UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

KENNETH DUANE LAYTON,
SHARON MARIE LAYTON,

Debtors.

Case No. 89-01865-W J

Chapter 7

MEMORANDUM OF DECISION AND ORDER

On January 19, 1990 an evidentiary hearing was held on the Chapter 7 trustee's objection to Kenneth Layton's claim of exemption in his interest in a retirement account. C. R. Hannan, the trustee, represented himself. Timothy O'Grady appeared on behalf of the debtors. The matter was considered fully submitted at the close of the hearing.

STATEMENT OF THE FACTS

1. On August 24, 1989 the debtors filed a petition for relief under Chapter 7. They resided in Iowa for more than 180 days immediately preceding that date.

2. On October 20, 1989 the trustee filed his objection to any exemption the debtors might claim in Kenneth Layton's retirement fund, which the debtors had not yet revealed anywhere on their schedules. On the same day the trustee filed an application against the debtors for turnover of the funds.

3. On November 14, 1989 the court conducted a telephonic hearing on the objection. At that time it was determined that an evidentiary hearing was necessary.

4. On November 27, 1989 the application for turnover--which had not been resisted by the debtors--was granted. The debtors were ordered to turn over or to pay the value of the retirement fund to the trustee.

5. On December 15, 1989 the schedules were amended to reflect Kenneth Layton's interest and claim of exemption in "a pension and retirement fund through the City of Omaha, . . . , with value of $3,995.98" pursuant to Iowa Code section 627.6(8)(e).[1]

6. Kenneth Layton has been employed as an equipment operator by the City of Omaha since February 14, 1985.

7. The City of Omaha Employee Retirement System (COERS) is governed by Chapter 22 of the Municipal Code of Omaha. The City automatically deducts 4% from an employee's total compensation. It deducts an additional 8% of compensation which is in excess of that which is subject to F.I.C.A. deductions, unless the employee makes an election in writing not to contribute the extra amount. The City matches employee contributions. After 25 years of member service, an employee may elect to discontinue the deductions, at which point the employer contributions would cease.

8. The record indicates that Kenneth Layton participated in the plan only to the extent of the mandatory 4% contribution.

9. An employee will receive or begin to receive benefits upon retirement from service by reason of age if the employee has

[1] Although the debtors actually cited Iowa Code section 627.6(6), that reference appears to be in error because that provision applies to life insurance.

completed ten years of service. The employee will receive a percentage of monthly compensation if the employee becomes unfit for active duty due to sickness or injury and if the employee completes at least five years of service credit. Provision is also made for death benefits.

10. If an employee becomes ineligible for membership in the retirement system, the employee may withdraw his or her contributions plus the accumulated interest. If the employee has attained at least ten years of service, that employee may leave his or her contributions in the system and shall be eligible for a deferred service retirement pension at or after age 55.

11. Section 22-44 provides that “[t]he right of a member to a service retirement pension, the return of accumulated contributions, or any other right accrued or accruing to any member or beneficiary under the provisions of this system shall be unassignable and shall not be subject to sale, execution, garnishment, or attachment".[2]

12. Kenneth Layton had not terminated his employment and was not eligible for retirement at the time the petition was filed.

13. Kenneth Layton is 31 years old and in good health. His job appears to be secure. At the time the petition was filed, the debtors were involved in a dissolution of marriage proceeding but a decree had not been entered. In addition to the pension plan,

[2] Although Kenneth Layton testified that he thought he could borrow against his account, nothing in Chapter 22 of the Omaha Code supports that interpretation.

the debtors claimed personal property in the amount of $3,915.00 exempt under Iowa’s general exemption statute.

STATEMENT OF THE ISSUES

1. Is the debtors' interest in the pension plan property of the estate as contemplated by 11 U.S.C. section 541(a)(1) or is it otherwise excluded by operation of 11 U.S.C. section 541(c)(2)?

2. If the debtors' interest is not excluded from the property of the estate, is it exempt from the estate pursuant to 11 U.S.C. section 522(b)(2)(A)?

a. Is the debtors’ interest exempt under Federal law other than 11 U.S.C. section 522(d)?

b. Is the debtors’ interest exempt under the State or local law of the debtors' domicile that is applicable on the date of filing?

