



Dated: December 15, 2014
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re Case No. **14-26711**
LaShandra Michelle Turner Chapter **13**
Debtor.
S.S. No. xxx – xx – 5348

**MEMORANDUM AND ORDER RE TRUSTEE’S “OBJECTION TO CONFIRMATION”
COMBINED WITH RELATED ORDERS AND NOTICE OF THE ENTRY THEREOF**

Introduction

This proceeding arises out of the August 7, 2014 “Objection to Confirmation” filed by the Chapter 13 Trustee (“Trustee”) in the above-named Chapter 13 case and also the subsequent “Amended Schedule B” filed by the above-named debtor, LaShandra Michelle Turner (“Ms. Turner”).¹ The question for ultimate judicial determination is whether prepetition child support arrearages that are owed to Ms. Turner, and are listed in her Schedule B, are property of Ms. Turner’s chapter 13 estate under 11 U.S.C. §§ 541 and 1306.

¹ This court is aware of the December 5, 2014, voluntary withdrawal of the Trustee’s “Motion to Dismiss Chapter 13 Case for Sufficient Grounds,” which was filed on August 7, 2014.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(L). The following shall constitute the court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Facts and Procedural History

Ms. Turner filed this Chapter 13 case on July 1, 2014. On Schedule B, "Personal Property," Ms. Turner listed "Child support arrears of approximately \$30,000.00" in item 17, entitled "Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled." Paragraph 2 of Ms. Turner's Statement of Financial Affairs reflects that she received \$834.20 in child support payments in 2014, as of the date of the filing of the Chapter 13 petition. Additionally, in Schedule C, "Property Claimed as Exempt," Ms. Turner claimed as exempt 100% of the unknown fair market value of the prepetition child support arrearages of approximately \$30,000 under Tenn. Code Ann. § 26-2-111(1)(F).² Ms. Turner later amended her Schedule B 17 to reflect her assertion that the prepetition child support arrearages were not a part of her § 541(a) estate created upon the filing of the Chapter 13 petition.³

The Trustee filed the "Objection to Conformation" on August 7, 2014, stating that the Chapter 13 plan failed to comply with 11 U.S.C. § 1325(a)(3), requiring that the plan be proposed in good faith. 11 U.S.C. § 1325(a)(3) ("the court shall confirm a plan if the plan has been proposed in good faith and not by any means forbidden by law"). Additionally, the Trustee asserts that the plan fails to comply with the so-called "best interest of creditors" test under 11 U.S.C. § 1325(a)(4) contending that the creditors would receive more in a hypothetical Chapter 7 liquidation than under Ms. Turner's proposed Chapter 13 plan.

² The court, after review of the applicable Tennessee exemption statute, reads Tenn. Code Ann. § 26-2-111(1)(F) as exempting only prospective court ordered child support payments from the bankruptcy estate rather than child support payments that are past due. *See* Tenn. Code Ann. § 26-2-111(1)(F) ("Child support payments to the extent that payment becomes due more than thirty (30) days after the debtor asserts a claim to such exemption in any judicial proceeding").

³ Ms. Turner claimed that the prepetition child support arrearages here are "not property of the estate and [are] held by the debtor [Ms. Turner] in constructive trust for benefit of children [under] 11 USC section 541(d)." [Docket #24]. Section 541(d) provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest [. . .] becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d).

The Trustee argued that Ms. Turner violated the good faith requirement by claiming inappropriate exemptions when Ms. Turner claimed that the prepetition child support arrearages to which she was entitled were exempt under Tenn. Code Ann. § 26-2-111(1)(F). The court held a hearing on the Trustee's objection to confirmation on December 2, 2014.

