Original Filed
January 17, 2002

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 01-32118-SFM
	)	Chapter 7
RODOLFO N. MELO,	)	
	)	
Debtor.	)	
	)	
_____	)	

MEMORANDUM DECISION

ON TRUSTEE'S OBJECTION TO EXEMPTION

I. Introduction

Chapter 7 trustee E. Lynn Schoenmann ("Trustee") objects to an exemption claimed by debtor Rodolfo N. Melo ("Debtor") in an individual retirement account (the "IRA").[1] The IRA had a balance of $101,088.24 at the time Debtor filed his voluntary bankruptcy petition.

[1] References to chapter 7 are to chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and references to statements and schedules are to the documents required to be filed by Rule 1007, Federal Rule of Bankruptcy Procedure.

Trustee argues that Debtor withdrew at least $239,000.00[2] from the IRA in the seven years preceding his petition, he made no contributions to the IRA during that time, he did not pay early-withdrawal penalties and taxes to the federal and state tax authorities, he spent the money on non-retirement purposes including gambling, and in general he used the IRA like a "tax-free checking account" that should not be exempt under California Code of Civil Procedure ("CCP") Section 703.140(b)(10)(E) (the "Exemption Statute"). Trustee makes essentially the same argument why, if Debtor were to amend his exemptions and claim the IRA as exempt under the alternate exemption provisions of CCP § 704.115, such exemption should be denied.[3] Debtor counters that the IRA was properly established and maintained, he reported all of his premature withdrawals to the tax authorities, he concedes he has liability for taxes and penalties, his largest transfer out of the IRA was used for divorce-related payments ordered by a state court, most of his withdrawals were necessary to cover expenses while he was unemployed, he claims no exemption in the money he withdrew, and his use of that money should not bar him from

---

[2] Trustee's briefs allege that Debtor withdrew over $300,000.00 from the IRA since 1993 but Trustee's counsel has conceded that $43,000.00 that was transferred to Debtor's ex-wife in October, 1999 was not a "withdrawal" under the Internal Revenue Code, title 26 U.S.C. Trustee also included $25,000.00 as a withdrawal on October 18, 1994 which Debtor claims was a transfer debit and not a withdrawal. Thus, Debtor concedes the total of premature withdrawals is $239,896.00. To the extent the parties disagree on the exact amount, such disagreement is not material to the court's decision.

[3] California's exemptions apply in this bankruptcy case because California has elected to opt out of the federal exemptions provided in the Bankruptcy Code, 11 U.S.C. § 522(b). See Cal. Code Civ. P. § 703.130; Jacoway v. Wolfe (In re Jacoway), 255 B.R. 234, 237 (9th Cir. BAP 2000).

exempting the balance remaining in his IRA.

The court rules that Trustee has the burden to show that the IRA as it existed on the date of Debtor's chapter 7 petition was not primarily designed and used for retirement purposes. Although Debtor's prior use of the IRA is relevant and Trustee has shown that Debtor used the funds he withdrew for non-retirement purposes (including payments to creditors), Trustee's evidence is insufficient to overcome Debtor's arguments that the IRA was established as a qualified IRA under the tax laws and continues to so qualify, and that the balance remaining in the IRA is being used primarily for his retirement and will be needed for that purpose. In other words, Trustee's evidence is insufficient to deny Debtor his exemption in the balance left in the IRA.

II. Facts[4]

Prior to 1992, Debtor was employed by a company that maintained a profit-sharing plan. Profits from that plan were contributed to the IRA.

From 1993 forward Debtor made no contributions to the IRA and made a number of withdrawals. In about December, 1999 Debtor left his job of seven years due to what he describes as divorce-related stress. He has been unable to find a new job and currently shares a home with his sister and her children. He is 52 years old, he estimates the total value of all of his assets other than the IRA is about $4,000.00, and he claims he likely will not have

[4] The following discussion constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

substantial opportunities to build any source of funds for his retirement other than the IRA. Trustee has not contested these facts.

