UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	BKY 4-96-7257
CHARLES ROBERT NIELSEN and LEANN NIELSEN,	
Debtors.	MEMORANDUM ORDER OVERRULING TRUSTEE'S OBJECTION TO CLAIMED EXEMPT PROPERTY

At Minneapolis, Minnesota, January 5, 1998.

The above-entitled matter came on for hearing before the undersigned on the Chapter 7 Trustee's objection to certain exemptions claimed by the Debtors. Appearances were noted in the record.

BACKGROUND

The Debtors in this case, Charles and Leann Nielsen, filed a Chapter 13 case under the United States Bankruptcy Code which was later converted to Chapter 7. On their amended Schedule B, the Debtors list ownership interests in two ERISA-qualified pension plans: Charles' Retirement Account through Deluxe Printing valued at $277,466.00 (the Deluxe account); and Leann's Employer Funded 401k through Jack Pixley Sweeps (the Pixley Sweeps account) valued at $1,266.00. In addition, the Debtors list the following non-ERISA-qualified Individual Retirement Accounts (IRAs), which they have claimed as exempt under Minn. Stat. § 550.37, Subd. 24(2):

a. Charles' American Bank IRA ($2,596.00) and his American Funds IRA ($17,386.00); and

b. Leann's American Bank IRA ($2,352.00) and her American Funds IRA ($16,761.00).

Minn. Stat. § 550.37, Subd. 24(2), provides that the following property is exempt from the claims of creditors:

> The *debtor's right to receive present or future payments*, or payments received by the debtor, under a stock bonus, pension, profit sharing, annuity, individual retirement account, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service:
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> (2) to the extent of *the debtor's aggregate interest under all plans and contracts* up to a present value of $30,000[1] *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. § 550.37, Subd. 24(2) (Supp. 1997) (emphasis added).[2]

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[1]This figure has been adjusted upward to $51,000. See MINN. STAT. § 550.37 note (Supp. 1997).

[2]Subd. 24(1) of Minn. Stat. § 550.37 further excepts such payments or rights to payment:

> (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 are or will be rolled over as provided in sections 402(a)(5), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986, as amended; . . . .

MINN. STAT. § 550.37, Subd. 24(1) (Supp. 1997). In Subd. 24(1) and (2), the Minnesota Legislature attempted to provide Debtors with an option. They could exempt either: (1) all their employer qualified pension, profit sharing, and stock bonus plans (§ 401(a)); employee annuities (§ 403); IRAs (§ 408); and deferred compensation plans arising from employment with state and local governments (§ 457) in an unlimited amount; or (2) rights to retirement benefits of all kinds (whether identified in Subd. 24(1) or not) up to a stated amount. In Estate of Jones by Blume v. Kvamme, 529 N.W. 335, 338-39 (Minn. 1995), the Minnesota Supreme Court declared Subd. 24(1) of Minn. Stat. § 550.37 unconstitutional because it violated

Article I, § 12 of the Minnesota Constitution, which allows the Legislature to provide exemptions from creditor collection only for a "reasonable amount of property." Because Subd. 24(1) exempted benefits in an unlimited amount, it was held unconstitutional. Based on the doctrine of severance to preserve constitutionality, however, the court held Subd. 24(2) of § 550.37 constitutional. The court specifically acknowledged that its decision meant that ERISA-qualified plans would continue to be entirely exempt as dictated by ERISA's anti-alienation provisions and preemption, while the exemption provided to IRAs would be limited to the indexed $30,000, plus an amount reasonably necessary for the support of the debtor and the debtor's dependents. The court said:

> . . . because of the breadth of ERISA's preemption, debtors can potentially shield assets over and above those necessary to support themselves and their dependents. This allows for an exemption beyond that which the public policy underlying the exemption requires. Moreover, it unfairly precludes legitimate creditors from satisfying a judgment, even though the debtor could afford to satisfy the judgment without jeopardizing the support of the debtor or the debtor's spouse and dependents. Therefore, while the Minnesota Constitution dictates the result we have reached, for the policy reasons articulated, we also believe this result is the fairest. Although Congress has not chosen to pursue the fairest result, the Minnesota Constitution directs us to pursue it within the present statutory framework.

