THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 98-53073
	)	
DONALD E. STYKA, JR. and VICKY J. STYKA,	)	CHAPTER 7
	)	
	)	JUDGE MARILYN SHEA-STONUM
	)	
Debtor.	)	ORDER SUSTAINING TRUSTEE'S
	)	OBJECTION TO PROPERTY
	)	CLAIMED AS EXEMPT

This matter came before the Court on the Objection to Property Claimed as Exempt filed by Kathryn A. Belfance, chapter 7 trustee (the "Trustee") and the opposition of Donald E. Styka and Vicky J. Styka (together, "Debtors") thereto. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. FINDINGS OF FACT

On September 29, 1998, Debtors filed a petition under chapter 7 of the Bankruptcy Code. At that time Donald Styka ("Styka") had an interest in an individual retirement account having an approximate balance of $7,700.00 (the "IRA"). Pursuant to an amended Schedule C, Styka claimed an exemption in the IRA pursuant to 11 U.S.C. § 522(b)(2)(A) and Ohio Rev. Code Ann. (Anderson Supp. 1997)("R.C.") § 2329.66(A)(17), (A)(10)(b) and (A)(10)(c).

While employed at Graffem Floors, Styka participated in a Qualified Defined Pension Plan, funded by his employer (the "Plan"). The Trustee and Styka have stipulated that the Plan was administered and qualified under the Employment Retirement Income

Security Act of 1974 ("ERISA") and contained a provision which satisfies the anti-alienation and anti-assignment requirements of 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1) (the "anti-alienation provision").

On or about December 17, 1997, after the termination of his employment in 1994, Styka received a distribution from the Plan in the amount of $7,726.00 (the "Distribution"). On or about April 30, 1998, Styka applied for and deposited the Distribution in the IRA. The Trustee and Styka have stipulated that the IRA is not reasonably necessary for the current support of Styka or his dependents.

II CONCLUSIONS OF LAW

A. The Exemption Claimed Under R.C. § 2329.66(A)(10)(b) and (10)(c)

Because the parties have stipulated that the IRA is not reasonably necessary for the current support of Styka or his dependents, the IRA is not exempt pursuant to R.C. § 2329.66(A)(10)(b) or (10)(c), both of which subsections limit the exemption of the relevant property "to the extent reasonably necessary for the support of the owner and any of his dependents." See In re Herbert, 140 B.R. 174, 178 (Bankr. N.D. Ohio 1992)(holding that individual retirement account was exempt only to the extent reasonably necessary for the support of the debtor and any of his dependents).

B. The Exemption Claimed Under 11 U.S.C. § 522(b)(2)(A)

11 U.S.C. § 522(b)(2)(A) of the Bankruptcy Code provides in pertinent part that an individual debtor may exempt from the estate "any property that is exempt under Federal law, other than subsection (d) of this section . . . ." The issue before the Court is whether Styka's rollover of the proceeds from the Plan into the IRA impacts his right to an exemption under 11 U.S.C. § 522(b)(2)(A).

In accordance with extensive case law, the IRA is not exempt under federal law

(exclusive of 11 U.S.C. § 522(d)), even though it represents the proceeds of a ERISA-qualified pension plan which contained the anti-alienation provision. See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1082-83 (10th Cir. 1994)("ERISA section 206(d)(1) protects ERISA-qualified pension benefits from garnishment only until paid to and received by plan participants and beneficiaries"), *cert. denied* 514 U.S. 1063, 115 S.Ct. 1691, 131 L.Ed2d 556 (1995); Trucking Employees of N. Jersey Welfare Fund, Inc. v. Colville, 16 F.3d 52 (3d Cir. 1994); Tenneco, Inc. v. First Virginia Bank, 698 F.2d 688, 690-91(4th Cir. 1983)(holding that funds or securities whose origin may be traced to a draw from an ERISA approved plan are not immune from attachment by creditors); NCNB Fin. Servs., Inc. v. Shumate, 829 F.Supp. 178, 180 (D. W.D. Va. 1993) (holding that once the line of actual receipt is crossed, ERISA no longer protects funds originating in private pension plan), *aff'd* Nationsbank of North Carolina v. Shumate, 45 F.3d 427 (4th Cir. 1994), *cert. denied* Shumate v. NationsBank, 515 U.S. 1161, 115 S.Ct. 2616, 132 L.Ed.2d 859 (1995); and In re Toone, 140 B.R. 605, 607 (holding that once funds are no longer part of an ERISA-qualified plan, the debtor cannot claim such protection as may be available under 29 U.S.C. § 1056(d) and related legislation). Because§ 522(b)(2)(A) merely incorporates those federal exemptions which are not set forth in § 522(d), and the IRA is not exempt under federal law exclusive of § 522(d), the IRA is not exempt under § 522(b)(2)(A).

C. The Exemption Claimed Under R.C. § 2329.66(A)(17)

Unless R.C. § 2329.66(A)(17) broadens the federal exemption for ERISA-qualified pension plans to include the proceeds of such a plan, the IRA will not be exempt pursuant to R.C. § 2329.66(A)(17). R.C. § 2329.66(A)(17) provides that any "property that is *specifically* exempted from execution, attachment, garnishment or sale by

federal statutes other than the 'Bankruptcy Reform Act of 1978,' 92 Stat. 2549, 11 U.S.C.A. 101, as amended" is exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order. R.C. § 2329.66(A)(17)(emphasis added).