Debtor concedes that his withdrawals from the IRA amounted to approximately $10,000.00 in 1993, $30,000.00 in 1994 (not including $25,000.00 that Debtor claims was transferred rather than withdrawn), $62,188.00 in 1995, $26,000.00 in 1996, $51,708.00 in 1997, $34,000.00 in 1998, $11,000.00 in 1999 (not including $43,000.00 transferred to Debtor's ex-wife pursuant to a court-approved dissolution agreement), and $15,000.00 for 2000 before the IRA was frozen.[5] Debtor does not dispute that all of these withdrawals were premature under the Internal Revenue Code, title 26 U.S.C. (the "Tax Code"), and subject to taxes and penalties. He claims he reported these premature withdrawals to the tax authorities. Trustee alleges that Debtor did not report the $11,000.00 withdrawn in 1999. Trustee also notes that on August 19, 1999, Debtor made a $30,878.53 offer in compromise to the Internal Revenue Service regarding his federal tax liabilities for tax years 1994 through 1998. Trustee claims that the only evidence Debtor paid any income tax liabilities is a series of entries in his check register indicating that he paid $1,300.00 between August, 1997 and March, 1999 to the Internal Revenue Service and the United States Department of the Treasury.

Debtor deposited all of the funds withdrawn from the IRA into whatever checking account he had at the time of the withdrawal.

---

[5] Trustee disagrees slightly with some of these amounts. Trustee alleges $61,188.36 was withdrawn in 1995, $26,003.35 in 1996, $51,709.84 in 1997, $34,000.01 in 1987, and $14,950.00 for 2000 before the IRA was frozen.

He attempted to record and pay all of his bills using the checking account, not by cash or money order. Debtor's financial records show that he used his checking accounts to pay credit card bills, utilities, automobile-related expenses, groceries, tax liabilities, and his daughter's high school tuition, among other things. Trustee alleges, however, that Debtor cannot account for a "large percentage" of the funds withdrawn, including a "vast" number of "cash/ATM" withdrawals. Debtor concedes that he probably gambled with funds withdrawn from automatic teller machines ("ATMs") on April 28, 2000 in the total amount of $251.90. Trustee infers that Debtor gambled an additional $705.00 withdrawn from ATMs in Reno, Nevada on June 12 and July 24, 2000.

On August 29, 2000 (the "Petition Date"), Debtor filed his voluntary chapter 7 petition and claimed the IRA as exempt in his Schedule C. Trustee timely objected to the claim of exemption and filed her motion for summary judgment on October 5, 2001. Debtor's opposition includes a counter-motion for summary judgment simply stating that Trustee cannot sustain her burden of proof. Trustee's reply asserts that she has met her burden and therefore the counter-motion should be denied. Both motions for summary judgment came on for hearing on November 2, 2001. Marty K. Courson, Esq. appeared for Debtor and James B. Devine, Esq. appeared for Trustee.

III. Discussion

Trustee has the burden of "proving that the exemption[] [is] not properly claimed." Rule 4003(c), Fed. R. Bankr. P. Summary judgment is appropriate if the moving party shows by "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Green v. Kennedy (In re Green), 198 B.R. 564, 566 (9th Cir. BAP 1996) quoting Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993) (citations omitted). See also Rule 7056, Fed. R. Bankr. P. Evidence must be viewed in the light most favorable to the non-moving party. Green, 198 B.R. at 566. Any dispute over the facts must be genuine and material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-252 (1986).

The California exemption statutes are "construed, so far as practicable, to the benefit of the judgment debtor." Schwartzman v. Wilshinsky, 50 Cal. App. 4th 619, 630 (1996) (citation omitted). There is a "tradition of generous California exemptions and a liberal attitude in favor of debtors who claim them." In re Phillips, 206 B.R. 196, 197 (Bankr. N.D. Cal. 1997), aff'd 218 B.R. 520 (N.D. Cal. 1998). The California Court of Appeals has observed that "the very purpose of [an] exemption is to permit a judgment debtor to place funds beyond the reach of creditors, so long as they qualify for the exemption under the law. Thus, a transfer which might otherwise be fraudulent is permitted if the funds qualify for an exemption." Schwartzman, 50 Cal. App. 4th at 629 (citations omitted).

