

# In the United States Bankruptcy Court

## for the Northern District of Iowa

CRAIG CARL ZIMMER and  
REBECCA KAY ZIMMER

*Debtor(s).*

Bankruptcy No. X89-01684F

Chapter 7

### MEMORANDUM OF DECISION AND ORDER RE: TRUSTEE'S OBJECTION TO EXEMPTIONS

Trustee James Cossitt has objected to debtors' claims of exemption in an employee profit sharing plan and in a 401(k) plan. Trial was held in on April 19, 1990. The court now issues this memorandum of decision which includes findings of fact and conclusions of law as required by Bank. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

#### FINDINGS OF FACT

Craig and Rebecca Zimmer, husband and wife, filed their voluntary petition under chapter 7 on November 2, 1989. On their schedule B-2-s, Zimmers listed interests in an "Employees 401(k) Benefit Plan" having a value of \$615.74, and in a "Profit Sharing Trust" having a value of \$24,858.95. Both assets were claimed as exempt under Iowa Code § 627.6(8)(e).

Craig Zimmer (ZIMMER) is 34 years old. He is a high school graduate who has been employed by Fareway Stores, Inc. (FAREWAY) since 1973. He is presently an assistant manager at the corporation's store in Carroll, Iowa. At the time of filing, his hourly wage was \$11.25. A cost of living adjustment granted after the bankruptcy filing raised his wage to \$15.00 per hour. He cannot be certain of additional cost of living adjustments. Absent such adjustments, he would obtain another raise only by promotion to a store manager position. His annual gross income from his job with Fareway is \$39,390.00. His net monthly income is \$2,245.64. He is in good health.

Rebecca Zimmer is a self-described "homemaker." She is 31 years old. Mrs. Zimmer was formerly employed by New Hope Village, a residential care facility, which paid her \$4.75 an hour. She hurt her back lifting a patient in November, 1988, and for that and other reasons, quit her job in October, 1989. She earns approximately \$500.00 per year for corn detassling and bean walking. She also baby sits in her home, earning approximately \$13.00 per week. Mrs. Zimmer has some health problems. She has been treated by a urologist, has continuing difficulty with her back, and recently underwent hernia surgery and the removal of a cyst. Her medical conditions, particularly her back injury, limit the type of employment she can obtain and perform in Carroll. However, there is no limitation on her performing clerical jobs.

The Zimmers have been married approximately 14 years and have two children: Dan, age 13, and Katie, age 9. The daughter is in good health. Dan has had behavioral problems at school; on at least two occasions, he has received professional treatment for these problems. The debtors have paid for this treatment without reimbursement from their medical insurance. The debtors believe that their son has improved because of the professional help but they are concerned that if Craig Zimmer's career again requires the family's relocation, these behavioral problems could recur. The son also has asthma for which he takes medication, generally in the spring and summer. The Zimmers have family medical insurance through a group plan with Fareway. It generally pays 80% of incurred medical expenses after consideration of a deductible.

The Zimmers express their goals as providing college educations for their children, purchasing a home, saving for retirement and buying a second car. Their exempt property includes their car (a 1979 Ford Thunderbird with 130,000

miles), household goods having a value of less than \$3,000.00 and miscellaneous wearing apparel, jewelry, and sports equipment all having a value of approximately \$1,200.00. In addition, there are exempt life policies insuring Craig Zimmer with death benefits of \$107,797.00 and cash values of \$2,562.62, and exempt life policies insuring Rebecca Zimmer, having death benefits of \$30,502.00 and cash values of \$692.79.

The Zimmers presently have post-petition debts of \$2,488.40; \$510.40 of that amount is for medical expenses. They owe postpetition legal fees of \$1,000.00. They say they have reaffirmed a \$350.00 debt with AVCO Financial Services. The court, however, could find no reaffirmation agreement in the Zimmers' bankruptcy file.

