Dated: July 14, 2005
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
ANDREA SPARKS, Debtor.

Case No. 03-38563-L
Chapter 7

ORDER GRANTING TRUSTEE'S MOTION TO APPROVE ASSIGNMENT OF STRUCTURED SETTLEMENT

BEFORE THE COURT is the motion of George W. Emerson, Jr, Chapter 7 trustee (the "Trustee"), dated December 1, 2004, to approve the assignment of payments under a structured settlement agreement owed to the Debtor. The payments are to be made to the Debtor by American General Assignment Company ("AGAC"). AGAC purchased an annuity contract from American General Annuity Insurance Company ("AGAIC") to fund its obligation to the Debtor (the "Annuity Contract"). AGAC and AGAIC are referred to herein collectively as "American General." American General filed a memorandum in opposition to the motion and the Trustee filed a reply memorandum. At issue is whether the Debtor's right to receive payments from AGAC is assignable by the Trustee. The court heard oral argument on December 23, 2004. For the following reasons, the motion of the Trustee will be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(N).

FACTS

On or about February 20, 2001, the Debtor executed a settlement agreement or release with an unnamed party that provided for the payment to the Debtor of certain periodic payments as damages on account of personal injury or sickness. By virtue of a Uniform Qualified Assignment and Release dated April 6, 2001 (the "Qualified Assignment"), the obligation to make the settlement payments to the Debtor was assigned to and assumed by AGAC. Among other provisions, the Qualified Assignment provides:

> 6. The Assignee may fund the Periodic Payments by purchasing a "qualified funding asset" within the meaning of Section 130(d) of the Code in the form of an annuity contract issued by the Annuity Issuer. . . .
>
> 7. The Assignee may have the Annuity Issuer send payments under any "qualified funding asset" purchased hereunder directly to the payee(s) specified in Addendum No. 1. Such direction of payments shall be solely for the Assignee's convenience and shall not provide the Claimant or any payee with any rights of ownership or control over the "qualified funding asset" or against the Annuity Issuer.

AGAC purchased an annuity contract from AGAIC to fund this liability. Pursuant to the Qualified Assignment, the Debtor is entitled to receive a series of payments commencing on February 1, 2008, in the amount of $1,310.71 per month for ten years.

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 28, 2003. George W. Emerson, Jr., was appointed trustee. In an amendment to Schedule C, the Debtor claimed the entire value of her rights under the Qualified Assignment, estimated by her to be $75,000.00, as exempt from the claims of creditors pursuant to Tennessee law. The

Trustee objected and the parties entered a consent order allowing the Debtor an exemption in the amount of $7,500.00 pursuant to Tennessee Code Annotated § 26-2-111(2)(B).[1] On November 1, 2002, the Trustee listed the Debtor's right to receive payments under the Qualified Assignment for sale and received an offer of $87,100.00. The Trustee seeks this court's approval for the sale.

American General opposes the sale on the basis that the Debtor's right to receive payments under the Qualified Assignment is not assignable. The Qualified Assignment expressly provides that:

> 3. The Assignee's liability to make the Periodic Payments is no greater than that of the Assignor immediately preceding this Agreement. Assignee is not required to set aside specific assets to secure the Periodic Payments. The Claimant has no rights against the Assignee greater than a general creditor. None of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be **anticipated, sold, assigned, or encumbered** (emphasis added).

Similarly, the Annuity Contract provides:

> No Payee, Beneficiary, or Annuitant of this policy shall have the right to commute or anticipate income payments. To the maximum extent permitted by law, payments shall not be subject to:
>
> 1. Transfer (any attempt to make such transfer is void); or
>
> 2. Assignment (any attempt to make such assignment is void); or
>
> 3. Alteration (except for misstatement of age or sex); or
>
> 4. Claims by creditors before any payment is due; or

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[1] Tenn. Code Ann. § 26-2-111 provides an exemption for:

> (2) The debtor's right not to exceed in the aggregate fifteen thousand dollars ($15,000) to receive or property that is traceable to: . . .
>
> > (B) a payment, not to exceed seven thousand five hundred dollars ($7,500) on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent . . . .

5. Encumbrance by creditors or Beneficiary; or

6. Judicial or legal process by creditors.

The Trustee argues that, notwithstanding the language of these contracts, he is entitled to sell the Debtor's right to receive payments under the Qualified Assignment for the benefit of the bankruptcy estate.

ANALYSIS

A. The Debtor's Right to Receive Payments is Property of the Bankruptcy Estate.

Upon the filing of a bankruptcy petition an estate is created consisting of all the legal and equitable interests of the debtor in property. 11 U.S.C. § 541(a)(1). This is true notwithstanding "any provision in the agreement, transfer instrument, or applicable non-bankruptcy law that restricts or conditions transfer" of an interest of the debtor in property by the debtor, except that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable under title 11." 11 U.S.C. § 541(c)(1)(A) and (c)(2). While federal bankruptcy law mandates that the legal and equitable interests of the debtor in property become property of the bankruptcy estate, "property interests are created and defined by state law." *Butner v. United States,* 440 U.S. 48, 55 (1979); *see also Fisher v. Apostolou*, 155 F.3d 876, 880 (7th Cir. 1998) ("The nature of a debtor's property is determined by state law . . . but the question whether the resulting interest should count as 'property of the estate' for § 541 purposes is an issue of federal law"). The scope of section 541(c)(1) is very broad. See *Tignor v. Parkinson (In re Tignor)*, 729 F.2d 977 (4th Cir. 1984) (citing legislative history and distinguishing the Bankruptcy Reform Act of 1978 from the Bankruptcy Act). The leading bankruptcy treatise explains:

> In a sharp departure from the former [Bankruptcy] Act, section 541(c)(1) renders ineffective restrictions or conditions on transfer.

> Section 541(c)(1)(A) operates to make virtually all property interests of the debtor property of the estate regardless of any restriction or conditions on transfer.

5 *Collier on Bankruptcy* ¶ 541.24 (15th ed. rev. 2005). Section 541(c)(1) "facilitates the conveyance of a debtor's property into the newly created bankruptcy estate." *In re Quinn*, 299 B.R. 450, 460 (Bankr. W.D. Mich. 2003). Once property comes into the bankruptcy estate pursuant to section 541(a) and (c)(1), property not claimed as exempt by the debtor is available for use, sale or lease by the trustee pursuant to section 363. Section 541(c)(1) brings all of the debtors property into the estate in a one-time transfer without regard to restrictions or conditions on transfer.

In its memorandum, American General is not always careful to distinguish between the "transfer" of the Debtor's interest in the Qualified Assignment to her bankruptcy estate and the proposed transfer of that interest by the Trustee. The interest that the Debtor held immediately preceding the filing of her bankruptcy case was her contractual right to receive payments from AGAC under the Qualified Assignment. The Qualified Assignment expressly provides for the release of the original obligor under the settlement agreement, so the Debtor held no rights under the original settlement agreement. Further, the Qualified Assignment expressly provides that, although AGAC may direct that payments under the Annuity Contract be made directly to the Debtor, this is solely for the convenience of AGAC and "shall not provide the Claimant or any payee with any rights of ownership or control over the 'qualified funding asset' [the Annuity Contract] or against the Annuity issuer." Immediately preceding the filing of the bankruptcy case, the Debtor held no rights under the Annuity Contract. The Annuity Contract was purchased for the use and convenience of AGAC in discharging its obligation to the Debtor under the Qualified Assignment.