A. The IRA Must be Designed and Used Principally For Retirement Purposes

The legal standards under the Exemption Statute itself are not as clear as the general standards outline above. Trustee

argues that the statute's vague reference to a plan or contract "similar" to a pension plan (or other specified items) must be read to mean a plan or contract that is "designed and used principally for retirement purposes," following Dudley v. Anderson (In re Dudley), 249 F.3d 1170, 1176 (9th Cir. 2001). Debtor points out that Dudley was construing another statute, CCP § 704.115,[6] and that the Exemption Statute does not use the same phrase:

> § 703.140. Federal bankruptcy; applicable exemptions

---

[6] CCP § 704.115 provides, in relevant part:

> § 704.115. Private retirement plans; exemption; periodic payments
>
> (a) As used in this section, "private retirement plan" means:
>
> (1) Private retirement plans, including, but not limited to, union retirement plans.
>
> (2) Profit-sharing plans designed and used for retirement purposes.
>
> (3) Self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1986, as amended [title 26, U.S.C.], including individual retirement accounts qualified under Section 408 or 408A of that code, to the extent the amounts held in the plans, annuities, or accounts do not exceed the maximum amounts exempt from federal income taxation under that code.
>
> (b) All amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt.
>
> . . .
>
> (e) Notwithstanding subdivisions (b) and (d), except as provided in subdivision (f), the amounts described in paragraph (3) of subdivision (a) are exempt only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor, taking into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires. . . .

CCP § 704.115

> (a) In a case under Title 11 of the United States Code . . . the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter . . . .
>
> (b) The following exemptions may be elected as provided in subdivision (a):
>
> (10) The debtor's right to receive any of the following:
>
> (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,[7] unless all of the following apply:
>
> (i) That 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 the plan or contract arose.
>
> (ii) The payment is on account of age or length of service.
>
> (iii) That plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code of 1986.

Cal. Code Civ. P. § 703.140 (emphasis added).

Debtor argues that so long as the balance in the IRA remains in an account classified and managed as an IRA under the Tax Code it is exempt under the Exemption Statute which must be construed, Debtor argues, "so far as practicable, to the benefit of the judgment debtor." Schwartzman, 50 Cal. App. 4th at 630. Debtor argues that this exemption would be lost only, for example, if he had attempted to put more money into the IRA on an annual basis than permitted under the Tax Code, or if he had attempted a

---

[7] Trustee has not questioned whether the remaining balance of the IRA is reasonably necessary for the support of the debtor and any dependent of the debtor.

"rollover" from an ineligible source.

Trustee replies that although the Exemption Statute does not use the phrase, "designed and used principally for retirement purposes," neither did the portion of CCP § 704.115 construed by Dudley. Moreover, Trustee points out that at least one case has applied that phrase in the context of the Exemption Statute, citing In re McKown, 203 B.R. 722, 725 (Bankr. E.D. CA 1996) ("McKown I"), aff'd Farrar v. McKown (In re McKown), 203 F.3d 1188 (9th Cir. 2000) ("McKown II").

The court essentially adopts the test articulated by Trustee, though for somewhat different reasons.

In Dudley the Ninth Circuit stated:

> [Debtors] contend the bankruptcy court erred by concluding that an IRA must be designed and used for retirement purposes in order to qualify for the exemption under § 704.115(a)(3). They point out that the statute does not, on its face, require that an IRA be "designed and used for retirement purposes," and that [such phrase] is used only in connection with "profit sharing plans." See [CCP] § 704.115(a)(2). According to [Debtors], if the California Legislature had intended to exempt an IRA only if it was designed and used for retirement purposes, it could have done so explicitly as it did with profit-sharing plans. . . .
>
> We addressed a somewhat similar contention in Bloom v. Robinson (In re Bloom), 839 F.2d 1376, 1378 (9th Cir. 1988) – whether a private retirement plan must be "designed and use[d] for retirement purposes" to qualify for an exemption under § 704.115(a)(1). We [stated in Bloom]:
>
> > . . . It is true that § 704.115 does not explicitly require private retirement plans to be "designed and used for retirement purposes" in order to be exempt. But we believe the absent phrase is implicit in the term "retirement plans," while it is not in that of "profit-sharing plans." Our reason is simple. Many profit-sharing plans are not used and designed for retirement purposes. The same cannot be said of retirement plans. Without regard to its label, a plan not used and

> designed for retirement purposes is not a retirement plan. Therefore, we apply the "designed and used for retirement purposes" standard to [the Bloom debtor's] retirement plan as well as her profit-sharing plan.
>
> Id.

