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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

| | | | |
|----------------|---|-----------------------|------------|
| IN RE |) | CASE NO. 95-52282 | |
| RONALD L. HAMO |) | | |
| |) | CHAPTER 7 | |
| DEBTOR(S) |) | | |
| |) | JUDGE | MARILYN |
| |) | SHEA-STONUM | |
| |) | | |
| |) | ORDER | SUSTAINING |
| |) | TRUSTEE'S | |
| |) | OBJECTION TO DEBTOR'S | |
| |) | EXEMPTION | |

This matter came before the Court on the chapter 7 trustee's objection to debtor's claimed exemption in an individual retirement account. A hearing on the trustee's objection was held on June 1, 1998, at which time the parties were afforded an opportunity to present evidence and arguments they wished the Court to consider in reaching its decision. Based upon the June 1 hearing, a review of the entire record in this case and the reasons set forth below, the Court finds that the trustee's objection to debtor's claimed exemption should be sustained in part.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

I. Background

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On December 15, 1996, debtor filed a joint chapter 13 bankruptcy petition with his wife, Susan Hamo. On May 8, 1996, Mrs. Hamo deconsolidated her portion of that joint chapter 13 case into an individual chapter 13 case and on May 30, 1996, debtor converted his case to one under chapter 7.¹

On July 18, 1996, debtor amended his bankruptcy schedules, apparently to conform them to the conversion of his case to an individual chapter 7. Debtor's amended Schedule B listed an interest in a Prudential Bache Individual Retirement Account (the "IRA") which debtor valued at \$71,257.73. On his amended Schedule C, debtor claimed the entire amount of that IRA as exempt pursuant to Ohio Revised Code ("ORC") §2329.55(A)(10)(c).

On September 13, 1996, the trustee filed an objection to debtor's claimed exemption in the IRA. On February 27, 1997, the trustee filed a motion to compromise and settle that objection. That motion was withdrawn on March 13, 1997, pursuant to newly discovered evidence which led the trustee to believe that debtor was not being honest and forthright about his assets and income.² The trustee's objection was then set for the June 1 hearing during which evidence was introduced that due to appreciation, the current value of the IRA was closer to \$96,000.

II. The Law

Unless a state has "opted out" of the exemption scheme provided by the

¹ Mrs. Hamo completed all obligations under the plan in her deconsolidated chapter 13 case and received a discharge in that case on November 14, 1997.

² That newly discovered evidence also motivated the trustee to object to debtor's discharge in a complaint filed on May 29, 1997. A trial on the trustee's complaint was held on April 24 and June 1, 1998 and pursuant to an order entered on September, 21, 1998, the debtor's discharge was denied.

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Bankruptcy Code, a debtor may choose between the statutorily listed uniform bankruptcy exemptions or the exemptions to which a debtor is entitled under applicable nonbankruptcy law. *See* 11 U.S.C. §522(b). Because Ohio has "opted out" of the Bankruptcy Code's exemption scheme, an Ohio bankruptcy debtor may exempt property from his bankruptcy estate only if Ohio law specifically permits such exemption from the claim of creditors.

In the case at bar debtor contends that O.R.C. §2329.66(A)(10)(c) permits him to exempt the IRA from inclusion in his bankruptcy estate. O.R.C. §2329.66(A)(10)(c) provides in pertinent part that:

(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment or sale to satisfy a judgment or order, as follows:

(10)(c) ...the person's right in the assets held in, or to receive any payment under, any individual retirement account, individual retirement annuity, or Keogh or "H.R. 10" plan that provides benefits by reason of illness, disability, death, or age, *to the extent reasonably necessary for support of the person and any of his dependents.*

O.R.C. §2329.66(A)(10)(c) (emphasis added). Funds in an individual retirement account should only be exempted from a bankruptcy estate under Ohio law to enable a debtor to sustain his basic needs and not to maintain a former or desired lifestyle. *In re Parker*, 219 B.R. 972, 976 (Bankr. S.D. Ohio 1998); *In re Hoppes*, 202 B.R. 595, 598 (Bankr. N.D. Ohio 1996); *Mid-America Federal Savings & Loan Ass'n v. Gateway Manor Congregate Apts.*, 641 N.E. 229, 233 (Ohio Ct. App. 1994).

