

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

MERLIN L. NIXON and
MARLENE A. NIXON

Bankruptcy No. 00-02288S

Debtor(s).

Chapter 7

ORDER RE: TRUSTEE'S OBJECTION TO EXEMPTION

The matter before the court is the trustee's objection to the claim of exemption in an individual retirement plan. Hearing on the matter was held November 21, 2000 in Sioux City. The trustee, Donald H. Molstad, appeared for himself. Wil L. Forker appeared for the debtors, Merlin and Marlene Nixon. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

Findings of Fact

Merlin and Marlene Nixon, husband and wife, filed a joint voluntary Chapter 7 petition on September 7, 2000. Nixons live in Thurston, Nebraska. They are both 59 years old and have three adult children.

Merlin has a high school diploma. He has also attended auctioneering school and has a realtor's license. Since 1978, he has been self-employed as a real estate broker. He has sold all types of real property, but mainly houses.

In 1998, he had gross income of \$64,937, and \$76,747 for 1999. For 2000 to the date of the petition, he grossed \$32,052. Doc. 1, Statement of Financial Affairs, question 1. Lately, Merlin's business has taken a downturn. Market conditions have made it difficult for him to get listings for land, and a competitor has moved into his area. He currently has one listing. He last had a closing in July of this year.

Marlene Nixon has been a teacher in the Pender public schools for 22 years. For seven years, she taught sixth grade math. She left that position because of problems with arthritis. She is now in her first year as a remedial education teacher, working one-on-one or with small groups of students. Marlene's salary is approximately \$33,000 annually, or \$1,841 net per month.

Nixons live in a mobile home valued at \$20,000. They have no equity in the home and do not own the lot on which it is located. Merlin drives a leased 1999 Ford pickup. Marlene has a 1987 Cadillac valued at \$1,200 that needs repairs.

Merlin has an individual retirement account valued at approximately \$16,000. All contributions to the IRA were made in the early 1990s. The account is invested in bank certificates of deposit. Merlin has not cashed in any part of the IRA.

Marlene's employment provides her with a retirement plan sponsored by the state of Nebraska. She expects to receive benefits of about \$1,500 per month when she retires at age 65. Based on estimates from the Social Security Administration, Nixons expect to receive monthly Social Security benefits of approximately \$1,000 for Merlin and \$900 for Marlene. These estimates assume that Nixons will retire at age 65 and will earn about the same amount until that time as they have earned in recent years.

Marlene's employment provides disability insurance, life insurance, and family health insurance. Nixons have borrowed the cash value of other life insurance. They scheduled interests in approximately \$3,585 worth of other personal property.

Nixons have not yet prepared their 1999 income tax returns, because they have not been able to pay their accountant who charges \$1,000. They expect they will owe approximately \$5,000 for state and federal taxes. They do not expect to owe taxes for 2000 because of expenses. In their bankruptcy schedules, Nixons listed general unsecured claims in the amount of \$99,088. The debt is largely credit card cash advances used to keep the real estate business going. Merlin said this use of credit cards began when he had a serious heart attack in 1990.

Nixons scheduled the following monthly expenses:

Mobile home, lot rent and taxes	\$436.00
Electricity and heat	\$150.00
Water and sewer	\$40.00
Telephone	\$100.00
Cable	\$45.00
Home maintenance	\$50.00
Food	\$400.00
Clothing	\$100.00
Laundry	\$15.00
Medical and prescriptions	\$250.00
Transportation	\$250.00
Recreation	\$50.00
Charitable contributions	\$167.00
Life insurance	\$22.00
Health insurance	\$33.00
Auto insurance	\$130.00
Auto lease	\$401.00
Business expenses	\$841.00
Haircuts, personal grooming	<u>\$40.00</u>
Total	\$3,520.00

Doc. 1, Schedule J. Merlin scheduled no current income from his real estate business and does not expect to continue the business. Closing the office would eliminate expenses of \$841, leaving Nixons with total monthly living expenses of approximately \$2,679.

There are two and a half years left on the term of the lease for the Ford pickup. Installment payments on the mobile home will continue for about seven more years. Merlin has been making payments on a boat purchased in 1996. He sold the motor in late 1998 for \$2,500 to pay living expenses. The boat is worth \$1,500. The balance of the debt is \$3,000.

