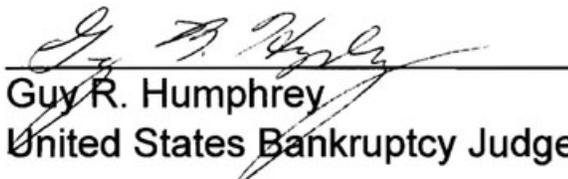


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: January 27, 2014




Guy R. Humphrey
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re: THOMAS E. MCCLASKEY
THERESA J. MCCLASKEY,

Debtors

Case No. 13-31143

Judge Humphrey
Chapter 7

Decision Granting Chapter 7 Trustee's Objection to the Debtors' Exemption in a 529 Plan

I. Introduction

This decision presents the narrow question of whether an out-of-state 529 college savings plan qualified for tax purposes under the regulations of the Internal Revenue Service is exempt under the Ohio statutory exemption scheme that existed on March 26, 2013.¹

¹ Because the Ohio exemption statutes changed significantly with respect to 529 plans effective March 27, 2013, this decision is of limited applicability to future cases.

II. Background

On March 26, 2013 the debtors, Thomas E. and Theresa J. McClaskey (the “McClaskeys”), filed a petition for relief under Chapter 7 of the Bankruptcy Code (the “petition date”) (doc. 1; doc. 45, ¶ 1). In their Schedule C, the McClaskeys claimed \$6,918 in a “Fidelity College Savings Plan” (the “529 Plan”) as exempt under Ohio Revised Code §§ 3334.09, 3334.15 and 2329.66(A)(16) (doc. 1). The 529 Plan was “sponsored by the state of New Hampshire.” (doc. 51). The funds for the 529 Plan were transferred from a “Fidelity Rollover IRA” on February 18, 2013 (doc. 45, ¶¶ 2 & 3). The IRA funds were owned by Debtor Theresa McClaskey, who is the participant in the 529 Plan (doc. 45, ¶ 2). The beneficiary of the 529 Plan is the McClaskeys’ son. *Id.* The only issue is whether the 529 Plan is exempt under any of the claimed Ohio exemption statutes.

III. Procedural Background and Arguments of the Parties

The parties’ arguments evolved during the briefing process. On April 29, 2013 the Chapter 7 Trustee, John G. Jansing (the “Trustee”), objected to the McClaskeys’ 529 Plan exemption claims (doc. 18). The objection stated that the 529 Plan was property of the estate under 11 U.S.C. § 541(b)(6)² because the funds were deposited in the 529 Plan within a year of the filing of the McClaskeys’ bankruptcy. The objection did not address the McClaskeys’ exemptions. In response, the McClaskeys agreed that the 529 Plan is property of Debtor Theresa McClaskey’s bankruptcy estate, but argued that it is exempt as an IRA pursuant to Ohio Revised Code § 2329.66(A)(10)(c) because it was transferred from an

² Unless otherwise noted, all statutory references are to the Bankruptcy Code of 1978, as amended, 11 U.S.C. §§ 101-1532, cited hereinafter in this decision as “§ ___”.

exempt IRA account to an exempt 529 Plan (doc. 25). In reply, the Trustee argued the IRA exemption ended when the funds were transferred to the 529 Plan and the 529 Plan was not exempt under Ohio Revised Code § 2329.66(A)(10)(c) because an amendment to include 529 plans in the statute became effective on March 27, 2013, the day after the petition date. Through their surreply, the McClaskeys argued that the 529 Plan was exempt under Ohio Revised Code § 3334.15, which is part of Chapter 3334 of the Ohio Revised Code, which addresses various types of Ohio college savings programs (doc. 31). In a further memorandum, the Trustee opined that Ohio Revised Code § 3334.15 would only protect the beneficiary of the 529 Plan, and not the participant in the 529 Plan, but cites to the “tuition contract” portion of § 3334.15, rather than the specific portion of that statute that addresses the 529 Plan (doc. 47). Finally, the McClaskeys argued that the statutes in Chapter 3334, read holistically, show a legislative intent to protect the 529 Plan from creditors, regardless of whether the plan was entered into pursuant to the Ohio tuition trust authority (doc. 46).

After inquiry by the court during a telephonic status conference on the matter, the parties stipulated that the 529 Plan was sponsored by the State of New Hampshire (doc. 51). The McClaskeys filed a supplemental memorandum on that particular point (doc. 52).

IV. Analysis

A. Standard of Review

“The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor.” *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). Consistent with this policy, the Bankruptcy Code allows a debtor to claim certain property as exempt from creditors’ claims. 11 U.S.C. § 522. The Bankruptcy Code allows a state to adopt

the federal exemptions contained in § 522(d) or instead “opt out” and use its own state exemptions. Ohio is an “opt-out” state. Ohio Revised Code § 2329.662. Ohio exemption provisions are to be construed liberally in favor of the debtor. *Daugherty v. Cent. Trust Co. of Northeastern Ohio, N.A.*, 504 N.E.2d 1100, 1104-05 (Ohio 1986). A party objecting to a claim of exemption “has the burden of proving that the exemptions are not properly claimed.” Fed. R. Bankr. P. 4003(c).

