

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

HAROLD LUTHER LUNDE,

Debtor;

BKY 6-90-268

and

In re:

BKY 6-90-269

ALTON IRVING LUNDE,

MEMORANDUM ORDER

Debtor.

At Fergus Falls, Minnesota, December 13, 1990.

The above-entitled matter came on for hearing before the undersigned on the 16th day of October, 1990 on objections by the Trustee in both cases, and by the Farmers State Bank of Waubun ("Farmers") and the Bank of Elbow Lake (collectively, the "Banks"), to numerous claims of exemption contained in the schedules the Debtors filed following the entry of orders for relief in these involuntary Chapter 7 cases. The appearances were as follows: Lowell Bottrell for the Trustee; James O'Gorman for Farmers; Brad Sinclair for the Bank of Elbow Lake; and Thomas Melloy for the Debtors. This Court has jurisdiction over the parties to and the subject matter of these cases pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate these objections because their subject matters render such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(B).

At the start of the hearing, a number of the objections were withdrawn. The claims of exemption for the following assets,

however, continued to be the subjects of objection on a number of grounds: 1) Harold Lunde's life insurance policy (the "Insurance Policy") from Northwestern Mutual Life Insurance Company ("NWML"); 2) Harold Lunde's annuity (the "Annuity") from Lutheran Brotherhood Fraternal Benefit Society purchased with funds from a money market account containing his partnership earnings; 3) Harold and Alton Lunde's "interests" in a 12.5-acre parcel of real estate (the "Parcel") owned by the Lunde Brothers Partnership (the "Partnership"); 4) Harold and Alton Lunde's right to payment based on the Partnership's accumulated equity credit (the "Equity Credit") with Community Co-ops of Lake Park (the "Co-op"); 5) Harold and Alton Lunde's interests in the Partnership; and 6) Harold and Alton Lunde's individual retirement accounts (the "IRA's") with NWML. In addition, Farmers continued to object to the Debtors' claims of exemption under subdivision 24 of section 550.37 based on its allegation that the property each Debtor claimed as exempt was not reasonably necessary for the support of the Debtor and his dependents and to the Debtors' claims of homestead exemption on the grounds that the homestead claimed by each Debtor exceeded the maximum acreage limitation.

At the conclusion of the hearing, I instructed the parties to file additional briefs on the remaining objections. The parties have now filed those briefs, and I have carefully considered them. All facts discussed herein were stipulated to at the hearing or are based on uncontested documents included as exhibits to affidavits submitted by the parties.

I. PROCEDURAL ISSUE

At the hearing, Debtors' counsel moved to strike all the objections on the basis that they failed to meet the requirements of Local Rule 107 and Bankruptcy Rule 9013 in that the objections did not state with sufficient particularity the grounds for the objections and they were not accompanied by memoranda concisely stating such grounds. I refused to strike the objections, but I admonished the attorneys for the Banks for failing to file sufficiently detailed pleadings. I also gave Debtors' counsel the option of requiring the objectors to submit more detailed objections and/or memoranda and allowing the Debtors additional time to respond. Debtors elected to go forward at the hearing, provided that their counsel would have the opportunity to submit a supplemental memorandum.

II. SUBSTANTIVE ISSUES

A. Insurance Policy

Debtors assert no substantive basis for overruling the Trustee's and Farmers objections that the value of the Insurance Policy exceeded the \$5,200 exemption limitation. Therefore, I will sustain the objections as to such value in excess of \$5,200 and require Harold Lunde to turn over such excess value to the Trustee.

B. Lutheran Brotherhood Annuity

The Trustee and Farmers contend that the Annuity does not qualify for exemption because it did not arise directly from an employment relationship or self-employment endeavor. See *In re Raymond*, 71 B.R. 628 (Bkctcy. D. Minn. 1987) (citing *In re Schuette*,

58 B.R. 417 (Bkctcy. D. Minn. 1986)) (both cases holding that only benefits stemming directly from employment relationship or self-

employment endeavor qualify for exemption under Minn. Stat. Section 550.37, subd. 24). Harold Lunde responds that the Raymond case was wrongly decided and that it has been overruled by the Minnesota legislature. I disagree with both responses.

