UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 97-40191
	)	
LEONARD CHARLES CONRAD	)	Chapter 7
Soc. Sec. No. [redacted]-7922	)	
	)	MEMORANDUM OF DECISION
	)	RE: DEBTOR'S INDIVIDUAL
Debtor.	)	RETIREMENT ACCOUNT

The matter before the Court is the Trustee's objection to Debtor's claim that a certain Individual Retirement Account is excluded from the bankruptcy estate or is exempt property. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the Trustee's objection must be sustained.

I.

Debtor filed a Chapter 7 petition on March 10, 1997. In his schedules also filed that day, he claimed exempt, among other things, an "IRA - Retirement" under 11 U.S.C. § 541(c)(2). The stated value of the Individual Retirement Account (IRA) was $9,187.00. Trustee John S. Lovald filed an objection to exemptions on April 29, 1997 on the grounds that Debtor had exceeded his allowable exemptions. Trustee Lovald identified the IRA as one asset that exceeded the Debtor's allowance. Debtor filed a

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response on May 2, 1997. He argued that the IRA should be excluded from the estate as an ERISA-qualified plan pursuant to *Patterson v. Shumate*, 112 S.Ct. 2242 (1992). Debtor relied on the following restriction set forth in Article IX of the IRA: "Neither you nor any beneficiary may sell, transfer, or pledge any interest in your IRA in any manner whatsoever, except as provided by law or this Agreement."

A hearing was held June 23, 1997. The parties agreed to hold the IRA-related objection in abeyance pending a decision on the same issue in another case before this Court. The parties also indicated they would be able to settle the Trustee's other objections to exemptions. Shortly thereafter, Trustee Lovald filed a settlement of the other objections and noticed the settlement for hearing. No objections to the settlement were received and an order approving the settlement was entered.

By letter decision dated August 6, 1997, the Court informed counsel that in *Lovald v. Schmidt (In re Schmidt)*, Bankr. No. 97-30009, Adv. 97-3001, slip op. (Bankr. D.S.D. August 6, 1997), the Court had concluded that generally IRAs are not ERISA qualified and, therefore, are not excluded from the bankruptcy estate under the rationale of *Patterson*. The Court noted, however, that the

IRAs in *Schmidt* had been in the form of a certificate of deposit while Debtor Conrad's IRA was different. The Court also noted that

> the 'transfer' restrictions in Article IX of the agreement between Debtor and the custodian do not appear to constitute the type of transfer restriction that is enforceable by any state or federal non bankruptcy law so as to exclude the IRA from the bankruptcy estate. Therefore, only if Debtor can identify a law that will enforce the transfer restrictions in Article IX will this IRA be excluded from the bankruptcy estate pursuant to § 541(c)(2).

The Court directed Debtor to supply the state or federal non bankruptcy law on which he relied to claim that his IRA was excluded from the estate. The Court also advised Debtor that he would have to specifically outline how the IRA was ERISA qualified if he relied on that federal law for the exclusion.

In his brief filed September 15, 1997, Debtor argued that S.D.C.L. § 43-45-16, which was enacted on July 1, 1997 after Debtor's petition was filed, combined with the IRA agreement, provided the restriction on transfer necessary to exclude the IRA under § 541(c)(2). Debtor acknowledged that laws in South Dakota are generally *not* presumed to apply retroactively. However, Debtor urged the Court to do so here because exemption laws are to be construed liberally in a debtor's favor and because the new state exemption legislation looked backed to January 1, 1997 as the reference date for the federal laws under which the exempt

retirement funds must be created or segregated.

In the alternative, Debtor argued that the IRA was akin to an exempt annuity under S.D.C.L. § 58-12-6. Debtor stated the IRA was an annuity because the credit union that held the IRA was obligated to pay a certain sum at a certain time and because Debtor was required to start taking distributions when he reached age 70 1/2.

Trustee Lovald filed a letter in response to Debtor's brief and appended the brief he had filed in *Schmidt*. He argued that S.D.C.L. § 43-45-16 clearly did not apply retroactively and that Debtor's argument that the IRA was an exempt annuity under S.D.C.L. Ch. 58-12 was frivolous.

III.

Debtor has failed to demonstrate through his exhibits or arguments how his IRA differs in any material respect from the IRAs that were included in the *Schmidt* bankruptcy estate. As in *Schmidt*, the Court cannot find the necessary transfer restrictions under state or federal non bankruptcy law required by 11 U.S.C. § 541(c)(2) to exclude the funds from property of the bankruptcy estate.

It is clear that S.D.C.L. § 43-45-16 was not effective until *after* Debtor filed his petition. Nothing in the legislation

indicates it should apply retroactively. The exemption laws to be applied are those which existed on Debtor's petition date. 11 U.S.C. § 522(b)(2)(A); *Armstrong v. Peterson (In re Armstrong)*, 897 F.2d 935, 936 (8th Cir. 1990); *Armstrong v. Harris (In re Harris)*, 886 F.2d 1011, 1013 (8th Cir. 1989)(cites therein); and *In re Myers*, 17 B.R. 339, 340 (Bankr. D.S.D. 1982).

Further, Debtor's IRA does not qualify as an exempt annuity under S.D.C.L. § 58-12-6. As discussed in *In re Erickson*, Bankr. No. 96-40398, slip op. at 3-4 (Bank D.S.D. March 28, 1997), an annuity, as defined by S.D.C.L. § 58-12-5, must be an obligation to pay certain sums at stated times during a life. That Debtor must start withdrawing from his IRA at a certain age to avoid tax consequences does not qualify those withdrawals as "certain sums" to be paid "at stated times."

An appropriate order will be entered.

Dated this 5th day of November 1997.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Diane Nickelson
Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT SEAL

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: DM
Date: 11-6-97

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
NOV 06 1997
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 97-40191 Form id: 122 Ntc Date: 11/06/97 Off: 4 Page : 1
Total notices mailed: 4

Debtor	Conrad, Leonard Charles 401 Maple, Yankton, SD 57078
Aty	Hoemer, Larry F. PO Box 668, Yankton, SD 57078-0668
Trustee	Lovald, John S. PO Box 66, Pierre, SD 57501
Aty	Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321