(1) Is the State or local law under which the plan is created and exempted in its entirety preempted by ERISA section 514(a)?

(2) Is the State law which provides for general personal exemptions preempted by ERISA section 514(a)?

(a) If the State law is not preempted, have the debtors established that their rights in a payment under the plan are reasonably necessary for their support or that of any of their dependents as required by Iowa Code section 627.6(8)(e)? [3]

3. If the debtors' interest in the plan is not exempt from the estate, what can the trustee recover for the benefit of the general unsecured creditors?

DISCUSSION

I. GENERAL OBSERVATIONS

Prior to late 1989 this court heard relatively few objections to retirement fund exemptions. Most that were filed focused not on whether the property should have been excluded from the estate pursuant to section 11 U.S. C. section 541(c) (2) [4] but on whether the

[3] The trustee also argues that Kenneth Layton can not claim an exemption under Iowa's general exemption statute because the statutorily created retirement system is not a plan or contract that is similar to the type of pension or annuity contemplated by the Iowa legislature when enacting Iowa Code section 627.6(9)(e) (now section 627.6(8)(e)). The court does not find the trustee's argument persuasive. The general reasoning set forth by former Bankruptcy Judge Richard Stageman in Matter of Pettit, 55 B.R. 394, 397-98 (Bankr. S.D. Iowa 1985) in support of his conclusion that a profit-sharing plan was a similar plan or contract is equally valid with respect to the statutorily created plan in this case. See also In re Hutton, 893 F.2d 1010 (8th Cir. 1990) (savings and investment plan provided by employer was "similar plan").

[4] This court is aware of only two decisions in which it discussed whether a particular trust arrangement was self-settled and, therefore, not excluded from the bankruptcy estate. Neither decision was submitted for formal publication but both are contained in the court's official decision books maintained at the three court locations in this district. In the decision cited by the trustee in support of his argument, the debtor had agreed to release all claims against certain defendants in a civil action in exchange for a sum of money that then was transferred by the defendants' insurer to a bank that acted as a trustee of the trust fund for the benefit of the debtor and her son. Since the debtor gave consideration for the

creation of a trust of which she was a beneficiary, the trust was held to be self-settled. That conclusion clearly rested on the specific facts of the case. In the property was reasonably necessary for the support of the debtor or a dependent of the debtor and, therefore, exempt from the estate by operation of Iowa Code section 627.6(8)(e).

Then In re Swanson, 873 F.2d 1121 (8th Cir. 1989), was filed. In that decision, the Eighth Circuit Court of Appeals held that the debtors' interest in a Teachers Retirement Fund created by the State of Minnesota was property of the estate even though some characteristics of a spendthrift trust were present. Similar to the interests of the debtors in three of the four cases filed today, [5] the debtors in Swanson made mandatory contributions to the fund and could reach those contributions plus accumulated interest upon termination of employment. After generally observing that Minnesota spendthrift trust law was less than specific, the appellate court determined that the contributions (even though involuntary) and the potential control over the fund (even though terminating employment technically was necessary) outweighed both

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other decision, the debtor made voluntary contributions to an ERISA qualified plan even after leaving his employment with the public university employer. The determination that the property in issue was not a spendthrift trust appears to be based on a general reading of circuit case law and, at best, upon an implicit analysis of the facts under Iowa spendthrift trust law; however, the court would have reached the same conclusion if the applicable nonbankruptcy law had been properly reviewed and discussed in the decision.

[5] The companion cases decided today include Matter of Carver, No. 89-1510-W (Bankr. S.D. Iowa May 29, 1990), Matter of Bartlett, No. 89-1841-C (Bankr. S.D. Iowa May 29, 1990), Matter of Gouker, No. 89-1735-W (Bankr. S.D. Iowa May 29, 1990).

the fact that the fund could not be assigned and the fact that the creditors could not levy against it. Id. at 1123-24.