The Raymond court concluded that the Minnesota legislature intended for courts to look to federal law for definitions of the types of plans listed in subdivision 24 of section 550.37. Raymond, 71 B.R. at 630. The court further concluded that federal law required contributions to such plans to be tied to wages earned in an employment relationship. Id. Consequently, the court held that the debtor's share of an annuity purchased by the debtor and his wife did not qualify for exemption.

I can find no fault with the Raymond court's reasoning. Nor can I distinguish the facts in the instant case from the situation in Raymond. In both cases, the annuities were purchased by the debtors rather than being generated in the debtors' employment or self-employment activities. The fact that the funds used for the purchase were ultimately derived from such activities is irrelevant. Id. Therefore, the objection based on the Raymond decision must be sustained.

Moreover, I cannot agree with the Harold Lunde's contention that the Raymond decision has been overruled. After Raymond was decided, the Minnesota Supreme Court struck down the statute exempting private annuities of the type purchased by the debtor in

Raymond and by Harold Lunde as being contrary to the Minnesota Constitution. See *In re Tveten*, 402 N.W.2d 551 (Minn. 1987). Subsequently, the legislature amended subdivision 24 to remove the

limitation on that exemption. Harold Lunde asserts that such amendment "clearly evinced a legislative intent to include private annuities" as exempt under subdivision 24, contrary to the Raymond decision. The only support he provides for this assertion is that the legislature amended subdivision 24 in the first session after Raymond was decided. This fact alone is insufficient to demonstrate the legislature's intent to overrule Raymond.(FN1)

On the contrary, the amendment of subdivision 24 tends to indicate that the legislature concurred with the Raymond court's interpretation of that exemption statute. The legislature could have amended subdivision 24 to explicitly overrule Raymond, but instead it amended the statute in a way that affected all the employee benefit plans listed, including annuities. The legislature's failure to explicitly address private annuities supports the conclusion that the legislature concurred with the Raymond decision.

C. Partnership's Real Estate

The Banks contend that the Debtors have no legal or equitable interests in the Parcel, since title to the Parcel is in the name

(FN1) Moreover, the Raymond decision merely followed the holding in Schuette, which had been decided a year earlier.

of the Partnership, and therefore the Debtors cannot claim the Parcel as exempt:

Any interest in the land, whether legal or equitable, shall constitute ownership, within the meaning of this chapter, and the dwelling house so owned and occupied shall be exempt, though situated on the land of another.

Minn. Stat. Section 510.04. The Minnesota courts have held that

partners have no right of exemption in partnership property so long as it remains such. See, e.g., *Prosser v. Hartley*, 35 Minn. 340, 343, 29 N.W. 156, 158 (1886); *Baker v. Sheehan*, 29 Minn. 235, 237, 12 N.W. 704, 705 (1882). Similarly, courts in other jurisdictions have held that individual partner debtors may not claim partnership property exempt because "there can be no individual ownership in partnership property until the partnership activity has ceased and all partnership debts have been paid." *In re Indvik*, 118 B.R. 993, 1003 (Bkctcy. N.D. Iowa 1990).

Debtors respond that their interests in the Parcel, which interests are defined by Minnesota law as tenancies in partnership, are sufficient to permit them to exempt the Parcel as part of their homesteads. See Minn. Stat. Section 323.24. In what the Debtors assert was an analogous situation, the Minnesota Supreme Court permitted the principal of a corporation to "reverse pierce" the corporate veil and assert the homestead exemption statute to protect property owned by the corporation. See *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985).

I need not reach this issue, however, since the Parcel is not property of the estates. Only property of the bankruptcy estate can be claimed exempt under section 522(b) of the Bankruptcy Code.