The Zimmers' present and anticipated monthly expenses are as follows:

	<b>PRESENT</b>	<b>ANTICIPATED</b>
Rent	\$325.00	\$450.00
Food	480.00	580.00
Utilities:		
Electricity	85.00	100.00
Gas	75.00	90.00
Water	30.00	50.00
Telephone	70.00	85.00
Insurance:		
Life	134.00	200.00
Auto	47.00	100.00
Renter's	9.00	10.00
Transportation	80.00	200.00
Education	55.00	70.00
Clothing	200.00	300.00
Laundry & Cleaning	50.00	75.00
Newspapers	25.00	30.00
Entertainment	100.00	150.00
Charitable	25.00	50.00
Haircuts	28.00	30.00
Second vehicle		350.00
Medical	100.00	200.00
<b>TOTAL</b>	<b>\$1,918.00</b>	<b>\$3,070.00</b>

The Zimmers have also submitted to the court a summary of their actual March, 1990 expenses:

Electricity	\$ 73.72
Gas	70.68
Water	14.00
Phone	135.25
Garbage	4.30
Life Insurance	134.00
Health Insurance	22.00
Automobile Insurance	75.00
Renter's Insurance	9.00
Transportation	100.00

Education	60.00
Food	520.00
Clothing	300.00
Medical	508.46
Dry Cleaning (Laundry)	50.00
Newspapers	25.00
Recreation/Entertainment	135.00
Charity	50.00
Haircuts	28.00
AVCO Finance	50.00
Polking Law Office	75.00
Citibank	40.00
Rent	325.00
TOTAL	\$2,804.41

The Zimmers admit that the phone bill for March, 1990 was higher than normal; it normally averages about \$80.00 per month. Local monthly phone service in their area costs approximately \$15.00; the balance of their monthly phone expense is for long distance service. The Zimmers also say that food expense for March was greater than normal. In March, the Zimmers paid postpetition medical expenses in the amount of \$508.46. The Zimmers used their Internal Revenue Service refund of \$438.00 to help pay them.

### **The 401(k) Plan**

Craig Zimmer's 401(k) plan is a retirement plan administered through his employer. It has a present balance of \$657.73. The plan permits employees of Fareway to direct a portion (2-20%) of their compensation to the plan each year with a maximum annual contribution of \$7,000.00. Zimmer ceased making contributions sometime prior to bankruptcy. The plan is administered by a three-person advisory committee appointed by the company. The monies are placed in a trust which is managed by its trustees. Benefits are payable upon retirement, disability, death or termination of employment.

Retirement, which triggers payment of benefits under § 5.2 of the plan, may be taken at the earlier of: reaching age 55 so long as the plan participant has completed five years of employment with Fareway, or completing 20 years of employment with Fareway. However, the plan permits semi-annual withdrawals in any amount once the employee has reached age 59-1/2.

The plan permits hardship withdrawals to provide for "heavy financial need" not normally provided for by other resources of the participant. These include education expenses of the plan participant or dependents; the purchase of a primary residence; medical expenses not covered by insurance; or for any other cause determined by the advisory committee as producing an immediate and heavy financial need. One such hardship withdrawal is permitted during each semi-annual accounting period in the plan. The committee has discretion as to whether to permit such withdrawals. Participants can also obtain loans from the 401(k) plan if they can show hardship, educational or medical needs, or needs involving the acquisition, construction or rehabilitation of a dwelling unit. Loans may also be obtained to enable participants to meet special situations in their family or financial affairs. The plan prohibits sale, assignment or transfer of the participant's interest in the plan. The plan is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § § 1001 et seq.

