No. 18-3415

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIAN A. LERBAKKEN,
Appellant,

– v. –

SIELOFF and ASSOCIATES, P.A.,
Appellee.

On Appeal from the Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals, No. 18-6018

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT SEEKING REVERSAL OF THE BANKRUPTCY COURT'S DECISION

TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

January 31, 2019

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Lerbakken v. Sieloff and Associates, P.A., No. 18-3415

Pursuant to FRAP 26.1 and Eighth Circuit Local Rule 26.1A, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

This 31st day of January, 2019.

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative History

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is also a nonprofit organization whose members are attorneys across the country. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

Amici have a vital interest in the outcome of this case. Giving debtors an opportunity to achieve a fresh start, and making it possible for them to enter retirement free of crippling debt are critical aspects of bankruptcy. For that reason, Congress has taken pains to protect debtors' retirement funds by preventing certain

ERISA accounts from entering a bankruptcy estate altogether, and by permitting debtors to exempt retirement accounts that are otherwise property of the estate. It is not uncommon for married couples to prepare for retirement together through contributions to one spouse's retirement account. In the event of a divorce judgment in which interests in retirement accounts are transferred to the non-contributing partner, it is essential that those funds continue to be treated as retirement monies. The bankruptcy court's decision, as affirmed by the Bankruptcy Appellate Panel, runs counter to the protections Congress has afforded retirement funds, and stands to threaten Mr. Lerbakken's, and other comparably situated debtors', fresh start.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC, NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

One of the foundational purposes of bankruptcy, in addition to paying creditors to the extent possible, is to provide the honest but unfortunate debtor with a fresh start. In furtherance of that goal, Congress has determined that not all of a debtor's property enters the bankruptcy estate upon filing the petition, or that, if certain property does enter the estate, it may be removed by exemption. Congress has taken special care to ensure that debtors be able to support themselves in later years by protecting retirement funds from the reach of creditors.

In this case, Mr. Lerbakken obtained an interest in two retirement accounts through a divorce judgment. To the extent the debtor's interests in these accounts are included in his bankruptcy estate, they are exempt. The bankruptcy court erred in relying on the Supreme Court's decision in *Clark v. Rameker*, 573 U.S. 122 (2014), which addressed the question of whether funds in an inherited IRA were "retirement funds" of the decedent's daughter. In *Clark*, the Court held that the inherited IRA funds were not "retirement funds" of the debtor based on three legal characteristics. However, these characteristics do not apply to retirement accounts transferred incident to a spouse or former spouse as a result of divorce. Therefore *Clark* is not controlling.

Further, the preferential treatment Congress provided to spouses obtaining interests in retirement accounts through death or divorce demonstrate Congress' acknowledgment that retirement planning is often a joint household decision-making process. However, retirement savings in tax advantaged accounts may only be in the name of one spouse, even though the savings were intended to support the couple jointly in retirement. As a result, the term "retirement funds" as used in section 522(b)(3)(C) of the Bankruptcy Code must include the debtors' interest in retirement accounts obtained through a divorce judgment. The bankruptcy court erred in concluding that the debtor's interest in the two retirement accounts were not "retirement funds" subject to exemption.

The bankruptcy court further erred by failing to analyze whether the debtor's interests in the retirement accounts were property of the estate before it entered into its analysis of whether the interests could be exempted. Here, debtor obtained an interest in his former wife's employer-sponsored 401(k) plan. Such plans are typically ERISA-qualified plans subject to anti-alienation provisions and are excluded from the debtor's bankruptcy estate. *See* 11 U.S.C. § 541(c)(2); *Patterson v. Shumate,* 504 U.S. 753 (1992).

ARGUMENT

I. The Bankruptcy Estate

Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). To achieve these dual goals, the Bankruptcy Code first creates a bankruptcy estate upon commencement of a case. 11 U.S.C. § 541(a). 5-541 COLLIER ON BANKRUPTCY 541.01 (H. Sommer & R. Levin, eds., 16th ed.). Section 541(a) defines the bankruptcy estate and contains an expansive definition of property that includes all legal or equitable interests in property whether tangible or intangible, real or personal.

Some property, such as that described in section 541(b), is specifically excluded from becoming property of the estate. *See, e.g.*, 11 U.S.C. § 541(b)(5) (excluding certain funds placed in an education savings account). While the term "equitable interests" generally includes a debtor's interest as a beneficiary in property held in trust, section 541(c)(2) carves out an exception to the general rule for property held in a trust that cannot be transferred to any other person. 11 U.S.C. § 541(c)(2). The Supreme Court has held that debtors' interests in pension plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) are not property of the bankruptcy estate, because benefits provided under such plans may not be assigned or alienated. *Patterson v. Shumate,* 504 U.S. 753 (1992).

Section 541 defines what interests of the debtor are included in the bankruptcy estate; however, it does not address the threshold question of the existence and scope of the debtor's interest in a given asset. Rather, bankruptcy courts are required to look to state law to determine the nature of the debtor's property interests. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *In re Thompson-Rossbach*, 541 B.R. 451 (B.A.P. 8th Cir. 2016) (state law determines nature and extent of debtor's interest in property and federal bankruptcy law determines the extent to which such property becomes property of the bankruptcy estate) (citations omitted).

II. Exemptions

Property initially considered part of the bankruptcy estate may be removed from the estate through the exemption process. *See Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 642 (1992) (Bankruptcy Code "allows the debtor to prevent the distribution of certain property by claiming it as exempt"); *see also Carpenter v. Ries*, 614 F.3d 930, 931-32 (8th Cir. 2010) (debtor may exempt property from the estate). Exemptions serve the overriding purpose of helping the debtor to obtain a fresh start by maintaining essential property. *See* H.R. REP. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (purpose of this scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start."); *Rousey v. Jacoway*, 544 U.S. 320, 322, 325 (2005). This Court consistently has held that exemptions are to be liberally construed in favor of the debtor. *See, e.g.*, *Wallerstedt v. Sosne*, 930 F.2d 630, 631 (8th Cir. 1991) (general rule is that courts should construe exemption statutes liberally in favor of the debtor); *Norwest Bank Nebraska, N.A., v. Tveten*, 848 F.2d 871, 875 (8th Cir. 1988) ("the policy of the [exemption] statutes is to favor the debtors, at the expense of creditors…such statutes are construed liberally in favor of the exemption.") (citation omitted); *Murray v. Zuke*, 408 F.2d 483, 487 (8th Cir. 1969) ("exemption laws were manifestly enacted for the relief of a debtor ... and should be liberally construed"); *see also In re Longstreet*, 246 B.R. 611, 616 (Bankr. S.D. Iowa 2000) ("[I]f an exemption statute can be construed in a manner that is both favorable and unfavorable to a debtor, the favorable construction should be chosen.").