Dudley, 249 F.3d at 1175-1176.

This reasoning from Bloom and Dudley does not directly apply because unlike CCP § 704.115 the Exemption Statute nowhere uses the phrase "designed and used for retirement purposes." Instead, the Exemption Statute refers to 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 . . . ." CCP § 703.140(b)(10)(E). Nevertheless, the court will apply the "designed and used for retirement purposes" test for several reasons.

First, this test comports with the Ninth Circuit's general comment that "[w]ithout regard to its label, a plan not used and designed for retirement purposes is not a retirement plan." Dudley, 249 F.3d at 1175-1176, quoting Bloom, 839 F.2d at 1378. Second, it would be anomalous to have different tests for IRAs depending on which exemption statute a debtor chose. See CCP §§ 703.114(b)(10)(E) and 704.115.[8] Third, some courts appear to

---

[8] The Exemption Statute generally tracks the language of 11 U.S.C. § 522(d)(10)(E) and the court has considered whether its interpretation of the Exemption Statute would be inconsistent with other courts' interpretations of the federal statute. The court is not aware of any cases, however, that have addressed the issue of whether premature withdrawals from an IRA undermine an exemption the debtor otherwise would have under the federal statute. See Generally Andrew M. Campbell, Annotation, Individual Retirement Accounts as Exempt Property in Bankruptcy, 133 A.L.R. Fed. 1 (1996). Cf. In re Ritter, 190 B.R. 323, 325-326 (Bankr.

have applied the "used and designed for retirement purposes" test under the Exemption Statute, though without analyzing why it applies. See McKown I, 203 B.R. at 725 (applying test under Exemption Statute); McDonald v. Metz (In re Metz), 225 B.R. 173, 179 (9th Cir. BAP 1998) (interpreting Exemption Statute but quoting "designed and used for retirement purposes" test from Schwartzman); cf. Schwartzman, 50 Cal. App. 4th at 628 (decided under CCP § 704.115, not Exemption Statute). Fourth, the Ninth Circuit's reasoning in McKown II supports Trustee's argument that some limits must apply to IRA exemptions and that those limits depend on how the IRA is designed and used.

The Ninth Circuit in McKown II did not use the bankruptcy court's reasoning based on CCP § 704.115 but instead tracked the precise language of the Exemption Statute to hold that an IRA "is similar enough [to the statutory examples] to be treated as a 'similar plan or contract.'" McKown II, 203 F.3d at 1190. Nevertheless, the Ninth Circuit noted that limits on how IRAs are designed and used are the reasons it is plausible to hold that IRAs are "similar" to the statutory examples listed in CCP § 703.140(b)(10)(E), notwithstanding other plausible arguments to the contrary:

> The trustee argues that an IRA is not "similar." He makes various plausible arguments: an IRA is established by the employee, while pension and profit sharing plans are established by employers; an IRA is controlled by the debtor; the debtor can draw his money out of an IRA whenever he likes, but ordinarily

---

N.D. Ill. 1995) (under Illinois statute requiring that retirement plan be "intended in good faith to qualify as a retirement plan" under Tax Code, debtor's use of some proceeds for her support and other expenses did not establish that accounts "were not intended to be established and maintained" pursuant to statute).

