



**SO ORDERED.**

**SIGNED this 09 day of March, 2006.**

*Dale L. Somers*

Dale L. Somers  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**DONALD LEE MATTERN,**

**DEBTOR.**

**CASE NO. 05-40985  
CHAPTER 7**

**MEMORANDUM DETERMINING THAT DEBTOR'S INTEREST IN  
REVOCABLE TRUST IS NOT ESTATE PROPERTY AND  
DENYING TRUSTEE'S MOTION FOR TURNOVER**

The matter before the Court is the Trustee's Motion to Determine Estate Property and for Turnover of any Trust or Inheritance. The Chapter 7 Trustee, Darcy D. Williamson (hereafter Trustee) appears by Darcy D. Williamson. The Debtor, Donald Lee Mattern (hereafter Debtor), appears by Brenda J. Bell. There are no other appearances. By agreement of the parties the

matter is submitted for determination based upon a joint stipulation of facts and briefs. The Court has jurisdiction.<sup>1</sup>

The primary issue presented is whether income and/or property to which the Debtor had an expectancy on the date of filing and to which he became entitled upon the death of his father, less than 180 days after filing, pursuant to his father's revocable trust and pour over will is property of the estate pursuant to 11 U.S.C.A. §§ 541(a)(1) or (a)(5).<sup>2</sup> For the reasons stated below, the Court holds that on the date of filing the Debtor's interest was excluded from the estate under § 541(c)(1), the spendthrift trust exception, and the property to which the Debtor became entitled upon the death of his father was not acquired by "bequest, devise, or inheritance" and is therefore not included in the estate and not subject to turnover.

#### **FINDINGS OF FACT.**

On March 12, 2004, Donald R. Mattern (the Debtor's father), a resident of Mohave County, Arizona, executed the Donald R. Mattern Revocable Trust (hereafter Trust) and The Last Will and Testament of Donald R. Mattern (hereafter Will). On April 7, 2005, the Debtor filed for chapter 7 bankruptcy relief. Darcy D. Williamson is the duly appointed and acting Chapter 7 Trustee. Debtor's schedules do not include any interest in the Donald R. Mattern

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<sup>1</sup> This Court has jurisdiction pursuant to 28 U.S.C.A. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. A motion to turn over property of the estate is a core proceeding which this Court may hear and determine as provided in 28 U.S.C.A. § 157(b)(2)(E). There is no objection to venue or jurisdiction over the parties.

<sup>2</sup> This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

Revocable Trust. On June 1, 2005, within 180 days of filing bankruptcy, Donald R. Mattern passed away. The Debtor is a beneficiary entitled to receive property and funds under his father's Trust.

Relevant portions of the Trust are the following:

ARTICLE FOUR

Distribution at Death of Trustor

Upon the death of the Trustor, the Trustee shall deliver and transfer, free of trust, the items which are listed on the attached Exhibit "B," incorporated herein by this reference, to the persons whose names are written opposite the item. . . .

Any remaining portion of the Trust estate which may be, subject to this Article Four, including any amounts added thereto by the Last Will and Testament of the Trustor, shall be distributed in equal shares to the Trustor's children, LINDA L. SHELOR, DONALD L. MATTERN, and JOHN W. MATTERN. . . .

ARTICLE SIX

Administrative Provisions

6.4. Spendthrift. Except for the Trustor, the interests of beneficiaries in principal or income shall not be subject to the claims of any creditor, any spouse for alimony or support, or others, or to legal process, and may not be voluntarily or involuntarily alienated or encumbered. This provision shall not limit the exercise of any power of appointment.

6.7. Testamentary Powers of Appointment. In disposing of any portion of the Trust Estate subject to a testamentary power of appointment, the Trustee may rely upon an instrument admitted to probate in any jurisdiction as the Will of the donee or may assume that he or she died intestate if the Trustee has no notice of a Will within three months after his or her death.

The Will transfers all property, after the payment of debts and costs, to the Trust. The dispositive provision of the Will provides as follows:

ARTICLE THREE

Dispositions

3.1 I give, devise and bequeath all of my property of every kind and character, wherever situated, whether community or

separate, owned by me at my death, including any property over which I have a power of testamentary disposition to the then acting Trustee of the DONALD R. MATTERN REVOCABLE TRUST, executed this date, to be held, administered and disposed of according to the terms of the said trust as they now exist or may hereafter be amended to the date of my death.

