

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 18-40460
	)	Chapter 7
PENNY JEAN BAUMAN)	
SSN/ITIN xxx-xx-3090	)	DECISION RE: TRUSTEE'S OBJECTION
	)	TO DEBTOR'S CLAIMED EXEMPTIONS
Debtor.	)	AND MOTION FOR TURNOVER

The matter before the Court is Trustee Lee Ann Pierce's Objection to Claimed Exemptions and Motion for Turnover. This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court will deny the objection to exemptions and grant, in part, the motion for turnover.

I.¹

In anticipation of a divorce, Debtor Penny Jean Bauman and her spouse entered into a stipulation dated March 20, 2012. Under the stipulation, Debtor was awarded \$16,500.00 from her spouse's qualified retirement plan through his employer under the Employee Retirement Income Security Act ("ERISA"). The divorce court approved the stipulation, and the couple was divorced on April 2, 2012. Debtor received the \$16,500.00 and placed it in a traditional Individual Retirement Account ("IRA") with Primerica.² These funds in Debtor's Primerica account were never part of an employee benefit plan through one of Debtor's employers.

¹ The material facts are gleaned from the parties' stipulated facts and agreed exhibit (doc. 54) and the case file.

² Debtor's divorce stipulation with her now ex-spouse, statements by Debtor in her brief, and a document Debtor attached to her brief indicate Debtor placed the \$16,500.00 from her former spouse in an *existing* IRA she had with Primerica. Trustee Pierce resisted this fact being recognized by the Court since Debtor had already stipulated to a set of facts that did not specifically acknowledge Debtor had the Primerica account before the divorce. Because the fact was not material to this decision, the Court did not consider it.

Debtor filed a chapter 7 petition in bankruptcy on September 21, 2018. Among her assets, Debtor included the Primerica IRA. Debtor claimed the Primerica IRA exempt under S.D.C.L. § 43-45-16.

Trustee Pierce objected to Debtor's claimed exemption in the Primerica IRA and sought turnover of those funds.³ Pursuant to Trustee Pierce and Debtor's request, the matter was put on hold, awaiting an opinion by the Court of Appeals for the Eighth Circuit on a similar issue. After the Court of Appeals entered its opinion, *Lerbakken v. Sieloff and Associates, P.A. (In re Lerbakken)*, 949 F.3d 432 (8th Cir. 2020), Trustee Pierce and Debtor submitted the matter to the Court on stipulated facts, stipulated issues, and briefs.⁴

II.

Exempt property is removed from the bankruptcy estate and is not liquidated by the case trustee to pay creditors. 11 U.S.C. § 522(b) and (c). In the District of South Dakota, the bankruptcy court looks to state law to define the allowed exemptions. 11 U.S.C. § 522(b)(1) and (2) and S.D.C.L. § 43-45-13. In addition to certain personal property and a homestead, a debtor may declare exempt certain retirement benefits. S.D.C.L. § 43-45-15 through § 43-45-18.

³ Trustee Pierce also objected to Debtor's exemption claim under S.D.C.L. § 43-45-16 regarding an account Debtor had with American Fund, and she sought turnover of that account and the bankruptcy estate's share of Debtor's 2018 federal income tax refund. Trustee Pierce withdrew her objection to exemptions and motion for turnover regarding the American Fund account (doc. 54). As to the 2018 federal income tax refund, in her amended response (doc. 48), Debtor agreed Trustee Pierce was entitled to the bankruptcy estate's share, though Debtor anticipated she would not receive a refund.

⁴ The Court of Appeals' opinion in *Lerbakken* is of limited relevance to the instant matter, where the debtor in *Lerbakken* claimed exempt under 11 U.S.C. § 522(b)(3)(C) an IRA he obtained in a divorce and where Minnesota state law defined his interest in that IRA.

A debtor's entitlement to an exemption is determined as of the day the debtor files his or her bankruptcy petition. *Alexander v. Jensen-Carter (In re Alexander)*, 236 F.3d 431, 432-33 (8th Cir. 2001) (in case converted from chapter 13 to chapter 7, original petition date controlled the debtor's right to claim a homestead exemption); *Armstrong v. Peterson (In re Peterson)*, 897 F.2d 935, 937-38 (8th Cir. 1990) (debtor's post-petition death did not result in reversion of exempt property to estate), *cited with approval in Lerbakken*, 949 F.3d at 435-36.

