

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

	)	CASE NO. 01-60366
)	
IN RE:	)	CHAPTER 7
)	
REBECCA PHILLIPS,	)	JUDGE RUSS KENDIG
)	
Debtor.)	
	)	MEMORANDUM OF DECISION
)	
)	

Now before the court is the trustee's objection to the exemption claimed by debtor in her deferred compensation plan. A hearing on this matter was held on May 14, 2001, at which time the court set a briefing schedule. The trustee filed a memorandum in support of the objection and the debtor responded. Upon review of the legal arguments presented, and for the reasons that follow, the objection is hereby **OVERRULED**.

The court has jurisdiction pursuant to 11 U.S.C. § 1334 and the general order of reference entered in this district. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FACTS

The facts are not in dispute. Debtor retired on disability retirement in July 2000. Following her retirement, she requested a lump sum distribution of her deferred compensation plan. The plan was valued at \$24,000. On December 20, 2000, the debtor received a net distribution of \$17,281.10 which was deposited in her personal checking account. According to the debtor, the money has been used for living expenses and repairs to her mobile home. Debtor filed her petition under Chapter 7 on February 6, 2001. In schedule C, pursuant to O.R.C. § 2329.66(A)(10)(a), debtor listed as exempt a \$24,000 Ohio Deferred Compensation plan. The trustee filed on objection to this claimed exemption on April 27, 2001.

DISCUSSION

According to the trustee, the funds from debtor's deferred compensation plan lost their exempt status once deposited into debtor's bank account. The debtor contends that the funds were statutorily exempted while in the deferred compensation account and do not lose their exempt status when deposited into a personal checking account.

Exemptions are governed by 11 U.S.C. § 522. Pursuant to section 522(b), Ohio has opted out of the federal exemption scheme and exemptions are therefore governed by Ohio law. *See* O.R.C. § 2329.66. Pursuant to section 2329.66(A)(10)(a), a debtor can claim as exempt the "right to a pension, benefit, annuity, retirement allowance, or accumulated contributions, the person's right to a participant account in any deferred compensation problem offered by the Ohio public employees deferred compensation board . . ." The parties do not dispute that deferred compensation fund is exempt when it is held by the state. The issue is whether the right to the exemption is extinguished once the funds are paid to the employee. This case is determined by the previous exposition of the state exemption in Daugherty v. Central Trust Co., 28 Ohio St. 3d 441 (1986).

In support of her position that the right to the claim the funds as exempt is not extinguished, the debtor references the Bresnahan case from the Bankruptcy Court for the Southern District of Ohio. In re Bresnahan, 183 B.R. 506 (Bankr. S.D. Ohio 1995). There, the retiree received an annual distribution of his pension which he placed in his checking account. When debtor filed for bankruptcy, \$7,000 of the distribution remained in his checking account and debtor claimed it was exempt under O.R.C. § 2329.66(A)(10)(b). The trustee disagreed. Relying on a case from the Ohio Supreme Court, the bankruptcy court held that "the retirement fund distribution made to the debtor has retained its statutory exemption from judicial process when deposited into the debtor's personal checking account." Bresnahan at 509 (relying on Daugherty, 28 Ohio St.3d 441).

Opposing debtor's argument, the trustee cites In re Moore, 214 B.R. 628 (Bankr. D. Kan. 1997).¹ In Moore, the debtor directly deposited social security and pension benefits into her checking account. In her schedules, she claimed all the monies as exempt. The trustee objected, arguing that the funds were not exempt once they were placed in her checking account. The Moore court found, under federal law, that social security benefits did not lose their exempt status. The debtor's retirement funds, however, were not governed by the federal statute and therefore were not accorded the same protection. According to the court, once the retirement monies were paid to the debtor, they were no longer exempt. The court interpreted the Kansas exemption statute as exempting only the "right to receive" the

¹ The debtor also cites In re Wiggins, 60 B.R. 89 (Bankr. N.D. Ohio 1986), which discusses whether an ERISA qualified pension plan is property of the estate. This question is not presented in the present dispute, and the court therefore finds the Wiggins case to be inapposite.

payment and not payment itself.