> cannot get money out of his pension or profit sharing plan until the employer, pursuant to the plan's terms, pays it to him; an IRA established by the employee himself is not subject to ERISA. The debtor also makes various plausible arguments: an IRA, like an employer pension or profit sharing plan, is a device used to provide for retirement; the money cannot be drawn out of an IRA prematurely without paying a substantial penalty (10%); Congress has given similar tax benefits for IRAs and pension and profit sharing plans because of the public benefit of encouraging people to provide for their own retirement income; other circuits have interpreted the same language to exempt IRAs.

McKown II, 203 F.3d 1188, 1189 (emphasis added).

The emphasized language above shows that the plausible arguments for exempting an IRA depend on the IRA being designed and used for retirement purposes. Only in that context did the Ninth Circuit rule that an IRA can qualify under the Exemption Statute. McKown II, 203 F.3d at 1189-1190 (emphasizing need for consistency between circuits). See also Rawlinson v. Kendall (In re Rawlinson), 209 B.R. 501, 503 (9th Cir. BAP 1997) (IRAs are designed to provide retirement benefits to individuals, and right to receive payment cannot be totally unfettered).

For all of these reasons, the court believes that an IRA must be "designed and used for retirement purposes" in order to be sufficiently "similar," under the Exemption Statute, to other plans and contracts "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." CCP § 703.114(b)(10)(E). Moreover, the court believes that this test must be applied in the same fashion as under CCP § 704.115. Therefore, the court will track Dudley's interpretation of CCP § 704.115(a)(3) and recognize that an IRA is exempt if:

> the IRA was designed and used principally for retirement purposes, as opposed to only for retirement purposes. . . .
>
> We believe the Bankruptcy Appellate Panel stated the appropriate inquiry in In re Jacoway:
>
> > There is no indication in this case that the bankruptcy court took into consideration that the plan could have two purposes, one to supplement current income and the other to provide for retirement. Particularly in light of the liberal construction given to exemption statutes, see Spencer v. Lowery, 235 Cal. App. 3d 1636, 1639, 1 Cal. Rptr. 2d 795 (1991), where [an IRA] is designed and used for dual purposes, the court should consider whether the principal purpose is to provide for retirement or to provide for current needs.
>
> [Jacoway v. Wolfe] In re Jacoway, 255 B.R. [240,] 239 [9th Cir. BAP 2000].
>
> In determining whether an IRA has been designed and used principally for retirement purposes, "[a]ll factors are relevant; but no one is dispositive." In re Bloom, 839 F.2d at 1379. A non-exhaustive list of relevant factors would include **[1] the purpose of the withdrawals** from the IRA, cf. [Daniel v. Security Pacific Nat'l Bank] In re Daniel, 771 F.2d [1352,] 1357 [9th Cir. 1985] [cert. denied, 475 U.S. 1016 (1986), abrogated on other grounds by Patterson v. Shumate, 504 U.S. 753, 757 n.1 and 761 n.4 (1992)], **[2] whether the applicable procedures for IRA withdrawals were followed**, see In re Bloom, 839 F.2d at 1379, **[3] the frequency of the withdrawals**, and **[4] whether the IRA was used to shield or hide funds from creditors or the bankruptcy court**, see In re Bloom, 839 F.2d at 1379; In re Daniel, 771 F.2d at 1358, and **[5] "whether any withdrawals diminished or will diminish the assets in the [IRA] to such an extent that they are inconsistent with the majority of the assets being used for long-term retirement purposes."** In re Jacoway, 255 B.R. at 239-40 (citing In re Daniel, 771 F.2d at 1358).

Dudley, 249 F.3d at 1176 (emphasis and numbering added).

The court applies these five Dudley factors below.

B. Application of The Dudley Factors

Many of the Dudley factors cut both ways. On balance, however, they favor Debtor's exemption.

First, although Trustee has shown that the "purpose of the withdrawals from the IRA" apparently included gambling, neither her moving papers nor her reply to Debtor's cross-motion for summary judgment suggest that she could prove the amounts used for gambling would be substantial in relation to the total amount withdrawn. The evidence suggests less than $1,000.00 was used for gambling.