Relying on the decisions in Daugherty v. Central Trust Co., 28 Ohio St.3d 441, 504 N.E.2d 1100 (Ohio 1986) and In re Bresnahan, 183 B.R. 506 (Bankr. S.D. Ohio 1995), Debtors contend that R.C. § 2329.66(A)(17) broadens the federal exemption for ERISA-qualified pension plans to include the *proceeds* of such a plan. In Daugherty, the Ohio Supreme Court evaluated whether personal earnings which are exempted under R.C. § 2329.66(A)(13) retain their statutory exemption when deposited in a bank checking account.[1] In holding that personal earnings do retain their exempt status after being deposited in the judgment debtor's personal checking account, the Daugherty court noted:

> The legislature's purpose, in exempting certain property from court action brought by creditors, was to protect funds intended primarily for maintenance and support of the debtor's family. This legislative intent would be frustrated if exempt funds were automatically deprived of their statutory immunity when deposited in a checking account which a depositor commonly maintains in order to pay by check those regular subsistence expenses he incurs.

---

[1] R.C. § 2329.66(A)(13) exempts a certain amount of the "personal earnings of a person owed to him for services rendered within thirty days before the issuing of an attachment or other process, the rendition of a judgment, or the making of an order, under which the attempt may be made to subject those earnings to the payment of a debt, damage, fine or amercement."

Daugherty, 28 Ohio St.3d at 445; 504 N.E.2d at 1103.

In Bresnahan, the bankruptcy court evaluated whether approximately $7,000 of a yearly retirement payment from the United States Air Force remained exempt under R.C. § 2329.66(A)(10)(b) after being deposited in the debtor's checking account. Subsection (A)(10)(b) exempts "the person's right to receive a payment under any pension, annuity, or similar plan or contract, not including a payment from a stock bonus or profit-sharing plan or a payment included in division (A)(6)(b) or (10)(a) of this section, on account of illness, disability, death, age or length of service, *to the extent reasonably necessary for the support of the person or any of his dependents.*" R.C. § 2329.66(A)(10)(b)(emphasis added). Testimony at the hearing "clearly established that the $7,000 [was] reasonably necessary for the support of the debtor and his dependents." Bresnahan, 183 B.R. at 507. In holding that the exemption was not terminated as a result of the debtor's deposit of the yearly retirement payment into his bank account, the Bresnahan court relied on Daugherty's interpretation of legislative intent, which supported the exemption of certain wages after their deposit into a personal checking account, and held that such legislative intent was equally applicable to a retirement payment which was deposited into the debtor's bank account and was reasonably necessary for the support of the debtor and his dependents.

The analysis set forth in Daugherty and Bresnahan does not support the application of R.C. § 2329.66(A)(17) to the IRA. First, the language of R.C. § 2329.66(A)(17) suggests that the statute is not intended to broaden the exemption from that available under federal law. R.C. § 2329.66(A)(17) provides that "[a]ny other property that is *specifically* exempted from execution, attachment, garnishment or sale by federal statutes . . ." may be exempted by an Ohio resident. R.C. § 2329.66(A)(17)(emphasis added). The

IRA, as proceeds of the Plan, is not exempt under federal law and hence does not satisfy the "specifically" exempt requirement of R.C. § 2329.66(A)(17). See Midamerica Federal Sav. & Loan Ass'n v. Gateway Manor Apartments, 94 Ohio App.3d 521, 641 N.E.2d 229 (Ohio Ct. App. 1994)(holding that Keogh plan which was not exempt under federal law was not exempt under R.C. § 2329.66(A)(17)).

Second, the legislative intent which supported the decisions in Daugherty and Bresnahan is not applicable here. R.C. § 2329.66(A)(10)(c), the statutory exemption which is directly applicable to individual retirement accounts [see Herbert, 140 B.R. at 178], exempts such accounts only "to the extent reasonably necessary for the support of the judgment debtor and any of his dependents." It is unlikely that the Ohio legislature intended to eliminate this requirement simply because the individual retirement account at issue was created by a rollover from an ERISA-qualified pension plan. Moreover, Daugherty and Bresnahan upheld the exemption of personal earnings and retirement payments which were required for the *immediate* maintenance and support of the owners and their families. In this case, the parties have stipulated that the proceeds of the exempt property at issue, i.e., the IRA, are not required for the current maintenance and support of Styka or his dependents. Consequently, the rationale for the courts in Daugherty and Bresnahan does not support the exemption of the property at issue here, especially when doing so would eliminate the "reasonably necessary" requirement to which the IRA is subject under R.C. § 2329.66(A)(10)(c).

Because Debtors do not satisfy the "reasonably necessary" requirement of R.C. § 2329.66(A)(10)(b) and (10)(c), and 11 U.S.C. § 522(b)(2)(A) and R.C. § 2329.66(A)(17) do not apply to an individual retirement account created by a "rollover" from an ERISA-qualified pension plan, the IRA is not exempt. Therefore, the

THIS OPINION IS NOT INTENDED FOR PUBLICATION

Court sustains the Trustee's objection to Debtors' claim of exemption regarding the IRA and overrules Debtors' opposition thereto.

IT IS SO ORDERED.

_____
MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 5/18/99