UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

IN RE:

CHARLENE I. ORSHAK,

Debtor.

MICHAEL E. KEPLER, Trustee,

Plaintiff,

v.

CLIFFORD & RELLES, S.C.,

Defendant.

IN BANKRUPTCY NO.:

MM7-88-02082

IN ADVERSARY PROCEEDING NO.:

89-0233-7

MEMORANDUM DECISION:

The debtor in this case was the respondent in a divorce action in Dane County Circuit Court, In re The Marriage of Orshak, 85 FA 0737. During the pendency of the divorce action, Keith R. Clifford, of Clifford & Relles, S.C., was appointed Guardian ad Litem ("Guardian") of the debtor's minor children. On May 14, 1985, the Assistant Family Court Commissioner of Dane County issued "Findings of Fact and Temporary Order" which provided:

> In the event the parties sell their homestead during the pendency of this action, the net proceeds, after payment of the first mortgage and other usual and ordinary closing costs, shall be placed in an interest bearing trust account pending further agreement of the parties and their attorneys or order of the Court.

Pursuant to the Temporary Order, the parties sold their residence and placed the net proceeds in a money market account. The trustee of the account was Karen D. Julian, Mr. Orshak's attorney. On July 31, 1987, $5,000 from that account was

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distributed to the Guardian for services rendered. The balance of the guardian fees were adjudged fair and reasonable by the court on the final day of trial, April 28, 1988, but Judge Bartell entered "Findings and Order" on May 12, 1988 which provided in part: "The Court shall take under advisement the question of timing of payment of the Guardian ad Litem's fees and whether the fees shall be paid from the parties' money market account . . . ." On July 15, 1988, within 90 days of the debtor's bankruptcy petition, Judge Bartell entered a final order which authorized Attorney Julian to distribute trust funds to the Guardian. That order designated the fee due the Guardian as a "marital debt" and stated in part: "Each party shall cause the sum of $4,810.60 to be disbursed directly from their respective shares of the money market account to the Guardian ad Litem herein. The balance of each party's share of the money market account may then be disbursed to each party respectively."

On November 14, 1989, the trustee commenced this adversary proceeding to have the debtor's share of the final payment to the Guardian declared a voidable preference. The defendant has moved for summary judgment, claiming the payment was made from a trust which was not property of the debtor. He also argues that the payment was constructively made by the state court prior to the final order, that the payment was "in the ordinary course of business," and that to find the state court's action voidable would undermine the whole system of Guardians ad Litem.

There is no material dispute as to the facts. This will be

considered on the record presented as if before the court on cross-motions for summary judgment.

The elements of a preferential transfer are set forth in section 547(b) which provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made--
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The first issue which must be determined is whether an interest of the debtor has been transferred. The Bankruptcy Code defines a "transfer" in section 101(50) as ". . . every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . ." It is obvious that at some point in

the divorce proceeding an interest of the debtor was transferred to the Guardian. The debtor had an interest in the parties' residence which was converted to cash proceeds upon sale, and the Guardian subsequently received a portion of those proceeds. The question remains as to whether the "transfer" occurred as a result of the issuance of the check to the Guardian in furtherance of Judge Bartell's final order or whether it constructively occurred at some earlier date. Judge Ginsberg has indicated that a "transfer is deemed to have taken place when it first becomes effective between the transferor and the transferee . . . " Robert E. Ginsberg, 1 Bankruptcy: Text, Statutes, Rules, § 8.02(h)(1) at 596 (Prentice Hall Law & Business, 2d ed 1989).

If the Guardian received the benefit of the trust created in the house proceeds and, more importantly, if the debtor surrendered her interest therein at the time the trust was created, then it may be said that the transfer took place when the trust was created and funded. The difficulty with such a view of the facts is that the debtor retained a beneficial interest in the trust account throughout the divorce proceeding. It wasn't until the final order was entered that it became clear that the debtor's share would be reduced by even the $4,810.60 ordered paid, because Judge Bartell's consideration of the question of the Guardian's fees was specifically announced as being focused on the possibility of payment from other sources. It seems, therefore, that although the Guardian was ultimately benefited by the funds in trust, the trust was not created or maintained for his primary benefit. His status

as a beneficiary was never so specific or secure as to terminate the debtor's interest in that portion of the trust paid over at any time prior to the actual payment.

The state court specifically designated the Guardian obligation as a marital debt[1] to be borne equally by the debtor and the debtor's spouse. Restatement (Second) of Trusts, § 12g (1959) provides:

> If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created. If the intention is that the person receiving the money shall have unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor or to a third person, a debt is created.

The intent in creating the account, as reflected in the May 14, 1985 order, was to preserve the proceeds from the sale of the residence subject to further agreement of the parties or court order. Agreements between parties in a divorce action are considered mere recommendations and must be evaluated prior to implementation. Leighton v. Leighton, 81 Wis. 2d 620, 628-29, 261 N.W.2d 457 (1978). Norman v. Norman, 117 Wis. 2d 80, 81-82, 342 N.W.2d 780 (Ct. App. 1984). Button v. Button, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986). The fact that the use of the trust account was restricted to court authorized distributions, and the trust was

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[1]Section 766.55, Stats., provides in pertinent part:

> (1) An obligation incurred by a spouse during marriage . . . is presumed to be incurred in the interest of the marriage or the family.

not liable for any allowable claim against the debtor except that of the beneficiary designated by the trust, did not, however, fix the Guardian as a beneficiary in any specific amount nor terminate the debtor's beneficial interest in the entire corpus, prior to the court's order.

