Bankruptcy Newsletter
December, 2016

The intersection of the Uniform Transfer to Minors Act (UTMA) and Bankruptcy Law

The UTMA are model laws developed by the National Conference of Commissioners of Uniform State Laws that are then proposed for adoption for the State Legislators. Ohio's UTMA was amended and renumbered as O.R.C. 5814. This act allows for an individual 18 years of age or older to make an irrevocable gift to a minor on the date of the transfer. Such a gift serves to protect assets for future use by the minor and establish a kind of trust without the formal creation of a trust. The transferor often names themselves as the custodian of theses funds, a custodian can only use funds for the exclusive benefit of the transferee (some expenses are prohibited, for example the daily food needs of the child. These gifts are often the subject of disputes in family law, but can occur in bankruptcy cases as well.

In the case of *Hyder v. Hyder, (2006 -Ohio-5285),* Appellant ex-wife argued in her first assignment of error that the "The trial court erred in determining certain [UTMAs] were marital property and in dividing said accounts by and between the parties in contravention of Ohio law." The court found that where a transfer of money to a minor conforms to the UTMA, said funds are "irrevocably convey[ed] to the minor [with] an indefeasibly vested legal title to the conveyed property." *LCP Holding Co. v. Taylor*, 158 Ohio App3.d 546, 2004-Ohio-5324. In *Hyder*, the court concluded that the assets used to open the UTMAs were properly formed and no evidence of malfeasance was found when the UTMAs were created. As a result the court found that the UTMAs were not apart of the disputed martial property and remanded this issue back.

In the case of *In Re Dally*, 202 B.R. 724 (Bankr. N.D. Ill. 1996), an Illinois Bankruptcy court is asked to determine if assets transferred to minor children were actually an UTMA, and if so what were the courts obligations regarding these assets. The court looked to 11 U.S.C. 541 (b) to settle this particular issue of the case, "property of the estate does not include 'any power that the debtor may exercise solely for the benefit of any entity other than the debtor' such as property over which the debtor is a trustee". Here, the UTMA conformed to the requirements of the Illinois statute, and although the defendant claimed the elements of a valid gift were not present, the court brushed aside this argument stating, "documentary compliance with the statutory mechanisms of the UTMA constitutes prima facie evidence that a gift was made as intended." No evidence rebutting this evidence was presented. As a result, the "transfers affected by establishing these accounts prior to the bankruptcy filing were irrevocable under Illinois law, and deposits therein indefeasibly vested in the...children". Consequently, the assets at the time of filing were not apart of the debtors estate and the court did not have jurisdiction over the funds.

As a matter of practice it may be useful to divulge thie type of transfer on Debtor's schedule while simultaneously claiming that UTMA assets under O.R.C. 5814 are not assets of the Debtor's Estate. While not a part of the bankruptcy estate, the gift may nonetheless be subject to recovery by the Chapter 7 trustee as a fraudulent conveyance.

<u>Calculating Current Monthly Income in Chapter 13</u>

Recently, the U.S. Bankruptcy Court for the Eastern District of Wisconsin clarified how a debtor's Current Monthly Income (CMI) is correctly calculated. In the matter of *Reinhart* (debtor), a Chapter 13 trustee objected to the confirmation of the debtor's proposed 46-month plan under a theory that the debtor had miscalculated their CMI. The trustee argued that if the CMI were correctly calculated the debtor would be an above-median-income debtor and therefore required to propose a 60-month plan. The court held that in calculating the CMI, the debtor-salesman should have included employer reimbursements as income, without first reducing the reimbursement income by netting out the expenses they incurred.

The debtor in this case was a salesman, some of his duties included taking customers out to business meals using his personal vehicle. These expenses were reimbursed by the employer after the debtor submitted monthly receipts. The issue for the court was how, if at all should employment-related reimbursements be factored into the debtor's CMI. In resolving this issue, the court first looked to the Code.

Section 101 (10A) of the Code defines CMI as "the average monthly income from all sources that the debtor receives... without regard to whether such income is taxable income," derived during the 6-month period before commencement of the bankruptcy. Section 1325(b)(2) defines "disposable income" as "CMI" less amounts reasonably necessary to be expended" by a debtor. In applying these code sections the court concludes that CMI is determined before disposable income, and the code only permits deduction for expenses once: in the disposable income calculation, but not in the CMI calculation.

In this case neither party nor the court could identify case law directly on point where the debtor is not self-employed but seeks to include employer reimbursement income netted against required employment-related expenses as part of his CMI. As a result, the court looked at Chapter 7 cases addressing the netting question for self-employed debtors. The majority of these cases concluded that when a self-employed Chapter 13 debtor calculates his CMI, they must include their gross business receipts but may not include the ordinary operating expenses arising from that self-employment. These same cases also acknowledge a disconnect between the Code text and various forms. The *Reinhart* court was quick to point out that the Code, and not the Form is controlling.

In closing the Court found, "(e)mployment-related reimbursement income, but not any corresponding employment-related expenses, should be included in the CMI calculation. This result was not unfair, because although the debtor here would be subject to a 60-month plan as opposed to a 46 month plan, the debtor can still amend his Schedules to reflect the employment expenses, as well as the reimbursement income received from his employer.

Sincerely,

Roger E. Luring

D. Andrew Venters