After the Swanson decision was published, some of the Chapter 7 trustees for this district began filing more objections to retirement plan exemptions and to both employer and employee contributions.[6] Debtors and, in one case, counsel for a public retirement system have responded by urging this court to distinguish Swanson and In re Graham, 726 F. 2d 1268 (8th Cir. 1984) and to find that the plans in issue actually constitute spendthrift trusts under state law and, accordingly, that the debtors' interests in those plans are excluded from the estates. In Graham the appellate court affirmed the determination by the bankruptcy court for the Northern District of Iowa that the debtor was required to turn over his ERISA trust funds to the bankruptcy trustee.

Certainly, this bankruptcy court must follow the controlling case law of the Eighth Circuit Court of Appeals. Mindful that appellate courts generally avoid determining more than the facts and the applicable law in a particular case warrant, this court concludes that the general holdings in the Swanson and the Graham decisions must be applied in a manner that is consistent with and

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[6] Although the statement of the issue set forth in the appellate court decision indicates that both the employer and the employee contributions were the object of the trustee's turnover action, the district court's published opinion stated that only the employee contributions were in issue. Compare In re Swanson, 873 F.2d 1121, 1122 (8th Cir. 1989) with Matter of Swanson, 79 B.R. 422, 423 (D. Minn. 1987). The bankruptcy court's decision was not published.

limited to the specific facts of those cases. Indeed, to do otherwise would work inequities in the four cases under consideration.

Hence, this court will avail itself of what might be deemed by some to be a convenient point of distinction with respect to the Swanson decision. That is, the Swanson opinion reviews the exclusion issue under Minnesota spendthrift trust law. By contrast, this court must analyze facts somewhat similar to those in Swanson under Iowa law in two of the cases and under Nebraska law in the other two cases. In re Graham, 24 B.R. 305, 310 n.4 (Bankr. N.D. Iowa 1982). See also Swanson, 873 F.2d at 1124 ("Nevertheless, we do not intend to state a broad rule that monies in any statutory trust are not excluded from the bankruptcy estate under section 541 (c)(2)."). The point of distinction will be one that yields a difference.

Then, it must be remembered that the Graham conclusions that only a "traditional" spendthrift trust can be excluded from.the property of the estate and that a pension plan may only be exempted from the estate flowed from findings that the debtor was the sole stockholder, director and officer of the corporation, which contributed approximately $150,000.00 to his fully vested pension plan, and that he had resigned on the date the petition in bankruptcy was filed. That latter fact meant that the debtor could reach the funds under the terms of the plan. In turn, that meant the bankruptcy trustee could recover the funds unless the court held that the spendthrift provisions of the pension plan excluded the debtor's beneficial interest from the estate [7] or that the debtor could exempt that interest from the estate.[8]

At this juncture, the court observes that its resolution of the exclusion issue will dispose of three of the four cases under consideration. If the court were to construe Iowa spendthrift trust law as being less than specific and to assess the facts in a manner consistent with the way in which the Swanson court interpreted the facts under Minnesota law, none of the cases would be so resolved. Nevertheless, this court also will address, in the alternative, the remaining issues in an effort to emphasize the structural integrity of the Code vis-a-vis other federal and state law.

II. PROPERTY EXCLUDABLE FROM THE BANKRUPTCY ESTATE

The first question that must be addressed in all of the cases

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[7] The appellate opinion addresses only issues of law with respect to the exclusion provision in the Bankruptcy Code. Apparently on appeal the parties did not challenge the bankruptcy court's findings of fact and conclusion of law that the debtor's pension plan was not a spendthrift trust under Iowa law. Compare In re Graham, 726 F.2d 1268, 1270-71 with In re Graham, 24 B.R. 305, 310-311 (Bankr. N.D. Iowa 1982).

[8] Both the appellate court and the bankruptcy court address only an issue of law with respect to the exemption provisions in the Bankruptcy Code. Graham, 726 F.2d at 1273-74 and Graham, 24 B.R. at 311-12. It should be noted that the debtor in the Graham case filed his petition on April 24, 1981. Iowa Code section 627.6, which enumerates the personal exemptions an Iowa resident may claim, did not allow any exemption for an interest in a retirement fund until July 1, 1981. Acts 1981 (69 G.A.) ch. 182, § 3.

under consideration is whether the debtors' interest in the retirement fund in issue remains property of the estate or is excluded from the estate. 11 U.S. C. section 541 (a) (1) provides that the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case" except as provided in subsequent subsections. Even exempt property is included initially in the estate. In re Graham, 726 F.2d 1268, 1271 (8th Cir. 1984).

11 U.S.C. section 541(c)(1)(A) generally invalidates any restrictions on assignment or alienation of a debtor's interest in property. It applies to anti-alienation clauses required by the Employee Retirement Income Security Act of 1974 (ERISA). Id. at 1273. Then section 541(c)(1)(A) is modified by 11 U.S.C. section 541(c)(2) which states that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." That qualification recognizes that the bankruptcy trustee would not be able to defeat a restriction on the transfer of a beneficial interest to the extent the restriction would be enforceable under state law as of the petition date. Only to the extent there would be no restriction would the beneficial interest be property of the estate and, if not exempt, subject to turnover. Cf. In re Schauer, 835 F.2d 1222, 1225 (8th Cir. 1987) (reviewing a number of case authorities supporting "the general principle that the trustee takes only those rights that the debtor had under state law".)

The court must analyze the spendthrift provisions under Nebraska law because COERS is governed by the Omaha Code. See In re Montgomery, 104 B.R. 112, 115 (Bankr. N.D. Iowa 1989)(New York law governed plan of Iowa debtor). Nebraska law generally recognizes and upholds the validity of spendthrift trusts. Matter of Leimer, 54 B.R. 587, 590 (D.C. Neb. 1985)(finding that neither the trust assets nor the debtor’s beneficial interest in those assets were property of the estate and, accordingly, reversing the bankruptcy court's denial of relief from the automatic stay that was based on the trust being property of the estate.) In First National Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N.W.2d 115 (1973), the Nebraska Supreme Court reviewed a situation in which the trust period had expired and the beneficiary had a present right to demand the trust corpus. In concluding that the beneficiary's failure to demand the distribution did not make the garnishment ineffective, the court pointed out that “[i]t is uniformly held to be against public policy to permit a person to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it." Id. at 118 (citing II Scott on Trusts (3d Ed. 1967), § 156, p. 1192). Certainly, under the Leimer and First National cases, a finding of fact that the debtor was the sole settlor and the sole beneficiary with an immediate right to access the plan or a portion of the plan would support a conclusion of law that the debtor's beneficial interest was not excludable from the estate by the mere presence of spendthrift provisions in the retirement plan.

In this case, Kenneth Layton is not the sole settlor and the sole beneficiary with respect to COERS. His interest in a retirement account under COERS is not the result of his voluntary action.[9] As of the petition date, he had no right to demand any distribution of his interest in the plan. His mandatory contributions are of benefit to other COERS employees. That is, as contemplated by Omaha Code section 22-26 (Retirement Reserve Fund -- Revenue), the mandatory contributions made by the COERS employees and the contributions by the COERS employers form a pool of monies which the COERS board of trustees may manage and invest for the benefit of all participants. The restrictions found in Omaha Code section 22-44 are designed.to protect the integrity of the statutorily created retirement system.

Based on this statutory scheme, this court concludes that COERS constitutes a spendthrift trust under Nebraska law at least with respect to mandatory contributions. It may not be a "traditional" spendthrift trust if the adjective refers only to stereotypes, such as the familiar family trust or an arrangement involving no overlapping of settlors and beneficiaries.[10] Yet, it

[9] Any argument equating the mere seeking and maintaining of employment similar to that in this case with creating or giving consideration to a trust is strained at best. The trustee’s reliance on the first case discussed in footnote 4 is misplaced.

[10] The court has been unable to find the specific term "traditional" used in conjunction with references to spendthrift trusts in the legislative history of section 541(c)(2).

certainly should be deemed a traditional spendthrift trust in theory and in practice because the City of Omaha, as the ultimate settlor, has mandated a system for the general welfare of the city employees as a whole and has attempted to protect that retirement system from adverse action by beneficiaries and by creditors of the beneficiaries. To say the least, it certainly is not a traditional nonspendthrift trust. To hold otherwise would "defeat the legitimate expectations of the settlor of the trust". Graham, 726 F.2d at 1272 (quoting from H.R. Rep. No. 595, 95th Cong., lst Sess. 175-76 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 6136). See generally In re Colsden, 105 B.R. 500, 501-502 (N.D. Iowa 1988) (observing that the Eighth Circuit Graham decision did not analyze whether the profit-sharing plan under consideration. was a spendthrift trust under state law and implying that a functional analysis might miss a distinction between a genuinely excludable spendthrift trust arrangement and a nonexcludable generic selfsettled and revocable plan).[11]