Neither the Trustee nor the Debtor know the full value of or full nature of the property which will pass to the Debtor under the Trust.

#### **ANALYSIS.**

There are three separate possible interests which must be considered: (1) The Debtor's interest under the Trust on the date of filing; (2) the Debtor's interest under the Trust upon his father's death, not considering the Will; and (3) the Debtor's interest in property transferred to the Trust by the Will upon the death of Debtor's father.

Upon the filing of a petition, § 541(a)(1) provides that an estate is created which is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case," except those interests excluded by §§ 541(b) and (c)(2). "Whether an asset is estate property is determined by examining the nature of the asset. . . ."<sup>3</sup> Although Federal law defines the interests included in the estate, the property interests are created by and defined by state law.<sup>4</sup> In this case, the Trust and Will were executed in Arizona, where Debtor's father resided. The parties therefore agree that Arizona law determines the nature of Debtor's property interests arising under the Trust and the Will.

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<sup>3</sup> *In re Roth*, 289 B.R. 161, 165 (Bankr. D. Kan. 2003).

<sup>4</sup> *Butner v. United States*, 440 U.S. 48, 55 (1979).

As of the date the bankruptcy petition was filed, Debtor was a contingent beneficiary of the Trust, entitled to receive a portion of the trust property upon the death of his father.

Although conceding that this interest is a property interest for purposes of § 541(a)(1),<sup>5</sup> Debtor contends that it is excluded from the estate by § 541(c)(2).<sup>6</sup> Section 541 of the Code in relevant part provides:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:  
(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

\* \* \*

(c)(2) 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.

By virtue of the § 541(c)(2), the “Bankruptcy Code recognizes spendthrift trusts to the extent they are enforceable under state law, and assets in a valid spendthrift trust do not become property of the estate.”<sup>7</sup> “Arizona law recognizes the validity of spendthrift trusts.”<sup>8</sup> Arizona statutes provide that if a trust instrument provides that a beneficiary’s interest in either principal

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<sup>5</sup> See *In re Crandall*, 173 B.R. 836, 839 (Bankr. D. Conn. 1994) (holding that a debtor’s contingent interest in a revocable inter vivos trust is included in the estate under § 541(a)(1), without discussion of the impact a spendthrift clause in the trust would have had).

<sup>6</sup> The Trustee does not oppose this position. Rather, she contends that the “sole issue here is whether income and property received by the debtor from his father’s trust within 180 days of filing for bankruptcy constitutes a gift, bequest or inheritance, thereby including it as estate property under 11 U.S.C. § 541.” Doc. 43.

<sup>7</sup> *Riley v. Pugh (In re Pugh)*, 274 B.R. 883, 885 (Bankr. D. Ariz 2002).

<sup>8</sup> *Birdsell v. Coumbe (In re Coumbe)*, 304 B.R. 378, 382 (9th Cir. BAP 2003).

or income is not subject to voluntary or involuntary transfer, the interest shall not be transferred and is not subject to enforcement of a money judgement until paid to the beneficiary.<sup>9</sup>

Prior to his father's death, the Debtor was a contingent beneficiary with only an expectancy of future distributions if the Trust was not revoked prior to his father's death. Debtor had no present right to income or principal under the Trust. The Trust includes a spendthrift clause which provides that a beneficiary's interest shall not be "voluntarily or involuntarily alienated or encumbered." Because of the spendthrift clause, Debtor's contingent interest could not be transferred and was not subject to enforcement of a money judgment. The Court therefore holds that the Debtor's interest as a contingent beneficiary of the Trust on the date of filing is excluded from the estate under § 541(c)(2).

Next, the Court considers whether the Debtor's interest as beneficiary of the Trust became property of the estate upon the death of the Debtor's father within 180 days of the filing of the petition. The Trustee asserts that Debtor's entitlement to the Trust property triggered by the death of his father is property of the estate under § 541(a)(5), which provides:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

\* \* \*

(5) Any interest in property that would have been property of the estate if such interest had been in interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -

(A) by bequest, devise, or inheritance;

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<sup>9</sup> Ariz. Rev. Stat. Ann. §§ 14-7701 and -7702 (2006).

