

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 04-23809
)
JAMES H. NICKLES and) Chapter 7
RANA A. NICKLES,)
)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The debtor James Nickles claims as exempt his interest in a SEP IRA and the chapter 7 trustee objects to the exemption claim. (Docket 24). For the reasons stated below, the trustee’s objection to exemption is overruled.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FACTS

The parties submitted this issue on briefs and these stipulated facts:¹

- “1. The Debtors filed their voluntary petition under Chapter 7 of the Bankruptcy Code on October 28, 2004.
2. [T]he Debtors filed an Amended Schedule C in order to claim the SEP IRA owned by the Debtor, James H. Nickles, and held by Nationwide Insurance with a balance on hand of \$48,026.22 as exempt under the provisions of Section 2329.66(A)(10)(b) of the Ohio Revised Code.

¹ Docket 24, 26, 27, 28, 30, 31.

3. The Trustee timely filed her objection to [this] exemption.
4. The Debtor, James H. Nickles, works as a mechanic for Conrad's Total Car Care and Tire Centers, where [he] has been employed for three years.
5. The average net income of . . . James H. Nickles, is \$1,714.14 per month and he earned approximately \$33,000.00 for the year of 2004.
6. . . . James H. Nickles, is 44 years old and in relatively good health except for his need of extensive dental work.
7. The Debtor, Rana Nickles, is 38 years old, suffers from hypothyroid, but is otherwise in good health.
8. . . . James H. Nickles, is a high school graduate who has been employed as a mechanic for the past 25 years.
9. . . . Rana Nickles, is a homemaker and raises the couples' two children, ages 3 years and 5 months. Prior to her marriage in 2000, she was employed at Don's Pomeroy House as a dishwasher.
10. Neither Debtor [has] any post secondary education.
11. Neither Debtor is currently funding any sort of retirement plan.
12. Other than the SEP IRA . . . , the Debtors own assets with an approximate value of \$4,500.00."

These are the supplemental stipulations that were filed.

- "1. The Debtors currently have a monthly rental expense of \$490.00 which did not exist at the date of the filing of the petition[.]
2. The Debtors' current remaining living expenses are the following:

Electric	\$ 60.00
Telephone	\$ 35.00
Cable	\$ 40.00
Food	\$500.00
Clothing	\$140.00
Laundry and dry cleaning	\$100.00

Medical and dental	\$100.00
Transportation	\$200.00
Life Insurance	\$160.75
Auto insurance	\$26.20

[and] total \$1,851.95 . . . includ[ing] rent[.]”

DISCUSSION

The parties agree that the debtor James Nickles’s SEP IRA² (the account) is property of the chapter 7 estate, but disagree regarding his right to exempt it. A debtor’s interest in certain property may be exempted, or removed, from the bankruptcy estate under 11 U.S.C. § 522. For debtors who file their bankruptcy cases in Ohio, the property that can be exempted is set out in Ohio revised code § 2329.66.³ *See* 11 U.S.C. § 522(b) (permitting a state to opt-out of the federal exemptions and use state exemptions instead) and OHIO REV. CODE § 2329.662 (in which Ohio opts-out of the federal bankruptcy exemptions)).

I. The Issues

The debtors argue that the account is exempt under the terms of Ohio revised code § 2329.66(A)(10)(b). The trustee opposes the exemption, arguing that the section does not apply to SEP IRAs, and that to the extent it does apply, the Ohio exemption provision is preempted by ERISA. Additionally, the trustee argues that the account is not necessary for the support of the debtor and his dependents.

² SEP IRA here refers to an individual retirement account which is part of a simplified employee pension under 26 U.S.C. § 408(k).

³ Property that is exempt under federal law (other than § 522(d)) is also exempt in Ohio. *See* 11 U.S.C. § 522(b)(2)(A).

A. Does § 2329.66(A)(10)(b) apply to exempt SEP IRAs?

Ohio Revised Code § 2329.66(a)(10)(b) permits a debtor to exempt from his bankruptcy estate:

b) . . . [his] right to receive a payment under any pension, annuity, or similar plan or contract . . . to the extent reasonably necessary for the support of the person and any of the person's dependents . . .

OHIO REV. CODE § 2329.66(A)(10)(b). The dispute regarding the availability of this exemption hinges on whether a SEP IRA is a “similar plan or contract” to those specifically named in this section. Adopting the reasoning of the court in *In re Schreiner*, 255 B.R. 545 (Bankr. S.D. Ohio 2000), this court concludes that it is. As the Schreiner court noted:

The SEP is an employer-sponsored plan that allows the employee to contribute more than the limits imposed on contributions to individual retirement accounts and annuities. The taxpayer's ability to make larger annual contributions, and an employer's opportunity to make contributions to a SEP (obviously not a possibility with individual retirement accounts or annuities, may explain the requirement that an exemption be conditioned on the account being reasonably necessary for support). Not all individuals are able to take advantage of employer-sponsored retirement plans, or to benefit from an employer's contributions to a plan. This lends further support to the conclusion that the SEP is more properly considered a “similar plan or contract” to those set forth in O.R.C. § 2329.66(A)(10)(b).

While SEPs may utilize individual retirement accounts or annuities as funding mechanisms, this merely allows the contributions to be funneled to each employee's retirement account. It does not, however, lead to the conclusion that the exemption status of the SEP be identical to that of an individual retirement account or annuity. It is difficult to “pigeon-hole” the SEP, something created and defined by federal statute, into a state law exemption statute that makes no reference to SEPs. It is also unfortunate that the Ohio legislature has not specifically identified the exemption statute into which it intended SEPs to be placed. However, based on the analysis set forth above, the Court finds that the most

appropriate Ohio exemption statute for SEPs is O.R.C. § 2329.66(A)(10)(b). Accordingly, the Court finds that the SEP constitutes a "similar plan or contract" under O.R.C. § 2329.66(A)(10)(b)[.]

