

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-11385
)
FRANK J. GABOR and) Chapter 7
RENA M. GABOR,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

The debtors Frank and Rena Gabor claim as exempt Rena Gabor's IRA account and the chapter 7 trustee objects to that exemption.¹ For the reasons stated below, the trustee's objection 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).

FACTS²

The parties stipulate to these facts:

1. The debtors . . . filed . . . a joint petition on February 7, 2005.
2. At the time of filing, the debtor, Rena M. Gabor, was a participant in a simple IRA established by her employer Mimax 1 (McDonalds). She has worked for McDonalds for 19 years and is a shift manager.

¹ Docket 6, 23.

² The court held an evidentiary hearing on September 21, 2005. The debtors testified on their own behalf. Also, the parties submitted written stipulations which were supplemented on the record at the evidentiary hearing. *See* Docket 30, 48.

3. The balance in the IRA as of the filing date was approximately \$40,454.30.
4. The debtor claimed an exemption in . . . that simple IRA pursuant to Ohio revised code § 2329.66(a)(10)(c).
5. Trustee Steven S. Davis timely objected to the exemption claim, arguing in part that the exemption statute is preempted by . . . the Employee Retirement Income Security Act (ERISA).
6. The debtors timely responded to the objection arguing in part [that] the congressional intent was not to pre-empt state law exemptions.
7. The debtor, Rena M. Gabor, is 52 years old and the debtor, Frank Gabor, is 56 years old.

The parties also stipulate that correspondence from the broker administering Ms. Gabor's IRA account appropriately describes the account. That document refers to the account as being a simple IRA. The parties agree that the account is ERISA qualified and that ERISA does not provide creditor protection as to the account.

Ms. Gabor testified that she is paid \$900.00 bi-weekly and nets approximately \$600.00. She established her IRA through her employer and she started making contributions to it in 2000 through payroll deductions. Her employer also makes contributions, although the amount of those contributions has decreased since 2000.

DISCUSSION

“The Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate, allowing them to retain those assets rather than divide them among their creditors.”

Rousey v. Jacoway, 125 S. Ct. 1561, 1564 (2005). Debtors who file their cases in Ohio may

exempt property as provided by 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) and Ohio Rev. Code § 2329.662 (in which Ohio opts out of the federal bankruptcy exemptions).

The debtors claim Rena Gabor's IRA as exempt under § 2329.66(A)(10)(c). In opposition, the trustee argues that this section is preempted by ERISA.⁴ The trustee also argues that § 2329.66(A)(10)(c) does not exempt an account like the debtor's. The trustee must show 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).

I. The Debtor's Account

The parties stipulated that debtor Rena Gabor's account is a simple IRA which was established by her employer and is governed by ERISA. No other description of the account is provided. Based on the stipulations, the court concludes that the debtor's account is a simple retirement account within the meaning of 26 U.S.C. § 408(p) which is held in the form of an individual retirement account, or IRA.⁵ See 26 U.S.C. § 408(p) (defining a simple retirement account as "an individual retirement plan (as defined in section 7701(a)(37))" and 26 U.S.C.

³ Section 2329.66 was amended effective September 29, 2005. Subsection 2329.66(A)(10)(c) was not changed, however, and in any case, the previous version of that section applies here as the debtors' chapter 7 case was filed on February 7, 2005.

⁴ The term ERISA refers to the Employee Retirement Income Security Act of 1974, as amended.

⁵ The trustee's brief suggests that the debtor's account is a simplified employee pension (SEP) under 26 U.S.C. § 408(k). That characterization is not supported by the broker's description which clearly indicates that the debtor's account is not a § 408(k) SEP IRA. (Docket 48).

§ 7701(a)(37) (providing that an individual retirement plan means an individual retirement account as described in § 408(a) and an individual retirement annuity as described in §408(b)).

A. Is the debtor's account exempt under Ohio Revised Code § 2329.66(A)(10)(c)?

Section § 2329.66(A)(10)(c) allows a debtor to exempt assets held in an individual retirement account from the bankruptcy estate:

(c) Except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's right in the assets held in, or to receive any payment under, any individual retirement account, individual retirement annuity, "Roth IRA," or education individual retirement account that provides benefits by reason of illness, disability, death, or age, to the extent that the assets, payments, or benefits described in division (A)(10)(c) of this section are attributable to any of the following:

(i) Contributions of the person that were less than or equal to the applicable limits on deductible contributions to an individual retirement account or individual retirement annuity in the year that the contributions were made, whether or not the person was eligible to deduct the contributions on the person's federal tax return for the year in which the contributions were made;

(ii) Contributions of the person that were less than or equal to the applicable limits on contributions to a Roth IRA or education individual retirement account in the year that the contributions were made;

(iii) Contributions of the person that are within the applicable limits on rollover contributions under subsections 219, 402(c), 403(a)(4), 403(b)(8), 408(b), 408(d)(3), 408A(c)(3)(B), 408A(d)(3), and 530(d)(5) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended.