The Bankruptcy Code provides for two exemption options, nominally, the federal bankruptcy exemption scheme and the state law exemption scheme. 11 U.S.C. § 522(b)(1)-(3). Under the "state law exemption scheme," debtors may also exempt certain retirement funds, property held as tenants by the entireties, and property exempt under non-bankruptcy federal law. 11 U.S.C. §§ 522(b)(1), 522(b)(3)(A), (B), (C). Some states, as authorized by the Code, have "opted-out" out of the federal bankruptcy exemption scheme. *See* 11 U.S.C.

§ 522(b)(1); *Owen* v. *Owen*, 500 U.S. 305, 308 (1991). Minnesota has not "opted-out", and therefore Minnesota debtors may choose either option. Here the Mr. Lerbakken chose the state law (Minnesota) exemption scheme. As permitted by the Code under the state law exemption scheme, the debtor sought to exempt his interest in certain retirement accounts under section 522(b)(3)(C). Addendum A, A-8.

III. What Is Property of Lerbakken's Bankruptcy Estate?

The critical first question that must be addressed is what property is property of Lerbakken's estate under the Bankruptcy Code framework described above. Only after this question is answered should the analysis proceed to evaluating the claimed exemptions.

At issue in this case are funds held in two retirement accounts: (1) $2,645 held in a traditional individual retirement account (IRA) titled in the debtor's ex-wife's name, and (2) $19,281 in debtor's ex-wife's employer-sponsored 401(k) plan. Addendum A, A-4. These funds have not been distributed to the debtor and remain in the respective accounts. *See Lerbakken v. Sieloff and Assoc., P.A.*, 590 B.R 895, 896 (B.A.P. 8th Cir. 2018).

By order of a Minnesota District Court, these funds were awarded to Mr. Lerbakken as part of a divorce judgment entered on August 8, 2017. Addendum A, A-4, A-6. The domestic relations order (DRO) issued by the Minnesota court gave Mr. Lerbakken a vested ownership interest in the accounts. *See Langston v. Wilson McShane Corp.*, 776 N.W.2d 684, 692 (2009) (rights to retirement funds arise under state domestic relations law); *see also Nelson v. Ramette*, 322 F.3d 541 (8th Cir. 2003) (addressing debtor's rights in retirement plan where bankruptcy was filed prior to qualification of DRO), citing *Gendreau v. Gendreau*, 122 F.3d 815 (9th Cir. 1997) (wife's interest in pension plans was established under state law at the time of the divorce decree); *In re Lawson*, 570 B.R. 563, 572 (Bankr. N.D. Ohio 2017) (domestic relations order vested debtor with rights in ERISA plan).

The state court order also directed Mr. Lerbakken to prepare a "qualified domestic relations order" (QDRO) with respect to the "IRA and 401(k)." Addendum A, A-4. A QDRO is the mechanism created by Congress with respect to ERISA-qualified plans to enforce the rights of alternative payees. *See Nelson*, 322 F.3d at 795, *citing Boggs v. Boggs*, 520 U.S. 833 (1997). The QDRO permits assignment of an interest in an ERISA plan to the alternate payee notwithstanding the anti-alienation provisions required in ERISA plans. QDROs are not necessary to transfer an interest in non-ERISA plans, such as traditional or Roth IRAs. *See* 26 U.S.C. §§ 71(b)(2), 408(d)(6) (transfer of an IRA incident to divorce requires only a divorce or separation instrument). Based on the record before the bankruptcy appellate panel, no QDRO had been submitted with respect to the accounts. *See Lerbakken*, 590 B.R. at 896.

On January 23, 2018, several months after the divorce judgment issued, Mr. Lerbakken filed a chapter 7 bankruptcy petition. *Id*. Under section 541(a) all Mr. Lerbakken's legal or equitable interests in property whether tangible or intangible, real or personal became property of the bankruptcy estate, subject to the exceptions in the Code. One such exception excludes property from the estate that is in a trust and that cannot be transferred to any other person. 11 U.S.C. § 541(c)(2). Section 541(c)(2) excludes from the bankruptcy estate debtors' interests in employer-sponsored retirement plans that are governed by ERISA. *Patterson v. Shumate,* 504 U.S. 753 (1992).

Under this framework, the debtor's interest in the 401(k) account is not property of the estate, and the debtor's interest in the IRA is property of the estate, subject to exemption. However, even if the debtor's interest in the 401(k) account were considered property of the estate, it too would be exempt.

A. The Wells Fargo 401(k) Account Was Not Property of the Estate[1]

Congress enacted ERISA in 1974 to protect interests in qualified employee pension plans. ERISA requires that "[e]ach pension plan shall provide the benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1); 26 C.F.R. § 1.401(a)-13(b)(1). Because of this anti-alienation language, as a general rule, assets held in "ERISA-qualified" plans are excluded from debtors' bankruptcy estates. *Patterson v. Shumate,* 504 U.S. 753 (1992). The protection afforded to ERISA plans covered by *Patterson* is broad. First, assets in ERISA plans are excluded in an unlimited amount. There is no requirement that the amounts be "reasonably necessary for the support of the debtor,"[2] no cap on the

---

[1] At the hearing on the objection to exemptions, debtor argued that the 401(k) interest was excluded from the estate on this very basis. Addendum B, B-4. The creditor responded by conflating the issue of property of the estate versus exemptions when it suggested that the *Patterson* decision turned on whether it was the debtor's own funds in the ERISA plan. Addendum B, B-6. This Court has already rejected the proposition that ERISA plan funds must have been contributed by the debtor in order to be excluded from the estate. *See Nelson*, 322 F.3d at 544 (interest obtained through divorce not property of the estate). The bankruptcy court did not rule on the fundamental question of whether the debtor's interest in the 401(k) plan was even property of the estate, but rather skipped that analysis and determined that funds in the 401(k) account were not exempt based on *Clark v. Rameker*, 573, U.S. 122 (2014).

