

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

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**In re: Carlton Roland Buford,  
Debtor**

**Bk. No. 03 - 32919-B  
Chapter 7**

**P. Preston Wilson, Trustee,  
Plaintiff**

**v.**

**Adversary No. 03 - 0934**

**Carlton Roland Buford,  
Defendant.**

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**MEMORANDUM OPINION AND ORDER ON TRUSTEE'S COMPLAINT FOR  
TURNOVER OF PROPERTY OF THE ESTATE**

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Before the Court are the parties' cross motions for judgment on the pleadings and for summary judgment on the Chapter 7 Trustee's Complaint For Turnover of Property of the Estate and the Defendant-Debtor's Answer. At issue is whether the debtor's postpetition liquidation of his interest in a 401(k) retirement fund rendered his interest in the retirement fund property of the bankruptcy estate that is not exempt from the claims of creditors. The following constitutes the

Court's findings and conclusions pursuant to Fed. R. Civ. P. 7056(c). This is a core proceeding under 28 U.S.C. § 157(b) (2)(A), (B) and (E).

### **FACTS**

Mr. Carlton Roland Buford (Debtor) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (Code) on July 30, 2003. Pursuant to Code § 341, the Trustee conducted the first meeting of creditors on September 4, 2003. No interest in any IRA, ERISA, Keogh, or other pension or profit sharing plans is reflected on Schedule B or C of the Debtor's original petition. However, upon questioning by the Trustee, the Debtor disclosed that he held an interest in an employer sponsored 401(k) plan at the commencement of his case. He further disclosed that his employment had been terminated on August 16, 2003 and that he had subsequently withdrawn \$17,000 from the 401(k) account that he used to pay bills.

Thereafter, the Debtor amended his schedules pursuant to Fed. R. Bankr. P. 1009(a). The Debtor's amended Schedule B, filed on September 26, 2003, lists a \$17,000 interest in an employer sponsored 401(k) plan as personal property while his amended Schedule C, filed on September 17, 2003, lists a \$12,000 interest in that same plan as exempt from the claims of creditors.

On September 22, 2003, the Trustee filed this complaint to recover for the benefit of the estate the \$17,000 that the Debtor admittedly withdrew from his 401(k) plan. The Debtor contends that because they were held in a 401(k) plan at commencement of the case, the funds are "exempt" under section 541(c)(2) from inclusion in the Debtor's bankruptcy estate. The Trustee does not dispute that the funds were "exempt" so long as they remained in the 401(k) plan, but the Trustee contends that once the plan assets were withdrawn from the 401(k) plan and deposited into the debtor's checking account, they lost their exempt status and became subject to the claims of the Debtor's creditors and to administration by the Trustee.

### **DISCUSSION**

Section 541(a)(1) of the Bankruptcy Code mandates that, with certain exceptions, "all legal and equitable interests of the debtor in property as of the commencement of the case" are included in the bankruptcy estate. Among the exceptions to that general rule is the type of property interest described in Code § 541(c)(2), which provides that "A restriction on the transfer of a beneficial

interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.” Accordingly, such a “beneficial interest” is excluded from property of the estate. *Taunt v. General Ret. Sys. of the City of Detroit (In re Wilcox)*, 233 F.3d 899, 904 (6th Cir. 2000); *Rhiel v. Adams (In re Adams)*, 302 B.R. 535 (B.A.P. 6th Cir. 2004). Because it is not property of the estate, such property is not available to prepetition creditors and the trustee who occupies the status of lien creditor as of the commencement of the case. Exclusion from the bankruptcy estate also means that such property is never available to be exempted from the estate. See, WILLIAM HOUSTON BROWN, LAWRENCE R. AHERN, III & NANCY FRAAS MACLEAN, BANKRUPTCY EXEMPTION MANUAL § 2.23 (2004).

As a different concept, but with similar results, a property interest that comes into the bankruptcy estate but that is exempt is not available to creditors or the trustee. As explained by the Supreme Court:

An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered or recoverable through transfer and lien avoidance provisions. An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor. . . . Property that is properly exempted [under applicable federal or state law] . . . is (with some exceptions) immunized against liability for prebankruptcy debts. § 522(c). No property can be exempted (and thereby immunized), however, unless it first falls within the bankruptcy estate. Section 522(b) provides that the debtor may exempt certain property "from property of the estate"; obviously, then, an interest that is not possessed by the estate cannot be exempted.

*Owen v. Owen*, 500 U.S. 305, 308, 111 S.Ct. 1833, 1835 (1991).

The determination of whether or not a debtor’s interest in property is excluded or exempt from the estate is made as of the commencement of the case. BROWN, AHERN & MACLEAN, BANKRUPTCY EXEMPTION MANUAL, §§ 2.24, 6.02. After that date, neither changes in the condition of the property or the debtor’s circumstances alter the status of the property. *Id.* at § 6.02, citing, *Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899 (7th Cir. 2000). See also, *Cisneros v. Kim (In re Kim)*, 257 B.R. 680, 685 (B.A.P. 9th Cir. 2000).

As noted above, the Debtor here asserts that his interest in the § 401(k) plan is “exempt” under Code § 541 (c)(2). However, notwithstanding the incorrect use of the term “exempt,” the Debtor relies on § 541(c)(2), and the Court can conclude that the intended argument is that the

property interest is “excluded” from property of the estate. The Trustee contends that the interest is “exempt” under applicable Tennessee exemption law only so long as the Debtor’s property interest remains in the § 401(k) plan. 11 U.S.C. § 522(b)(1); Tenn. Code Ann. § 26-2-112.

In *Patterson v. Shumate* the United States Supreme Court interpreted § 541(c)(2) to encompass interests in retirement funds held in trust under the federal Employee Retirement Income Security Act of 1974. 504 U.S. 753, 758-760, 112 S.Ct. 2242, 2247 (1991). The Debtor’s interest in the retirement fund here, established under ERISA and § 401(k) of the Internal Revenue Code, is just such an interest. There is no dispute by the parties as to the § 401(k) qualification of this plan. The Trustee’s entire argument rests upon a requirement that the money remain in the § 401(k) plan. The Debtor’s interest in the § 401(k) plan was excluded from property of the bankruptcy estate rather than exempt from property of estate, and it was not available to prepetition creditors and the Trustee. Moreover, given that its §541 status is determined at commencement of the case, the Debtor’s postpetition withdrawal of the funds does not change its exclusionary status. As such, it is not necessary to further address whether the property may be exempt from the claims of creditors.

### **CONCLUSION AND ORDER**

From the above discussion, the Court concludes that the Debtor’s interest in the employer sponsored, ERISA-qualified § 401(k) retirement plan was excluded from property of the bankruptcy estate as of commencement of the case as a matter of law. The subsequent change in the condition and form of the property interest did not change its status and thus the Debtor’s Motion for Summary Judgment must be granted. It follows that the Trustee’s Motion for Judgment on the Pleadings to recover said interest should be denied. The Clerk shall prepare a judgment on this final order and service this Opinion and Order on:

Debtor  
Michael Don Harrell, attorney for Debtor  
R. Preston Wilson, Chapter 7 Trustee  
U.S. Trustee



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