[11] The lower courts in the Eighth Circuit have analyzed the exclusion issue in various ways. In re Boon, 108 B.R. 697, 702703 (W.D. Mo. 1989). In the Boon decision, the district court held that the profit-sharing plan in issue was a spendthrift trust and, accordingly, reversed the bankruptcy court's order directing the debtors to turn over their interest in the plan to the bankruptcy trustee. The district court engaged in an exhaustive review of the relevant case law that has developed since the Graham decision was rendered and concluded that "the most narrow, and safest, reading of the Eighth Circuit's opinion in Graham is that ERISA pension plans may not be excluded under section 541(c) (2) merely because they are ERISA pension plans" and "ERISA plans may be excluded from the bankruptcy estate under section 541(c) (2) if, and only if, they qualify as an enforceable spendthrift trust under applicable state law". Id. at 702 and 706.

III. PROPERTY EXEMPT FROM THE ESTATE--THE ALTERNATIVE ANALYSIS

Had this court concluded that the property in issue was not excluded from the bankruptcy estate, it would have been required to address whether Kenneth Layton could exempt that property from the estate. As explained earlier, the court will provide the alternative analysis.

The discussion begins with a review of 11 U.S.C. section 522(b) which provides in relevant part:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. ...Such property is—
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> (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2) (A) of this subsection specifically does not so authorize; or, in the alternative,
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> (2) (A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition...

As permitted by section 522(b)(1), Iowa opted out of the federal exemptions set forth in 11 U.S.C. section 522(d) by operation of Iowa Code section 627.10. [12] Like the debtors in the other cases

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[12] Iowa Code section 627.10 states:

> A debtor to whom the law of this state applies on the date of filing of a petition in bankruptcy is not

entitled to elect to exempt from property of the bankruptcy estate the decided today, Kenneth Layton resided in Iowa for more than 180 days immediately preceding the petition date. Accordingly, he may exempt the property in issue to the extent permitted, if at all, under Federal law other than section 11 U.S.C. 522'(d) or under Iowa or local law.

With respect to the exemption options under Federal law, the Eighth Circuit Court of Appeals made it very clear that any prohibition on assignment or alienation pursuant to 29 U.S.C. section 1056(d) (ERISA) or 26 U.S.C. section 401(a) (IRS) did not constitute a federal exemption under section 522 (b) (2) (A). Graham, 726 F.2d at 1273-74. Then in Swanson, the appellate court made the following observations:

> The debtors elected the federal exemptions which do not exempt retirement funds such as those involved in this case. The debtors' decisions seem to have been motivated by a belief that the retirement funds at issue would be excluded from their bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). In any event, it is clear that had the debtors selected the exemptions provided under Minnesota law the retirement funds in this case would have been exempt.

Swanson, 873 F.2d at 1122.

It must be remembered that the debtors in Swanson were free to choose either the section 522(d) exemptions pursuant to section 522(b)(1) or the section 522(b)(2)(A) federal exemptions (in

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property that is specified in 11 U.S.C. sec. 522 (d) (1979). This section is enacted for the purpose set forth in 11 U.S.C. sec. 522(b)(1) (1979).