[2] *Compare* 11 U.S.C. § 541(c)(2) *with* 11 U.S.C. § 522(d)(10)(E) (exempting payments under certain plans 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).

amount protected by the exclusion,[3] no requirement that payment from the trust be associated with any particular event, such as retirement, age or disability, no requirement that there be a penalty for early withdrawal,[4] and no requirement that plan funds be "retirement funds".[5] ERISA interests belonging to non-participants are also covered under section 541(c)(2) because the exclusion is based on the fact that all plan assets are subject to the anti-alienation language. *See Nelson v. Ramette*, 322 F.3d 541 (8th Cir. 2003); *Ostrader v. Lalchandani*, 279 B.R. 880 (B.A.P. 1st Cir. 2002) (undistributed interest in ERISA plan not property of the estate where bankruptcy filed after divorce decree but before QDRO entered); *In re Lawson*, 570 B.R. at 575.

Here, Mr. Lerbakken has a vested interest in the 401(k) account funds based on the domestic relations order (DRO) entered by the state court. The funds remain in the Wells Fargo 401(k) plan[6] and have not been distributed to the debtor.

---

[3] *Compare* 11 U.S.C. § 541(c)(2) *with* 11 U.S.C. § 522(n) (exempting assets in individual retirement accounts under IRC § 408 and 408(A), other than simplified employee pensions under IRC § 408(k) and simple retirement accounts under IRC § 408(p), up to a statutory cap of approximately $1.25 million (subject to periodic adjustment).

[4] *See, e.g., In re McBride*, 347 B.R. 585, 591-93 (Bankr. S.D. Tex. 2006) (collecting cases from multiple jurisdictions and holding that all property in ERISA plan, including after-tax contributions that could be withdrawn without penalty, were excluded from estate).

[5] *Compare* 11 U.S.C. § 541(c)(2) *with* 11 U.S.C. §§ 522(b)(3)(C) *and* 522(d)(12).

[6] There does not appear to be any serious dispute that the Wells Fargo 401(k) plan is ERISA-qualified. However, because the bankruptcy court skipped this critical analysis, and to the extent the issue is disputed, remand would be appropriate.

See Lerbakken, 590 B.R. at 896. Even though Mr. Lerbakken does not have a "qualified domestic relations order" (QDRO), he nevertheless is an "alternate payee" of the 401(k) plan under ERISA. 29 U.S.C. § 1056(d)(3)(K) (defining "alternate payee" to include any former spouse who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.); *see also Files v. ExxonMobil Pension Plan*, 428 F.3d 478, 489 (3d Cir. 2005) ("QDRO only related to enforcement of an already defined right"); *Gendreau*, 122 F.3d at 819 (rights in retirement plans based on divorce decree, not altered by the absence of a QDRO). As the *Lawson* court noted, section 541(c)(2) and *Patterson*'s reasoning are not limited to plan participants, but rather extend to any interest held in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. 570 B.R. at 574, *quoting Patterson*, 504 U.S. at 758. Accordingly, Mr. Lerbakken's interest the 401(k) account is not property of the estate.

The bankruptcy court erred in not determining whether the property was property of the estate prior to evaluating whether the property was exempt. To the extent, however, this Court considers the Mr. Lerbakken's interest in the 401(k) account as property of the estate, they are exempt under section 522(c)(3)(B). *See* Part V, *infra*.

B. Upon Filing The Debtor's Interest in the IRA Account Became Property of the Estate

While plans subject to ERISA have enjoyed broad protection since *Patterson*, the same has generally not been true for Individual Retirement Accounts (IRAs). IRAs are not subject to, or governed by ERISA. Unlike ERISA plans, IRAs do not typically contain anti-alienation provisions. *See* 26 U.S.C. § 408(a). Subject to a potential tax penalty, taxpayers possess the unlimited power to withdraw funds from an IRA at any time. Because IRAs do not satisfy the anti-alienation language required by section 541(c)(2), it is well-settled that such accounts are property of the estate. *See, e.g., Rousey v. Jacoway*, 544 U.S. 320 (2005) (IRA rolled-over from previous employer-sponsored 401(k) property of the estate exempt under section 522(d)(10)(E)).

IV. Debtor's Interest in the IRA Account Is Exempt under 11 U.S.C. § 522(b)(3)(C)

A. BAPCPA and the IRA Exemption

The debtor sought to exempt his interest in the IRA under section 522(b)(3)(C). A.90; *see* 11 U.S.C. §§ 522(b)(1), (b)(3)(C). This exemption was enacted as part of the 2005 amendments to Bankruptcy Code, and it applies to, "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. § 522(b)(3)(C). This exemption was part of a broader package of provisions in the 2005 amendments that protected tax-qualified retirement plans. *See* 11 U.S.C. §§ 362(b)(19), 522(b)(3)(C), (b)(4), (d)(12), 523(a)(18), 1322(f). With the 2005 amendment to the Bankruptcy Code, Congress expanded the protection for tax-favored retirement plans by, among other things, providing standard federal exemptions to supplement the patchwork of state law exemptions that sometimes did not suffice to exempt IRAs from a debtor's estate. *See* H.R. Rep. No. 109-31(I), pt.1 at 63-64 (2005) (intent to "expand the protection for tax-favored retirement plans or arrangements that may not be already protected" under the Code, or other state or federal law.) All of the varied state law protections were supplemented by the uniform federal exemption, which effectively established a floor, but not a ceiling, for retirement fund exemptions. In creating a uniform exemption for tax-qualified retirement plans, Congress imposed only three requirements: (1) the amount the debtor seeks to exempt must be retirement funds; (2) the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code set forth therein; and (3) the aggregate amount of funds to be exempted must be $1,283,025[7] or less. 11 U.S.C. § 522(d)(12); 522(n).

---

[7] This is the applicable amount as of today and at the time of debtor's filing. Pursuant to 11 U.S.C. § 104, the Judicial Conference adjusts the dollar amounts in three-year intervals. The last adjustment was effective April 1, 2016.

In this case, the only issue is whether Mr. Lerbakken's interests in the retirement accounts based on his divorce judgment are "retirement funds" within the meaning of section 522(b)(3)(C).

B. Clark *and IRAs Inherited by Non-Spouses Are Distinguishable*

The Bankruptcy Court and the Bankruptcy Appellate Panel relied exclusively upon the Supreme Court's decision in *Clark v. Rameker* to determine that the funds sought to be exempted were not Mr. Lerbakken's "retirement funds." *See* 573 U.S. 122 (2014). The courts, however, failed to take into account the significant difference in the treatment of spouses when it comes to retirement account transfers due to divorce or death.

In *Clark,* the Supreme Court addressed the question of whether funds in an inherited IRA were "retirement funds" of the decedent's daughter subject to exemption under the Bankruptcy Code. 573 U.S. 122 (2014); 11 U.S.C. §§ 522(b)(3)(C), 522(d)(12). Based on three significant legal differences between traditional IRAs and inherited IRAs, the Court held that inherited IRA funds were not "retirement funds" of the daughter. Those characteristics are: (1) the holder of an inherited IRA may never invest additional money into the account—the ability to make additional contributions being a hallmark of a retirement account, (2) holders of inherited IRAs are required to withdraw money from such accounts, no matter how many years they may be from retirement, and (3) the holder of an inherited IRA may withdraw the entire balance of the account at any time—and for any purpose—without penalty. *Clark*, 573 U.S. at 125, 128. The Court further distinguished inherited IRAs from traditional IRAs by noting that the latter help ensure debtors will be able to meet their basic needs during their retirement years, while the former, if exempt, would give debtors a "free pass" to spend the balance, without penalty, on a vacation home or sports car. *Id*. at 129.

The attributes identified by the Supreme Court in *Clark* do not apply to IRAs transferred incident to a divorce. First, the Internal Revenue Code specifically denies individuals the ability to contribute funds to inherited accounts. *See* 26 U.S.C. § 219(d)(4); *see Clark*, 573 U.S. at 125. No such limitation applies to an IRA transferred incident to a divorce. IRAs transferred incident to divorce are treated as the transferee spouse's IRA for tax purposes. 26 U.S.C. § 408(d)(6). There are no limitations on the ability of the spouse to subsequently contribute to the IRA and receive the related tax benefits of such contributions.

Second, a non-spouse beneficiary of an inherited IRA must either withdraw all of the funds in the IRA within five years after the owner's death or take minimum annual distributions every year. *See* 26 U.S.C. § 401(a)(9); *see also* 26 C.F.R. § 1-408-8 (Q–1 and A–1(a) incorporating § 1.401(a)(9)–3 (Q–1 and A–1(a)); *see Clark*, 573 U.S. at 125. This requirement does not apply to funds in an IRA transferred incident to divorce, nor does it apply to spouses that have inherited an IRA. Instead, former spouses obtaining IRA interests by death or divorce may roll the funds into their own IRA, at which point the IRA is subject to the same rules as other IRAs. *See* 26 C.F.R. § 1.408-8 (providing for spousal rollovers); 26 U.S.C. § 408(d)(3)(C) (providing that a non-spouse cannot roll over an inherited account).

Finally, an individual may withdraw funds from an inherited IRA at any time without paying a tax penalty. 26 U.S.C. § 72(t)(2)(A)(ii); *see Clark*, 573 U.S. at 125. By contrast, the transfer of funds in an IRA from one spouse to another incident to a divorce is not automatically exempt from taxation and penalty. The two commonly used methods of transferring funds that will not result in taxation or penalty are: (1) changing the name on the IRA to that of the nonparticipant spouse, or (2) a direct trustee-to-trustee transfer of the IRA assets to the trustee of an IRA owned by the nonparticipant spouse. *See Kirkpatrick v. Comm'r,* 115 T.C.M. (CCH) 1073, 2018 WL 1040955 (2018); IRS Publication 590-A (2018) Contribution to Individual Retirement Arrangements (IRAs), at 28, *available at* https://www.irs.gov/pub/irs-pdf/p590a.pdf. As noted above, once the IRA is transferred to the nonparticipant spouse by either means, it is subject to all the same IRA rules with respect to penalties and taxability. *See id.* Importantly, a distribution from an IRA that is then paid to one's ex-spouse pursuant to a divorce judgment, instead of a transfer by way of a name change or direct rollover, is taxable as income and subject to a 10% penalty. *Cohen v. Comm'r*, T.C.M. 2004-227, 2004 WL 2251801 (2004) (10% penalty imposed on early distribution that is includable in the taxpayer's gross income notwithstanding subsequent payment pursuant to a divorce decree).

Because an IRA transferred incident to a divorce has none of the characteristics identified by the Supreme Court in *Clark*, that decision is not controlling. Indeed, the tax code and the Supreme Court acknowledge that even in the inherited IRA context, spouses may be treated differently. *See* 26 U.S.C. §§ 408(d)(6); *Clark*, 573 U.S. at 125

C. An Interest in the IRA Funds Obtained through a Domestic Relations Order Constitutes Retirement Funds of the Debtor.

Unlike retirement accounts that are inherited by a non-spouse, a retirement account belonging to one spouse is an account intended to provide for the retirement of both members of the marriage. The reality is that "[r]etirement planning is often a joint household decision-making process." *See* Katherine Carman and Angela Hung, "Household Retirement Savings: The Location of Savings Between Spouses", RAND Corporation, WR-1166 (Jan. 2017) available at https://www.rand.org/pubs/working_papers/WR1166.html. Indeed, it is recommended that couples optimize retirement planning by considering the entire household portfolio. However, retirement savings in tax advantaged accounts may only be titled in one spouse's name, even though the savings were intended to support the couple jointly in retirement.[8] *See, e.g.*, 26 U.S.C. § 408. In recognition of this limitation, the tax code provides unique preferential treatment for spouses who obtain interests in retirement accounts either through divorce or death. *See, e.g.*, 26 U.S.C. § 408(d)(6) (providing special treatment for IRAs transferred pursuant to a divorce); 29 U.S.C. § 1056(d)(3)(k) (providing an exception to ERISAs anti-alienation provision for 26 C.F.R. § 1.408-8 (describing spousal rollovers for inherited IRAs). Construing the term "retirement funds" as applying only to the individual named on the account, and not that individual's spouse, is contrary to both the reality households face when planning for retirement and the preferential treatment Congress gave to nonparticipating spouses, who obtain, interests in retirement accounts through death or divorce. Read in this context, the term "retirement funds" must include the Mr. Lerbakken's interest in the IRA that he obtained via a judgment of divorce. Accordingly, the bankruptcy court erred in holding that such interest was not exempt under section 522(b)(3)(C).

