recovery, and that he had told the debtor the recovery was property of the estate. The debtor, knowing it to be property of the estate, deposited the proceeds in his personal checking account and dissipated the entire amount. The trustee was not told of the partial distribution until 13 days after the debtor received it, by which time the debtor had spent virtually all of the proceeds he received. The debtor was aware he would receive a wrongful death recovery as early as June 4, 1999. The debtor knew it was property of the estate no later than June 23, 1999. He received \$86,341.65, immediately spent \$40,000, and then refused to deliver the remaining proceeds to the trustee.

The debtor now seeks to justify his actions, espousing the legal theory that the proceeds were a gift. That is pure baloney. In *In re Attorney Lightfoot*, No. D-00-0002 (7<sup>th</sup> Cir. May 19, 2000), the Seventh Circuit stated that "[the] taking of unreasonable positions in litigation [is] sometimes sanctionable under the various rules designed to protect courts and litigants from frivolous and vexatious litigation and other abuses of judicial process." This is one of those circumstances. The debtor's post hoc explanation and legal justification are unreasonable and further evidence fraudulent intent.

The debtor's discharge must be revoked.

**END NOTES:**

1. Section 554(d) of the Bankruptcy Code provides: "Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate." 11 U.S.C. §554(d).