B. The 529 Plan is Property of the Estate

The parties do not dispute, and this court agrees, that the 529 Plan is property of the estate because the funds were transferred into the 529 Plan within 365 days of the petition date. Therefore, the property of the estate exception for qualified 529 plans under § 541(b)(6)³ does not apply. Therefore, the funds are property of the estate because the participant in the plan, in this case Debtor Theresa McClaskey, has a legal and equitable interest in the property on the petition date. 11 U.S.C. § 541(a)(1). *See also Addison v. Seaver*, 540 F.3d 805, 819 (8th Cir. 2008) (Minnesota 529 plan is property of the participant’s estate).

C. Ohio Revised Code § 3334.15(A) Does Not Apply to Out-of-State Plans

Ultimately, the McClaskeys argue that the 529 Plan is exempt under Ohio Revised Code § 3334.15(A).⁴ Section 3334.15(A) states that “[t]he right of a person to a tuition credit

³ Section 541(b)(6) states, in part, that “[p]roperty of the estate does not include . . . funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined by section 529(b)(1) of such Code) not later than 365 days before the date of filing of the petition in a case under this title” The other requirements of § 541(b)(6) are not at issue.

⁴ The funds are not exempt under Ohio Revised Code § 2329.66(A)(16), which exempts “[t]he person’s interest in a tuition unit or a payment under section 3334.09 of the Revised Code pursuant to a tuition payment contract, as exempted by section 3334.15 of the Revised Code[.]” The 529 Plan is not a “tuition unit” or payment. Additionally, the 529 Plan is not exempt under § 3334.09 because that section addresses a “tuition payment contract” and, in any event, it is not an exemption statute. As noted elsewhere, the McClaskeys

or a payment under section 3334.09 of the Revised Code to a tuition payment contract, a scholarship program, or a *variable college savings program account* shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or the insolvency laws, or other process of law.” (emphasis added).

A “variable college savings program” refers only to a 529 plan sponsored by the State of Ohio and not to 529 plans sponsored by other states. The term “variable college savings program” distinguishes it from the “college savings program” which already existed, which included college savings bonds and tuition units. See Ohio Revised Code § 3334.03(A) & (D). The other references in the Ohio Revised Code and the Ohio Administrative Code to variable college savings program lead to the inexorable conclusion that this is a term of art that refers to the Ohio 529 savings plan. See Ohio Revised Code § 3334.02(C) (“To provide the citizens of Ohio with a choice of tax-advantaged college savings programs and the opportunity to participate in more than one type of college savings program at a time, *the Ohio tuition trust authority shall establish and administer a variable college savings program as a qualified state tuition program under section 529 of the Internal Revenue Code.*”) (emphasis added); Ohio Revised Code § 3334.02(D) (“A person may participate simultaneously in both the Ohio college savings program and the *variable college savings program.*”) (emphasis added); Ohio Revised Code § 3334.21 (“*The variable college savings program* may be terminated by statute or upon the determination of the Ohio tuition trust authority that the program is not financially feasible.”) (emphasis added). Ohio Administrative Code Chapter

concede that the 529 Plan is not exempt under the version of Ohio Revised Code § 2329.66(A)(10)(c) applicable to this case. Thus, the ultimate issue is whether Ohio Revised Code § 3334.15(A) applies to protect the 529 Plan funds from the claims of creditors and the Trustee.

3334-1(A) (“Accounts may exist under either the Ohio college savings program and/ or the Ohio *variable college savings program.*”) (emphasis added); Ohio Revised Code § 3334.10(B) (“The contributor of a *variable college savings program account may rollover amounts to another qualified tuition program* under section 529 of the Internal Revenue Code) (emphasis added); Ohio Revised Code § 3334.12(C) (“The authority shall prepare and cause to have audited an annual financial report Copies of the audited financial report also shall be made available . . . to prospective purchasers of tuition units and *prospective contributors to variable college savings program accounts.*”) (emphasis added); Ohio Revised Code § 5747.70 (“In computing Ohio adjusted gross income, a deduction from federal adjusted gross income is allowed to a contributor for the amount contributed during the taxable year to a *variable college savings program account* and to a purchaser of tuition units under the Ohio college savings program created by Chapter 3334.”) (emphasis added).

Still, it could have been the case that the term “variable college savings program” is a term of general applicability for 529 investment plans derived from § 529 of the Internal Revenue Code (“I.R.C.”) itself or perhaps under other states’ statutes creating 529 plans. But the court’s independent research reveals this is not so. The term “variable college savings program” appears to be limited to Ohio’s statutory scheme relating to 529 plans and is not referenced in I.R.C. § 529.

This interpretation is also consistent with the most recent amendments to Ohio Revised Code § 3334.15. The statute was enacted on July 1, 1994. Prior to amendments effective June 8, 2000, § 3334.15 did not contain a subsection (A) and (B) and only protected “tuition units” and “tuition credits” from being used as security but did not protect the

investment programs that are, in the common vernacular, referred to as 529 savings plans. Section 3334.15 could not have provided such protection because at that time, I.R.C. § 529 did not provide tax advantages for variable investment vehicles. See 26 U.S.C. § 529. Section 3334.15 also did not address protecting Ohio college savings program accounts from attachment by creditors.