V. Debtor's Interest in the 401(k) Account Is Exempt under 11 U.S.C. § 522(b)(3)(C), if It Is Property of the Estate.

[8] The RAND study showed that "husbands' retirement account balances tend to be larger than their wives' retirement account balances." Carman, *Household Retirement Savings*, *supra* at 3.

As with IRAs, the attributes relied on by the Supreme Court in *Clark* do not wholly apply to the interests of a nonparticipant spouse in a 401(k) plan based on a domestic relations order.

Employer-sponsored 401(k) plans, like the one at issue in this case, are governed by ERISA. The Retirement Equity Act of 1984 created an exception to ERISA's anti-alienation rule for "alternate payees" under a qualified domestic relations order (QDRO). The alternate payee under the QDRO has a number of options for enforcing his or her rights: (1) leave funds in the 401(k) plan and receive distributions in their normal course,[9] (2) directly rollover of funds in a trustee-to-trustee transfer to his or her own qualified retirement plan,[10] 3) take a lump-sum distribution and roll it over within sixty days to his or her own qualified retirement plan,[11] or 4) take a lump-sum distribution without rollover. If the funds are transferred by the nonparticipant spouse into a qualified retirement plan, they are subject to all the same early distribution and tax rules as similar plans.

There is no requirement that a spouse, who receives an interest in a 401(k) account based on a divorce judgment, must withdraw all of the funds from the

---

[9] 26 U.S.C. § 402(e)(1)(A) (treating alternate payees as distributes); 29 U.S.C. § 1056(d)(3)(J) (treating alternate payees as beneficiaries under the plan), (d)(3)(K) (defining alternate payee).
[10] 26 U.S.C. §§ 402(c)(1) (excluding certain rollovers from taxable income); 402(e)(1)(B) (permitting rollovers to the same extent as employees).
[11] 26 U.S.C. §§ 402(c)(1) (excluding certain rollovers from taxable income); 402(c)(3)(A) (providing a 60-day time limit for rollover); 402(e)(1)(B) (permitting rollovers to the same extent as employees).

account within five years or take minimum annual distributions every year. *Cf. Clark*, 573 U.S. at 125. Funds may remain in the original 401(k) plan subject to distribution in the normal course. There is no prohibition on rolling 401(k) account funds into a qualified retirement plan belonging to the nonparticipant spouse. *Cf id.* (heirs, such as the daughter in *Clark*, may not roll over the funds; the only option is to hold the IRA as an inherited account). There are no limitations on the nonparticipants spouse's ability to contribute additional funds to the subsequent qualified retirement plan. *Cf. id* at 128 (additional funds may not be contributed to an inherited IRA). While there is no tax penalty incurred with respect to a distribution under a QDRO, the failure to roll over the funds into a qualified retirement plan results in taxable income to the nonparticipant spouse. *See* 26 U.S.C. § 72(t)(2)(C). In essence, Congress provides the nonparticipating spouse the option to treat the funds as retirement savings or to withdraw the funds without penalty. This is similar to the option provided to spouses in the inherited IRA context, and distinguished by the Court in *Clark*. 573 U.S. at 125. On the whole, the legal characteristics applicable to 401(k) retirement funds subject to transfer pursuant to a divorce judgment are sufficiently different from IRA inherited by non-spouses that *Clark* does not control the determination of whether such funds are the "retirement funds" of the debtor.

Instead the Court should consider the unique preferential treatment of spouses with respect to ERISA-qualified accounts and the realities of household retirement planning, as discussed above. The better conclusion is that when retirement accounts are divided pursuant to a divorce judgment, the funds in those accounts represent retirement funds of both spouses even though the accounts may only be titled in an individual's name. To hold otherwise, potentially wreaks havoc on the future of the spouse who is not in a position to contribute equally to his or her retirement accounts due to lower pay, due to the lack of an employer-sponsored retirement plan, or due to the absence of employer matching retirement funds. *See, e.g.*, Addendum A, A-4 (all the retirement accounts identified as marital property were titled in the name of Mr. Lerbakken's spouse). While in this case the retirement accounts were in the name of the wife, the broader ramifications of such a decision would disadvantage spouses who work in the home or who have lower-paid jobs, predominantly women, a discriminatory effect this court should eschew.

For these reasons, this Court should hold that the interest Mr. Lerbakken has in his wife's employer-sponsored 401(k) plan is exempt.

CONCLUSION

The reality of retirement savings is that while retirement planning is typically a joint decision making process among spouses, retirement accounts must be titled only in the name of an individual. As a result, Congress has provided special treatment for the division of retirement assets upon divorce. This special treatment makes interests in retirement accounts obtained through divorce significantly different than the treatment of IRAs inherited by non-spouses. Therefore, the bankruptcy court erred in holding that *Clark v. Rameker*, 573 U.S. 122 (2014), which dealt only with an inherited IRA by a non-spouse, was controlling. Instead, the term "retirement funds" in the context of a marital dissolution must apply to funds awarded to the nonparticipant spouse in a divorce proceeding. To hold otherwise, would disadvantage spouses who are not in a position to contribute equally to his or her retirement accounts because of household decision (e.g., one parent to stay home) or due to factors beyond that spouses control (e.g., disability, lack of employer matching retirement funds, etc.). For these reasons, the decision of the bankruptcy court below should be reversed.

