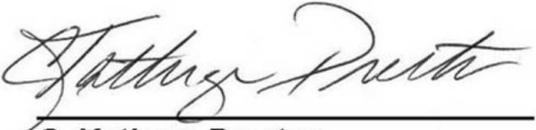


**This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.**

**IT IS SO ORDERED.**

**Dated: February 07, 2007**

  
\_\_\_\_\_  
**C. Kathryn Preston**  
**United States Bankruptcy Judge**

---

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re: : Case No. 06-54893  
Timothy L. Dailey : Chapter 7  
Debtor(s) : Judge Preston

**OPINION AND ORDER ON  
TRUSTEE'S OBJECTION TO CLAIM OF EXEMPTION**

This cause came on for hearing on November 28, 2006, upon the Trustee's Objection to Debtor's Claim of Exemption in Roth IRA (Doc. #15). Present at the hearing were Amy L. Bostic, the Chapter 7 Trustee, and Michael Warren, counsel for the Debtor.

In addition to the Debtor's testimony, the parties stipulated to a number of the relevant facts. Based on the evidence presented and the stipulations of the parties, the Court finds and concludes as follows:

The Debtor owns a 2002 Honda (the "Vehicle") jointly with his spouse<sup>1</sup>. The Vehicle has a fair market value of \$9,600; therefore, the Debtor's interest therein has a value of \$4,800. The Debtor visited his attorney to explore the remedies he could obtain under bankruptcy law approximately 10 to 14 days prior to filing his Petition for Relief. At that time, he had seven or eight judgments against him totaling approximately \$65,000. One of the judgment creditors had garnished his wages, and the Debtor sought bankruptcy protection in order to avoid garnishment. Shortly prior to the commencement of this bankruptcy case on September 5, 2006, the Debtor borrowed \$3,500, using the Vehicle as collateral for the loan. Prior to that loan, the Vehicle was free and clear of any liens. In the morning of the day his bankruptcy case was commenced, the Debtor established an individual retirement account ("IRA"), specifically a Roth IRA, depositing therein the funds obtained through the loan secured by the Vehicle plus \$500 of other funds on hand, in order to take advantage of the exemption contained in Ohio Revised Code §2329.66(A)(10)(c). The Debtor readily admits and disclosed in his documents that he had converted non-exempt assets (ie., the equity in the Vehicle) into exempt assets (the Roth IRA), wishing to protect his vehicle and the funds that he placed in the Roth IRA. In the Schedules filed in the case, Debtor listed approximately \$18,000 of unsecured debt and approximately \$59,000 of judgment liens.

The Trustee objects to the Debtor's claim of an exemption in the Roth IRA asserting that the Debtor established the Roth IRA for the purpose of evading payment of his debts, in contravention of O.R.C. § 2329.66(A)(10)(c).

---

<sup>1</sup>The Debtor's spouse has not filed a petition for relief under any provision of the Bankruptcy Code.

Ohio Revised Code § 2329.66(A)(10)(c) provides in pertinent part as follows:

**(c) Except for any portion of the assets that were deposited for the purpose of evading the payment of any debt** and except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's right in the assets held in, or to receive any payment under, any individual retirement account, individual retirement annuity, "Roth IRA," or education individual retirement account that provides benefits by reason of illness, disability, death, or age, to the extent that the assets, payments, or benefits described in division (A)(10)(c) of this section are attributable to any of the following:

(i) Contributions of the person that were less than or equal to the applicable limits on deductible contributions to an individual retirement account or individual retirement annuity in the year that the contributions were made, whether or not the person was eligible to deduct the contributions on the person's federal tax return for the year in which the contributions were made;

(ii) Contributions of the person that were less than or equal to the applicable limits on contributions to a Roth IRA or education individual retirement account in the year that the contributions were made;

(iii) Contributions of the person that are within the applicable limits on rollover contributions under subsections 219, 402(c), 403(a)(4), 403(b)(8), 408(b), 408(d)(3), 408A(c)(3)(B), 408A(d)(3), and 530(d)(5) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended.

O.R.C. § 2329.66(A)(10)(c)(emphasis added).

Based on the opening clause of O.R.C. § 2329.66(A)(10)(c), the Trustee asserts that she need not show bad faith or fraudulent intent, but merely a desire on the part of the Debtor to shield assets from the liquidation process of Chapter 7. The Debtor counters that he simply engaged in prudent pre-bankruptcy planning and took full advantage of exemptions allowable by law.

In connection with the Bankruptcy Reform Act of 1978, the reports of both the House of Representatives and the Senate Judiciary Committees state:

As under current law, the debtor would be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of exemptions to which he is entitled under the law.