The Debtor responds that his entitlement to property upon the death of his father is pursuant to an *inter vivos* trust which does not constitute a "bequest, devise, or inheritance" within the meaning of § 541(a)(5)(A).

The Bankruptcy Code does not define bequest, devise, or inheritance. As commonly used, bequest and devise refer to testamentary dispositions. A bequest is "the act of giving property (usu. personal property) by will."<sup>10</sup> A devise is "the act of giving property (usu. real property) by will."<sup>11</sup> An inheritance is "property received from an ancestor under the laws of intestacy."<sup>12</sup> A testamentary trust is defined in the dictionary as "[a] trust that is created by a will and takes effect when the settlor (testator) dies."<sup>13</sup>

Arizona law recognizes *inter vivos* trusts,<sup>14</sup> and the Court is convinced that Trust would be found nontestamentary under Arizona law. An *inter vivos* trust is a "trust that is created and takes effect during the settlor's lifetime."<sup>15</sup> Revocable *inter vivos* trusts are widely recognized as nontestamentary dispositions which are "legitimate means of avoiding the cost and delays typically associated with the processes of administering decedent's estates in this country."<sup>16</sup>

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<sup>10</sup> *Black's Law Dictionary* 152 (7<sup>th</sup> ed. 2000).

<sup>11</sup> *Id.* at 463.

<sup>12</sup> *Id.* at 787.

<sup>13</sup> *Id.* at 1518.

<sup>14</sup> *E.g., Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078 (Ariz. App. 2004).

<sup>15</sup> *Black's Law Dictionary* at 1516.

<sup>16</sup> Restatement (Third) of Trusts § 25 cmt. a (2003).

The Restatement (Third) of Trusts, Validity and Effect of Revocable Inter Vivos Trust, which is cited as a relevant authority in the Arizona annotated statutes,<sup>17</sup> provides:

(1) A trust that is created by the settlor's declaration of trust . . . is not rendered testamentary merely because the settlor retains extensive rights such as a beneficial interest for life, powers to revoke or modify the trust . . . or, because the trust is funded in whole or in part or comes into existence at or after the death of the settlor, or because the trust is intended to serve as a substitute for a will.

These Arizona authorities classify the Debtor's interest as a beneficiary of the Trust upon the death of his father as a nontestamentary disposition, and therefore outside the scope of § 541(a)(5)(A).

This construction of the Trust is supported by case law applying the law of other jurisdictions which does not appear to be different from that of Arizona. Judge Karlin, applying Kansas law, has held that the interest in a revocable inter vivos trust to which a debtor became entitled upon the death of his father within 180 days of the petition date was not included in the estate under § 541(a)(5)(A). The court found the debtor's rights under the trust "were transferred inter vivos, not by way of will or intestate succession."<sup>18</sup> As she noted, numerous other courts have reached this same conclusion.<sup>19</sup> One court has found it was "constrained to give a narrow construction to the words 'bequest, devise, and inheritance' and to conclude such words in their

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<sup>17</sup> *Id.* at § 25(1). This section of the Restatement is cited as a practice aid in the annotations to an Ariz. Stat. Ann. §14-6102 (2006).

<sup>18</sup> *In re Roth*, 389 B.R. at 167. The Trustee argues that *Roth* is not applicable because of the pour over will issue in this case. Whether property transferred to the Trust by the pour over will is included in the estate by § 547(a)(5)(A) is discussed below.

<sup>19</sup> *Id.*(citing 5 cases from other jurisdictions).



plain meaning do not encompass revocable inter vivos trusts.”<sup>20</sup> The cases relied upon by the Trustee concern testamentary trusts, trusts created by wills, and therefore are clearly distinguishable.<sup>21</sup>

For the foregoing reasons, the Court holds that the interest of the Debtor under the Trust as to property in the Trust on the date of his father’s death did not pass to the estate under § 541(a)(5)(A). The disposition was by inter vivos trust, and was not by “bequest, devise or inheritance.” None of the Debtor’s interest in the Trust assets held in the Trust during Debtor’s father’s lifetime were acquired by devise, bequest or inheritance.<sup>22</sup> This analysis applies to the Debtor’s portion of the trust principal and income while held by the trustee of the Trust and after distribution to the Debtor.