The Debtor's interest in the Qualified Assignment is a contractual right. The Debtor's interest in the contract is property of the estate unless it falls under the section 541(c)(2) exception. That section generally is understood to refer to state spendthrift trusts, but it is not limited to such trusts. *Patterson v. Shumate*, 504 U.S. 753, 762, 112 S. Ct. 2242 (1992); *Taunt v. Gen. Ret. Sys. (In re Wilcox)*, 233 F.3d 899, 904 (6th Cir. 2000). State or federal law other than state spendthrift trust law can serve as "applicable non-bankruptcy law" under section 541(c)(2). For example, tax-qualified pension plans created pursuant to the Employee Retirement Income Security Act ("ERISA"), an act which specifically requires the presence of an anti-alienation provision, do not become property of a bankruptcy estate. *Patterson*, 504 U.S. at 758-59; *see* 29 U.S.C. § 1056(d)(1). There is a split of authority, however, as to whether ERISA-qualified annuity plans (as opposed to ERISA-qualified *trust* plans) are excluded as well. See *Skiba v. Gould (In re Gould)*, 322 B.R. 741, 742-44 (Bankr. W.D. Penn. 2005) (describing this split).

Even if the court were to conclude that the presence of a trust is not strictly required for application of section 541(c)(2), American General has pointed to no applicable state or federal law that prohibits transfer of the Debtor's interest in the Qualified Assignment. Nothing in federal law prohibits the transfer of the Debtor's right to receive payments pursuant to a structured settlement agreement. In order to encourage the use of structured settlements in personal injury cases, Congress has provided favorable tax treatment for certain transactions involving such agreements. *See* 26 U.S.C. §§ 104(a)(2), 130(a). A person who is a party to a suit or agreement to make periodic payments as damages on account of personal injury or sickness may assign that liability to another under certain conditions. None of these conditions requires the presence of language prohibiting assignment or alienation, although the payments, among other requirements, (i) must be fixed and determinable as to amount and time of payment; and (ii) may not be accelerated, deferred, increased or decreased by the recipient of such payments.[2] 26 U.S.C. § 130(c)(2)(A) and (B). In contrast, ERISA specifies that "[e]ach pension plan provide that benefits may not be assigned or alienated." 26 U.S.C. § 1056(d)(1). To be sure, a substantial tax penalty (40%) is imposed upon the factoring of structured settlement agreements, but an exception is provided if the transaction is approved by a "qualified order." *See* 26 U.S.C. § 5891(b)(2).[3]

Pursuant to the federal Structured Settlement Protection Act, a number of states have enacted legislation regulating transactions involving structured settlement agreements. Both Tennessee (the state of the Debtor's residence) and Texas (the domicile of AGAC and AGAIC and the state specified in the choice of law provision in the Qualified Assignment) have enacted such legislation. *See* Tennessee Structured Settlement Act, Tenn. Code Ann. § 47-18-2601-2607 and Texas Structured Settlement Protection Act, Tex. Civ. Prac. & Rem. Code Ann. § 141.001-.007. Neither act prohibits voluntary transfers of payment rights under a structured settlement agreement. In fact,

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[2] The Qualified Assignment contains the required language preventing the acceleration, deferral, increase or decrease of payments. In addition, the Qualified Assignment contains language prohibiting the anticipation, sale, assignment or encumbrance of the payments. This language is not required by federal law.

[3] 26 U.S.C. § 5891(b)(2) defines a "qualified order" for purposes of the Structured Settlement Protection Act as:

> [A] final order, judgment, or decree which –
> (A) finds that the [structured settlement factoring transaction]
> (i) does not contravene any Federal or State statute or the order of any court or responsible administrative authority, and
> (ii) is in the best interest of the payee, taking into account the welfare and support of the payee's dependents, and
> (B) is issued –
> (i) under the authority of an applicable State statute by an applicable State court, or
> (ii) by the responsible administrative authority (if any) which has exclusive jurisdiction over the underlying action or proceeding which was resolved by means of the structured settlement.

both acts provide specific procedures and guidelines for the approval of such transfers. Both acts require disclosure to the payee and prior court approval of the transfer. These requirements are intended to prevent payees under structured settlement agreements from bargaining away their interests in structured settlement agreements for less than adequate consideration. *See, e.g., Johnson v. Structured Asset Services, LLC,* 148 S.W. 3d 711, 729 (Tex. Ct. App. 2004) (describing the purpose of the Texas act and similar acts as adopted in a majority of other states). Both acts provide protection to the structured settlement obligor in the event of transfer. Nothing in either of the acts prohibits attachment of the rights of the payee by a creditor of the payee. Rather, each state provides for exemption of certain property interests from the claims of creditors. Under the Bankruptcy Code, property that may be claimed as exempt by a debtor nevertheless becomes property of the bankruptcy estate pursuant to section 541(a). *See* 11 U.S.C. § 522(b) ("Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate property listed [below]").