Appleton v. Gagnon (In re Gagnon), 26 B.R. 926, 928 (Bkctcy. M.D. Pa. 1983). At the time the petitions were filed, Debtors had no legal or equitable interest in the Parcel, since the Partnership owned it.(FN2) *Connolly v. Nuthatch Hill Assoc. (In re Manning)*, 831 F.2d 205, 207 (10th Cir. 1987). C.f. *Hedge*, 375 N.W.2d at 478 (expressly declining to hold that corporation's sole shareholder

had equitable interest in corporation's property for homestead exemption purposes). Moreover, their bankruptcy estates have not subsequently acquired interests in the Parcel, since the parties concede that the Partnership has not ceased activity and paid all its debts. *Dixon v. Koplak*, 102 F.2d 295, 297 (8th Cir. 1939). A partnership is not terminated until the winding up of its affairs is completed. Minn. Stat. Section 323.29. Consequently, the Parcel is not property of the estates. 11 U.S.C. Section 541(a)(1) and (7).

The purpose of the Debtors' claims of exemption for the Parcel was to protect it from the claims of their individual creditors, as represented by the Trustee. What the parties failed to recognize is that the Parcel cannot be subject to the claims of their individual creditors under Minnesota law, regardless of the

(FN2) Debtors merely had a undivided one-half tenancy-in-partnership interests in the Parcel, which became property of the estate when the involuntary petitions were filed. *Connolly*, 831 F.2d at 207. "[A]s of the commencement of the bankruptcy case, the estate's legal and equitable interests in the property rise no higher than those of the debtor." *Gagnon*, 26 B.R. at 928.

applicability of the homestead exemption statute, since the Parcel is partnership property:

[A] partner's right in specific property is not subject to attachment, garnishment or execution, except on a

claim against the partnership

Hedge
Minn. Stat. Section 323.24(3). Thus, the case cited for the proposition that the principal of a corporation may "reverse-pierce" the corporate veil to claim corporate property as exempt arose where the principal was attempting to use the homestead exemption to shield corporate property from the claims of the corporation's creditors, not from the claims of the principal's creditors.(FN3) See Hedge, 375 N.W.2d at 478. Consequently, the case addresses an issue only tangentially related to the instant objection.

If I had concluded that the Parcel became property of the estates at the time the involuntary petitions were filed, I would have been inclined to conclude that the Debtors were entitled to exempt the Parcel from the estates. The Parcel could have been property of the estates at the time of filing only if the Debtors had "legal or equitable interests" in the Parcel at that time. 11

(FN3) Not before me is the issue of whether the homestead exemption statute would protect the Parcel against the claims of the Partnership's creditors by virtue of the Debtors' occupation of it as their homesteads:

[W]hen partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws, except as specifically authorized under exemption law.

Minn. Stat. Section 323.24(3).

U.S.C. Section 541(a)(1). If they had had such interests, they would have been entitled to exempt them under the homestead exemption statute, since that statute applies to "[a]ny interest in land, whether legal or equitable." Minn. Stat. Section 510.04. The Minnesota law cited by the objectors does not preclude such a conclusion, since it addresses exempting partnership property from the claims of partnership creditors rather than an individual partner's property from the claims of his individual creditors:

[W]hen partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws, except as specifically authorized under exemption law.

Minn. Stat. Section 323.24(3) (emphasis added). I have, however, concluded that the Parcel is not property of the estates, and therefore the issue of whether the Parcel itself may be exempted is moot.

D. Partnership's Equity Credit with Co-op

Over the years, the Partnership has accumulated the Equity Credit with the Co-op in exchange for its patronage of the Co-op. Apparently, the Co-op will redeem the accumulated Equity Credit from the Partnership for cash after the individual partners reach age 69. It is uncontroverted that the Debtors each have contracts with the Partnership entitling them to receive any redemption payment the Co-op pays to the Partnership. The Debtors have claimed as exempt their right to payment under these contracts as constituting the type of asset defined in subdivision 24 of section 550.37:(FN4)

The debtor's right to receive present or future payment . . . under a stock bonus, pension, profit sharing, annuity, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service

Minn. Stat. Section 550.37, subd. 24.

The Trustee and the Banks contend that this right to payment does not qualify for exemption because it did not arise directly from an employment relationship or self-employment endeavor. See *In re Raymond*, 71 B.R. at 630. Debtors respond by 1) urging this Court to reject the *Raymond* decision as wrongly decided and 2) asserting that even if the Court decides to follow the *Raymond* holding, the Debtors' right to payment did arise directly from their employment relationship or self-employment endeavors. I have already rejected the Debtors' first response, but I cannot reject their second on this record.