Id. at 339. The Kvamme court sustained the trial court's determination that a debtor's $51,900 IRA account was not reasonably necessary for the support of the debtor or the debtor's dependents. This was consistent with its ruling that "under clause (2), in this case and in future cases, the sum of ***all plans*** is exempt up to an indexed $30,000, plus additional amounts under ***all the plans and contracts*** to the extent reasonably necessary for the support of the debtor and any spouse or dependents of the debtor." Id. at 339 (emphasis added). Community Bank Henderson v. Noble, 552 N.W.2d 37 (Minn. App. 1996), followed Kvamme in holding that ERISA-qualified plans were governed by ERISA's preemption and anti-alienation provisions. More recently, the Minnesota Court of Appeals has narrowly construed the statutory language exempting "additional amounts . . . to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor" as allowing an exemption (of non-ERISA plans) solely for the debtor's (and the debtor's spouse or dependent's) needs at retirement. See Halliday v. Halliday, No. C4-96-2347, 1997 WL

On June 5, 1997, I held that, in a Chapter 7 case, when determining whether a debtor's non-ERISA-qualified plans or contracts (such as IRAs) can be exempted under Minn. Stat. § 550.37, Subd. 24(2), ERISA-qualified plans, while clearly not property of the bankruptcy estate (see Patterson v. Shumate, 504 U.S. 753 (1992)), must be included when calculating the debtor's "aggregate interest under all plans and contracts." I set for evidentiary hearing the question of whether the Debtors' four IRAs, when combined with the ERISA-protected Deluxe account and Jack Pixley account, met the test set forth in Minn. Stat. § 550.37, Subd. 24(2). I subsequently held an evidentiary hearing, and by order dated November 25, 1997, sustained the Trustee's objection to Charles' claimed exemption of Charles' IRAs. My findings and conclusions, read into the record, were that the present value of Charles' "aggregate interest under all plans and contracts," which included his Deluxe Account, exceeded $51,000, plus an amount reasonably necessary for the support at retirement of Charles and his only dependent, Leann.[3] At the conclusion of the hearing, the

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396233, at *1 (Minn. App. July 15, 1997).

[3]This order is now on appeal to the United States District Court for the District of Minnesota. On August 7, 1997, the United States Bankruptcy Appellate Panel for the Eighth Circuit remanded to me my prior February 6, 1997, order in which I had found that Debtors' original Chapter 13 Plan was proposed in bad faith. See In re Nielsen, 211 B.R. 18 (B.A.P. 8th Cir. 1997). The BAP decision specifically instructed me to consider Debtors' modified Chapter 13 Plan. On October 22, 1997, I held an evidentiary hearing and subsequently issued an order denying confirmation of

Debtors' modified Chapter 13 Plan based on findings that the Debtors' Plan did not meet the best interests of creditors test under 11 U.S.C. § 1325(a)(4). The evidence before me on October 22, and that before me on November 25, was essentially the same (with the exception of certain expert testimony) and my reasoning for denying the Debtors' claimed exemption for Charles' IRAs was presaged by and virtually identical to my reasons read into the record at the confirmation hearing. I concluded, at both the confirmation and exemption hearings, that Charles had not demonstrated that his IRAs were reasonably necessary to meet the retirement needs of himself and Leann. Basically, I found that, with only modest investment returns, Charles would have something close to or in excess of $500,000 in the Deluxe Account at retirement and both debtors could comfortably live out their retirement on that amount, especially in light of their modest lifestyle. They did not need Charles' IRAs in addition to his Deluxe account.