/s/ Tara Twomey

TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY
RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,518 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on January 31, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amicus Curiae

Addendum A

Excerpts from Motion of Sieloff & Associates, P.A. Objecting to Debtor's Claim of Exempt Property (March 28, 2018)
In re Lerbakken, No. 18-50037 (Bankr. D. Minn.)
Docket No. 9 (March 28, 2018)

from any and all further liability of any kind, nature or description whatsoever to the other.

NOW THEREFORE, THE COURT MAKES THE FOLLOWING:

CONCLUSIONS OF LAW AND ORDER

1. **Dissolution of Marriage.** The marriage of and existing between the parties, Brian Allan Lerbakken and Paula Jean Foede, is hereby dissolved.

2. **Custody and Parenting Time.** The parties are awarded joint legal custody of their minor child, Joint legal custody requires the parties to share all substantial decisions relating to the education, health, safety and welfare of the minor child; each party has the right to make decisions relating to emergency medical care while the child is in that party's control; and, each party has access to school, governmental, law enforcement, and medical records and access to all other teachers, government officials, officers, doctors, and other professionals having contact with the child without consent from the other party.

   Wife is awarded sole physical custody of the parties' minor child, born subject to Husband's right to reasonable and liberal parenting time as set forth in the SENE Agreement and the Order of this Court dated October 1, 2015, attached as Exhibit A. Wife's residence shall be the primary residence of the child for purposes of school registration and legal matters unless otherwise agreed to. Neither party shall change the enrollment of the minor child from the Two Harbors, Minnesota school district unless otherwise agreed to by the parties.

3. **Child Support.** Husband shall pay to Wife the sum of $239.00 per month as and for child support, effective as of February 9, 2017, payable on the 1st day of each month. Child support shall continue until the occurrence of the first of the following events:

   A. When the child reaches age eighteen, or, if the child has still not reached age twenty and is still attending secondary school, then until graduation from secondary school, but not beyond the twentieth birthday;

   B. When the child marries, is emancipated or otherwise becomes self-supporting; or,

   C. Should the child die.

   The provisions of this Order supersede any other previous child support orders.

   Husband shall pay any previously unpaid child support obligation.

4. **Health Insurance for Child.** Wife shall maintain in full force and effect for the benefit of the minor child, the current level of medical, dental and optical insurance coverage

available through present or future employers for so long as the child is eligible for the coverage.

5. **Uninsured Medical Expenses of Child.** Pursuant to the PICS, Husband shall pay 22% and Wife shall pay 78% of the out-of-pocket costs, co-payments and deductibles incurred for medical, dental, optical, orthodontic and medical prescription expenses for their minor child. The parties' obligation to reimburse the other party for all out-of-pocket costs, co-payments, and deductibles shall continue so long as Wife is entitled to continue dependent health and dental coverage under her insurance policy for the minor child. Both parties shall be in agreement before major, non-emergency and uninsured medical, optic or orthodontia expenses are incurred.

6. **Income Tax Dependency Exemption.** Because Wife is awarded sole physical custody, she shall have the right to claim as a dependency exemption for federal and state income tax purposes commencing tax year 2016 and every year thereafter.

   Neither party shall have any right to claim the child as a dependency exemption except as stated above.

7. **Spousal Maintenance.** Husband is awarded permanent spousal maintenance in the sum of $400 per month, commencing September 1, 2017 and payable on the 1st each month thereafter. Husband is awarded an additional $200 per month in spousal maintenance, for as long as he is obligated to pay child support for the parties' minor child. See the attached memorandum for calculations and findings regarding spousal maintenance. Wife's spousal maintenance obligation shall continue until such time as Husband remarries, or until the death of either party, whichever occurs sooner. Cost of living adjustments shall apply pursuant to the provisions of Minn. Stat. § 518A.75, or any amendments thereto.

8. **Health Care Coverage.** The parties waive all right to health care insurance coverage available to them under the other party's health care insurance plans, if any. Each party shall be solely responsible to provide for their own health and dental insurance.

9. **Homestead.** The homestead of the parties located at 1838 Highway 12, in the City of Two Harbors, County of Lake, State of Minnesota, legally described as follows:

   > Southwest one-fourth of Northwest one-fourth (SW ¼ of NW ¼) EXCEPT South one-half (S ½), Section Twenty-two (22), Township Fifty-three (53), Range Eleven (11).

   is awarded to Wife, who shall be solely responsible for payment of the mortgage on the homestead, together with insurance, taxes, maintenance and utilities, and Wife shall hold Husband harmless therefrom.

Immediately upon entry of this Judgment and Decree herein, Husband shall execute a Quit Claim Deed drafted by Wife's attorney conveying Husband's interest in the property to Wife. If Husband fails to execute proper documents, recording a certified copy of this Judgment and Decree shall operate to effectuate the transfer. Husband's and Wife's counsel shall cooperate in the prompt entry of a Summary Real Estate Disposition Judgment if requested by Wife. In the event there is any technical error or omission made in describing the legal title or description to any of the real property referenced herein, the parties are required to make, execute, and deliver to each other any and all documents necessary to correct any such error or omission.

10. **Husband's Homestead.** A telephone scheduling conference will be set to determine whether further argument and/or amended findings regarding this matter are appropriate regarding Husband's home which was referenced in Wife's proposed Judgment and Decree.

11. **Pension and Profit Sharing Plans.** Pursuant to the terms of the FENE Agreement stipulated to by the parties and attached as Exhibit B:

    a. Wife is awarded all interest of the parties in her Prudential Retirement Plan, free from any interest of Husband in said plan.

    b. Husband is awarded all interest of the parties in Wife's Wells Fargo Traditional IRA, free from any interest of Wife in said plan.

    c. Husband is awarded the sum of $19,281.45 from Wife's Wells Fargo 401(k) plan, adjusted for any gains or losses from February 17, 2015 to present.

    d. Husband's attorney shall prepare the Qualified Domestic Relations Orders for his interest in the IRA and 401(k) plans awarded herein.

12. **Financial Accounts.** The parties are awarded all interest in their respective bank and other financial accounts, free from any interest of the other party, including the value of any balance increase in said accounts after the date of separation.

13. **Husband's Workers Compensation Claim.** This asset is hereby awarded as set forth in this Court's Order dated April 14, 2017.