The objectors bear the burden of demonstrating that the Debtors' right of payment did not arise from the Debtors' employment relationships or their self-employment activities. Fed. R. Bankr. P. 4003(c); *In re Schuette*, 58 B.R. at 421. The objectors failed to produce any evidence tending to show that the right to payment was not granted to the Debtors as employees of the

(FN4) Debtors have claimed neither the Equity Credit itself nor the Partnership's right to payment exempt. Therefore, the issue of whether these assets are property of the Debtors' bankruptcy estates is not currently before me.

Partnership or arose from their self-employment endeavors through the Partnership.(FN5)

The Trustee, however, also contends that the right to payment

does not constitute a "similar plan or contract" so as to qualify for exemption. See Minn. Stat. Section 550.37, subd. 24. I agree.

A right to payment does not qualify for exemption under subdivision 24 of section 550.37 if such payment will not come from a separate fund. *Westinghouse Credit Corp. v. J. Reiter Sales, Inc.*, 443 N.W.2d 837 (Minn. Ct. App. 1989). In the *Westinghouse Credit* case, the court held that an independent contractor's profit sharing plan did not qualify for exemption because the accumulation of the benefit existed only as an entry in the books of the entity granting the benefit without the granting entity transferring any money into a separate fund. The court concluded that such an unfunded plan was not "similar" to the types of plans enumerated in subdivision 24, and therefore it did not qualify for exemption. *Id.* at 443.

Similarly, the Debtor's right to payment from the Partnership is unfunded. Creditors of the Partnership could attach the Equity Credit prior to redemption by the Co-op and thereby obtain priority over the Debtors in any redemption payment the Partnership received. Thus, the contracts amounted to an "unsecured promise" by the Partnership to pay over funds received from the Co-op if and when such funds became available. See *id.* Consequently, the facts

(FN5) The objectors, in apparent misapprehension of the Debtors' theory of exemption, concerned themselves with proving that the Debtors were not employees of the Co-op.

of the instant case cannot be distinguished from the situation in the Westinghouse Credit case, and therefore the Trustee's exemption must be sustained.

E. Interest in Partnership

The Trustee and the Banks object to the Debtors' claims of their respective interests in the Partnership as exempt under section 510.01 and subdivision 24 of section 550.37. There is no basis for claiming a partner's interest in a partnership as exempt under either of those exemption statutes. Therefore, the objection will be sustained.

F. Individual Retirement Account

Farmers contends that the subdivision 24 of section 550.37 as it applies to IRA's is void as being contrary to the Minnesota Constitution:

A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt liability. The amount of such exemption shall be determined by law.

Minn. Const. art. I, Section 12.

I need not reach this constitutional issue. Farmers challenges the constitutionality of only paragraph (1) of subdivision 24:

The debtor's right to receive present or future payment . . . under a[n] . . . individual retirement account . . .:

(1) to the extent the plan or contract is described in section 401(a), 403, 408, or 457 of the Internal Revenue Code of 1986, as amended, or payments under the plan or contract will be rolled over as provided in section 402(a)(5), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986, as amended; or

(2) to the extent of the debtor's aggregate interest under all plans or contracts up to a present value of \$30,000 and additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor.

Minn. Stat. Section 550.37, subd. 24 (footnotes omitted). The Debtors, however, may elect to claim their IRA's as exempt under paragraph (2). They need not make a showing of reasonable necessity for support, since the present value of each Debtor's IRA is less than \$30,000.(FN6) Minn. Stat. Section 550.37, subd. 24(2). In the interest of judicial restraint, this Court should avoid deciding a constitutional question "if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (Brandeis, J., concurring), reh'g denied, 297 U.S. 728 (1936). This interest is especially compelling where, as here, a federal court is being called upon to determine whether a state statute complies with the state constitution. Therefore, I will deem that the Debtors have elected to claim their IRA's as exempt under paragraph (2) of subdivision 24. Consequently, the constitutionality-based objection is moot.