Acts 1981 (69 G.A.) ch. 182, § 2.

addition to state and local exemptions) pursuant to section 522(b)(2) because Minnesota did not opt out of the federal exemption scheme. As the quote indicates, the debtors chose the first option, meaning they could not then claim the section 522 (b) (2) (A) federal exemptions. Hence, the first sentence in the above quote does not appear to be relying upon the Graham holding that certain plans can not be exempted under section 522 (b) (2) (A) but rather seems to be based on unstated findings that the plan in issue does not satisfy the requirements of section 522(d)(10)(E). [13] Addition-

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[13] 11 U.S.C. section 522(d)(10)(E) provides:

> (d) The following property may be exempted under subsection (b)(1) of this section:
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> ....
> (10) The debtor's right to receive--
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> ....
> (E) A payment under a stock bonus, pension, profit-sharing, 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, unless--
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> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
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> (ii) such payment is on account of age or length of service; and
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> (iii) such plan or contract does not qualify under section 401 (a) , 403 (a) , 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 USC 401 (a),

ally, since the Graham decision previously found that ERISA regulated private employer plans and that, like non-ERISA plans, [14] such plans could be exempt under section 522 (d) (10) (E), it is reasonable to assume that the Eighth Circuit also concluded that the plan in Swanson was not an ERISA qualified plan. Graham, 726 F. 2d at 1272 and 1274. A determination that the Minnesota Teachers Retirement Fund is not an ERISA qualified plan appears in any event to be consistent with the statutory framework of ERISA.[15]

403(a), 403(b), 408, or 409).

[14] It might be argued that the Eighth Circuit Court of Appeals determined that a statutory retirement system is not a "similar plan or contract" under the federal exemption; however', such conclusion appears to be at odds with its subsequent observation that "if 541(c) (2) were construed to exclude retirement funds from the bankruptcy estate then the part of the Code which provides a limited federal exemption for these funds would be rendered meaningless". Swanson, 873 F.2d at 1124. See supra note 3 (the trustee did not rely upon the Swanson language).

[15] The controlling ERISA provisions state in part:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."
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> 29 U.S.C. 1144(a).
>
> "The provisions of this title shall not apply to any employee benefit plan if--
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> (1) such plan is a governmental plan as defined in section 1002(32) of

Returning to the facts of this case, Kenneth Layton can not exempt the COERS retirement account under a section 522 (b) (2) (A) federal exemption. COERS is a creature of local law and, as such, is not similar to any of the property interests set forth in the legislative history of section 522 (b) (2) (A). See Graham, 726 F. 2d at 1274 ("The pensions, wages, benefits and payments included in the illustrative list are all peculiarly federal in nature, created by federal law or related to industries traditionally protected by the federal government.”). Since Iowa has opted out of the federal exemption scheme, the debtor can not utilize section 522 (d) (10) (E).

Accordingly, the court must now determine whether the retirement account in this case is exempt under Iowa law. Unlike Matter of Carver, No. 89-1510-W, slip op. at 18-24 (Bankr. S. D. Iowa May 29, 1990), there is no specific exemption upon which the court may rely. The court may not utilize the applicable nonbankruptcy law governing the statutory retirement system to determine the exemption issue in this case because that law is not the law applicable "at the place in which the debtor's domicile has been

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this title...

29 U.S.C § 1003(b).

> "The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing... 11

29 U.S.C. 1002(32).

located for the 180 days immediately preceding the date of the filing of the petition". 11 U.S.C. § 522(b)(2)(A).

Hence, the analysis in this case is limited to a review of Iowa Code Chapter 627 which is a general exemptions statute. As in Matter of Bartlett, No. 89-1841-C, slip op. at 15-18 (Bankr. S.D. Iowa May 29, 1990) and Matter of Gouker, No. 89-1735-W, slip op. at 18-22 (Bankr. S.D. Iowa May 29, 1990), the court must determine whether ERISA section 514(a), as codified at 29 U.S.C. section 1144 (a) [16] preempts Iowa Code section 627. 6 (8) (e) which provides:

> A debtor who is a resident of this state may hold exempt from execution the following property:
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> ....
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> 8. The debtor's rights in:
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> ....
>
> 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.

ERISA section 514(a) preempts any and all state laws that make reference to ERISA plans even when those state laws are consistent with the federal statutory scheme. Mackey v. Lanier Collections Agency & Service, Inc., 486 U.S. 825, 100 L.Ed.2d 836, 108 S. Ct. 2182, 2185 (1988). (Georgia statute which provided

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[16] See first statutory provision quoted supra note 15.

treatment for ERISA employee welfare benefit plans that was different from that provided for non-ERISA plans was preempted by ERISA). Cf. Baxter By And Through Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989) (ERISA preempted any state statute or common law which restricts a plan's right of subrogation); Davis v. Ottumwa YMCA, 438 N.W.2d 10, 12-13 (Iowa 1989)(ERISA preempted claims based on state statutes that related to an employee benefit plan and did not fall within any of the preemption exceptions). See also Bricker v. Maytag Co., 450 N.W.2d 839, 841-42 (Iowa 1990) (ERISA did not preempt indirect action by former employees against former employer).