With no specific prohibition or absolute restriction on transfers of interests under a structured settlement agreement in either federal or state law, the Debtor's right to payment becomes property of the estate by virtue of section 541(c)(1)(A) notwithstanding the language in the Qualified Assignment prohibiting transfer.

B. The Trustee May Sell the Debtor's Right to Receive Payments Pursuant to the Qualified Assignment.

The Trustee proposes to assign the Debtor's rights under the Qualified Assignment pursuant to section 363(b)(1) of the Bankruptcy Code, which provides:

> The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(b)(1). American General argues that the Trustee's rights concerning the structured settlement payments are restricted by state law. American General points to no provision of the Bankruptcy Code that directs this result. Instead, American General confuses the question of whether the Debtor had a legal or equitable interest in property that became property of her bankruptcy estate pursuant to section 541(a) with the question of whether a trustee in bankruptcy is bound by restrictions on transfer of a debtor's legal or equitable interest in property.

Once property is determined to be property of the bankruptcy estate, the bankruptcy trustee may use, sell, or lease the property for the benefit of creditors of the bankruptcy estate: "Section 363(b) provides [t]rustee with the authority to once again override the assignment restrictions contained within . . . [an] annuity." *Quinn*, 299 B.R. at 461. Had the Debtor not settled her personal injury claim before the filing of her bankruptcy case, her pre-petition cause of action would have become property of her bankruptcy estate, and any proceeds from settlement or judgment, not specifically claimed as exempt by the Debtor, would have been available for distribution to her creditors. *See Johnson v. Cooper (In re Cooper)*, 135 B.R. 816, 819 (Bankr. E.D. Tenn. 1992) (comparing the property interest of a debtor in a personal injury cause of action which is unliquidated to the property interest of a debtor in a periodic right to payments resulting from the settlement of such a cause of action, concluding that "whether unliquidated or settled, [both] are the property of the bankruptcy estate"). All of the payments under the annuity contract are property of the bankruptcy estate. The Trustee is entitled to use the balance after satisfaction of the Debtor's exemption to pay creditors. Rather than wait for each payment to be received, the Trustee proposes to sell the estate's right to receive future payments for a lump sum. No provision of section 363 prevents him from doing so.

American General urges a different result based upon the decision of the bankruptcy court in *Grochocinski v. Crossman (In re Crossman)*, 259 B.R. 301 (Bankr. N.D. Ill. 2001). In that case, the parties did not dispute that the debtor's right to receive structured settlement payments became property of her bankruptcy estate, or the trustee's right to receive the payments on behalf of the estate, but only the trustee's right to discount the future payments to a present cash value. *Id.* at 305. The court held that notwithstanding the trustee's right to receive payments on behalf of the estate and distribute them to creditors, the trustee was nevertheless bound by contractual and state law restrictions on assignment. The court indicated that the trustee might seek permission of an Illinois circuit court to assign the structured settlement payments pursuant to the Illinois equivalent of the Tennessee and Texas structured settlement acts. *Id.* at 306.