Discussion

Section 541(a) of the Bankruptcy Code provides that a debtor's bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1); *see also* 11 U.S.C. § 1306. The statutory language of § 541(a) "suggest[s] that Congress intended a broad range of property to be included in the [bankruptcy] estate." *See U.S. v. Whiting Pools*, 462 U.S. 198, 204, 103 S.Ct. 2309, 2313 (1983). While the scope of § 541(a) indeed is expansive, it is not without limitation. For example, section 541(b) excludes, *inter alia*, from a debtor's bankruptcy estate "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." 11 U.S.C. § 541(b)(1). Furthermore, § 541(d) excludes equitable interests in property in which the debtor may simply have legal title without any equitable interest in the property. 11 U.S.C. § 541(d).

In order to determine the estate's and Ms. Turner's interest in the prepetition child support arrearages, the court must look to state law to determine what interest, if any, Ms. Turner may have in the specific property in question. *Butner v. U.S.*, 440 U.S. 48, 54-55, 99 S.Ct 914, 918 (1979); *see also In re Cannon*, 277 F.3d 838, 849 (6th Cir. 2002). Therefore, this court must look to applicable Tennessee law to determine Ms. Turner's interest, or lack thereof, in the prepetition child support arrearages listed in her Schedule B, "Personal Property," and, subsequently, whether that interest will become a part of her Chapter 13 estate, subject to the claim of exemptions.

Under applicable Tennessee law, "[c]hild support payments are typically paid to the custodial parent despite the fact that the child support payments are intended for the benefit of the child." *Lichtenwalter v. Lichtenwalter*, 229 S.W.3d 690, 692 (Tenn. 2007) (*citing Rutledge v. Barrett*, 802 S.W.2d 604, 607 (Tenn. 1991)); *See also* Tenn. Code Ann. § 36-5-101(c)(2)(A) ("[P]ayments for the support of such child or children shall be paid either to the clerk of the court or directly to the spouse.")

(*emphasis added*). The Tennessee Supreme Court also has held that “[t]he duty to support is ultimately owed to the minor child and is paid to an obligee parent or custodial third party *on behalf of the child.*” *Kirkpatrick v. O’Neal*, 194 S.W.3d 674, 680 (Tenn. 2006) (*emphasis added*). Accordingly, even though child support payments are directed or made payable to a parent or custodian of a minor child, it is, seemingly, well settled that the payments are intended to be applied in a manner that would support and provide for the child’s welfare⁴ (and not the creditors of the parent or custodian of the minor child).

It necessarily follows, then, that the custodial parent or guardian is holding the child support payments in a consequential, equitable constructive trust for the minor child as a beneficiary. Four types of constructive trusts have been recognized in Tennessee:

They are: (1) where a person procures the legal title to property in violation of some duty, express or implied, to the true owner; (2) where the title to property is obtained by fraud, duress or other inequitable means; (3) where a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained; and (4) where a person acquires property with notice that another is entitled to its benefits.

Story v. Lanier, 166 S.W.3d 167, 185 (Tenn. Ct. App. 2004) (*citing Myers v. Myers*, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994)). The type of constructive trust at issue in the current case is one akin to number four—“where a person acquires property with notice that another is entitled to its benefits.” *Id.* Here, as with all court ordered payments for child support, the custodial parent or guardian is receiving the payments for the inherent purpose of supporting the minor children in his or her custody. As such, while the custodian may be entitled to receive or be in physical possession of the payments, the purpose of the payments themselves is to support the minor child, with the custodian merely holding the payments in a type of constructive trust with the child as the actual intended beneficiary. Ms. Turner, then, exercising control of those funds, is to use the payments received for the benefit of the minor children rather than for personal advancement or gain.

⁴ The court recognizes that *Lichtenwalter* held that “the right of recovery for a child support arrearage is a vested right that lies with the parent to whom the child support is due.” *Lichtenwalter*, 229 S.W.3d at 693. However, the fact that the payment may be due to the parent does not change the notion that the *purpose* of the payment itself is for the benefit and welfare of the minor child.