S. Rep. No. 95-989 (1978); H.R. Rep. No. 95-595 (1977).

This legislative history, coupled with the fresh start policy underlying the Bankruptcy Code, has led many courts to conclude that the mere conversion of nonexempt into exempt assets does not, in and of itself, constitute fraud. *Smiley v. First National Bank of Belleville (In re Smiley)*, 864 F.2d 562, 566 (7<sup>th</sup> Cir. 1989); *Norwest Bank Nebraska N.A. v. Tveten*, 848 F.2d 871, 873-74 (8<sup>th</sup> Cir. 1988); *Ransier v. Public Employees Retirement System (In re Cottrill)*, 118 B.R. 535, 539 (Bankr. S.D. Ohio 1990); *Noland v. Wadley (In re Wadley)*, 263 B.R. 857, 859 (Bankr. S.D. Ohio 2001).

An exception may be made where there exists evidence of fraud beyond the mere conversion of assets. Factors often considered include:

1. whether the transfer occurred immediately prior to the bankruptcy;
2. whether the debtor converted a large amount of assets or the assets were of high value;
3. whether the transfer was a reaction to a judgment entered against the debtor;
4. whether the debtor received inadequate consideration for the transfer;
5. whether the debtor continued to use the property transferred;
6. whether the debtor was rendered insolvent by the transfer; and
7. whether the debtor attempted to conceal the conversion or attempted to mislead creditors or other parties-in-interest.

*See, Wadley*, 263 B.R. at 860.

The Trustee admits that there is no fraud or bad faith present in this case, but insists that the Court need not find fraud or bad faith in light of the opening clause of O.R.C. § 2329.66(A)(10)(c). This Court agrees. O.R.C. § 2329.66(A)(10)(c) states that a Roth IRA is

generally exempt property, “[e]xcept for any portion of the assets that were deposited for the purpose of evading the payment of any debt....” O.R.C. § 2329.66(a)(10). In light of this language, which is not contained in any other section of O.R.C. § 2329.66, it is clear that the Ohio State Legislature did not intend to allow a debtor to exempt assets in an IRA when the debtor placed those assets in the IRA to avoid loss of the assets through payment of a debt. It is also clear that the Ohio State Legislature did not intend to require fraud in order to dispossess a debtor of the benefits of the exemption statute as it pertains to an IRA or other assets described in the statute. However, the Trustee further insists that the Debtor’s purpose in the instant case was to evade payment of debt because the Debtor stipulated that his intent was to take advantage of the exemptions authorized by the Bankruptcy Code and Ohio law. On this point, the Court disagrees.

Under the language of O.R.C. § 2329.66(A)(10)(c), the Debtor risks loss of the exemption only if the Debtor actually and specifically intended to avoid payment of debt when investing funds in the IRA. In the Stipulation and in the Debtor’s testimony, he stated only that he intended to protect his assets. While it may be a fine line between investing in an exempt asset for the purpose of avoiding payment of a debt and engaging in prudent pre-bankruptcy planning by converting non-exempt assets into exempt assets; nonetheless, there is a line.

Admittedly a debtor may not readily confess to his intentions underlying pre-bankruptcy activities. Therefore, the Court can consider the facts surrounding the Debtor’s activities and the totality of the circumstances. Many of the factors which the Court can consider in discerning the existence of fraud may also be utilized to determine the Debtor’s true purpose in converting non-exempt assets into an exempt IRA. The Court may also consider factors such as:

- (A) the debtor's understanding of the effect of his transfer or conversion of assets;
- (B) the debtor's intended or anticipated use or disposition of the exempt assets;
- (C) the use or disposition of the exempt assets after the commencement of the bankruptcy case;
- (D) the debtor's knowledge or understanding of the purpose of the exempt asset;
- (E) whether any collection activities were underway at the time of the conversion of the assets.

It is well established that exemptions are to be construed liberally in favor of the Debtor.

While the Trustee need not show actual fraud by the Debtor in order to reach assets claimed exempt, the Trustee must present evidence to illustrate the Debtor's true purpose in converting the non-exempt assets into exempt assets of the kind described in the statute. The Court simply is not willing to equate pre-bankruptcy planning with a purpose of evading payment of debt.

The burden of proof on an objection to exemptions rests with the objecting party. *See* B.R. 4003(c). The Court having considered the Debtor's testimony and the evidence in conjunction with the factors listed above, concludes that the Debtor did not convert his non-exempt assets into exempt assets for the purpose of evading payment of debt. In light of the foregoing, it is

ORDERED AND ADJUDGED that the Trustee's Objection to Exemptions is  
OVERRULED.

**IT IS SO ORDERED.**

Copies to:

Timothy L. Dailey, 410 S. Market Street, Waverly, OH 45690  
Michael W. Warren, Attorney for Debtor (Electronic Service)  
Amy L. Bostic, Chapter 7 Trustee (Electronic Service)  
Office of the U.S. Trustee (Electronic Service)

###