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(Revised 10/90)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 7
Bky Case No. 04-41822-RJK

James Charles Pegelow,

**VERIFIED NOTICE OF HEARING AND
MOTION OBJECTING TO CLAIMED
EXEMPT PROPERTY**

Debtor(s).

TO: The United States Bankruptcy Court, the United States Trustee, the debtor, the debtor's attorney, and all parties who requested notice under Bankruptcy Rule 2002 (none):

1. John R. Stoebner, 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, Bankruptcy Rule 5005, and Local Rule 1070-1. 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 4003-1(a).

3. The Court will hold a hearing on this objection on August 25, 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 entity opposing the motion under Local Rule 9013-2 is required to file and serve a response, including a memorandum of facts and law and any opposing affidavit, not later than August 20, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than August 16, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). **If no response is timely served and filed, the Court may grant the relief requested without a hearing.**

5. The undersigned trustee hereby objects to the debtor's claim that the following property is exempt under the applicable exemption statute:

a. Homestead, legally described as follows: That part of Lots 2 and 3, Block 1, of the recorded plat of Howard Lake 2nd Addition, Anoka County, Minnesota, lying Southwesterly of the following described line: Commencing at the most northerly corner of Lot 3; thence South 66 degrees 32 minutes 11 seconds West, plat bearing along the northerly line of said Lot 3, a distance of 293.96 feet to the point of beginning of the line to be described; thence South 27 degrees 23 minutes 14 seconds East, a distance of 662.68 feet to the south line of said Lot 2, and there terminating, Anoka County, Minnesota, claimed exempt to the extent of \$40,000.00 under MSA §§ 510.01 and 510.02.

b. IRA; rolled from 401 (k), claimed exempt to the extent of \$1,500.00 under MSA § 550.37 subd. 24 and MSA § 550.37 subd. 20 – traceable funds re: subdivisions 9, 10, 11, 15, and 24.

c. Computer, printer, and monitor, claimed exempt to the extent of \$25.00 under MSA § 550.37 subd. 4(b).

d. 1956 Ford Model 860 with backblade and 6 foot mower deck, claimed exempt to the extent of \$1,450.00 under MSA § 550.37 subd. 4(b).

6. The objection is made for the following reasons:

a. Upon information and belief, the size of the homestead exceeds ½ acre and the property is located within the platted portion of a city. Accordingly, the exemption in the homestead should be disallowed.

b. Debtor claimed the Individual Retirement Account (“IRA”) exempt under Minn. Stat. §550.37, subd. 24. Upon information and belief, the IRA is held in the form of mutual funds and money market funds/cash. The IRA is not exempt under §550.37, subd. 24 because it is not payable on account of illness, disability, death, age or length of service.

This court has held that to qualify for exemption under subdivision 24, a plan must meet three criteria: (1) Debtor must have the right to receive payments under a stock bonus, pension, profit sharing, annuity, individual retirement, individual retirement annuity, simplified employee pension, or

similar plan; (2) Debtor's right to payment must be on account of illness, disability, death, age or length of service; and, (3) Debtor's aggregate interest under all such plans and contracts must have a present value of no more than [\$54,000.00]. *In Re Gagne*, 166 B.R.362, 363 (Bankr. D. Minn. 1993), Aff'd in relevant part, *Gagne v. Bergquist*, 179 B.R. 884 (D. Minn. 1994)(emphasis added). *Gagne* dealt with an earlier version of the statute, but the relevant language still applies. Debtor's IRA meets the first and third requirement, but does not meet the second requirement. Debtor is free to withdraw the balance in his account at any time. *Also see, In re Clark*, BKY No. 03-40923-RJK (unreported decision – copy of Order entered July 2, 2003 attached).

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.

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).

Accordingly, where, as here, the manner in which funds are held in an IRA 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 IRA is not on account of illness, disability, death, age or length of service and the IRA does not qualify for exemption under Minn. Stat. §550.37, subd. 24.

Finally, the monies in the IRA account are not exempt as traceable funds under subdivision 20 of § 550.37 because the monies were never included under the protection of subdivision 24. *See, Community Bank Henderson v. Noble*, 552 N.W.2d 37 (Minn.App. 1996).

c. The debtor is not entitled to exempt a computer as a household appliance under MSA § 550.37 subd. 4(b). Accordingly, the exemption should be disallowed. *See, In re: Rhonda Rae Irwin*, BKY Case No. 98-47629-NCD. In *Irwin*, the debtor attempted to claim a computer, printer, and monitor exempt under the same Minnesota statute, and this Court ruled that "...a computer is not exempt as a household appliance." Also, *see, In re: Keith Marten Stassen*, BKY Case No. 02-84562-RJK. In *Stassen*, the debtor attempted to claim a computer, printer, and monitor exempt under the same Minnesota statute, and this Court ruled, "That the debtor's claims of exemption in the computer, printer and monitor are denied."

d. Upon information and belief, the 1956 Ford Model 860 with backblade and 6 foot mower deck is not a "household good"; but rather is a full-size farm tractor and thus is not exempt under MSA § 550.37 subd. 4(b).