Ohio Rev. Code § 2329.66(A)(10)(c). The trustee argues that a simple retirement account may not be exempted under this section and that the evidence suggests that the debtor contributed excess amounts to the account.

The trustee's argument that the debtor contributed excess amounts to the account is not supported by the record. There is no evidence that the debtor made deposits into the account for the purpose of evading debt and there is no evidence to support a determination that the debtor's contributions to the account exceeded the amounts allowed under § 2329.66(A)(10)(c).

The trustee's argument that a simple retirement account may not be exempted under § 2329.66(A)(10)(c) also lacks merit as it is based on case law dealing with a SEP IRA which is an entirely different type of account. A SEP IRA is a simplified employee pension (*see* 26 U.S.C. § 408(k)) which uses an individual retirement account as a funding mechanism. *In re Schreiner*, the case on which the trustee relies, held that SEP IRAs are more analogous to employee sponsored pensions than they are to individual retirement accounts, and concluded that they may only be exempted under Ohio revised code § 2329.66(A)(10)(b), which exempts a debtor's right to receive a payment under a pension plan and limits the exemption amount based on the debtor's reasonable need for support. *See In re Schreiner*, 255 B.R. 545 (Bankr. S.D. Ohio 2000). The simple retirement account at issue here, however, is not a SEP IRA and it is not analogous to an employer sponsored pension plan. It is held as an individual retirement account and is by definition "an individual retirement plan." *See* 26 U.S.C. §§ 408(p)(1) and 7701(a)(37). The account is funded mainly by employee contributions made under a qualified salary reduction arrangement. *See* 26 U.S.C. §§ 408(p)(1) and (2). As a result, the concerns

which led the *Schreiner* court to conclude that a SEP IRA may not be exempted under § 2329.66(A)(10)(c) do not apply here and Ms. Gabor may exempt her IRA under that section.⁶

B. Does ERISA Preempt Ohio Revised Code §2329.66(A)(10)(c)?

The trustee argues that Ohio revised code § 2329.66(A)(10)(c) is preempted by ERISA under the terms of 29 U.S.C. § 1144(a) which provides:

. . . 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). The debtors argue that the ERISA savings clause prevents preemption; that clause provides that “[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States” 29 U.S.C. § 1144(d).

The savings clause is appropriately applied here to save §2329.66(A)(10)(c) from preemption. This is because “[a] holding that state exemption statutes like [§ 2329.66(a)(10)(c)] . . . , 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).

⁶ Although evidence on the issue of whether the account is reasonably necessary for the debtors’ support was presented, it is not considered here because § 2329.66(A)(10)(c) provides that the funds held in the account are exempt and does not limit the exemption based on the debtor’s need for support.

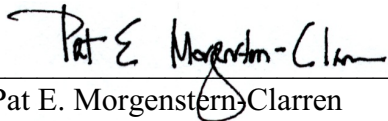
The circuit courts which have addressed this issue have concluded that § 1144(d) saves state law exemptions authorized under bankruptcy code § 522(b)(2) from preemption. *See In re Schlein*, 8 F.3d 745 (11th Cir. 1993); *Checkett v. Vickers (In re Vickers)*, 954 F.2d 1426 (8th Cir. 1992); *Heitkamp v. Dyke (In re Dyke)*, 943 F.2d 1435 (5th Cir. 1991). *But see, Pitrat v. Garlikov*, 947 F.2d 419 (9th Cir. 1991), a decision to the contrary which was withdrawn and superseded by 992 F.2d 224 (9th Cir. 1993).

The trustee's reliance on the Sixth Circuit's unpublished opinion in *Lampkins v. Golden*, 28 Fed. Appx. 409 (6th Cir. 2002), for a different result is misplaced. That decision is legally distinguishable because it addresses the issue of ERISA preemption of a state law exemption in the context of a garnishment proceeding rather than in the bankruptcy context.

CONCLUSION

For the reasons stated, the debtors are entitled to exempt Rena Gabor's interest in her simple IRA from the bankruptcy estate and the trustee's objection to the claim of exemption is overruled. A separate order will be entered in accordance with this decision.

Date: 7 October 2005

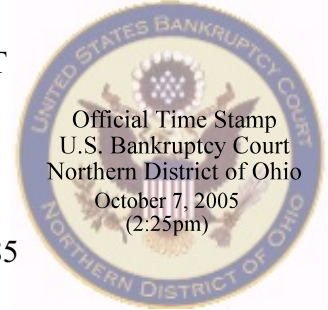


Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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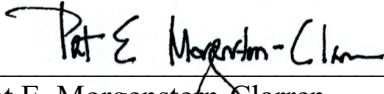


In re:) Case No. 05-11385
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FRANK J. GABOR and) Chapter 7
RENA M. GABOR,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the debtors are entitled to exempt Rena Gabor's interest in her simple IRA, and the trustee's objection to the claim of exemption is overruled. (Docket 6).

IT IS SO ORDERED.

Date: 7 October 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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