### **Profit Sharing Trust**

Craig Zimmer is fully vested in Fareway's Profit Sharing Trust. Contributions to the trust are made solely by his employer. The contributions earn income based on trust investments. Additions to an employee's share of the trust are made annually at the end of the trust's calendar year. The company contribution to each employee is calculated by a

point system. An employee-participant is entitled to points based on the amount of wages earned during the plan year (one point per \$100.00 in wages) and based upon years of service (10 points for each year of service). All plan participants' points are totaled and an individual employee's percentage of those points determines his percentage allocation of the company's annual plan contribution. His interest having fully vested, Zimmer's benefits under the plan are non-forfeitable. Benefits are payable to him or to his survivors upon retirement, death, disability or termination of employment. With regard to termination of employment, the plan states as follows:

When a Participant's employment is voluntarily or involuntarily terminated other than by reason of death, disability or retirement, such Participant shall be entitled only to the Vested Accrued Benefit in his account as of the last day of the Plan Year concurring with or next succeeding the date of termination.

Plan, Article VI, section 6.1(d).

Plan benefits are accessible under other circumstances. The plan trustees, in accordance with the direction of the plan's advisory committee, may comply with the provisions of a qualified domestic relations order as defined in the IRS Code § 414(p). Plan section 6.8.

Plan trustees may also provide loans to participants to meet hardships, to meet educational or medical needs, or to enable participants to meet special situations. The discretion to make such loans is the prerogative of the advisory committee. Plan section 9.7.

Article XVII of the plan provides that:

The Plan herein established is for the benefit and protection of the Participants and beneficiaries herein named and the rights, privileges and benefits herein conferred shall not be pledged, sold, assigned or transferred, or in any manner anticipated or encumbered; and neither shall the same be subject to the claims of creditors of such Participants or beneficiaries, nor shall the same be subject to levy, attachment, garnishment or other legal process but shall be held and administered as herein provided for the use and benefit of said Participants and beneficiaries. However, nothing in this Article shall preclude the application of the provisions of section 6.8 and 9.7.

Sections 6.8 and 9.7 relate respectively to the distributions under domestic relations orders, and to the trustees' power to loan vested amounts for hardship, education, or medical reasons. The plan is subject to ERISA, *id.* Although Zimmer's interest in the trust at the time of trial was \$30,035.91, the estate's interest had a value at filing of \$24,858.95.

## SUMMARY OF THE ISSUES

The Zimmers initially seek to protect the interest in Craig Zimmer's profit sharing plan by claiming that it does not qualify as property of their chapter 7 estate. Zimmers contend that the profit sharing plan constitutes a spendthrift trust, and is thus excluded from their bankruptcy estates pursuant to 11 U.S.C. § 541(c)(2). To the extent it is property of either of their estates, they claim it exempt pursuant to Iowa Code § 627.6(8)(e). Zimmers concede that Craig Zimmer's 401(k) plan is property of the bankruptcy estate, but they claim the plan as exempt pursuant to Iowa Code § 627.6(8)(e)

## DISCUSSION

### A. Is the Profit Sharing Plan Property of the Estate?

Congress intended the scope of the bankruptcy estate under 11 U.S.C. § 541 to be broad. Samore v. Graham (*In re Graham*), 726 F.2d 1268, 1270 (8th Cir. 1984). Section 541 provides that the bankruptcy estate consists of all legal and equitable interests of the debtor at the time the bankruptcy petition is filed. 11 U.S.C. § 541(a)(1). Generally, restrictions on the transfer of a debtor's interest in property will not prevent the inclusion of such a property interest in the estate. 11 U.S.C. § 541(c)(1)(A), Graham, 726 F.2d at 1270. However, 11 U.S.C. § 541(c)(2) states the following exception to this general rule:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.

Congress intended § 541(c)(2) to exclude from a debtor's estate only property that qualifies as a traditional spendthrift trust recognized by state law. Graham, 726 F.2d at 1271; In re Swanson, 873 F.2d 1121, 1123 (8th Cir. 1989). Contra: Forbes v. Lucas (In re Lucas), No. 89-6487 (6th Cir., Jan. 14, 1991) (WESTLAW, 1991 WL 1925); Anderson v. Raine (In re Moore), 907 F.2d 1476, 1480 (4th Cir. 1990). **(Fn.1)** Therefore, the excludability of Craig Zimmer's profit sharing plan turns on whether it is a spendthrift trust under Iowa law.