When Congress permitted such variable investments to qualify for tax advantages under I.R.C. § 529, Ohio, like other states, created its own 529 investment program. As part of that enacting legislation, § 3334.15 was also amended. It added language protecting the pre-existing programs, such as tuition units, from execution by creditors, but also amended the statute so any “variable college savings program account” was not subject to attachment. It also amended § 3334.15 to provide that “variable college savings program accounts” could not be used as security or collateral for loans. These changes to § 3334.15 were part of the larger set of changes that created the Ohio 529 college savings program and did not address any general exemption for other state plans. This type of state-based preference, whatever one may think of its wisdom, is not unique to Ohio. See *Addison*, 540 F.3d at 820 (Minnesota statute only protects a 529 account from “claims by creditors of the state”, but not all creditors).⁵

The legislative history for the amendments to § 3334.15 confirm this analysis. It is clear that the intent of S.B. 161 was to create an Ohio 529 plan that allowed the use of

⁵ The McClaskeys cite *In re Stockberger*, 192 B.R. 908 (E.D. Tenn. 1996) apparently to address the issue of whether Ohio exemptions apply to out-of-state 529 plans. The court agrees, and the parties never disputed that Ohio exemptions apply because the McClaskeys are domiciled in Ohio and Ohio exemptions apply pursuant to 11 U.S.C. § 522(b). However, as explained, the pertinent point is that the Ohio exemptions that apply to this bankruptcy case do not exempt 529 plans sponsored by a state other than Ohio.

traditional investment vehicles on a tax-preferred basis. Again, the change to § 3334.15 was part of the larger statutory change to the Ohio Revised Code authorized by I.R.C. § 529.

This interpretation is also consistent with a change to Ohio Revised Code § 2329.66(A)(10)(c) which became effective on March 27, 2013. That statute, which in its current form appears to provide broad protection to both the beneficiary of and the participant in a 529 plan, states that the following interests are exempt:

Except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's rights or interests in the assets held in, or to *directly or indirectly* receive any payment or benefit under, any individual retirement account, individual retirement annuity, "Roth IRA," "529 plan," or education individual retirement account that provides payments or benefits by reason of illness, disability, death, retirement, or age or provides payments or benefits for purposes of education, to the extent that the assets, payments, or benefits described in division (A)(10)(c) of this section are attributable to or derived from any of the following or from any earnings, dividends, interest, appreciation, or gains on any of the following:

* * *

(iv) Contributions by any person into any plan, fund, or account that is formed, created, or administered pursuant to, or is otherwise subject to, section 529 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S. C. 1, as amended.

Ohio Rev. Code § 2329.66(A)(10)(c) (March 27, 2013 amendments in italics). It appears that the intent of this change was to ensure all 529 plans receive broad protection. Ohio Legislative Service Comm'n, Ohio Bill Analysis, 2012 H.B. 479 (Dec. 6, 2012) (The bill analysis provides that it "[e]xpands the current exemption for certain payments . . . to include an exemption for certain for payments or benefits under a 529 plan."). As noted, the McClaskeys filed their petition on March 26, 2013, the day before the effective date of the statute. The court is applying the generally-settled principle that the court considers

exemptions as they exist as of the petition date. See *In re Guikema*, 329 B.R. 607, 619 n. 8 (Bankr. S.D. Ohio 2005) (quoting *In re Lude*, 291 B.R. 109, 110 (Bankr. S.D. Ohio 2003) (“The right to claim an exemption from property of the bankruptcy estate arises and is fixed in a voluntary case on the date the petition is filed.”)). Changes in the exemption law post-petition do not change the status of a properly claimed exemption. *Id.* (citing *Lude*, 291 B.R. at 109). If anything can be gleaned from this statutory change, it is that § 3334.15 did not provide adequate protection for all 529 plans for both participants and beneficiaries.

The court is aware this is a harsh result for the McClaskeys in that the funds were transferred pre-petition from an apparently exempt IRA account. The property of the estate language of § 541(b)(6), which appears to be designed to protect against pre-bankruptcy planning, do not achieve that policy in these circumstances. Further, the Ohio General Assembly apparently has decided that 529 investment plans deserve to be protected from creditors, regardless of whether the participant is using a plan from another state and made that change effective March 27, 2013.⁶ Nevertheless, the court finds no ambiguity in the plain language of Ohio’s exemption scheme, as it existed on March 26, 2013. The court must interpret the statutes as they are written and in effect at the pertinent time.

V. Conclusion

For these reasons, the Trustee’s objection to the McClaskeys’ exemption in the 529 Plan is sustained.

⁶ This issue appears to extend to various state exemptions in opt-out states. Those state exemption statutes for 529 plans appear to lack any uniformity in language or intent. See *In re Bronk*, 444 B.R. 902, 917-25 (Bankr. W.D. Wisc. 2011) (extended discussion of the Wisconsin 529 exemption statute, as well as the various differences in 529 exemption statutes in other states).

Copies to:

Default List