In re Schreiner, 255 B.R. at 549.

B. Does ERISA preempt the Ohio exemption?

The trustee argues that § 2329.66(A)(10)(b) is preempted by ERISA under 29 U.S.C.

§ 1144(a) which provides that:

. . . the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title

29 U.S.C. § 1144(a). As the trustee herself notes, however, the ERISA savings clause which provides that “[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . .” has been applied in this context to avoid this result. 29 U.S.C. § 1144(d).

The savings clause is appropriately applied to save § 2329.66(a)(10)(b) from preemption because “[a] holding that state exemption statutes like [§ 2329.66(a)(10)(b)] . . . , are preempted would alter, amend, or modify the Bankruptcy Code’s provision permitting states to set exemptions and the deliberate policy choices of Congress that underlie that provision.” *Schlein v. Mills (In re Schlein)*, 8 F.3d 745, 753-54 (11th Cir. 1993). “By allowing states to ‘opt-out’ of the list of federal exemptions in favor of those created under state law, Congress clearly contemplated the important role state exemption statutes would play in bankruptcy.” *In re Buzza*, 287 B.R. 417, 423 (Bankr. S.D. Ohio 2002). The circuit courts which have addressed this

issue have concluded that § 1144(d) saves state law pension plan exemptions authorized under § 522(b)(2) of the bankruptcy code from preemption.⁴ See *In re Schlein*, 8 F.3d 745 (11th Cir. 1993); *Checkett v. Vickers (In re Vickers)*, 954 F.2d 1426 (8th Cir. 1992); *Heitkamp v. Dyke (In re Dyke)*, 943 F.2d 1435 (5th Cir. 1991).

The Sixth Circuit's unpublished opinion in *Lampkins v. Golden*, 28 Fed. Appx. 409 (6th Cir. 2002), on which the trustee relies, is legally distinguishable and does not require a different result. That opinion addressed the issue of ERISA preemption of a state law exemption in the context of a garnishment proceeding rather than in the bankruptcy context.

C. Is the Debtor's SEP IRA account exempt under § 2329.66(A)(10)(b)?

The parties dispute whether the debtor's account is exempt under the terms of § 2329.66(A)(10)(b). The trustee bears the burden of showing by a preponderance of the evidence that the exemption should be disallowed. See *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999). This dispute focuses solely on whether the account "is reasonably necessary for the support of debtor [James Nickles] and [his] dependents[.]" OHIO REV. CODE § 2329.66(A)(10)(b).

The following factors are considered in determining whether retirement funds are reasonably needed for a debtor's support:

- (1) the debtor's present and anticipated living expenses;
- (2) the debtor's present and anticipated income from all sources;
- (3) the age of the debtor and his dependents;

⁴ A circuit court decision to the contrary, *Pitrat v. Garlikov*, 947 F.2d 419 (9th Cir. 1991), was withdrawn and superseded by 992 F.2d 224 (9th Cir. 1993).

- (4) the health of the debtor and his dependents;
- (5) the debtor's ability to work and earn a living;
- (6) the debtor's job skills, training and education;
- (7) the debtor's other assets (including exempt assets);
- (8) the liquidity of the other assets;
- (9) the debtor's ability to save for retirement;
- (10) special needs of the debtor and his dependents; and
- (11) the debtor's financial obligations, e.g. alimony or support.

In re Hamo, 233 B.R. at 723; *In re Conkle*, 275 B.R. 530, 531 (Bankr. S.D. Ohio 2002).

Consideration of these factors based on the stipulated facts leads to the conclusion that the debtor's account is reasonably necessary for his support.

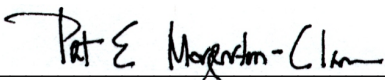
The debtor is 44 years old. He has two young children and his wife is unemployed. Despite his employment, the debtor's current monthly living expenses exceed his income. Although he has the skills to work as an auto mechanic and has done so for 25 years, he has no other training or education which would permit him to earn substantially more than he is currently earning. The debtor's wife worked as a dishwasher before their marriage and does not have any special training or skills. The debtors do not own a home and their assets other than the account have a value of only \$4,500.00. The debtor and his dependents do not have any special needs or other financial obligations to consider. In sum, the debtor cannot meet his living expenses, there is no reasonable expectation that his income will increase or his expenses decrease, and he has little or no financial safety net for life's unexpected events. These facts show that the account is reasonably necessary for the family's support. The trustee does not

analyze the facts differently; she simply states that based on the stipulated facts the court should conclude that the funds are not reasonably necessary. The trustee did not meet her burden of proving that the exemption should be disallowed.

CONCLUSION

For the reasons stated, the trustee's objection to the debtor's exemption is overruled. A separate order will be entered in accordance with this decision.

Date: 5 August 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

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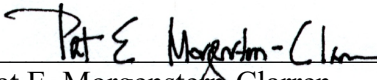


In re:) Case No. 04-23809
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JAMES H. NICKLES and) Chapter 7
RANA A. NICKLES,)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the debtor is entitled to exempt his interest in the SEP IRA and the trustee's objection to the claim of exemption is overruled. (Docket 24).

IT IS SO ORDERED.

Date: 5 August 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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