**(Fn.1)** These two cases hold that ERISA--particularly 29 U.S.C. 1056(d)(1)--constitutes "applicable nonbankruptcy law" so as to exclude ERISA-qualified plans from the debtors' bankruptcy estates under S 541(c)(2) of the Bankruptcy Code.

Iowa law recognizes and upholds the validity of spendthrift trusts. Bucklin v. Wharton (In re Bucklin's Estate), 243 Iowa 312, 51 N.W.2d 412 (1952). The Iowa Supreme Court has described a valid spendthrift trust (as to income) as one which provides the beneficiary with the income from the trust but further provides that the beneficiary's equitable "interest shall not be transferable by him and shall not be subject to the claims of his creditors." In re Bucklin's Estate, *id.* at 414 quoting Restatement (Second) of Trusts § 152 (1959). Such restraints on alienation, voluntary and involuntary, are also applicable to trust principal. Restatement (Second) of Trusts § 153(1) (1959).

These trusts with their attendant restraints are permitted in Iowa as an acknowledgment of "the power of the donor to limit or place conditions on the disbursement of trust funds." Murphy v. Scott (Matter of the Estate of Dodge), 281 N.W.2d 447, 450 (Iowa 1979); In re Bucklin's Estate, 51 N.W.2d at 416.

In Iowa, spendthrift trusts may not be established by the beneficiary. In re Schwartz, 58 B.R. 606, 607 (Bankr. N.D. Iowa 1984) citing DeRousse v. Williams, 181 Iowa 379, 164 N.W. 896 (1917). Nor can the beneficiary terminate the trust. See Merchants' National Bank v. Crist, 140 Iowa 308, 118 N.W. 394, 395 (1908).

The characteristics of a spendthrift trust valid in Iowa are not different from the requirements of such trusts in Minnesota as these requirements have been interpreted by the Eighth Circuit in Swanson. Matter of Lingle, 119 B.R. 672, 674 (Bankr. S.D. Iowa 1990); Matter of Caldwell, Case No. 88-2339-C, slip op. at 6 (Bankr. S.D. Iowa, Sept. 25, 1990). Consequently, using Swanson to analyze Zimmer's profit sharing plan will not violate any tenets of Iowa trust law.

Because of Zimmer's access to the trust funds, the Profit Sharing Plan does not qualify as a valid spendthrift trust. Despite the plan's provisions for payment of benefits upon retirement, disability or death, the plan also permits the beneficiary to obtain all funds upon voluntary termination of employment. Exhibit 13, Article VI, Section 6.1(d).

According to Swanson, the ability of a debtor to gain access to plan benefits by terminating his employment precludes the plan from being treated as a spendthrift trust:

". . . While this is a very limited right of control over the funds, the ability of the beneficiary to control trust assets in any way is inimical to the policies underlying the spendthrift trust . . ."

Swanson, 873 F.2d at 1124 (emphasis added). This court has similarly held that a benefit plan in which the debtor retains a power of revocation does not qualify as a spendthrift trust. In re Schwartz, 58 B.R. 606, 607 (N.D. Iowa 1984), see also Restatement Second of Trusts § 153(2) and Comment C (1959).

#### **B. Are The Profit Sharing and 401(k) Plans Exempt Under Iowa Law?**

Zimmers claim the plans as exempt under Iowa law. The governing Code section is Iowa Code § 627.6(8) which states:

A debtor who is a resident of this state may hold exempt from execution the following property:

8. the debtor's rights in--

E. a payment under a pension, annuity, or similar plan or contract on account of illness, disability,

death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

Trustee contends that the plans are not "reasonably necessary" for the Zimmers' support. **(Fn.2)** In determining what is "reasonably necessary," this court has looked to several nonexclusive factors which may be considered on a case-by-case basis. In re Flygstad, 56 B.R. 884, 889 (Bankr. N.D. Iowa 1986). These factors include: (1) debtor's present and anticipated living expenses; (2) debtor's present and anticipated income from all sources; (3) age of the debtor and dependents; (4) health of the debtor and dependents; (5) debtor's ability to work and earn a living; (6) debtor's job skills, training and education; (7) debtor's other assets, including exempt assets; (8) liquidity of other assets; (9) debtor's ability to save for retirement; (10) special needs of the debtor and dependents; and (11) debtor's financial obligations. Flygstad, 56 B.R. at 889-90.