In addition, Trustee admits that Debtor withdrew funds to pay for his daughter's high school tuition, groceries, tax liabilities, utilities, automobile-related expenses, and credit card bills the bona fides of which she has not questioned. Trustee claims that Debtor cannot account for an unspecified "large percentage" of the funds withdrawn, but the overall level of withdrawals is not much more than what a normal person with a child in school might require on an annual basis.

In other words, although the purposes of Debtor's withdrawals are not retirement-related they appear for the most part to comprise payments to bona fide creditors for necessary and typical expenses. Compare Daniel, 771 F.2d 1352 (withdrawal in form of $75,000.00 loan to buy house); Yaesu Electronics Corp. v. Tamura, 28 Cal. App. 4th 8, 12-13 (1994) (court found "by a preponderance of the evidence that the dominant purpose for the establishment of the defined benefit pension plan was not to provide for [judgment debtor's] retirement, but rather to defer taxes, to consequently enhance the accumulation of savings, and to accumulate funds for a

gift to [judgment debtor's] sons").[9]

Second, Debtor generally has followed the "applicable procedures for IRA withdrawals." Trustee admits that Debtor reported his premature withdrawals (except for the $11,000.00 withdrawn in 1999); she admits that Debtor has negotiated with the tax authorities for payment of those taxes and penalties; and she makes no allegation that Debtor failed to follow all of the applicable procedures with withdrawals under the Tax Code and the terms of the IRA account. See Bloom, 839 F.2d at 1379. Trustee argues that it is not enough for Debtor to acknowledge liability without actually having paid the taxes and penalties. It is entirely legitimate, however, for a debtor to prefer one creditor to another including paying non-tax creditors before paying taxes. Cal. Civ. Code § 3432 ("A debtor may pay one creditor in preference to another . . ."). Moreover, tax authorities have

---

[9] This court has previously commented that the expenditure of funds nominally held for retirement for "legal defense and other expenses of the Debtors is inconsistent with the utilization of [their alleged private retirement plan] for retirement purposes." Phillips, 206 B.R. at 203, aff'd 218 B.R. 520. In that case, however, within a month after the debtors learned that a substantial judgment soon would be rendered against them they transferred the entire value of their residence above their homestead exemption and investments valued at $74,308 into what they alleged was a pre-existing "informal" private retirement plan. Phillips, 206 B.R. at 198-199. Moreover, the debtors in Phillips had no history of charitable contributions or pattern of setting aside money for heirs, and one of them admitted that the purpose of putting funds into the retirement plan was to protect them from creditors. Id. at 200-201. In these circumstances the court rejected "the notion that a California resident, facing a substantial monetary judgment, can instantly create a retirement plan exemption by declaring such a plan to exist." Id. at 204. No such facts are presented here.

remedies if Debtors do anything improper.[10] In other words, on balance Debtor has followed the "applicable procedures for IRA withdrawals." See generally Rawlinson, 209 B.R. at 507 (noting possibility that IRA participant could withdraw up to entire amount, but holding that this and other aspects of IRAs do not destroy their exemptibility).

Third, although Debtor's "frequency" of withdrawals was great Trustee estimates that during the twenty-seven month period before the IRA was frozen Debtor withdrew just under $1,000.00 per month, excluding the $43,000.00 transfer to his ex-wife. That level and frequency of withdrawal is consistent with an attempt to preserve the balance of the IRA for retirement purposes and only drawing on it when necessary because of Debtor's unemployment. Moreover, frequent withdrawals would be much more troublesome if Debtor were contributing to the IRA near the time he was withdrawing funds or taking loans from his IRA, because those circumstances might show that the account was being operated primarily to meet his short-term needs rather than his long-term retirement goals. See Bloom, 839 F.2d at 1379 (frequent withdrawals but IRA held exempt) and compare Daniel, 771 F.2d 1352 (account being operated to meet short-term needs rather than long-term retirement goals).