This court respectfully disagrees with the conclusion of the Illinois bankruptcy court. Once property becomes property of the bankruptcy estate, the trustee is authorized to use, sell, or lease the property for the benefit of creditors. The state law procedure for approving the assignment of structured settlement payments is designed to protect the payee/beneficiary. When, as the result of the filing of her bankruptcy case, a debtor's interest in structured settlement payments is limited to her exemption amount, the requirement of state court approval[4] for assignment serves no purpose. The bankruptcy court is in the better position to determine whether the proposed sale is in the best interest of creditors of the estate. In this case, the Trustee has submitted the right to receive payments under the annuity to the market for bids, and has submitted the highest bid to the court for approval. There is no contention that the bid is inadequate. In fact, it exceeds the value assigned to the property by the Debtor. Further, assignment of the estate's interest is in the best interest of

[4] Unlike in *Crossman*, neither the Tennessee nor the Texas law actually requires "state court" approval. Rather, each requires a final court order. Tenn. Code Ann. § 47-18-2603; Tex. Civ. Prac. & Rem. Code Ann. § 141.004.

the Debtor because it will enable her to receive her exemption amount in a lump sum at what may be assumed to be a critical time in her financial recovery.

C. The Trustee is Not Prohibited from Assigning the Debtor's Rights under the Qualified Assignment by Section 365(c).

Although not specifically relied upon by American General, section 365(c) of the Bankruptcy Code concerns the assumption or assignment of executory contracts and unexpired leases of a debtor. American General's arguments assume that the Trustee may not assign the Debtor's rights under the Qualified Assignment without the consent of AGAC. Section 365(c) provides in pertinent part:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –
>
> > (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
> >
> > (B) such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c)(1). Strictly speaking, the annuity contract is not an executory contract, because no performance is due from the Debtor. *See In re Mirant Corp.* 378 F.3d 511, 518 n.3 (5th Cir. 2004) (Section 365(a) does not define executory contract, but the legislative history of that section indicates that the term means a contract "on which performance is due to some extent on both sides." (quoting *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 522 n. 6, 104 S. Ct. 1188 (1984)). Even were this section to apply to the Qualified Assignment, however, that section makes clear that the mere

presence of a non-assignment clause in the contract would not prevent the Trustee from assigning the Debtor's right to receive payments. Generally section 365(c) prevents assignment of personal services contracts, but it also prevents assignment of contracts for which assignment "would . . . increase materially the burden or risk imposed on [the obligor] by his contract." *See Nedwick Steel Co., Inc.*, 289 B.R. 95, (Bankr. N.D. Ill. 2003) (prohibiting bankruptcy trustee's assignment of exclusive distribution contract pursuant to Illinois law).

American General argues that the proposed assignment is invalid because it would materially increase the risks and burdens for "AGLIC." AGLIC is not a party identified in the opposition filed by American General, nor does it appear to be a party to either the Qualified Assignment or the Annuity Contract. The court cannot determine what effect, if any, the proposed assignment would have on the unidentified AGLIC. American General's argument is also confusing insofar as it discusses the calculation of the settlement amount. American General says that "[t]he possibility of transfer should have required AGAC and AGLIC [sic] to lower the settlement valuation in order to offset the increased administrative burdens and expenses." The court assumes that the underlying settlement valuation was determined by the unnamed party or parties who caused the Debtor's injuries, or its insurer. This obligation was assigned to and assumed by AGAC pursuant to the Qualified Assignment. The liability of AGAC is fixed, and cannot increase. Further, this liability was fully funded through the purchase of the Annuity Contract. It is this liability, the liability of AGAC to the Debtor, that the Trustee seeks to assign. Pursuant to the Qualified Assignment, the Debtor, as "Claimant," has no rights of ownership or control over the Annuity Contract. AGAIC's responsibility under the Annuity Contract is limited to making monthly payments to AGAC, or if directed by AGAC to do so, directly to the "Claimant." AGAC is specifically protected from the possibility of double liability by the Tennessee Structured Settlement Act and the Texas Structured Settlement Protection Act, which provide, in pertinent part, that following a transfer approved by court order, "the structured settlement obligor and annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments." Tenn. Code Ann. § 47-18-2604(d); Tex. Civ. Prac. & Rem. Code Ann. § 141.005(1). Following the entry of this court's order approving the transfer of the Debtor's right to receive payments, the only administrative burden on AGAC and AGAIC that the court can discern is the burden of changing the name and address of the payee.