**(Fn.2)** Trustee, in his written objection, claimed that the plans were not pensions or similar contracts payable on account of illness, disability, death, age or length of service. He nowhere argues this position in his post-trial brief and has presumably abandoned it.

After weighing all relevant factors in the present case, the court concludes that Craig Zimmer's profit sharing and 401(k) plans are not reasonably necessary for his or his dependents' support.

The court considers that Zimmers' present and anticipated expenses are excessive in light of debtors' income. Present and anticipated expenses for entertainment, clothing and haircuts all appear out of proportion to Zimmers' income and any proven necessity. Anticipated food expenses of nearly \$600 per month appear high for a family of four experiencing financial difficulties. Although the purchase of one's own home and a second car are understandable desires, they are not necessities. Debtors should be able to pare their monthly expenditures to a level below income. Substantial savings for retirement probably will not be possible for the debtors until their children attain majority. Yet, the debtors are young. Craig Zimmer has a good and apparently stable job with Fareway. Rebecca Zimmer can seek employment. As a couple, they have the ability over the next 30 years to prepare for retirement. Fareway's post-petition contributions to the profit sharing plan would presumably aid in that preparation. The court recognizes some health problems in the family. However, expenses in excess of insurance coverage appear manageable if the debtors secure control over personal, discretionary living expenses.

The court recognizes the difficulty in predicting with any certainty what the debtors' needs will be upon retirement. In this case, retirement by the "breadwinner" of the family is nearly 30 years away. No one can foretell what the general cost of living will be at such a remote time. Nor can anyone predict what the individual needs of the debtors will be. In the present case, the court considers as most important that Craig Zimmer is in good health, has a moderately well-paying job, and is young. Other factors in the debtors' lives do not so detract from these positive circumstances as to require a determination that the plans are exempt.

## RIGHTS OF THE TRUSTEE

Although the plans remain property of the estate, the trustee's rights in them rise no higher than the debtors' rights. Zimmer's interests in the plans are limited. He is still employed by Fareway and thus cannot obtain present possession of the funds. He cannot assign the funds or encumber them. The trustee is limited by the same constraints. Should Zimmer quit his job or be discharged, the trustee would have access to the funds. However, the trustee must await that event or the future retirement of the debtor. Such a wait, in this case, would severely conflict with the trustee's duty to administer the estate as expeditiously as possible. It may be, therefore, that the plans have little value to the estate. Mutual of Omaha Insurance Co. v. Baron (In re Johnson), No. CBS-4155, slip op. at 10 (N.D. Iowa, Sept. 29, 1989); Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan and Trust (In re DeWeese), 47 B.R. 251, 256 (Bankr. W.D. N.C. 1985).

## CONCLUSIONS OF LAW

Craig Zimmer's interest in "Fareway Stores, Inc. profit sharing trust" does not qualify as a spendthrift trust under Iowa law; its value as of November 2, 1989 is property of Zimmer's bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1).

Craig Zimmer's interest in both the "Fareway Stores, Inc. profit sharing trust" and 11401(k) benefit plan and trust" are not reasonably necessary for the support of either Craig Zimmer or his dependents. The plans are not exempt under Iowa Code § 627.6(8)(e).

**ORDER**

IT IS, THEREFORE, ORDERED that the objection of the trustee is sustained.

SO ORDERED ON THIS 8th DAY OF FEBRUARY, 1991.

William L. Edmonds  
Chief Bankruptcy Judge