Many district and bankruptcy court decisions regarding exemption issues pertaining to retirement plans discuss the Mackey decision. At this point in time the majority appear to hold that ERISA section 514(a) preempts both specific exemptions in state laws creating and governing plans and also personal exemptions in general exemption statutes. See In re Conroy, 110 B.R. 492 (Bankr. D. Mont. 1990) (finding opt-out state's general exemption statute preempted as to ERISA plans and citing numerous cases finding both specific and general state exemption statutes preempted). See also In re Gaines, 106 B.R. 1008 (Bankr. W.D. Mo. 1989) (opt-out state's general exemption statute preempted to the extent that it relates to ERISA); In re Bryant, 106 B.R. 727 (Bankr. M.D. Fla. 1989) (opt-out state's exemption statute referring to ERISA pensions was preempted as to ERISA references); In re Sheppard, 106 B.R. 724 (Bankr. M.D. Fla. 1989) (opt-out state's exemption statute referring to ERISA pensions was preempted as to ERISA references) In re Weeks, 106 B.R. 257 (Bankr. E.D. Okla. 1989) (opt-out state's general exemption statute referring to ERISA plans only was preempted); and In re Flindall, 105 B.R. 32 (Bankr. D. Ariz. 1989) (opt-out state's general exemption statute allowing ERISA plan exemption was preempted). But see, In re Volve, 100 B.R. 840 (Bankr. W.D. Tex. 1989) (state exemption statute was not preempted as it was not "related to" ERISA within the meaning of 29 U.S.C. section 1144(a)); In re Bryan, 106 B.R. 749 (Bankr. S.D. Fla. 1989) (state exemption statute not preempted, adopting Volpe analysis); In re Martinez, 107 B.R. 378 (Bankr. S.D. Fla. 1989) (opt-out state's Exemption clause allowing exemption of ERISA plans was not Preempted as it was not in conflict with federal law); and In re Seilkop, 107 B.R. 776 (Bankr. S.D. Fla. 1989) (opt-out state's exemption statute not preempted, adopting Martinez analysis). Although this court seriously questions whether ERISA section 514(a) or the Mackey decision mandates a conclusion that a general exemption statute's reference to ERISA plans in an opt-out state results in the preemption of the state provision, [17] the resolution

[17] The very language of ERISA section 514(a) focuses on "state laws insofar as they may now or hereafter relate to any employee benefit plan". 29 U.S.C. 1144(a)(emphasis added). Most general exemption statutes are not intended to impact on any plan but only on an individual’s interest in a plan as of the petition date.

11 U.S.C. section 522(d)(10)(E) permits a debtor to exempt a right to receive a payment under a pension plan to the extent it is reasonably necessary for support. 11 U.S.C. section 522(b) sanctions state exemption systems. At a minimum, a state exemption that does not go beyond the bounds of the federal provision should

of the preemption issue raised by the trustee does not require a lengthy analysis. That is, Iowa Code section 627. 6 (8) (e) is generic on its face. It can not be construed as making any reference to ERISA or to attendant IRS provisions. Thus, it is not preempted by ERISA section 514(a).

Accordingly, the next step in this alternative analysis is to determine the extent to which Kenneth Layton's interest in the plan is reasonably necessary for his support or that of any of his dependents. The facts indicate that Kenneth Layton is relatively young and continues to be employed by the City of Omaha, -meaning that he should be able to re-establish his interest in the plan. The record does not suggest that Kenneth Layton and his debtor spouse are facing any unusual expenses or that the existing income and exempt property would not cover their basic needs. Thus, Kenneth Layton would not be entitled to exempt any portion of his interest in the plan under section 627.6(8)(e).