D. The Proposed Transfer by the Trustee Does Not Violate State Law.

American General argues at length that the proposed assignment by the Trustee of the Debtor's rights to receive payments under the Qualified Assignment violates the laws of Tennessee and Texas. We have already seen that American General failed to consider the application of the Bankruptcy Code to the anti-assignment language in the Qualified Assignment, and further that nothing in the structured settlement laws of either Tennessee or Texas prohibits transfer of the right to receive payments under a structured settlement agreement. American General also argues that the proposed assignment violates Texas common law and the Texas Insurance Code.

American General asserts that Texas courts consistently enforce anti-assignment language in contracts. Each of the cases it cites is easily distinguished from the present case, however. None of them is a bankruptcy case and therefore none of them discusses the rights granted to a bankruptcy trustee to use, sell, or lease property of the estate.

The first case relied upon by American General, *Island Recreational Dev. Corp. v. Republic of Texas Savings Ass'n,* 710 S.W.2d 551 (Tex. 1986), concerned the enforcement of the anti-assignment provision of a loan commitment letter. The loan commitment expressly stated that it could not be assigned without full consent of the lender, but there was an attempted assignment nonetheless. The Texas Supreme Court held that an attempted assignment of a loan commitment without the consent of the committed lender would be of no force and effect. Pursuant to the Bankruptcy Code, a trustee may not assume or assign a contract to make a loan whether or not the contract in question prohibits assignment. *See* 11 U.S.C. § 365(c)(2). Therefore, the result would have been the same had the case been a case in bankruptcy, but not because of the anti-assignment clause.

The second case, *Texas Farmers Insurance Co. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. Ct. App. 1994), involved the attempted assignment of a cause of action against an insurance company arising out of a personal injury. A passenger in an automobile insured by the defendant assigned her rights under the insurance policy to a health care provider, and then accepted reimbursement from the insurance company without paying the provider. The provider, as assignee, sued the insurance company, arguing that the anti-assignment language in the policy was intended to apply only to the named insured and not to a third-party beneficiary (the absconding passenger). The court rejected this argument and enforced the anti-assignment clause. The analogous question in this case would be whether a trustee in bankruptcy would be entitled to assign an injured debtor's rights under an insurance policy without the consent of the insurer before the debtor has received treatment. At that stage, the insurance company would have an interest in ensuring that the treatment received by the insured was reasonable and that costs associated with that treatment also were reasonable. Section 365(c)(1)(A) would prevent the trustee from assigning a debtor's rights under those circumstances without the consent of the insurer, whether or not the contract contained an anti-assignment provision. Once services were provided, however, and all that was left was payment of the claim, section 365(c)(1) would not prevent assignment of the claim. One might also consider the result if the health care provider filed a bankruptcy case and its trustee attempted to bring the claim into the bankruptcy estate. In that event, whether the provider had a claim (i.e., an interest in property) would be a question of state law. If state law would enforce the anti-assignment provision, then the provider would have no right against the insurer that could become property of the provider's bankruptcy estate. American General argues that the mere presence of an anti-assignment clause means that the Debtor has no interest that can become property of her estate. This is not the correct interpretation of *Butner,* however. There is no question that, pursuant to state law, the Debtor had a contractual right in the Qualified Assignment immediately prior to the filing of her bankruptcy case that became property of her bankruptcy estate upon filing.

The third case relied upon by American General, *Cloughly v. NBC Bank-Seguin, N.A.,* 773 S.W.2d 652 (Tex. Ct. App. 1989), involved an attempted assignment of payments under an annuity contract. In that case, the annuity contract specifically provided that the right to receive payments could not be assigned without the prior written consent of the annuity issuer. The annuitant sought permission for the assignment from the issuer, and it was expressly denied. The alleged assignee then tried to intervene to prevent the annuity issuer from paying over funds due under the annuity contract pursuant to a garnishment issued by a creditor of the original annuitant. The trial court entered judgment for the garnishing creditor and the annuitant and alleged assignee appealed. The court of appeals affirmed, holding that the attempted assignment was invalid because the assignment was not approved. Here the Trustee has sought court approval of the proposed assignment and need not obtain the consent of the obligor for the assignment under federal bankruptcy law. *Cloughly* is instructive primarily because the anti-assignment language of the annuity contract did not place the payments beyond the reach of the annuitant's creditors.