14. **Life Insurance.** The parties are awarded all interest in their respective life insurance policies, free from any interest of the other party.

15. **Automobiles.** Wife is awarded the 2004 Jeep Liberty automobile and shall assume and pay, and hold Husband harmless from, all liens and encumbrances due thereon.

    Husband is awarded the 2004 Ford F-150 Heritage automobile and shall assume and pay, and hold Wife harmless from, all liens and encumbrances due thereon.

Both parties shall execute all documents necessary to transfer title of the above-named vehicles awarded herein. Should any party fail to cooperate in the transfer of title, this Judgment and Decree shall be considered an Order directing the Minnesota Department of Public Safety to transfer title to the party designated as owner herein.

16. **Personal Property.** Personal property is awarded pursuant to the FENE Agreement attached as Exhibit B and the March 19, 2015 property settlement agreement attached as Exhibit C. Husband has 75 days from the date of entry of this Judgment and Decree to remove his personal property from the homestead.

17. **Debts.** There are no marital debts remaining for division.

18. **Release.** Except as otherwise provided, each party is released from all claims and rights of the other party as follows:

    a. To share, as a result of the marital relationship, in the other party's estate upon the latter's death, including any rights accruing to either party under any ERISA plan;

    b. To act as personal administrator in the estate of the other; to any right of dower, election, exemption, or maintenance from, to, or against the estate of the other; or

    c. To any other property right, benefit or privilege in or from the property of the other. Further, except as otherwise provided, each party is released and discharged from any and all claims or demands of every nature of the other party to the date of entry of this Judgment and Decree.

19. **Attorney's Fees.** The parties are responsible for their own attorney's fees and expenses incurred in this matter.

20. **Property Settlement.** In consideration of all the terms and conditions of this Final Decree and the parties' FENE Agreement, Wife shall pay to Husband the sum of $3,712, cash, as a final and in full settlement of all claims Husband has against Wife which arose as a result of the marriage. See the attached memorandum for calculation of this final amount. That the sum shall be paid on or before 120 days of the date of entry of this judgment and pursuant to the FENE Agreement, if not timely paid interest shall commence on day 121 at the rate of 4% per annum and shall become a judicial lien on the homestead awarded to Wife.

21. **Undisclosed Assets.** In the event there are assets of value discovered after entry of the Judgment and Decree, those assets are to be divided equitably between the parties. If those assets of value are the subject of future court proceedings, then the party having failed to disclose such assets of value shall be responsible for all attorneys' fees and costs incurred by the other party in any such proceedings.

22. **Other Property.** That, except as otherwise provided herein, all other property, both real and personal, now in the possession of, or titled in, the name of Wife, shall be owned by Wife without any claim, right, title or interest of Husband in and to the same.

    That, except as otherwise provided herein, all other property, both real and personal, now in the possession of, or titled in, the name of Husband, shall be owned by Husband without any claim, right, title or interest of Wife in and to the same.

23. **Cooperation and Compliance.** The parties shall execute any instrument of conveyance or transfer or other instrument required to effectuate the terms of this Judgment and Decree. In the absence of such instrument of conveyance, a certified copy of this Judgment and Decree shall serve as, and have the legal effect of, such instrument of conveyance. If either party fails to fulfill any of the obligations required by this Judgment and Decree, including the obligation to vacate the homestead, the other party shall be entitled to recover any attorney's fees and costs incurred in obtaining compliance or enforcement.

24. **Service of Decree.** Service of a copy of this Judgment and Decree may be made upon the attorney for the other party, by United States Mail, and the same shall be in lieu of personal service upon a party.

25. **Discharge of Attorneys.** Sixty one (61) days after filing of this Judgment and Decree, all attorneys of record will be automatically discharged without further notice.

26. **Request for Review Hearing.** Each party has the right to a review hearing within six months after entry of the decree of dissolution or legal separation or order that initially establishes child custody, parenting time or child support. The form necessary to request a hearing is attached. Minn. Stat. § 518.1781 sets forth the procedure to follow to request this hearing.

27. **Attachments.** The attached memorandum, interest calculations, child support calculations, exhibits, and Appendix A are incorporated herein by reference.

28. **Waiver of Automatic Stay.** Rule 125 automatic stay of entry of judgment is waived and judgment is to be entered immediately.

ORDER FOR JUDGMENT

NOTWITHSTANDING GEN. R. PRAC. 125, LET JUDGMENT BE ENTERED IMMEDIATELY.

BY THE COURT:

Cuzzo, Michael
Aug 8 2017 11:08 AM

Honorable Michael J. Cuzzo
Judge of District Court

I certify that the above Conclusions of Law constitute the Judgment and Decree of the Court. IT IS HEREBY ADJUDGED THAT JUDGMENT IS ENTERED AS STATED ABOVE. DECREE ENTERED AND JUDGMENT ROLL FILED THIS _____ DAY OF _______________, 2017.

District Court Administrator

By: Nicole R. Ostern Ostern, Nicole
Aug 8 2017 11:27 AM

Deputy

Fill in this information to identify your case:

Debtor 1	**Brian A. Lerbakken**		
	First Name	Middle Name	Last Name
Debtor 2 (Spouse if, filing)			
	First Name	Middle Name	Last Name
United States Bankruptcy Court for the:	DISTRICT OF MINNESOTA		
Case number (if known)			

☐ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

4/16

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*

■ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)

☐ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	Current value of the portion you own Copy the value from *Schedule A/B*	Amount of the exemption you claim *Check only one box for each exemption.*	Specific laws that allow exemption
Homestead legally described as: South 400 feet of the East 200 feet of the SW 1/4 of the SE 1/4, Section 19, Township 53 N, Range 10 West, Lake County, MN Line from *Schedule A/B*: **1.1**	**$120,000.00**	■ **$120,000.00** ☐ 100% of fair market value, up to any applicable statutory limit	**Minn. Stat. §§ 510.01, 510.02**
2006 Victory Hammer motor cycle miles Line from *Schedule A/B*: **3.1**	**$3,500.00**	■ **$3,500.00** ☐ 100% of fair market value, up to any applicable statutory limit	**Minn. Stat. § 550.37 subd. 12a**
HHGs Line from *Schedule A/B*: **6.1**	**$4,000.00**	■ **$4,000.00** ☐ 100% of fair market value, up to any applicable statutory limit	**Minn. Stat. § 550.37 subd. 4(a)**
wearing apparel Line from *Schedule A/B*: **11.1**	**$500.00**	■ **$500.00** ☐ 100% of fair market value, up to any applicable statutory limit	**Minn. Stat. § 550.37 subd. 4(a)**
checking and savings: Wells Fargo (Social security) Line from *Schedule A/B*: **17.1**	**$400.00**	■ **$400.00** ☐ 100% of fair market value, up to any applicable statutory limit	**42 U.S.C. § 407**