G. Reasonable Necessity for Support

Farmers' objects to Debtors' claims of exemption under

(FN6) Each Debtor claimed three assets as exempt under subdivision

24: an IRA, a right to payment based on the Partnership's Equity Credit, and each Debtor's interest in the Partnership. I have sustained the objections to the claims of exemption for the right to payment and the interests in the Partnership, and thus the only asset each Debtor can claim as exempt under subdivision 24 is his IRA.

subdivision 24 of section 550.37 based on its allegation that the property each Debtor claimed as exempt is not reasonably necessary for the support of the Debtor and his dependents. This objection is also moot, since the present value of each Debtor's IRA is less than \$30,000.

H. Maximum Acreage of Homestead

Finally, Farmers objects to the Debtors' claims of homestead exemption on the grounds that each Debtor exceeded the maximum acreage limitation. Farmers contends that holding in the case of *In re Huesman* requires this Court to limit the sums of the two Debtors' exempted acreage to 160 acres, since some of the property each has exempted is held in tenancy in common with the other. See *In re Huesman*, 381 N.W.2d 73 (Minn. Ct. App. 1986). Debtors respond that the *In re Huesman* decision does not stand for the proposition for which Farmers has cited it.

In *In re Huesman*, two brothers had acquired 120 acres of land as tenants in common as the result of a settlement agreement. The attorney who negotiated the settlement agreement had a lien on the property for legal fees based on a contingent fee agreement between the brothers and the attorney. When the attorney attempted to foreclose the lien, the brothers asserted that the entire 120 acres was exempt, even though the Minnesota statute at that time limited the homestead exemption to 80 acres. The court held that each brother was entitled to exempt his one-half interest, but only in the same 80 acres as the other brother, leaving 40 acres as non-exempt. *Id.* at 77.

In the instant case, the Debtors and their wives are all tenants in common in a 40-acre parcel. In addition, each Debtor is a tenant in common with his wife in one of two other 80-acre parcels. If the In re Huesman decision applies at all in this case,(FN7) it requires each Debtor to count the same 40-acre parcel toward his 160-acre exemption limit. Each Debtor has claimed exempt the 40 acres they commonly own and the additional 80 acres each owns separately from the other, for a total of 120 acres each.(FN8) Therefore, the Debtors have not exceeded the exemption limit, and consequently Farmers' objection must be overruled.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The objection to Harold Lunde's claim of exemption for his life insurance policy from Northwestern Mutual Life Insurance Company is sustained as to any value in excess of \$5,200.00, and Harold Lunde shall turn over such excess value to the Trustee;

2. The objection to Harold Lunde's claim of exemption for his annuity from Lutheran Brotherhood Fraternal Benefit Society is

(FN7) In *In re Huesman*, the common owners were invoking the homestead exemption against the same creditor, who held claims against each of them. In the instant case, two of the common owners are invoking the homestead exemption against two distinct entities: the bankruptcy estates of the two Debtors.

(FN8) There might have been an issue if at the time the petitions were filed the Debtors owned the two 80-acre parcels as tenants in common with each other and their respective wives, as they apparently once did. Farmers alleges that the transfer of these parcels into separate ownership by the two couples constituted a preference. I cannot, however, determine the existence of a preferential transfer in the context of an objection to a claim of exemption.

sustained, and he shall turn over such asset or its value to the Trustee;

3. The objections to the Debtors' claims of homestead exemption for their "interests" in the 12.5-acre parcel of real estate owned by the Lunde Brothers Partnership are overruled as being moot;

4. Debtors shall amend their respective B-1 and B-4 Schedules to delete the listing of the 12.5-acre parcel of real estate;

5. The objections to the Debtors' claims of exemption for their right to receive payment of any redemption payment the Lunde Brother Partnership receives from Community Co-ops of Lake Park are sustained;

6. The objections to Debtors' claims of exemption for their interests in the Lunde Brothers Partnership are sustained;

7. The objections to the Debtors' claims of exemption for their individual retirement accounts are overruled as being moot;

8. The objections based on the allegation that property each

Debtor claimed as exempt under Minn. Stat. Section 550.37, subd. 24 is not reasonably necessary for the support of the Debtor and his dependents are overruled as being moot; and

9. The objections to Debtors' claims of homestead exemption based on the maximum acreage limitation are overruled.

Nancy C. Dreher

United States Bankruptcy Judge