A Texas case that is more factually analogous to the present one is *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, an interpleader action in which the issuer of an annuity sought direction about whether to pay an annuitant, who received the annuity as part of a personal injury settlement, or the factoring company to whom the annuitant had assigned a portion of his interest. The annuitant argued that his assignment was ineffective because of anti-assignment language in the contract. The trial court held for the factoring company concluding that the annuitant had waived any contractual right he had to assert the anti-assignment clause and that the assignment was not against public policy. The annuitant appealed and the Texas Court of Appeals affirmed, agreeing that "a party can waive contract provisions that are in the contract for his benefit." *Id.* at 722 (citation omitted). The Texas Structured Settlement Protection Act did not apply to the annuity in question, but the court noted that that act does not prohibit the assignment of structured settlement payments, but merely "require[s] certain precautionary mechanisms that will safeguard recipients from possible abuse by factoring companies." *Id.* at 729. The court described the act as "a paternalistic statute . . . [, one that] requires disclosures and court approval before any transfer of structured settlement payment rights." *Johnson,* 148 S.W.3d at 729.

As noted above, the payments due under the Qualified Assignment are now property of the Debtor's bankruptcy estate. The anti-assignment provision of the Qualified Assignment was intended for the benefit of the Debtor. That provision is not required by federal law in order for AGAC to enjoy favorable tax treatment. The Trustee is now the beneficiary of the provision and may waive the provision for the benefit of the creditors of the bankruptcy estate.

Finally, American General argues that the proposed assignment violates the Texas Insurance Code. American General relies upon the Texas Insurance Code which provides:

> If an insurance policy, annuity contract, or annuity or benefit plan described by Section 1108.051 prohibits a beneficiary from assigning or commuting benefits to be provided or other rights under the policy, contract, or plan, an assignment or commutation or attempted assignment or commutation of the benefits or rights by the beneficiary is void.

Tex. Ins. Code Ann. § 1108.102 (Vernon 2003). American General argues that this section together with the provision of the Annuity Contract prohibiting assignment by the payee or annuitant renders any attempted transfer void. This argument fails because the Debtor has no interest in the Annuity Contract. The interest that the Trustee may assign is the Debtor's interest in the Qualified Assignment. Further, the Texas Insurance Code section relied upon by American General is an exemption statute. Tex. Ins. Code Ann. § 1108.101. As such, it would not be available to the Debtor who is not a resident of Texas. Bankruptcy Code section 522(b) provides that a debtor in bankruptcy may choose between the exemptions provided by federal bankruptcy law or the law of the state of the debtor's domicile unless that state has "opted out" of the federal exemption. 11 U.S.C. § 522(b). Tennessee has opted out, meaning that the only exemptions available to the Debtor in bankruptcy are those provided by the State of Tennessee. *See* Tenn. Code Ann. § 26-2-112. The Debtor properly chose to claim her exemption in the Qualified Assignment under Tennessee law. Finally, the section relied upon by American General applies to insurance policies or annuity contracts issued by a life, health, or accident insurance company. *See* Tex. Ins. Code Ann. § 1108.102. The interest of the Debtor does not arise under an insurance policy or annuity. Further, even if it did, neither AGAC nor AGAIC appears to be a life, health, or accident insurance company.

CONCLUSION

Because the Debtor's right to receive payments under the Qualified Assignment is property of the bankruptcy estate, the motion of the Trustee to assign the right to receive those payments for the benefit of the estate is **GRANTED.** The Trustee is authorized to transfer the Debtor's right to receive payments under the Uniform Qualified Assignment and Release, dated April 6, 2001, to Alan Travis for the sum of $87,100.00.

cc: Debtor
Attorney for Debtor
Chapter 7 Trustee
Attorney for Chapter 7 Trustee
American General
Attorney for American General