The factors that this Court, as well as other courts within this jurisdiction, consider in determining whether an individual retirement account is "reasonably necessary" for a debtor's support are as follows:

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- (1) the age of the debtor and his dependents;
- (2) the health of debtor and his dependents;
- (3) debtor's ability to work and earn a living;
- (4) debtor's job skills, training and education;
- (5) debtor's present and anticipated living expenses;
- (6) debtor's present and anticipated income from all sources;
- (7) debtor's other assets, including exempt assets;
- (8) the liquidity of debtor's other assets;
- (9) debtor's ability to save for retirement;
- (10) any special needs of debtor and his dependents; and
- (11) debtor's financial obligations.

In re Parker, 219 B.R. 972, 975 (Bankr. S.D. Ohio 1998); *In re Hoppes*, 202 B.R. 595, 599 (Bankr. N.D. Ohio 1996); *In re Baumgardner*, 160 B.R. 572, 573 (Bankr. S.D. Ohio 1993); *In re Herzog*, 118 B.R. 529, 532 (Bankr. N.D. Ohio 1990). The Court will now address each of these factors as they relate to the case at bar.

IV. Discussion

A. Age and Health of Debtor

At the time of the hearing on this matter, debtor was 54 years old and undergoing treatment for heart disease, high blood pressure and depression. Debtor suffered a massive heart attack in 1993 which caused him to undergo coronary by-pass surgery. Since that surgery, debtor has suffered several minor heart attacks.

During the June 1 hearing, letters from two of debtor's treating physicians were offered into evidence. Based upon a review of those documents, it appears that debtor suffers from a degenerative heart condition that is presently controlled by medication. Debtor's prognosis for the immediate future is described as "relatively good" but given the degenerative nature of his heart ailment, debtor may require additional invasive procedures. It also appears that debtor's depression was triggered by his massive heart attack and subsequent rehabilitation. That depression is also being treated and is presently

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controlled with psychotherapy and medication. Despite the seriousness of his health problems, neither treating physician reported that debtor was or would become completely incapacitated.

B. Age and Health of Debtor's Dependents

Debtor has no dependents as his two children are grown and self-supportive. Debtor's wife is also self-supportive. Mrs. Hamo is currently president of the Akron/Summit County Convention and Business Bureau and has been employed with that organization for over 12 years. During her prior appearances before this Court Mrs. Hamo appeared healthy and no evidence contradicting the Court's observation has been presented.

C. Debtor's Ability to Work and Earn a Living / Debtor's Job Skills, Training and Education

At the time of the hearing debtor testified that he has been unemployed since sometime in 1994. Debtor has 2 ½ years of college education and since 1965, debtor has earned a living by managing and owning several bar and restaurants in Ohio and Florida. Additionally, since 1989, debtor served as president of Freedom Properties, Inc., an Ohio corporation that acquires, renovates, manages, rents and sells single family properties in the Summit County area. Debtor testified that he has tried to secure employment through "contacts" but has not made any formal application for employment. Since his unemployment, debtor has not applied for social security benefits and he maintains that due to his age and failing health he is unable to find a job.

Despite his age and health problems, debtor possesses the education, skills and training to apply for a wide variety of jobs in several different fields. Notwithstanding this diverse background, debtor has limited his employment search to merely approaching

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friends and prior business associates. Additionally, debtor has consciously chosen not to seek public assistance to help bridge the financial gap until he finds another job.

D. Debtor's Present and Anticipated Living Expenses

Although debtor's amended Schedule J lists no monthly expenses, debtor testified that his living costs include rent, utilities, food, clothing, medication and transportation. All of debtor's living expenses are currently paid for by Mrs. Hamo and, from the time that debtor filed his bankruptcy petition until sometime in 1996 when he reconciled with his wife, debtor's living expenses were paid for by his mother, Alice Hamo. The bulk of debtor's current medical expenses are covered under Mrs. Hamo's health insurance and, so long as Mrs. Hamo retains that insurance, debtor's future medical expenses should also be covered. Aside from debtor's medical situation, no evidence was presented during the hearing to indicate that debtor's future living expenses would substantially increase or that Mrs. Hamo would be unable to continue to pay for those expenses.

E. Debtor's Present and Anticipated Income From All Sources

At the present time, debtor has no income as he is and has been unemployed. Despite this absence of income, debtor has been able to subsist without withdrawing any money from the IRA at issue. Should debtor secure employment or elect to seek some form of public assistance while remaining unemployed, he would be able to contribute additional income to his family unit. As already noted, Mrs. Hamo is healthy and has been employed with the Akron/Summit County Convention and Business Bureau for over 12 years. No evidence was presented to indicate that Mrs. Hamo would not continue on in her capacity as president of this organization or that her current yearly income of close to \$70,000 would decrease.

F. Debtor's Other Assets, Including Exempt Assets

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Upon review, debtor's schedules indicate that he owns almost no assets except for the IRA at issue and a \$150,000 life insurance policy which he also claims is exempt. The majority of other assets, including the Hamo's marital residence, which was valued at 185,000 in their jointly filed schedules, are held in Mrs. Hamo's name alone. There is at least \$37,000 in equity in the marital residence and the other assets held in Mrs. Hamo's name include a \$46,000 pension and \$20,000 in stock.

Although married parties are free to take title to property in whichever manner they choose, this Court will not ignore a non-debtor spouse's income and assets. To do so could create an opportunity for parties to shelter marital assets in a non-debtor spouse's name and would ignore the reality that one spouse is often financially supported by the other. *See In re Velis*, 123 B.R. 497 (Dist. N.J. 1991). In this case it is particularly important that the Court give consideration to Mrs. Hamo's assets and income given the fact that the debtor's discharge was denied because he was not forthright and honest about his own assets and income.

G. The Liquidity of Debtor's Other Assets

As noted above, the only other significant asset held in debtor's name is a \$150,000 life insurance policy which debtor reported as having a current cash value of approximately \$8,000. Although the maximum value of this policy would not be realized if it were reduced to its current cash value, no evidence was presented to indicate that debtor is restricted from liquidating this policy. Because the policy has not been redeemed for its current cash value, it does not appear that that money is for debtor to meet his basic needs.

H. Debtor's Ability to Save for Retirement

Given debtor's unemployment he currently has no means to save for retirement.

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However, should debtor secure even the most menial of employment, his additional income could arguably be set aside for the couple's retirement given that their living expenses have been completely covered for the last several years by Mrs. Hamo's income alone. Moreover, no evidence was presented to indicate that Mrs. Hamo would be unable to continue contributions to her pension fund or that upon their retirement, this fund would not be used to support both debtor and Mrs. Hamo. However, given the fact that the debtor is over 54 years of age, his ability to save for retirement is abridged by a what is certainly a limited number of years in the workplace.

I. Special Needs of Debtor and His Dependents

As noted above, debtor requires medication and ongoing treatment for his heart condition, high blood pressure and depression. The majority of the expenses for these items appear to be covered by Mrs. Hamo's health insurance. Conclusory evidence by the debtor was presented regarding monthly co-payments for his medication which he estimated at \$400. Despite the paucity of evidence on this issue, the Court does not treat such a need lightly. The Court was not made aware of whether Mrs. Hamo has any special needs that should be considered in this matter.

J. Debtor's Financial Obligations

In his bankruptcy petition, debtor listed no secured debts, no unsecured priority debts and approximately \$260,000 in unsecured, nonpriority debts. Of that \$260,000, debtor's mother, Alice Hamo, is listed as holding a \$40,000 claim. As noted the debtor was denied a discharge in this case and was therefore unable to free himself from his pre-petition financial obligations.

V. CONCLUSION

Based upon the foregoing, it is clear that the IRA is not reasonably necessary for

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debtor's present support as his basic needs have continually been met despite his unemployment. Given debtor's health problems, it is somewhat more uncertain as to whether the IRA is reasonably necessary for debtor's future support. Given debtor's skills and background, it is probable that he can secure some type of employment if he tries. Should he be unable to find any employment, however, debtor can apply for public assistance. However, even if the debtor does find a new job, his ability to obtain medical insurance covering his pre-existing conditions must be taken into account. As such, it appears to the Court that \$20,000 of the IRA is reasonably necessary for debtor to sustain his basic needs in the future.

THEREFORE, IT IS HEREBY ORDERED:

1. That the trustee's objection is sustained, in part;
2. That all assets in the IRA in excess of \$20,000 are not exempt under ORC §2329.66(A)(10(c) and shall be liquidated by the trustee for the benefit of creditors in this case with the remainder to remain on deposit in the IRA for the benefit of the debtor; and
3. That all fees, costs, taxes and penalties from liquidation of the IRA shall be borne by the trustee.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/22/98