After a thorough review of the authorities, the court finds that the debtor's argument is more persuasive. Exempt funds do not lose their exempt status when deposited into a personal checking account. As stated above, because Ohio has opted out of the federal exemptions, exemptions are governed by Ohio law. Because Moore relies on Kansas law, we find it unpersuasive in light of clear Ohio law to the contrary. Although the Bresnahan case dealt with personal earnings, and not deferred compensation monies, the reasoning relied on by the Ohio Supreme Court applies equally to deferred compensation. The court found that

[t]he legislature's purpose, in exempting certain property from court action brought by creditors, was to protect funds intended primarily for maintenance and support of debtor's family. *Dennis v. Smith* (1932), 125 Ohio St. 120, 180 N.E. 638. 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.

Daugherty, 28 Ohio St. 3d at 445. Debtor's deferred compensation was exempt prior to receipt and remains exempt upon receipt. The court notes that the debtor has retired on disability and she alleged that the monies are being used to pay living expenses and to make necessary repairs to her residence.

Many courts have reached similar conclusions with regard to exempt funds which are placed into a personal account. *See, e.g., In re Hunt*, 250 B.R. 482 (Bankr. E.D.N.Y. 2000); *In re Green*, 178 B.R. 533 (Bankr. M.D. Fla. 1995); *In re Frazier*, 116 B.R. 675 (Bankr. W.D. Wis. 1990). *Cf. In re Williams*, 181 B.R. 298 (Bankr. W.D. Mich. 1995) (holding that federal exemption for worker's compensation payments covers the right to the payments and not the funds received or assets purchased with the funds). These cases are illuminating, but not dispositive. The decision is one of state law. The court can find no principled basis for distinguishing Daugherty. Many of the decisions are based on policy considerations, including the need to allow debtor to shelter from creditors enough income to provide support and maintenance to the debtor. The exemption statutes are designed to create a base from which a debtor can obtain a "fresh start." *See In re Cordy*, 254 B.R. 413 (Bankr. N.D. Ohio 2000).

The court also recognizes the reality of debtor's circumstances. While working, she put money into a deferred compensation plan, presumably for retirement. Now, her disability has created the need for a source of additional support, and she turned to the

deferred compensation fund. If she had withdrawn only a portion of the fund, the remainder would be exempt. Similarly, if she could draw a monthly stipend, any future payment would also remain exempt. The court sees no practical reason to refuse to allow the same result through the exemption.

Although the parties reference a deposit of \$17,281.10, an exhibit introduced by the trustee shows that some of the monies were spent prior to debtor filing her petition. The \$17,281.10 amount is the absolute ceiling for the exemption. Any non-exempt funds which were commingled with the deferred compensation funds remain non-exempt. It is undisputed that the debtor spent some of the exempt funds, so she is not entitled to hold the full \$17,281.10 as exempt. The parties are directed to determine the actual amount of the exemption. In the event the parties cannot agree on an amount, the court holds that the lowest balance in debtor's checking account between the date of the deposit and the date of the petition is the amount which is exempt.

The court also does not decide whether the nature of the expenditures changed the exempt nature since this was not raised. Nor does the court render any opinion as to the effect of commingling, if any, since this was not raised.

Based on the above, it is ordered that the trustee's objection to the exemption be **OVERRULED**. Debtor's exemption is **SUSTAINED** to the extent set forth herein.

So ordered.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of October, 2001, the above Memorandum of Decision was sent via regular U.S. Mail to:

Andrew F. Peck
507 West Park Avenue
Barberton, Ohio 44203

James R. Kandel
401 Bank One Tower
Canton, Ohio 44702

Donald R. Miller
1400 Market Avenue, North
Canton, Ohio 44714

Deputy Clerk

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

	)	CASE NO. 01-60366
)	
IN RE:	)	CHAPTER 7
)	
REBECCA PHILLIPS,	)	JUDGE RUSS KENDIG
)	
Debtor.	)	ORDER OVERRULING
	)	TRUSTEE'S OBJECTION
	)	TO DEBTOR'S EXEMPTION
)	

On September 18, 2001, the court entered a provisional decision on the trustee's objection to the debtor's exemption in deferred compensation funds. The accompanying order invited the parties to file objections to the court's findings of fact and to file comments on the decision. All submissions were due by October 3, 2001. No objections or comments have been received.

For the reasons set forth in the accompanying Memorandum of Decision, the court finds that the debtor's deferred compensation funds did not lose their exempt status once deposited into her personal account. Debtor is entitled to an exemption of the funds in an amount in accord with the decision.

IT IS THEREFORE ORDERED that the provisional decision be entered in as a final Memorandum of Decision. The trustee's objection to the exemption is **OVERRULED**.

So ordered.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

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