Finally, the Court considers whether the result is different as to property, if any, which passed to the Trust based upon the Will. As examined above, the disposition of property by will is a bequest or devise. An Arizona statute<sup>23</sup> addresses whether in this circumstance the

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<sup>20</sup> *In re Crandall*, 173 B.R. at 839.

<sup>21</sup>*In re Hunter*, 261 B.R. 789 (Bankr. M.D. Fla. 2001)(testamentary trust); *In re Coumbe*, 304 B.R. at 384 (testamentary trust); *Togut v. Hecht (In re Hecht)*, 54 B.R. 379 ( Bankr. S.D.N.Y. 1985) (testamentary trust); *In re Kragness*, 58 B.R. 939 (Bankr. D. Or. 1986) (testamentary trust). *See also Smith v. Moody (In re Moody)*, 837 F.2d 719 (5th Cir. 1988)(holding income received by debtor from spendthrift trust within 180 days of filing is included in estate under 541(a)(5)(A) without discussing whether trust was testamentary). The Trustee also cites *In re Schauer*, 246 B.R. 384 (Bankr. D.N.D. 2000)(where trust was not created by will and was not a testamentary trust, monthly postpetition distributions were not included in the estate under § 541(a)(5)(A)).

<sup>22</sup> Because Debtor’s interest was not acquired by bequest, devise, or inheritance and is therefore not part of the estate, there is no reason to consider the Trustee’s position that any postpetition distributions to the Debtor of funds brought into the estate under section 541(a)(5)(A) are not protected by the spendthrift clause of the Trust since they would no longer be held by the trustee.

<sup>23</sup> Ariz. Stat. Ann. §14-2511 (2006).

beneficiary's interest is acquired by testamentary or nontestamentary disposition. It provides that such additions to an inter vivos trust are not held in a testamentary trust. It states:

A. A will may validly devise property to the trustee of a trust established or to be established:

1. During the testator's lifetime by the testator alone . . .

\* \* \*

B. Unless the testator's will provides otherwise, property devised to a trust described in subsection A is not held under a testamentary trust of the testator but becomes a part of the trust to which it is devised and must be administered and disposed of in accordance with the provisions of the governing instrument that states the terms of the trust, . . .<sup>24</sup>

Therefore, although the pour over Will may have transferred property to the inter vivos Trust, the Debtor acquired his interest under the Trust, not the Will.

Section 541(a)(5)(A) therefore does not operate to bring within the estate the Debtor's interest in any property transferred to the Trust by the Will. The Debtor's right to property transferred to the Trust by the Will, like his right to property held by the Trust immediately prior to his father's death, arose under the Trust and was not by reason of bequest, devise, or inheritance.<sup>25</sup>

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<sup>24</sup> Ariz. Stat. Ann. § 14-2511 (2006).

<sup>25</sup> This Court declines to follow *Yellin v. Gilroy (In re Gilroy)*, 235 B.R. 512 (Bankr. D. Mass. 1999). In *Gilroy* the Debtor's father had created an inter vivos trust and a pour over will. A few days after filing, the father died, and the trustee urged that the property from the father was included in the estate. Unlike this case, because of the ineffectiveness of the spendthrift clause in the trust, the debtor's contingent interest on the date of filing was property of the estate under subsection 541(a)(1). The property passing from the will to the trust was also held to be included in the estate under subsection 541(a)(5)(A) because it was transferred by will to the trust and the debtor's interest in the trust would have been estate property if the property had been in the trust on the date of filing. The *Gilroy* court did not consider state law addressing whether distributions of property acquired by a trust from a pour over will are testamentary for purposes of subsection 541(a)(5)(A). Because Arizona law provides that such distributions are not testamentary *Gilroy* is

For the foregoing reasons the Court denies the Trustee's motion. The estate has no interest in the Debtor's interest in the Trust. As of the date of filing, the Debtor's interest was an expectancy protected by the spendthrift clause of the Trust and therefore not included in the estate because of § 541(c)(2). Upon the death of the Debtor's father within 180 days of filing, Debtor had an immediate right to Trust property, both that in the Trust at time of death and that added to the Trust by the Will, but this right was acquired from the inter vivos Trust. It was not acquired by bequest, devise or inheritance; § 541(a)(5)(A) did not operate to include that interest in the estate.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

**IT IS SO ORDERED.**

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not applicable here.