Next, the trustee would step into the figurative shoes of Kenneth Layton to pursue the property in issue. He would be

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be reconciled with the Congressional policy underlying ERISA section 514(a) and allowed to remain in full force and effect as is the federal exemption. To do otherwise penalizes debtors in opt-out states even when the state exemption language mirrors the federal provision. "The question of whether state law is preempted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchtone (sic].'" In re Laxson, 102 B.R. 85, 87 (Bankr. N.D. Tex. 1989) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909, 85 L.Ed.2d 206 (1985)). See generally Carver, No. 89-1510-W, slip op. at 20 n. 16 (discussing the interaction between codified federal law and statutory state law on the somewhat less than level playing field established by the United States Constitution).

required to file a complaint against the plan administrators seeking a turnover of the property pursuant to 11 U.S.C. section 542 and Bankruptcy Rule 7001(l). Assuming that Kenneth Layton did not become disabled or die or terminate his employment with the City in the near future, he would have a long wait.[18] Cf. In re Schauer, 835 F.2d 1222, 1227 (8th Cir. 1987) (recognizing that certain action taken by trustee based upon the rights a debtor has may result in considerable delay in the administration of the estate and in the closing of the case). The ultimate merits of pursuing this action are dubious at best--especially if it is remembered that a debtor may find it necessary to seek bankruptcy

[18] Ironically, if Kenneth Layton died or became disabled, his dependents in the first instance and he in the second situation would more likely than not need the funds for support. If he terminated his employment with the City, it is possible that he might then need some or all of the funds for his support. Yet, the "reasonably necessary for support" test is assessed as of the petition date. Parenthetically, it should be noted that converting the Chapter 7 case to another chapter case would not change the determinative date. See 11 U.S.C. section 348(a) (conversion does not effect change in date of filing petition). Cf. Matter of Brownlee, 93 B.R. 662, 664-65 (Bankr. S.D. Iowa 1988) (discussing treatment of exemption date issues by the Eighth Circuit Court of Appeals in the context of Chapter 13 cases being converted to Chapter 7 cases).

Moreover, requiring the trustee to wait years to complete the administration of the estate would seem to be at odds with 11 U.S.C. section 554(a), which provides that “[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate". Consideration of both the expense and inconvenience associated with the administration of the estate and also the discounted value of the funds at the time they would be turned over to the trustee probably would justify an order granting abandonment--even over the unlikely objection of a general creditor who would be willing to keep its own records open for years pending a distribution by the trustee.

relief as a result of new debt in the long interim.[19]

CONCLUSION

WHEREFORE, based on the foregoing analysis of the facts and the law, the court finds that COERS constitutes a spendthrift trust under Nebraska law and, accordingly, concludes that Kenneth Layton's interest in COERS is excluded from the bankruptcy estate by operation of 11 U.S.C. 541(c)(2).

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[19] The only statutory limitations are those found in 11 U.S.C. section 109 which defines who may be a debtor under the various chapters. 11 U.S. C. section 727 (a) (8) prohibits a Chapter 7 debtor receiving another discharge in a Chapter 7 case if less than six years has transpired between petition dates. It does not prohibit filing a Chapter 7 petition before six years have elapsed.

Although some courts have held that there is a general prohibition against a debtor maintaining two chapter cases at the same time, the underlying rationale usually is that the two cases would entail the same debtor and the same debts. See, eg., In re Wead, 38 B.R. 658, 659 (Bankr. E.D. Mo. 1984) (citing Freshman v. Atkins, 269 U.S. 121, 46 S.Ct. 41, 70 L.Ed. 193 (1925) and Prudential Ins. Co. of America v. Colony Square, 29 B.R. 432, 436 (W.D. Penn. 1983)) . But see, eg., In re Saylors, 869 F. 2d 1434 (llth Cir. 1989) (debtor was not prohibited from filing Chapter 13 petition to cure arrearages on mortgage debt that had been discharged in Chapter 7 case even though the Chapter 7 case was open pending the filing of the final report).

ORDER

THEREFORE, the trustee's objection to exemption is overruled and the turnover order is vacated.

Signed and filed this 29th day of May, 1990.

LEE M. JACKWIG
CHIEF U.S. BANKRUPTCY JUDGE