In Matter of Lenk, 44 B.R. 814 (Bankr. W.D. Wis. 1984), this Court found a statutory trust to exist where the intent and effect of the state law was to create a trust, stating that "[g]enerally, to create a valid trust a settlor conveys property to a trustee with the intention that the trustee will hold the property for a beneficiary." Lenk, 44 B.R. at 816, citing Hoffman v. Wausau Concrete Co., 58 Wis. 2d 472, 483, 207 N.W.2d 80 (1973). The federal district court affirmed this Court's order that the statutory trust funds were not property of the estate. Matter of Lenk, 48 B.R. 867 (D.C., W.D. Wis. 1985). However, Lenk must be distinguished because it involved Wisconsin statutory law expressly creating a separate trust to satisfy specific claims. In the present case, there is no similar statute. Furthermore, there is no alternative basis upon which to presume or infer that the trust account was created for the purpose of preserving sufficient funds to satisfy the administrative costs of the divorce proceeding. Section 757.48(2), Stats., allows a court to award payment of a Guardian ad Litem fee out of real or personal property involved in the case. However, the May 12, 1988 order appears to contemplate at least the possibility of payment of the Guardian fee from sources other than the trust account.

What scant support there is for finding a trust which would insulate the funds paid to the Guardian from recovery as a preference is not controlling or compelling. In In re North American Marketing Corp., 24 B.R. 16 (Bankr. S.D. Fla. 1982), the court excluded from property of the estate a supersedeas bond posted by the debtor to stay a state judgment prior to filing bankruptcy. The bond was funded in the form of a money market certificate in the name of the debtor's attorney as trustee. The state court, post-petition, determined that the debtor had no legal or equitable interest in the bond funds and authorized their release in satisfaction of a judgment against the debtor. The court emphasized that the debtor had no expectation of ever recovering the funds which constituted the bond even though any surplus in the money market certificate, after satisfaction of the judgment, was to be refunded to the debtor. Most importantly, the court concluded that there could be no avoidance because the actual transfer was the posting of the bond which took place prior to the 90 day preference period.

The trust fund theory also finds some support in an analogy to IRS tax fund cases. In Matter of All-Way Services, 73 B.R. 556 (Bankr. E.D. Wis. 1987), Judge Eisenberg held that money held in the debtor's payroll account, which was used solely for payment of wages and employment taxes, was not property of the estate because it was held in trust for employees and the IRS. However, the court reached the opposite result as to funds in the debtor's general operating account. Other courts have also refused to impose a

trust by operation of law where funds were distributed to the IRS from a general operating account. Drabkin v. District of Columbia, 824 F.2d 1102 (D.C. Cir. 1987). However, still other courts have followed the dissent in Drabkin, supra, and found that payments from nonsegregated funds did not constitute preferential transfers because a special trust account had been established by the mere payment of withholding taxes to the IRS. See Begier v. U.S. I.R.S., 878 F.2d 762 (3rd Cir. 1989), aff'd, No. 89-393 (U.S., June 4, 1990). Thus, in Begier, the court was effectively creating a segregated trust account in the context of general funds of the debtor by operation of law in order to promote the policy of ensuring payment of withholding taxes for the benefit of employees and the IRS.

In answering whether an interest of the debtor was transferred within the 90 day preference period, the earmarking of funds "doctrine" must be considered and rejected. Earmarking is said to operate to negate an otherwise preferential transfer. In In re New York City Shoes, Inc., 98 B.R. 725 (Bankr. E.D. Pa. 1989), aff'd 106 B.R. 58 (E.D. Pa. 1989), the court found that a debtor's power and discretion to disperse funds as he wishes is tantamount to an interest in the funds transferred so that earmarking is inapplicable. However, where a third party exercises strict and exclusive control over the distribution of funds, earmarking may be involved to avoid an otherwise preferential transfer because the debtor is considered to have no interest in the funds. Even if this so-called doctrine were to be recognized as such, which it is

not by this court, there is no suggestion that the deposited house proceeds were so earmarked as to invoke its rationale.

In order to be preferential, a transfer must be "to or for the benefit of a creditor." Section 547(b)(1). Although the Guardian may be an atypical creditor as that term is generally used, he clearly was within the Bankruptcy Code definition. The Bankruptcy Code defines a "creditor" in section 101(a) as an "entity that has a claim against the debtor . . . ." A claim is defined in section 101(4)(A) as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Thus the transfer meets the requirement of Section 547(b)(1).

The second requirement of Section 547(b) is also met. The debt to the Guardian arose well before its payment. All of the Guardian's services had been provided prior to April 28, 1988, when Judge Bartell found them to be "fair and equitable." Their payment after July 15, 1988, was certainly for an antecedent debt.

The Bankruptcy Code provides a presumption of insolvency in the context of preferences. Section 547(f). In the present case, this presumption has not been challenged and there appears to be no dispute that the debtor was insolvent throughout the 90 day preference period. Thus, the requirement on Section 547(b)(3) has been met.

The parties appear to concede that all claims in the bankruptcy case will not be paid in full. Thus, by receiving the

contested transfer, the Guardian received more than if the transfer had not been made. All elements of section 547(b) therefore have been met.

The Guardian does claim that the transfer was made in the ordinary course of business and thereby fits within an exception provided by § 547(c)(2). The contention is so farfetched as to deserve no discussion here.

Upon the foregoing findings of fact and conclusions of law, the trustee may recover the value of the transfer made to the Guardian on or about July 15, 1988 in the amount of $4,810.60. An order will be so entered.

Dated this 26 day of June, 1990.

ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

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ORDER:

The court having this day entered its memorandum decision in the above-entitled matter,

IT IS HEREBY ORDERED that summary judgment is granted in favor of the trustee, who may recover from Clifford & Relles, S.C. the amount of $4,810.60.

Dated this 26th day of June, 1990.

ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

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MEMORANDUM DECISION AND ORDER:

Copies of this memorandum decision and order were mailed to the following parties on June 27, 1990:

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