Fourth, the IRA was not used to shield or hide funds from creditors or the bankruptcy court. To the contrary, the IRA was funded more than seven years before the Petition Date and presumably was fully exempt. Therefore, as Debtor points out, his

---

[10] In addition, of course, non-payment of taxes will likely leave Debtor saddled with those unpaid taxes as non-dischargeable debts, which survive his bankruptcy. See 11 U.S.C. §§ 507(a)(8), 523(a)(1) and (7).

payments to creditors out of the IRA gave them funds they otherwise would not have received. This circumstance makes Debtor's exemption arguably more defensible than that in Bloom. In that case the Ninth Circuit held that although the debtor's loans to herself meant that the retirement funds were "poorly, even imprudently, invested" nevertheless the pension and profit-sharing plan was exempt "without considering how the amount borrowed was spent." Bloom, 839 F.2d at 1379 and n.3 (emphasis added). Cf. Daniel, 771 F.2d 1352 ($39,000.00 transferred on eve of bankruptcy to shield or hide funds from creditors). See also In re Witwer, 148 B.R. 930, 941 (Bankr. C.D. Cal. 1992) (fact that debtor had not made any contributions to his plan within last six years was favorable to exemption because "unlike the debtor in Daniel, it cannot be said that this Debtor attempted to hide otherwise ineligible assets from bankruptcy administration . . . .").

Fifth, the last factor listed in Dudley is whether Debtor has used a "majority" of the IRA's assets for "long-term retirement purposes." Measuring from when the IRA's balance was at its highest point Debtor withdrew approximately 70% of the IRA prematurely (75% according to Trustee). This is a substantial amount, and from this perspective the last of Dudley's five factors tips in favor of Trustee. Nevertheless, looking back more than seven years before the Petition Date to find the highest balance may not be very relevant to the exemption Debtor is claiming now, and for the reasons below the court rules that this one factor does not cause Debtor to lose his exemption in the IRA.

Most importantly, no one factor is dispositive and each must

be considered "in the light of the fundamental inquiry - whether the [IRA] was designed and used for a retirement purpose." Bloom, 839 F.2d at 1379-1380. See also Dudley, 249 F.3d at 1176. In fact, the Ninth Circuit in Bloom has held that where a debtor loaned herself nearly $300,000.00 out of her $475,000.00 interest in a retirement and profit sharing plan, without security, and paying interest only, that was not such an abuse of the plan that it was no longer "designed and used for retirement purposes." The Bloom court emphasized that there was no indication the debtor therein used the plan to hide otherwise ineligible assets from bankruptcy administration, as did the debtor in Daniel. Bloom, 839 F.2d at 1379.

The court has already noted that there is no evidence in this case that Debtor was attempting to hide assets, and given Bloom's emphasis on this factor it is instructive to examine the facts in Daniel. The debtor in Daniel, approximately two weeks before filing his chapter 7 petition, caused his corporation to contribute $39,000.00 to the plan, which was "all the corporation's available cash," "nearly twice the largest contribution for any previous year," and could not have been based on any profit calculation despite the profit-sharing purpose of plan because it was made "in the middle of the fiscal year." Daniel, 771 F.2d at 1354. The Ninth Circuit concluded, "[w]hile it is well recognized that a debtor may convert non-exempt property to exempt property on the eve of bankruptcy, the shielding and hiding of assets from creditors is clearly not a 'use for retirement purposes.'" Id. at 1358 (citation omitted). Trustee does not suggest any conduct by Debtor remotely like the

shielding and hiding of assets in Daniel. Debtor did the opposite: he converted apparently exempt property to non-exempt property over a seven year period before the Petition Date.

Another distinction between Debtor's situation and Daniel is that the debtor therein took a loan against his retirement funds whereas Debtor took withdrawals. Daniel, 771 F.2d 1352. The same is true in Bloom, but in the present circumstances this distinction cuts in favor of Debtor's exemption not against it. Bloom, 839 F.2d 1376. The Bankruptcy Appellate Panel for the Ninth Circuit has already rejected the argument that withdrawals disqualify an exemption automatically. Jacoway, 255 B.R. 234. Moreover, unlike the debtor in Daniel, Debtor in this case was not attempting to have it both ways by structuring withdrawals as a loan in order to use "pre-tax dollars" for non-retirement purposes while nominally keeping those dollars in his IRA. Compare Daniel, 771 F.2d at 1356 (buying residence with pre-tax dollars). Again, the facts in Daniel are instructive. The debtor in Daniel caused his wholly-owned corporation's plan, of which he was the trustee, to loan him $75,000.00, or almost all of his interest in the plan, on an interest-only basis, at a favorable rate, and to roll-over the principal at maturity despite the fact he never paid any interest or principal. Daniel, 771 F.2d at 1353-1358. The Ninth Circuit observed:

> If debtor's real concern had been retirement, rather than buying a residence with pre-tax dollars, he would surely have invested the funds in assets which would yield a competitive money market return, would provide adequate security, and would preserve and enhance the capital of the plan.

Daniel, 771 F.2d at 1356.

Debtor, in contrast, has acknowledged that his premature withdrawals are subject to taxes and penalties. He is not attempting to have it both ways.

In addition, as Debtor points out, he is not attempting to exempt funds he has already withdrawn from his IRA. Debtor claims an exemption only in the balance remaining in the IRA as of the Petition Date, when exemptions are determined, not as of some prior date when the IRA had a higher balance. See generally Cisneros v. Kim (In re Kim), 257 B.R. 680 (9th Cir. BAP 2000) (exemptions determined as of petition date; holding that post-petition use of funds was irrelevant). This is another distinction from Daniel, where the borrowed funds were still nominally in the account as of the petition date.

Debtor so far has used the balance of his account for retirement purposes by saving and investing that money instead of spending it all pre-petition. From the perspective of creditors on the Petition Date the situation is not much different than if Debtor had never had more funds in the IRA that he has today, except that at least some creditors were paid money they otherwise presumably would not have received. It would be a perverse incentive to penalize Debtor for making payments which gave creditors additional funds by depriving him of the balance he has been able to save for his retirement. See Rawlinson, 209 B.R. at 503 and 505 (emphasizing policy of "providing the honest debtor with a fresh start" and declining to create a "trap for the unwary" debtor).

Debtor's withdrawals would be more troubling if Trustee had challenged Debtor's assertions that he cannot find employment and

that he will need the funds in the IRA for his retirement. As Debtor points out, he is 52 years old, he estimates the total value of all of his assets other than the IRA is about $4,000.00, and he claims he likely will not have substantial opportunities to build any source of funds for his retirement other than the IRA. Trustee has not suggested that there is any triable issue of material fact on any of these issues. As Jacoway points out, an IRA can "have two purposes, one to supplement current income and the other to provide for retirement." Jacoway, 255 B.R. 239. On the record presented by the parties, the court has no doubt that the IRA has both of these purposes but that the principal purpose is retirement.[11]

IV. Conclusion

Trustee has the burden to show that the IRA was not primarily designed and used for retirement purposes. The facts on which there is no genuine dispute establish that many of Debtor's withdrawals were for necessary and typical expenses, Debtor generally reported his withdrawals and has negotiated with the tax authorities for payment of his taxes and penalties, the overall level of withdrawals is not much more than what a normal person in Debtor's circumstances might require, Debtor did not attempt to hide his assets or shield assets that normally would be available to creditors, Debtor did not attempt to use pre-tax dollars for

[11] For the reasons stated, the court also rejects Trustee's argument that Debtor cannot exempt the IRA under CCP § 704.115. The court has applied the same test under that statute and the Exemption Statute, and Trustee has presented no argument why the outcome would be any different under CCP § 704.115.

non-retirement purposes, and Debtor should not be penalized for using funds that apparently would have been unavailable to creditors, especially where some of those funds were used to pay creditors. In short, although Debtor may have had the secondary purpose of using his retirement savings to supplement his income while he has been unemployed, that does not destroy the IRA's principal purpose to provide for retirement.

Trustee has not presented a triable issue of material fact on any issue sufficient to meet her burden to show that the IRA has not been principally designed and used for retirement purposes. Trustee's motion for summary judgment will be denied and Debtor's counter-motion will be granted.

Counsel for Debtor should submit a form of order consistent with this Memorandum Decision, and should comply with B.L.R. 9022-1.

Dated: January 17, 2002

S/_____
DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE