

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bky. Case No. 04-41614-RJK
Chapter 7

Richard J. Karl and Bonnie A. Karl,

Debtors

VERIFIED NOTICE OF HEARING AND MOTION ON TRUSTEE'S OBJECTION TO
CLAIMED EXEMPT PROPERTY

TO: Debtor; Debtor's attorney; the United States Trustee and other parties in interest.

1. Timothy D. Moratzka, Trustee herein, moves the Court for the relief requested below, and gives notice of hearing herewith.

2. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1071-1. This motion is filed pursuant to Bankruptcy Rule 9014 and Local Rules 9013-1 through 9013-5. This proceeding arises under 11 U.S.C. § 522 and Local Rule 40031 (a). This is a core proceeding. The petition commencing this Chapter 7 case was filed on March 26, 2004, and the case is now pending in this Court.

3. The Court will hold a hearing on this objection on July 28, 2004 at 9:30 a.m. in Courtroom No. 8 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, or as soon thereafter as counsel can be heard.

4. Any objection to the relief requested herein must be filed and delivered not later than July 23, 2004, which is three (3) days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than July 19, 2004, which is seven (7) days before the time set for the hearing, (excluding Saturdays, Sundays and holidays). UNLESS A WRITTEN RESPONSE IS TIMELY FILED, THE

COURT MAY GRANT THE MOTION WITHOUT A HEARING.

5. This motion is filed pursuant to Bankruptcy Rule 4003(b) and Local Rule 4003-1 and 9013 *et seq.* Trustee objects to the Debtor's claim that the following property is exempt under the applicable exemption statute:

- A) SEP claimed exempt under 11 U.S.C § 522(d)(10)(E)
Value scheduled as \$68,504.

6. It appears the SEP (IRA) plan does not have a restraint on alienation or limits on ability to withdraw funds, and is under the Debtor's direction and/or control. A SEP or Simplified Employee Pension is similar to an IRA. Debtor's SEP is not necessary for the current support of Debtor, the right to payment does not appear to be limited to the extent that the payment is reasonably necessary for the support of the Debtor and any dependent, and thus cannot be claimed exempt under 11 U.S.C. § 522(d)(10)(E). *See In re Bowder*, 262 B.R. 919 (Bky. D. Minn. 2001)(Bky. J. O'Brien). As set forth in *In re Anderson*, 259 B.R. 687 (8th Cir. B.A.P. 2001):

Payments are exempt only if (1) they are received pursuant to a "pension, annuity, or similar plan or contract," (2) "on account of illness, disability, death, age, or length of service," and (3) are reasonably necessary for the debtor's support or for the support of a dependent of the debtor.

7. In addressing the exemption of an IRA under 11 U.S.C. §522(d)(10)(E), the Eighth Circuit Bankruptcy Appellate Panel held that payments "are exempt only if they (1) are received pursuant to a pension, annuity, or similar plan or contract; (2) are on account of illness, disability, death, age, or length of service; (3) are reasonably necessary for the Debtor's support or the support of a dependent of the Debtor", and, that the plan must meet all three requirements. *In Re Rousey*, 283 B.R. 265, 269 (8th Cir. BAP, 2002). In *Rousey*, Debtors argued that the fact there would be tax penalties for early withdrawal of the IRA funds

amounted to a restriction on access, but the BAP found that the Debtor still had unfettered discretion to withdraw the funds. *Rousey*, 283 B.R. at 272.

8. In applying the same language under the Iowa exemption statute, Iowa Code §627.6(8)(e), the 8th Circuit Court of Appeals likewise held that the unfettered ability to withdraw money from an annuity or plan means that the rights to payment are not “on account of illness, disability, death, age, or length of service,” disqualifying the IRA from exemption. *See, In Re Eilbert*, 162 F.3d. 523, 527-528 (8th Cir. 1998), *In Re Huebner*, 986 F.2d. 1222, 1224-1225 (8th Cir. 1993), cert. denied, 510 U.S. 900, 114 S.Ct. 272 (1993); *see also In re Jenkins*, 300 B.R. 348 (Bky. D. Minn. 2003) (holding that debtor’s unfettered access to SEP IRA and IRAs meant they were not exempt under Minnesota exemption, which uses similar language as in Section 11 U.S.C. §522(d)(10) (E)).

9. Accordingly, where, as here, the manner in which funds are held in a SEP IRA that allows the Debtor to withdraw the funds without restriction, other than early withdrawal tax penalties or brokerage fees, the Debtor’s right to payment under the SEP IRA is not on account of illness, disability, death, age or length of service and the IRAs do not qualify for exemption under 11 U.S.C. §522(d)(10)(E).

10. Debtors are both employed or receive regular monthly income such that the SEP is not need for the support of Debtors. Debtors schedule no dependents.

11. In addition, the SEP appears to have been established by an insider that employed Debtor. Trustee requires additional information on the number of participants or others involved in the SEP.

WHEREFORE, Trustee respectfully moves the Court for an order sustaining the Trustee's motion to Debtor's claimed exemption listed herein and for such other relief as may be just and equitable.

Dated: May 27, 2004

MACKALL, CROUNSE & MOORE
By /e/Patrick C. Summers
Timothy D. Moratzka (Atty No. 75036)
Patrick C. Summers (Atty. No. 028841X)
Attorneys for Trustee
1400 AT&T Tower
Minneapolis, Minnesota 55402
(612) 305-1400

VERIFICATION

Timothy D. Moratzka, being duly sworn, says that he is the Chapter 7 Trustee in this action, that he has read this Verified Notice and Objection to Claimed Exempt Property and that it is true of his own knowledge, to the best of his information.

DATED: May 27, 2004

/e/Timothy D. Moratzka

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DISTRICT OF MINNESOTA

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Richard J. Karl and Bonnie A. Karl,

Debtor.

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Jannyce Barbee, employed by Mackall, Crouse & Moore, attorney(s) licensed to practice law in this court, with office address of 1400 AT&T Tower, 901 Marquette Avenue, Minneapolis, MN 55402-2859, declares that on the date set forth below, I served the annexed **Verified Notice of Hearing and Motion on Trustee's Objection to Claimed Exempt Property** upon each of the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota addressed to each of them as follows:

Office of the United States Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

(Attorney for Debtor)
William P. Kain
13 South 7th Avenue
St. Cloud, MN 56301

(Debtor)
Richard J. Karl
Bonnie A. Karl
20016 Major Avenue
Hutchinson, MN 55350

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: May 27, 2004

By /e/ Jannyce Barbee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

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Debtor.

The above-entitled matter came before the Court for hearing on July 28, 2004, on the motion of Timothy D. Moratzka, Trustee for the above-referenced Debtor, objecting to the exemption claim of the Debtor of the SEP under 11 U. S. C. § 522 (d)(10)(E). Appearances were noted in the Court's record. Based upon the proceedings had on said date, the statements of counsel, and all of the files and records herein, the Court now finds grounds for sustaining the Trustee's objection.

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the debtor's claim of exemption in the SEP account is not exempt and shall be administered as property of the estate.

Dated: _____

Honorable Robert J. Kressel
United States Bankruptcy Judge