The property a debtor places on his schedule C is deemed exempt unless a timely objection is filed. 11 U.S.C. § 522(l). Once exempt, that property generally is no longer liable for pre-petition claims or administrative claims. 11 U.S.C. § 522(c). The objector bears the burden of proving an exemption has not been properly claimed. Fed.R.Bankr.P. 4003(c). Exemptions are construed liberally in favor of the debtor. *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d 630, 631-32 (8th Cir. 1991), *cited with approval in Hanson v. Seaver (In re Hanson)*, 903 F.3d 793, 796 (8th Cir. 2018).

Trustee Pierce's objection to Debtor's claim of exemption in her Primerica IRA implicates three state statutes.⁵ The first statute sets forth the state legislature's intent.

The Legislature of the State of South Dakota hereby declares that §§ 43-45-16 to 43-45-18, inclusive, is for the purpose of absolutely exempting certain retirement benefits in a reasonable amount from all

⁵ There is a fourth related state statute:

Court determination of appropriate exemption. In the event that any court of South Dakota finds the exemption provided in § 43-45-16 is excessive, the court is hereby directed to determine the amount of the exemption permissible under the S.D. Const., Art. XXI, § 4.

S.D.C.L. § 43-45-18. Trustee Pierce, however, did not ask the Court to limit Debtor's claimed exemption in the Primerica IRA under § 43-45-18.

process, levy, or sale pursuant to the S.D. Const., Art. XXI, § 4. The Legislature hereby finds §§ 43-45-16 to 43-45-18, inclusive, is necessary to insure that a debtor enjoys the comforts and necessities of life during retirement years.

S.D.C.L. § 43-45-15. The second state statute creates the exemption.

Any person has the right to select and designate a total of one million dollars and the income and distributions therefrom from the employee's benefit plans as exempt from execution, attachment, garnishment, seizure, or taking by any legal process. This exemption is subject to the right of the State of South Dakota and its political subdivisions to collect any amounts owed to them. This section permits benefits under such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order as defined in 29 U.S.C. § 1056(d) or in § 401(a)(13) of the Internal Revenue Code.

S.D.C.L. § 43-45-16. The third state statute defines a key term in the exemption statute.

For the purposes of §§ 43-45-16 to 43-45-18, inclusive, the term, employee benefit plan, means any plan or arrangement that is subject to the provisions of 29 U.S.C. §§ 1001 through 1461, as amended, and in effect on January 1, 2007, or that is described in § 401, 403(a), 403(b), 408, 408A, 409, 414, 457, or 501(a) of the Internal Revenue Code, as amended, and in effect as of January 1, 2007. The term, employee benefit plan, does not include any employee benefit plan that is excluded from application pursuant to 29 U.S.C. § 1003(b)(1), as amended, and in effect as of January 1, 2007.

S.D.C.L. § 43-45-17. Section 43-45-17 incorporates several federal code provisions in effect as of January 1, 2007. Applicable federal provisions are discussed below.

In her briefs, Trustee Pierce focused almost exclusively on § 43-45-16 in arguing the funds Debtor received from her former husband in the divorce were not from *Debtor's* "employee benefit plan" and so could not be claimed exempt. She also argued neither of two "exceptions" in § 43-45-16, as she denominated the last two sentences of the statute, was at issue because Debtor is neither the State of South

Dakota nor the payer under a Qualified Domestic Relations Order. Trustee Pierce also discussed *In re Odessa Ostia Roehrs*, Bankr. No. 18-41831 (D. Neb. April 10, 2019), an oral decision regarding a Nebraska retirement fund exemption that Debtor cited in her amended response.

In her brief, Debtor argued the word "employee" in § 43-45-16 does not limit what may be claimed exempt because § 43-45-17 defines "employee benefit plan" utilizing the several federal code sections. Debtor again cited *Roehrs* in contending 26 U.S.C. § 408(d)(6) allows certain transfers of IRA funds to a spouse in a divorce to be considered thereafter as the spouse's IRA.⁶

III.

As noted above, § 43-45-17 defines what funds may be claimed exempt under § 43-45-16 by incorporating several federal code provisions. Debtor has identified 26 U.S.C. § 408(d)(6) as the federal provision that makes her former spouse's funds in her Primerica account an "employee benefit plan" she is permitted to claim exempt under § 43-45-16. Section 408(d)(6) of title 26 of the United States Code in 2007 provided:⁷

(6) Transfer of account incident to divorce. The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such

⁶ Debtor did not provide a transcript of the Nebraska bankruptcy court's oral ruling. The Court was, however, able to listen to the audio recording of it posted on the bankruptcy court's docket.