Nixons have a number of health problems. They estimate they spend \$150 per month on prescription drugs. Marlene takes medication for arthritis and other conditions. Merlin has heart problems. He takes Cardizem and Aldactazide. In July he began taking Zoloft for depression. At 300 pounds, he is overweight. He has diabetes, which is being controlled through diet. Last spring, he fell on the ice and hurt his back. At times, he has problems moving around. He sees a chiropractor. Nixons' health insurance coverage is 80% after a \$250 deductible per person per year. After meeting a deductible for prescription drugs, they pay \$10 per month for generic prescriptions and \$25 per month for brand-name drugs.

Merlin would like to continue working for another five to seven years before retiring. He has attempted to find other employment. He has worked in sales all his life and has looked for jobs in that line of work. He does not believe he would be able to do manual labor because of his back. He feels that his opportunities will be limited by both his age and his health. He has not applied for Social Security disability benefits. With the accommodation made for her arthritis, Marlene does not foresee any reason that she will not be able to continue working to her normal retirement age.

Discussion

The trustee bears the burden of proving that Nixons' exemptions are not properly claimed. Fed.R.Bankr.P. 4003(c). Merlin Nixon claimed his IRA exempt under § 25-1563.01 of the Nebraska Revised Statutes, which provides:

In bankruptcy and in the collection of a money judgment, the following benefits shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors: To the extent reasonably necessary for the support of the debtor and any dependent of the debtor, an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service unless:

(1) Within two years prior to bankruptcy or to entry against the individual of a money judgment which thereafter becomes final, such plan or contract was established or was amended to increase contributions by or under the auspices of the individual or of an insider that employed the individual at the time the individual's rights under such plan or contract arose; or

(2) Such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code.

For purposes of this section, unless the context otherwise requires, insider shall have the meaning provided in 11 U.S.C. § 101.

Neb. Rev. Stat. § 25-1563.01 (1999). It is undisputed that Merlin's IRA is a type of pension plan or similar contract covered by § 25-1563.01. Matter of Anzalone, 122 B.R. 730 (Bankr. D. Neb. 1990). The only issue raised by the trustee is whether the IRA is "reasonably necessary for the support of the debtor" and his dependents.

In Nebraska, "exemption statutes are to be liberally construed to effectuate their statutory purpose." Matter of Weaver, 98 B.R. 497, 498 (Bankr. D. Neb. 1988). Section § 25-1563.01 must be construed to permit a retirement plan to serve its purpose, which requires that a court consider the future needs of the debtor and his dependents. Id. at 499. In Weaver, the court concluded that the following factors should be considered in determining whether a retirement plan was "reasonably necessary" for purposes of § 25-1563.01:

(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; (11) debtor's financial obligations, e.g. alimony or support payments.

Id., 98 B.R. at 500 (following In re McCabe, 74 B.R. 119, 122 (Bankr. N.D. Iowa 1986)).

The trustee argues that Merlin's IRA is not reasonably necessary for Nixons' support because they will have sufficient retirement income from Social Security and Marlene Nixon's pension. Their projected combined Social Security benefit will be \$1,900 per month. Marlene's retirement benefit of \$1,500 would give them total combined income of \$3,400 per month, an amount that exceeds their current expenses.

The estimated retirement benefits assume retirement at age 65 and continued earnings at the current rates until the retirement date. There was no evidence that Marlene would not be able to work at her same position until her normal retirement. However, Merlin's income of recent years will not continue, and he will most likely have far lower earnings. He would like to work to normal retirement age, but his employment prospects are uncertain.

The prospect of future retirement benefits must be weighed against the Nixons' present financial condition. Nixons are both 59. Their health problems add a significant amount to their living expenses. Merlin's health affects his employment options. Other than Merlin's IRA and their interests in future retirement benefits, Nixons have few assets. If the court held the IRA to be non-exempt, Nixons would not be able to save additional funds for retirement. Merlin has no current income; Nixons' living expenses exceed Marlene's net income.

The deadline for filing objections to Nixons' discharges is December 15, 2000. If no objections are filed, Nixons will receive their discharge shortly thereafter. This will discharge their personal liability for unsecured debt of more than \$99,000. They will remain liable, however, for income taxes for tax year 1999. Their fresh start after bankruptcy discharge will be impaired to that extent.

Construing the exemption statute liberally in order to effectuate its purpose, and applying the factors set out in Weaver to this case, the court finds and concludes that Merlin Nixon's IRA is reasonably necessary for his support and the support of his wife.

ORDER

IT IS ORDERED that the trustee's objection to exemptions is overruled.

SO ORDERED THIS 11th DAY OF DECEMBER 2000.

William L. Edmonds
U.S. Bankruptcy Judge