

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-30221

DONNA MARIE RIMMER

Debtor

**MEMORANDUM ON TRUSTEE'S OBJECTION TO EXEMPTION**

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**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

Ann Mostoller, the Chapter 7 Trustee (Trustee), filed an Objection to Debtor's Claim of Exemption (Objection) on March 12, 2001. By her Objection, the Trustee disputes the Debtor's claimed exemption of her \$21,000.00 interest in her ex-husband's retirement account (Retirement Account). This contested matter was heard on June 13, 2001. The record before the court consists of the testimony of the Debtor and nine exhibits, including a written Stipulation of Facts, all of which were stipulated into evidence by the parties.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(B) (West 1993).

## I

On November 17, 2000, the Debtor was divorced from her husband, Robert H. Rimmer, pursuant to a Judgment of Absolute Divorce entered in the General Sessions Court for Blount County, Tennessee. The divorce decree incorporates the spouses' Marital Dissolution Agreement (MDA) dated November 7, 2000. The MDA grants the Debtor an interest in the Retirement Account, providing in material part:

13) Pension and Profit Sharing Plans: The Wife shall have thirty-five percent of the balance of the Husband's Retirement Plan as of the 12<sup>th</sup> day of October, 2000. If a Quadro [qualified domestic relations order] is required to transfer the monies into a Retirement Plan of the Wife's choice, the Wife shall be responsible to obtain said Quadro [qualified domestic relations order] and pay said costs.

The Debtor subsequently filed her Chapter 7 Petition on January 16, 2001. On Schedule C to her Voluntary Petition, the Debtor valued her interest in the Retirement Account at \$21,000.00 and claimed that amount as exempt pursuant to TENN. CODE ANN. § 26-2-105(b). The

Debtor then amended her Schedule C on March 28, 2001, by adding TENN. CODE ANN. § 26-2-105(c) as an alternate ground for exempting her interest in the Retirement Account.

On January 19, 2001 - three days after the Debtor's Chapter 7 filing - a "Denzo [sic] Associates Retirement Plan Qualified Domestic Relations Order" (QDRO) was entered by the Blount County Sessions Court. The QDRO assigned to the Debtor a portion of the Retirement Account. The QDRO was subsequently rejected by Mr. Rimmer's employer, Denso Manufacturing Tennessee, Inc., because it was written for a pension plan rather than a 401(k) plan. An amended QDRO has not been entered.<sup>1</sup>

## II

The Trustee objects to both of the Debtor's claimed grounds for exemption, TENN. CODE ANN. § 26-2-105(b) and (c) (2000). The version of § 26-2-105(b) in effect on the date of the Debtor's bankruptcy filing provided in material part:

Except as provided in subsection (c), any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 403(a), 403(b), and 408 of the Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.

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<sup>1</sup> The Debtor testified that at least four QDROs have been tendered to her former husband's employer, but that all have been rejected. This testimony, however, conflicts with the parties' Stipulation of Facts in which they stipulate that "[s]ince the Chapter 7 was filed, the Debtor has not filed an amended QDRO to transfer the funds from the ex-spouse's 401-K [sic] account due to the objection to the exemption filed by the Trustee." The parties are bound by their Stipulation.

TENN. CODE ANN. § 26-2-105(b) (2000).<sup>2</sup> The Trustee concedes that the Retirement Account is of a type covered by § 26-2-105, but argues that the Debtor is not entitled to the protection of subsection (b) because she is not a “participant in or beneficiary of” the Retirement Account.

The record does not establish that the Debtor is a “participant” in her ex-husband’s retirement plan. “The funds in the plan were derived from her former spouse’s employment, and it was his plan.” *In re Hageman*, 260 B.R. 852, 857 (Bankr. S.D. Ohio 2001). Additionally, the Debtor did not have rights in the Retirement Account as a “beneficiary” when she commenced her bankruptcy case.<sup>3</sup> Her rights instead emanate from the divorce decree. *See id.*

Section 26-2-105(b)'s protection is expressly limited to “participants” and “beneficiaries” of a retirement plan. The Debtor has no property rights as a “participant” or “beneficiary” created by the plan. She therefore may not use TENN. CODE ANN. § 26-2-105(b) to exempt her interest in the Retirement Account.

The Debtor’s alternate ground for exemption, TENN. CODE ANN. § 26-2-105(c), provides in material part:

[T]he interest of any and all alternate payees under a qualified domestic relations order are exempt from any and all claims of any creditor, other than the state of Tennessee. As used in this subsection, “alternate payee” and “qualified domestic

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<sup>2</sup> This court has previously noted that, in order to effectuate the obvious intentions of the drafters, the mutually exclusive Internal Revenue Code provisions referenced by § 26-2-105(b) should be “deemed joined in the disjunctive rather than the conjunctive. Therefore, each section stands independent of the other.” *In re Martin*, 102 B.R. 639, 645-46 (Bankr. E.D. Tenn. 1989).