Section 541(b)(1) of the Bankruptcy Code excludes from the estate “any power that the debtor may exercise solely for the benefit of an entity other than the debtor.” 11 U.S.C. § 541(b)(1). If the parent or guardian of the minor child is, according to Tennessee law, holding the funds for the benefit of any minor children in the debtor’s custody, the debtor would then be holding these monies for the “benefit of an entity other than the debtor,” which would thereby prevent the prepetition child support payments from becoming property of the debtor’s bankruptcy estate. *See* 11 U.S.C. § 541(b)(1). This court subscribes to this logic. Because the debtor has the authority to receive these funds for the benefit of another party, pursuant to § 541(b)(1) the funds should be excluded from the property of the bankruptcy estate.⁵

Though this is a case of first impression for this court, other courts have found, based on similar state statutes and respective case law, that because child support payments are indeed for the benefit of the minor child, the debtor is holding the payments in an equitable constructive trust for the child, thereby removing it from the purview of the broad § 541 bankruptcy estate.⁶ In *In re Poffenbarger*, Chief Bankruptcy Judge Mahoney for the Southern District of Alabama, concluded that “child support funds are held for the benefit of the minor children. And, because it would be inequitable for the custodial parent to retain and use child support money for himself or herself, under the Alabama law a ‘constructive trust’ may be impressed upon these funds for the benefit of the minor children.” *In re Poffenbarger*, 281 B.R. 379, 388 (Bankr. S.D. Ala. 2002).

Conclusion

This court, after reviewing Tennessee law, finds the analysis of *In re Poffenbarger* to be persuasive (and also comport with equitable principles). *Id.* Accordingly, this court finds that, under the

⁵ The court recognizes, as such, that child support payments are to be made to the custodial parent for the benefit of the child, which is the cause of the distinction between child support payments and alimony payments made to former spouses for the benefit of the recipient spouse. *See Burlew v. Burlew*, 40 S.W. 3d 465 (Tenn. 2001). Had the child support payments been for the purpose of supporting the custodial parent, there would be no need for the distinction between alimony payments received and child support payments received from non-custodial parents/former spouses.

⁶ *See, e.g., In re Poffenbarger*, 281 B.R. 379 (Bankr. S.D. Ala. 2002); *In re Perry*, 2009 WL 367079, 61 Collier Bankr. Cas. 2d 1109 (Bankr. S.D. 2009); *In re Anders*, 151 B.R. 543, 546 (Bankr. Nev. 1993). *Contra, e.g., In re Davis*, 167 B.R. 104 (Bankr. S.D. Ohio 1994)(holding that the debtor’s right to payment of past-due child support is part of the bankruptcy estate subject to a claim of exemption.)

facts of this case, the child support payments, and incidentally, child support arrearages, are payable to Ms. Turner, the custodial parent, for the benefit and support of the minor child, rather than for the personal benefit and support of Ms. Turner (and her creditors). As such, the right to receive the prepetition child support arrearages do not become a part of Ms. Turner's estate pursuant to § 541(b)(1). Accordingly, the Trustee's "Objection to Confirmation" is denied.

The Bankruptcy Court Clerk is directed to cause a copy of this Memorandum and Order to be transmitted to the following:

George W. Stevenson, Esquire
Standing Chapter 13 Trustee
5350 Poplar Ave., Suite 500
Memphis, TN 38119

Chontele McIntyre, Esquire
Attorney for Standing Chapter 13 Trustee
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Philip F. Counce, Esquire
Philip Counce, Jr., Esquire
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Memphis, TN 38111

United States Trustee for Region 8
200 Jefferson Ave., Suite 400
Memphis, TN 38103

Additionally, the Bankruptcy Trustee is authorized to send a courtesy/informational copy of this Order and Memorandum to:

Jason S. Mangrum, Esquire
Attorney for OCWEN Loan Servicing, LLC
5217 Maryland Way, Suite 404
Brentwood, TN 37037