Dated: June 1, 2004

/e/ John R. Stuebner
John R. Stuebner, Trustee
One Financial Plaza, Suite 2500
120 South Sixth Street
Minneapolis, MN 55402
(612) 338-5815

VERIFICATION

John R. Stuebner, 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.

/e/ John R. Stuebner
John R. Stuebner

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Thomas Paul Clark,

Debtor.

ORDER SUSTAINING OBJECTIONS
TO EXEMPTIONS

BKY 03-40923

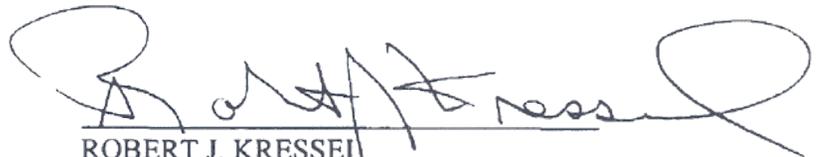
At Minneapolis, Minnesota, July 2, 2003.

This case came on for hearing on the objection of the trustee to three different exemptions. Patrick B. Hennessy appeared for the trustee and George W. Roberts appeared for the debtor. Prior to the hearing, the trustee withdrew his objection to the debtor's homestead exemption claim. Also prior to the hearing, the debtor agreed that his exemption in the Principal Life Insurance policy could be denied.

The debtor's IRA is not payable on account of illness, disability, death, age, or length of service and, therefore, is not exempt under Minnesota law.

THEREFORE, IT IS ORDERED:

1. The debtor's Principal Qualified Annuity is not exempt.
2. The debtor's Principle Life Insurance policy is not exempt.



ROBERT J. KRESSEL
UNITED STATES BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 7
Bky Case No. 04-41822-RJK

James Charles Pegelow,

Debtor(s).

UNSWORN CERTIFICATE OF SERVICE

I, Lori A. Frey, declare under penalty of perjury that on June 1, 2004, I mailed copies of the attached **Trustee's Verified Notice of Hearing and Motion Objecting to Claimed Exempt Property and proposed Order** by first class mail postage prepaid to each entity named below at the address stated below for each entity:

James Charles Pegelow
16159 Kettle River Blvd.
Forest Lake, MN 55025

Craig W. Andresen, Esq.
2001 Killebrew Drive, Suite 330
Bloomington, MN 55425

U.S. Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Executed on: June 1, 2004

/e/ Lori A. Frey
Lori A. Frey, Paralegal
Lapp, Libra, Thomson, Stuebner &
Pusch, Chartered
120 South Sixth Street, Suite 2500
Minneapolis, MN 55402
612/338-5815

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 7
Bky Case No. 04-41822-RJK

James Charles Pegelow,

Debtor(s).

ORDER SUSTAINING OBJECTION TO CLAIM OF EXEMPTION

At Minneapolis, Minnesota, August 25, 2004.

The objection of the trustee to the debtor's claim that the following property is exempt under the listed exemption statute:

- a. Homestead, legally described as follows: That part of Lots 2 and 3, Block 1, of the recorded plat of Howard Lake 2nd Addition, Anoka County, Minnesota, lying Southwesterly of the following described line: Commencing at the most northerly corner of Lot 3; thence South 66 degrees 32 minutes 11 seconds West, plat bearing along the northerly line of said Lot 3, a distance of 293.96 feet to the point of beginning of the line to be described; thence South 27 degrees 23 minutes 14 seconds East, a distance of 662.68 feet to the south line of said Lot 2, and there terminating, Anoka County, Minnesota, claimed exempt to the extent of \$40,000.00 under MSA §§ 510.01 and 510.02.
- b. IRA; rolled from 401 (k), claimed exempt to the extent of \$1,500.00 under MSA § 550.37 subd. 24 and MSA § 550.37 subd. 20 – traceable funds re: subdivisions 9, 10, 11, 15, and 24.
- c. Computer, printer, and monitor, claimed exempt to the extent of \$25.00 under MSA § 550.37 subd. 4(b).
- d. 1956 Ford Model 860 with backblade and 6 foot mower deck, claimed exempt to the extent of \$1,450.00 under MSA § 550.37 subd. 4(b).

came duly on for hearing on August 25, 2004. Appearances, if any, were as noted in the record.

Upon said objection and for cause shown, and upon all the files, records, and proceedings herein,
IT IS ORDERED,

1. The debtor's claim of exemption in the Homestead, legally described as follows: That part of Lots 2 and 3, Block 1, of the recorded plat of Howard Lake 2nd Addition, Anoka County, Minnesota, lying Southwesterly of the following described line: Commencing at the most northerly corner of Lot 3; thence South 66 degrees 32 minutes 11 seconds West, plat bearing along the northerly line of said Lot 3, a distance of 293.96 feet to the point of beginning of the line to be described; thence South 27 degrees 23 minutes 14 seconds East, a distance of 662.68 feet to the south line of said Lot 2, and there terminating, Anoka County, Minnesota, is disallowed as to that portion of the real estate that exceeds one-half of an acre.
2. The debtor's claims of exemption in the IRA; rolled from 401 (k), the computer, printer, and monitor, and the 1956 Ford Model 860 with backblade and 6 foot mower deck are disallowed.

Dated: _____, 2004

Robert J. Kressel
United States Bankruptcy Judge