EXHIBIT
tabbies
H

A-8

Debtor 1 **Brian A. Lerbakken** Case number (if known)

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption.*	**Specific laws that allow exemption**
401(k): Wells Fargo Line from *Schedule A/B*: **21.1**	**$19,281.45**	■ **$19,281.45** ☐ 100% of fair market value, up to any applicable statutory limit	**11 U.S.C. § 522(b)(3)(C)**
IRA: IRA Line from *Schedule A/B*: **21.2**	**$2,650.00**	■ **$2,650.00** ☐ 100% of fair market value, up to any applicable statutory limit	**11 U.S.C. § 522(b)(3)(C)**
preferential garnishment by Sieloff and Associates Line from *Schedule A/B*: **34.1**	**$1,800.00**	■ **$1,800.00** ☐ 100% of fair market value, up to any applicable statutory limit	**Minn. Stat. § 550.37 subd. 13**

3. **Are you claiming a homestead exemption of more than $160,375?**
(Subject to adjustment on 4/01/19 and every 3 years after that for cases filed on or after the date of adjustment.)

■ No

☐ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?

☐ No

☐ Yes

A-9

Addendum B

Excerpts from Hearing Transcript (May 15, 2018)
In re Lerbakken, No. 18-50037 (Bankr. D. Minn.)
Docket No. 19 (June 13, 2018)

MS. HAUSER: Understood.

So, Your Honor, under Rameker courts must look at the legal characteristics of the specific account where the funds are held and in this instance the 401k proceeds and the IRA proceeds accounts are not retirement funds under the definition of Clark vs. Rameker. In other words, sums of money set aside for the day when an individual stops working. Once the debtor has access to these funds, presumably through a QDRO, the debtor could not add funds to either account. The debtor couldn't withdraw all the funds in either -- in either of the accounts without facing an early withdrawal penalty and the debtor is not required to hold the funds until he reaches retirement age or demonstrates disability, whereas his ex-wife does face these restraints for her own retirement funds and the analysis of the Kieser, which we cited in our brief, I think is valid here and in that case the court determined that -- that the debtor could not exempt proceeds of his ex-wife's IRA account that he had obtained as part of a property settlement in his divorce.

Here the wife cannot withdraw -- the ex-wife could not withdraw the funds without facing a penalty. The anti-alienation provision applies to her, so they are certainly retirement funds as regards her, but the debtor's portion of these funds are not retirement funds with regard to the debtor. In other words, the accounts are not required to serve the original intended purpose of a retirement fund.

Furthermore, the Minnesota Exemption Statute, 550.3724 only exempts those assets which are derived from the debtor's own employment.

We've cited the Anderson case which also disallowed a claimed exemption in funds derived from an ex-wife's IRA under the Minnesota statute.

In summary, under the Clark vs. Rameker case, both IRA proceeds and 401k proceeds lack the legal characteristics of a retirement fund which can be exempted under 522(b)(3)(c) and, furthermore, the debtor cannot -- cannot exempt those funds under the

Minnesota statute because they are not generated by his own earnings.

Therefore, we request that the claimed exemption be denied.

THE COURT: Okay. Thank you. Mr. Hedtke.

MR. HEDTKE: Yes, Your Honor.

First of all, I think Counsel is wise to acknowledge that the lien would not be enforceable against an exempt asset as I stated in my brief.

In Minnesota an attorney's lien does not attach to an exempt asset unless there was an express waiver of that exemption.

Now addressing the exemption. First of all, the 401K interest is excluded from the bankruptcy estate under Section 541(c)(2) and also the holding in Patterson vs. Shumate. The receiving spouse gets the same benefit, the anti-alienation benefit under ERISA as the plan participant.

The same holds for the interest in the IRA. Under -- Ms. Hauser says that the IRA is not exempt under Minnesota law. We agree with that under the 550.37. The debtor did not use that section though.

The debtor used the 522(b)(3)(c) and under that section all that the retirement account has to be is tax exempt and under the holding In Re: Miller the court found that these -- an IRA was exempt from taxation and a qualified retirement account under 522(b)(3)(c).

And then under the code, excuse me, under the Internal Revenue Code, 408(d)(6) states that a former spouse -- an interest transferred to a former spouse incident to a divorce is to be treated as an individual retirement account of such receiving spouse, so it's treated the same and this is quite distinctly different from an interest that is received in an inheritance and we agree that if this was an inheritance it would not be exempt, but it is not. It's from a domestic relations order and it is still with -- both interests are still with the plan administrators.

So the case law is replete that the receiving spouse gets the same benefit as the plan participant, meaning the other spouse, so correct -- excuse me, so the debtor requests that the court deny the motion and allow the exemptions.

THE COURT: Thank you. Anything to add, Ms. Hauser?

MS. HAUSER: Yes, Your Honor. The Patterson vs. Shumate case directly -- well, concerned a debtor, a debtor's interest in his own ERISA qualified plan funds. 522(b)(3)(c) has two qualifiers. It says that retirement funds, to the extent that those funds are in a fund or account that is tax exempt, so the funds need to be both tax exempt, which we acknowledge they are, but then under the Clark vs. Rameker case in order to be retirement funds, as the Supreme Court defined that term, they must be funds that are held specifically for retirement, and so those anti-alienation provisions that are in the tax code need to apply.

When you have a spouse or an ex -- when you have a debtor who receives a property settlement from the next -- from the ex-spouse, as we have here, when the debtor obtains access to those funds they are no