⁷ Debtor cited 26 U.S.C. § 408(d)(6) (2020) in her amended response and brief.

account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.

Section 71(b)(2)(A) of title 26 of the United States Code (2007) provided:

Divorce or separation instrument. The term "divorce or separation instrument" means–

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree[.]

Reading the plain language of state code §§ 43-45-16 and -17⁸ and the two federal code provisions set forth above, the Court is satisfied Debtor has correctly claimed the \$16,500.00 she received in her pre-petition divorce and the interest and dividends earned thereon exempt under § 43-45-16. As Trustee Pierce noted, § 43-45-16 refers to an *employee* benefit plan, but § 43-45-17, in defining "employee benefit plan," does not use "employee" in a limiting fashion. Instead, § 43-45-17 states the allowed exemption under § 43-45-16 encompasses "*any* plan or arrangement . . . that is described in § . . . 408 . . . of the Internal Revenue Code, as amended, and in effect as of January 1, 2007." (Emphasis added.) Though the \$16,500.00 did not originate from Debtor's employer's benefit plan, the funds did originate in her former spouse's ERISA account and, by application of 26 U.S.C. § 408(d)(6), once the funds were given to Debtor under the divorce decree and placed in an IRA, the IRA is "treated as maintained for the benefit of [Debtor.]"

In her reply brief, Trustee Pierce did not challenge Debtor's reliance on § 408(d)(6) or argue the divorce stipulation does not meet the definition of 26 U.S.C. § 71(b)(2)(A). She also did not argue Debtor had not placed the subject divorce-

⁸ The Court need not consider the legislative history of S.D.C.L. §§ 43-45-16 and -17 because the portions of the statutes relevant to this decision are not ambiguous. *Long v. State*, 904 N.W.2d 358, 364 (S.D. 2017).

related funds in a qualifying account before the petition date. *See Lerbakken*, 949 F.3d at 436. In sum, the trustee bears the burden of establishing the exemption has not been properly claimed, and she has not established a record that undermines Debtor's reliance on S.D.C.L. §§ 43-45-16 and -17 and 26 U.S.C. § 408(d)(6).

An order will be entered overruling Trustee Pierce's objection to claimed exemptions as to the funds in Debtor's Primerica account and denying the trustee's motion for turnover as to the same funds. The order will also, consistent with Debtor's amended response, direct Debtor to turn over 264/365ths of Debtor's 2018 federal income tax refund, less the \$445.01 Debtor has claimed exempt.

Dated: May 13, 2020.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Charles L. Nail, Jr.", is positioned above the printed name.

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 18-40460
	)	Chapter 7
PENNY JEAN BAUMAN)	
SSN/ITIN xxx-xx-3090	)	ORDER RE: TRUSTEE'S OBJECTION
	)	TO DEBTOR'S CLAIMED EXEMPTIONS
Debtor.	)	AND MOTION FOR TURNOVER

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED Trustee Lee Ann Pierce's Objection to Claimed Exemptions (doc. 12), to the extent not previously withdrawn, is overruled.

IT IS FURTHER ORDERED Trustee Pierce's Motion for Turnover (doc. 12) is granted in part and denied in part, and Debtor shall, if she has not previously done so, promptly file her 2018 federal income tax return and provide a copy of that return to Trustee Pierce. If Trustee Pierce receives Debtor's 2018 federal income tax refund, Trustee Pierce shall retain the bankruptcy estate's 264/365ths share of the refund, less the \$445.01 Debtor has claimed exempt, and forward the sum remaining to Debtor. If Debtor receives her 2018 federal income tax refund, she shall promptly turn over to Trustee Pierce the bankruptcy estate's 264/365ths share of the refund, less the \$445.01 Debtor has claimed exempt.

IT IS FURTHER ORDERED Debtor's payments pursuant to this order shall be by cashier's check or money order payable to Lee Ann Pierce, Trustee for the Bankruptcy Estate of Penny Bauman, Bankr. No. 18-40460, Post Office Box 524, Brookings, South Dakota 57006.

So ordered: May 13, 2020.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

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Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
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