At the confirmation hearing, the evidentiary hearing, and again in moving for a stay pending appeal of my decision with respect to Charles' IRAs, Debtors' counsel asserted that the BAP had "signaled" its decision on this issue when two BAP judges made comments from the bench during oral argument on appeal from my February 6, 1997 order denying confirmation of Debtors' original Chapter 13 Plan. Counsel has asserted that one BAP judge stated "Why is the trial judge referring to debtor's ERISA plan?" Another is said to have stated that I must ignore the ERISA plans entirely. I do not know whether such comments were made, but lest it appear that I have ignored any BAP "signal," I note that comments from the bench at oral argument are not part of any court ruling. Further, nothing in the BAP's opinion so stated. Most importantly, although such statements are correct in the context of deciding whether ERISA-qualified plans are excluded from the bankruptcy estate (an issue that was clearly decided by Patterson v. Shumate), we are not dealing with that issue in this case. Rather, the question in this case is how one should interpret the language of Minn. Stat. § 550.37, Subd. 24(2), when determining whether the Debtors' IRAs are exempt property. That statute requires the inclusion of "*all* plans and contracts" when calculating whether the Debtors' claimed exemption exceeds the maximum exemption amount. It does not say "all non-ERISA-qualified plans and contracts." As originally written, with the inclusion of Subd. (1), Minn. Stat. § 550.37(24)(2) clearly contemplated that ERISA-qualified plans would be included when making the calculation. Kvamme, while recognizing the complete protection afforded ERISA-qualified plans, nonetheless makes clear that for purposes of making the calculation under Minn. Stat. § 550.37, Subd. 24(2), *all* plans means *all* plans, whether

Trustee asserted that she was also objecting to Leann's claimed exemption for her IRAs. I asked the parties to brief the issue and reserved ruling on the question of whether Leann's IRAs were exempt.

Currently the sole issue before me is the one I left for decision until further briefing: the Trustee's objection to Leann's claim of exemption for Leann's IRAs. The two IRAs are owned by Leann in her own name and total $19,113.00. Although the Trustee concedes that the present value of Leann's Pixley Sweeps account and her IRAs falls well within the permissible $51,000-plus limit of Minn. Stat. § 550.37, Subd. 24(2), the Trustee argues that Leann's "aggregate interest under all plans and contracts" exceeds the amount allowed by Minn. Stat. § 550.37, Subd. 24(2), because: (1) Leann has a "marital property" interest in Charles' Deluxe account under Minn. Stat. § 518.54, Subd. 5; or (2) the Employee Retirement Income Security Act (ERISA) provides Leann with a future interest in Charles' Deluxe account under 29 U.S.C. § 1055. In either case, the Trustee asserts, Charles' Deluxe account should be included in making the calculation for Leann under § 550.37, Subd. (24)(2).

ERISA-qualified and exempt from attachment, or not. Nothing in this construction of the statute does violence to nor is any way inconsistent, with the Supreme Court's Patterson decision. In fact, such construction is perfectly consistent with Patterson.

DISCUSSION

I. THE "MARITAL PROPERTY" ARGUMENT

The Trustee first argues that Charles' Deluxe account constitutes "marital property" under Minn. Stat. § 518.54, Subd. 5, and that Leann therefore has a vested interest in the account that causes her "aggregate interest under all plans and contracts" to exceed the maximum exemption amount allowed under § 550.37, Subd. 24(2). This argument may be quickly dismissed, however, as it is clear that Minn. Stat. § 518.54, Subd. 5, does not create rights to "marital property" outside the context of marital dissolution proceedings. Indeed, in a comprehensive and well-reasoned decision, Judge Kressel recently held that Minn. Stat. § 518.54, Subd. 5, does not create vested property rights in married debtors for purposes of determining exemptions in bankruptcy. See In re Johnson, No. 97-40241, slip op. at 5 (Bankr. D. Minn. June 25, 1997). In Johnson, married Chapter 7 debtors filing jointly sought to apportion the value of their claimed exempt property between their respective bankruptcy estates using Minn. Stat. § 518.54, Subd. 5. Stating that "no Minnesota court has concluded that Minn. Stat. § 518.54, subd. 5, vests ownership interests for purposes other than marriage dissolution," Judge Kressel concluded that "the mere classification of property as 'marital property' is [in]sufficient to create cognizable property rights." Id. This Court agrees with the analysis of the Johnson Court. Therefore

Minn. Stat. § 518.54, Subd. 5, does not provide Leann with a vested property interest in the husband's Deluxe account. For this reason, the Trustee's first argument must fail.

II. THE "SURVIVORSHIP INTEREST" ARGUMENT

The Trustee next argues that Charles' Deluxe account should be included in calculating Leann's "aggregate interest under all plans and contracts" because the provisions of 29 U.S.C. § 1055 grant Leann a right of survivorship in her husband's ERISA-qualified pension plan, without regard to any state law "marital property" provisions. According to 29 U.S.C. § 1055(a):

> Each pension plan to which this section applies shall provide that--
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> (1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and
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> (2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

29 U.S.C. § 1055(a) (Supp. 1997). The statutory object of this provision is to ensure a stream of income to surviving spouses of ERISA-qualified plan participants. Boggs v. Boggs, 117 S. Ct. 1754, 1761 (1997). To carry out this purpose, § 1055(a) mandates that a survivor's annuity be provided, not only where a participant dies after the annuity starting date, but also if the participant dies before then. Id. Furthermore, § 1055(c)(2) provides that,

absent certain limited circumstances, the provision of a survivor's annuity may not be waived by the participant unless the spouse consents in writing to the designation of another beneficiary, which designation also cannot be changed without further spousal consent witnessed by a plan representative or notary public. Id. Thus, absent a valid waiver of the survivor's annuity, the only way that the spouse of a vested participant of an ERISA-qualified plan would not be entitled to a survivor's annuity would be if the nonparticipant spouse predeceases the plan participant. See id. at 1766-67 (stating that the surviving spouse annuity provisions of ERISA reinforce the conclusion that Congress was concerned with providing for the living).

Thus, assuming Leann has not waived her right to a survivor's annuity,[4] she is entitled to receive future payments under the Deluxe account in the event she outlives Charles. Notwithstanding the existence of this contingent right of survivorship, however, Leann's spousal interest in Charles' Deluxe account is not properly included in her bankruptcy estate, exempted by her, or included in the calculation under Minn. Stat. § 550.37, Subd. 24(2). It is axiomatic that property of the estate includes virtually all legal and equitable interests owned by a debtor. 11 U.S.C. § 541(a). This definition is broad, to be sure. Certain specific interests

[4]The record does not reflect whether Leann has executed a valid waiver of her spousal interest in the Deluxe Printing retirement plan.

which may accrue in the future are specifically included. See, e.g., § 541(a)(5). Nevertheless, it is further axiomatic that, with certain specific exceptions articulated by the Bankruptcy Code, only property that is owned by the debtor as of the commencement of the case may constitute property of the estate and may be exempted. Consistent with this concept, Minn. Stat. § 550.37, Subd. 24(2) refers to the *debtor's right to* receive present or future payments. Leann's survivorship interest in her husband's ERISA-qualified retirement plan is not a presently vested property right. She neither owns nor possesses it to the exclusion of others; nor could she assign, convey, or alienate the survivorship interest in the Deluxe account. 29 U.S.C. § 1056(d)(1); Boggs, supra. Because Leann's right to payment under the plan is contingent upon the happening of an uncertain future event which may never occur (Leann outliving Charles), it would be inappropriate to include such amounts when valuing property interests for purposes of determining exemptions.

Therefore, since the value of Leann's "aggregate interest" in her IRAs, when aggregated with her ERISA-qualified plan, is conceded to be well within the limitations of Minn. Stat. § 550.37, Subd. 24(2), Leann's right to receive future payments under her IRAs is exempt.

Accordingly, IT IS HEREBY ORDERED THAT the Trustee's objection to the claimed exemption of Leann Nielsen to her American Bank IRA and her American Funds IRA is OVERRULED.

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Nancy C. Dreher
United States Bankruptcy Judge