<sup>3</sup> In their Stipulation of Facts, the parties stipulate that the Debtor “was a beneficiary under Robert Rimmer’s 401-K [sic] account with Denso” (emphasis added). The court logically construes this stipulation to mean that the Debtor was a beneficiary of the Retirement Account prior to her divorce. After the divorce, her interest in her former husband’s 401(k) plan was fixed by the MDA incorporated into the November 17, 2000 Judgment of Absolute Divorce.

relations order” have the meaning ascribed to them in § 414(p) of the Internal Revenue Code of 1986, as amended.

TENN. CODE ANN. § 26-2-105(c) (2000). An “alternate payee” is “any spouse, former spouse, child or other dependent of a participant 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.” 26 U.S.C.A. § 414(p)(8) (West Supp. 2000). A “qualified domestic relations order” is defined as follows:

**(1) In general.—**

**(A) Qualified domestic relations order.—**The term “qualified domestic relations order” means a domestic relations order—

(i) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

**(B) Domestic relations order.—**The term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which—

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).

**(2) Order must clearly specify certain facts.—**A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

**(A)** the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

**(3) Order may not alter amount, form, etc., of benefits.**—A domestic relations order meets the requirements of this paragraph only if such order—

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

26 U.S.C.A. § 414(p)(1)-(3) (West Supp. 2000).

As a "former spouse . . . of a participant who is recognized by a domestic relations order [the Judgment of Absolute Divorce] as having a right to receive . . . a portion of[] the benefits payable under a plan with respect to such participant," the Debtor is an "alternate payee" under TENN. CODE ANN. § 26-2-105(c). See 26 U.S.C.A. § 414(p)(8). There was not, however, a "qualified domestic relations order" in place as of the commencement of the Debtor's bankruptcy case.<sup>4</sup> As previously noted, the Debtor's subsequently rejected QDRO was not entered by the Blount County Sessions Court until three days after her bankruptcy filing.

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<sup>4</sup> The Judgment of Absolute Divorce is not a "qualified domestic relations order." For example, it does not specify the number of payments or the payment period over which the Debtor is to receive funds from the Retirement Account. See 26 U.S.C.A. § 414(p)(2)(C).

A debtor's exemption rights are fixed as of the commencement of the bankruptcy case. See *Miller v. Miller (In re Miller)*, 246 B.R. 559, 566 (Bankr. E.D. Tenn. 2000). "Bankruptcy exemptions are 'fixed on the date of filing' and 'only . . . the law and facts as they exist[ed] on the date of filing the petition' are to be considered." *Id.* (citing and quoting *Armstrong v. Peterson (In re Peterson)*, 897 F.2d 935, 937 (8<sup>th</sup> Cir. 1990)). The Debtor was not entitled to a § 26-2-105(c) exemption at the commencement of this case because on that date there was no qualified domestic relations order in place as required by the exemption statute.

The Debtor relies on *In re Abbata*, 157 B.R. 201 (Bankr. N.D.N.Y. 1993) for the proposition that she is entitled to an exemption under her invalid QDRO. *Abbata* is distinguishable, however, not only because it involves the exemption statutes of a different state, but also because a qualified domestic relations order was in place prior to the commencement of Mrs. Abbata's bankruptcy case. Although the QDRO in *Abbata* was later rejected by the plan administrator, its existence prior to bankruptcy enabled that court to find that the debtor had an equitable interest in the plan and an equitable right to obtain an amended order post-petition which satisfies the requirements of a QDRO." *Id.* at 205. In the present case, the Debtor cannot claim a similar equitable right because no qualified domestic relations order - valid or not - was in place as of the commencement of this case.

The Trustee's Objection must be sustained. An appropriate order will be entered.

FILED: June 15, 2001

BY THE COURT

*/s/*

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE



**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-30221

DONNA MARIE RIMMER

Debtor

**ORDER**

For the reasons stated in the Memorandum on Trustee's Objection to Exemption filed this date, the court directs the following:

1. The Objection to Debtor's Claim of Exemption filed by the Chapter 7 Trustee, Ann Mostoller, on March 12, 2001, is SUSTAINED.

2. The Debtor's exemption of \$21,000.00 claimed in her former husband's retirement account under TENN. CODE ANN. § 26-2-105(b) and (c) (2000) is DISALLOWED.

SO ORDERED.

ENTER: June 15, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE