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Attorneys for Plaintiff/Appellee

IN THE SUPREME COURT OF THE STATE OF MONTANA

ROD EDWARD VanLOAN, Plaintiff/Appellee, -vs- JAMES VanLOAN, Defendant/Appellant.	Cause No. 94-586 MOTION TO RETAIN TRIAL SETTING AND SUPPORTING BRIEF

COMES NOW the Plaintiff/Appellee, Rod VanLoan, and moves the Court for an Order expressly stating that the lower court proceedings are not stayed pending the outcome of this appeal. This motion is intending to invoke the Court's supervisory powers derived from Article VII, Section 2, of the Montana Constitution.

FACTUAL BACKGROUND

In October 1992, the Defendant was arrested and charged with six counts of incest. On January 27, 1993, the Defendant entered pleas of guilty to six counts of incest in Flathead County criminal Cause No. DC-92-225(A), which included counts related to his sexual abuse of the Plaintiff. On March 1, 1993, at his sentencing hearing, the Defendant admitted his sexual abuse of the Plaintiff, as well as to other victims.

The Defendant is currently serving a 60-year sentence at the Montana State Penetentiary.

A lawsuit was filed by the Plaintiff in the lower court on May 19, 1994, alleging that the Defendant committed the intentional torts of sexual assault and battery, sexual abuse, and intentional infliction of emotional distress on the Plaintiff, and that Defendant's conduct was willful and malicious, entitling the Plaintiff to special, general, compensatory and punitive damages. Prior to this appeal, the case was set to be tried before a jury during the trial session beginning January 9, 1995. (See Target Order attached hereto marked Exhibit "A".)

On October 6, 1994, a hearing was held before the lower court on the Plaintiff's application for preliminary injunction. Following the hearing, the Court issued an order in which it enjoined the Defendant from concealing or disposing of certain liquid assets maintained by the Defendant in IRA's and an investment account. (See Order dated November 1, 1994, attached hereto marked Exhibit "B".) The Defendant has appealed the lower court's order granting the injunction pursuant to Rule 1(b)(2), M.R.App.P.

ARGUMENT

The Plaintiff does not dispute the appealability of the lower court's order granting a permanent injunction. This Court has clearly stated that such orders are appealable. State, ex rel. Park County v. Montana 6th Judicial Court, 253 Mont. 331, 833 P.2d 210 (1992); Rule 1(b)(2), M.R.App.P. Moreover, because the appeal in this case was timely, the

Plaintiff acknowledges that the lower court has been divested of jurisdiction over substantive issues. Matter of M.L.Y. and M.Y., 201 Mont. 467, 655 P.2d 499 (1982). However, neither of these facts precludes this Court from exercising its extraordinary power of supervisory control to direct the lower court to proceed with the trial in this matter currently set during the session beginning January 9, 1995.

With regard to the use of its power of supervisory control, this Court has made the following observations:

> The power to issue writs of supervisory control is derived from Article VII, Section 2, of the Montana Constitution which states:
>
> **'Section 2. Supreme court jurisdiction.** (1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.
>
> (2) It has general supervisory control over all other courts. . . .'
>
> This provision grants this Court supervisory control over all inferior courts within the state. This power is separate and distinct from the Court's appellate jurisdiction. This Court has observed that it is a power which is called into use when necessary to meet exigent circumstances for which no express remedy has been provided. [Citations omitted.] Its primary purpose is to 'keep the courts themselves within bounds and to insure the harmonious working of our judicial system.' [Citations omitted.] The writs should only be issued in extraordinary situations. [Citations omitted.] Washington v. Montana Mine Properties, Inc., 243 Mont. 509, 515, 759 P.2d 460, ___ (1990).

Plaintiff submits that this is a proper case for invoking the Court's power of supervisory control. First, the resolution of the appeal will have no direct bearing on any of the issues to be tried before and decided by the District Court jury. The issue on appeal is whether it was proper for the

District Court to issue an injunction prohibiting the Defendant from disposing of assets which, if successful, the Plaintiff will look to to satisfy the judgment. The issues before the jury, on the other hand, have to do with the Defendant's liability for intentional torts and damages. (There is a motion for partial summary judgment on the issue of liability pending in the lower court.) Since it is irrelevant to a jury, as well as wholly inadmissible, whether a defendant has sufficient resources to pay a judgment, there is no reason to delay the trial pending the outcome of this appeal.

Second, if the concern is that the lower court's order has wrongly imposed a burden on the Defendant's property rights, that burden will be lifted sooner if this matter is allowed to proceed to trial, than by waiting for a determination of the appeal. An appeal will likely not be decided before June of 1995, whereas the trial will proceed in either January or February of 1995.

Third, there is a real possibility that if this trial is postponed six months to a year pending the outcome of this appeal, the Plaintiff will be severely damaged. The sexual assault committed by the Defendant against the Plaintiff has caused the Plaintiff severe emotional trauma.

The Plaintiff has been under the care of Arthur H. Brown III, Ph.D., a clinical psychologist, since approximately May 21, 1993. (See Affidavit of Arthur H. Brown III, Ph.D., attached hereto marked Exhibit "C".) As a result of Dr. Brown's care of the Plaintiff, he has diagnosed the Plaintiff with severe and recurrent major depression, primary-type early

onset dysthymia, severe post-traumatic stress disorder, impulse control disorder, and oppositional and conduct disorder features. Dr. Brown has further stated that the cause of the Plaintiff's current emotional and mental states is the sexual abuse committed by the Defendant.

As a result of treating the Plaintiff, Dr. Brown believes the Plaintiff is a suicide risk and will continue to be such as long as this litigation is pending. According to Dr. Brown, it would be helpful to the Plaintiff's recovery if this litigation, and thus his contact with the Defendant, could be terminated as soon as possible. Needlessly prolonging it, on the other hand, will only further traumatize the Plaintiff and extend the possibility of suicide indefinitely.

When the collateral nature of this appeal is compared to the possible harm which could arise should the resolution of this dispute be postponed six months to a year, it must be concluded that this case presents the type of extraordinary situation which warrants this Court's use of its power of supervisory control. The Plaintiff has suffered enough at the hands of the Defendant. The Defendant's use of this appeal as a further attempt to continue that suffering must fail. The Plaintiff's life may depend on it.

Finally, not only is this appeal an attempt by the Defendant to prolong the Plaintiff's suffering, but it was calculated to afford the Defendant the opportunity to make himself almost wholly judgment proof. The Defendant obviously filed his appeal to indefinitely postpone the trial of this matter. If he is successful in overturning the injunction,

then he will immediately file bankruptcy, long before the case can be reset for trial. (See letter dated November 8, 1994 from Attorney James C. Bartlett attached hereto marked Exhibit "D".) According to recent bankruptcy decisions, the Defendant contends that his IRA accounts (comprising 60% of his net worth) will then become exempt property. In re Shumaker, 9 Mont. B.R. 252 (Bankr. Mont. 1991); In re Locke, Jr., 120 B.R. 563, 9 Mont. B.R. 31 (Bankr. Mont. 1990). (See copies of these two cases attached hereto marked Exhibits "E" and "F", respectively.)

The only way to thwart this legal maneuvering is to allow the trial to proceed as scheduled. With the injunction in place, a bankruptcy petition would be ineffective. A swift judgment would not only allow the Plaintiff to finally cut all ties to the Defendant, but it would prevent the Defendant from exerting final and ultimate control over the Plaintiff and his future. The State has been allowed to make the Defendant accountable for his actions--the Plaintiff should be given the same opportunity before it is too late.

CONCLUSION

The only reason the Defendant appealed the lower court's order granting the permanent injunction at this stage in the litigation was to indefinitely postpone the trial in this matter. The Defendant, of course, has nothing but time on his hands, while for the Plaintiff, time is of the essence. If the order of injunction which is being appealed were anything but an anciliary matter, the Plaintiff would not be asking the Court to invoke its supervisory powers. Moreover, in light of

the serious consequences which could arise should the trial in this matter be indefinitely postponed, the Plaintiff urges that this Court conclude that the facts of this case warrant the Court's exercise of its extraordinary power of supervisory control to direct the lower court to proceed with the scheduled trial of this matter.

RESPECTFULLY SUBMITTED this 5th day of December, 1994.

BOTHE & LAURIDSEN, P.C.

By _____
David W. Lauridsen
Attorneys for
Plaintiff/Appellee

CERTIFICATE OF MAILING

I, ALINE FAULCONER, Secretary to David W. Lauridsen, do hereby certify that on the 5th day of December, 1994, I served the foregoing instrument by mailing a copy thereof, first class mail, postage prepaid, as follows, to-wit:

Mr. James C. Bartlett
HASH, O'BRIEN & BARTLETT
Attorneys at Law
P.O. Box 1178
Kalispell, MT 59903

_____
Aline Faulconer

IN THE DISTRICT COURT OF THE ELEVENTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DV-94-231(A)

ROD EDWARD VANLOAN,

Plaintiff,

-vs-

JAMES VANLOAN,

Defendant.

TARGET ORDER

Plaintiff in the above-entitled matter having requested a Scheduling Order; NOW, THEREFORE,

IT IS HEREBY ORDERED:

1. That all potential parties to the action be joined, and all pleadings amended, not later than Friday, September 16, 1994.

2. That full disclosure of all witnesses be made by Friday, September 23, 1994.

3. That all pretrial discovery be completed not later than Friday, September 30, 1994.

4. That all pretrial motions, together with supporting briefs, be served and filed by Friday, October 14, 1994.

5. That the parties agree upon facts requiring no further proof, and exchange exhibits, by Friday, October 21, 1994.

6. That all parties prepare and exchange their contentions, and that any objections to exhibits be filed, by Friday, October 28, 1994.

7. That, after the parties have held a settlement conference, a Report of Settlement Master be filed by no later than Friday, November 11, 1994.

8. That the Plaintiff's attorney prepare a proposed Pretrial Order in accordance with Rule 16 of the Montana Rules of Civil Procedure, Uniform District Court Rule No. 1, and the Court's local rules, submitting copies to all other counsel by Friday, November 25, 1994.

EXHIBIT "A"

9. That the Plaintiff's attorney file with this Court the complete, original and countersigned Pretrial Order by no later than Friday, December 2, 1994.

10. That a pretrial conference be set for Thursday, January 5, 1995 at 3:00 p.m.

11. That this matter is set during the civil jury trial session beginning Monday, January 9, 1995, at 9:00 a.m. An attorney's conference will be held at 8:30 a.m. the same day the trial commences. A date and time certain will be assigned by the Court before the trial session begins. NO TRIAL WILL BE HELD WITHOUT A SETTLEMENT CONFERENCE.

12. Counsel will prepare and file with the Court their proposed jury instructions on or before Friday, January 6, 1995 at 1:00 p.m.

DATED this 16th day of August, 1994.

Michael H. Keedy
District Judge

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

ROD EDWARD VanLOAN, Plaintiff, v. JAMES VanLOAN, Defendant.	)	Cause No. DV-94-231A MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Application for Preliminary Injunction. A hearing was held on October 6, 1994. The Defendant was sworn and testified as well as attorney Don Vernay. After the taking of testimony and listening to arguments of counsel, the Court granted the Plaintiff's Application for Preliminary Injunction as to the following liquid assets:

Asset	Value as of March, 1994
IRAs:	
709-65954-13	$ 317,855.58
709-65955-12	318,678.56
709-65956-11	200,476.41
709-65861-15	109,199.48
709-60056-11	27,131.08
709-63568-16	108,943.13

EXHIBIT "B"

Investment Account:

709-16468-15 $ 716,781.39

The preliminary injunction is intended to remain in full force and effect until further order of this Court. During the time of the injunction's enforcement, the Defendant is to provide the Plaintiff with copies of all quarterly reports stating the present values of these assets.

DATED this ____ day of October, 1994.

/s/ Michael H Keeley
DISTRICT COURT JUDGE
11/01

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(406) 892-2193

Attorneys for Plaintiff

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

ROD EDWARD VanLOAN, Plaintiff, -vs- JAMES VanLOAN, Defendant.	Cause No. DV-94-231A AFFIDAVIT OF ARTHUR H. BROWN, III, Ph.D.

STATE OF UTAH)
: ss.
County of _____)

ARTHUR H. BROWN, III, Ph.D., being first duly sworn, deposes and says:

1. I am a doctor of family psychology and the Clinical Director of the Residential Treatment Center for Juvenile Sex Offenders & Family Therapist at the Benchmark Regional Hospital in Woods Cross, Utah.

2. The above-named Plaintiff has been treated at Benchmark Regional Hospital on both an inpatient and outpatient basis from May 21, 1993 to the present. I am currently the Plaintiff's primary treating doctor.

3. The Plaintiff was diagnosed and treated for severe and recurrent major depression, primary-type early onset dysthymia, severe post-traumatic stress disorder, impulse control disorder, and oppositional and conduct disorder features.

4. It is my professional medical opinion that Plaintiff's psychological and emotional damage was directly caused by the Defendant's sexual abuse of the Plaintiff.

EXHIBIT "C"

5. It is further my professional medical opinion that the Plaintiff is currently suicidal and it is crucial to his psychological well-being to terminate this litigation as soon as possible.

6. The Plaintiff has incurred actual medical expenses in excess of $160,000.00 and continues to receive treatment.

Arthur H Brown III PhD

Arthur H. Brown, III, Ph.D.

Subscribed and sworn to before me this 28 day of November, 1994.

Tami Larsen

Notary Public for the State of Utah
Residing at Bountiful, Utah
My Commission expires 02-18-96

NOTARY PUBLIC
TAMI LARSEN
280 West 1500 South
Bountiful, Utah 84010
My Commission Expires
February 18, 1996
STATE OF UTAH

HASH, O'BRIEN & BARTLETT
ATTORNEYS AT LAW
PLAZA WEST – 136 FIRST AVENUE WEST
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CHARLES L. HASH
KENNETH E. O'BRIEN
JAMES C. BARTLETT
C. MARK HASH

November 8, 1994

David W. Lauridsen
BOTHE & LAURIDSEN, P.C.
P. O. Box 2020
Columbia Falls, MT 59912

RE: VAN LOAN vs. VAN LOAN
Cause No. DV-94-231(A)

Dear David:

I received your letter of November 3, 1994. I have referred your offer to settle Rod's claim for $400,000. As I told you on the telephone I felt that the maximum exposure to Jim, because of the exemptions afforded by the State of Montana and the Bankruptcy Code, is around $300,000. This basically is the investment fund. His IRA accounts are not only subject to a large tax penalty, if they were cashed in, but once bankruptcy is filed the IRA accounts are set aside as exempt property. As I told you on the telephone, Judge Peterson has had occasion to uphold the constitutionality of 31-2-106, MCA and has permitted the debtor in the bankruptcy to keep the IRA account, subject to any amount deposited within one (1) year of the bankruptcy petition which exceeds 15% of the debtor's gross income. That exception is not involved in this case.

I enclose for your reading the case of *Shumaker*, 9 Mont. Bankruptcy Reports, 252-267. Note that Judge Peterson states that Montana exemption law, in contrast to the federal bankruptcy exemption provisions for IRA accounts, does not include any limiting words "reasonably necessary for the support of the debtor". See page 261 of the Opinion.

In the *Shumaker* case, the IRA account had a net value of $33,247.85, not including penalties or costs of early withdrawal. Other amounts were rolled over into the IRA.

The point, however, is that Jim's IRA accounts are totally exempt. He can file either a Chapter 7 or Chapter 13 case and the only asset that could be reached by his creditors is the investment account which is approximately $300,000. The Chapter 7 Trustee or the Chapter 13 Trustee can take 10% for administrative expense, which is approximately $30,000,

EXHIBIT "D"

leaving only the approximate sum of $270,000 to be divided by Jim's creditors. Jim would list all of the children as creditors setting forth an equal amount due to each child. Obviously, each creditor can file his or her own Proof of Claim. Jim would object to any proof of claim that did not provide for an equal distribution. Judge Peterson would hear the objections to the Proof of Claims and after he adjudicates the amount due on claim, the payments would be made and Jim would obtain his discharge.

The U.S. Congress has now increased the limit on the amount of secured and unsecured debt for an individual to qualify for a Chapter 13 Plan. It is likely then that I would file a Chapter 13 Plan rather than file a Chapter 7 and I would obtain a complete discharge. The IRA accounts would be set over to Jim as exempt property forever.

I am also sending to you a copy of the *Locke* opinion, found at 9 Mont. Bankruptcy Reports, 31-37. In that particular case, Locke rolled over $103,389.44 from a retirement plan into an IRA. In that particular case, Peterson overruled one of his own prior decisions, *Conroy*. The Court recognized that IRA's are not plans between employer and employee, but are savings accounts with a contract between the depositor and the depository which affords tax benefits to the individual. The individual's discretion and control in the IRA is significant, unlike a qualified pension plan. The Court recognized that the debtor had the clear statutory right to claim his IRA as exempt. The Court set aside the $103,389.44 IRA account to the debtor as exempt property.

Thus it is clear to me that Rod and his siblings, presumably through Bruce McEvoy, need to accept any tender that may ultimately be made of Jim Van Loan's investment account ONLY with the provision that all would sign a mutual release against Jim, and perhaps against one another, so that this family problem can be brought to an end. If not, either before or after the Appeal is resolved by the Montana Supreme Court, it would be my intent to protect Jim Van Loan's IRA accounts in the Bankruptcy Court as I told you in the courtroom.

Sincerely yours,

HASH, O'BRIEN & BARTLETT

James C. Bartlett

JCB:aeh
Enclosures
cc: Bruce McEvoy
James Van Loan

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MONTANA

In re

THOMAS LEE SHUMAKER,
f/d/b/a Rocky Mountain
Packing Company, Case No. 90-41106-007

Debtor.

O R D E R

At Butte in said District this 6th day of March, 1991.

In this Chapter 7 case, United Food and Commercial Workers Union (Union), an unsecured creditor, has filed timely objections to claims of exemption sought by the Debtor.[1] The matter has been submitted on stipulated facts and Briefs by the parties have been filed in support of their respective positions.

The stipulated facts are:

1. That the Debtor, Thomas Lee Shumaker, is 47 years old, and filed his Chapter 7 bankruptcy on July 28, 1990.

2. That the Debtor, Thomas Lee Shumaker, is holding an individual retirement account having a net value of $33,247.85, not including penalties or cost of early withdrawal, consisting of securities valued at $29,011.25, and cash in the amount of $4,236.60 at the time of filing as demonstrated by Exhibit "A".

3. That the Debtor opened his individual retirement account on November 3, 1987. The Debtor completed the Account

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[1]The Trustee has joined in the objections, although the Trustee's objections are tardy under Bankruptcy Rule 4003(b). This decision is issued on the basis of the creditor's objections.

EXHIBIT "E"

on, even though such record keeping is not a requirement of the Debtor's employment. Additionally, all of the former Rocky Mountain Packing Company records are kept on his computer.

10. The parties stipulate that in the event that the Montana exemption statute is found unconstitutional, leave shall be granted the Debtor to amend his schedules to claim the IRA as exempt under federal exemptions laws, and the creditor reserves all right applicable thereto.

In the bankruptcy Schedules filed by the Debtor, under Schedule B-4, Debtor claimed the following exemptions:

Type of Property	Value Claimed Exempt
Household good	$ 1,710.00
Automobile - 1988 Chevrolet Pickup	8,867.86
Boat - Duracraft Canoe	2,500.00
Office equipment - computer	2,000.00
Tangible personal property - D.A. Davidson Account (120 shares General Electric)	5,400.00
Tangible personal property - Oscar Meyer Pension	5,000.00
Stock and company interest - 401K Rocky Mountain Packing Company Plan	2,039.76
Stock and company interest - D.A. Davidson Account	6,600.00

By Order dated October 25, 1990, the Debtor was allowed to amend his Schedules to reflect, among other things, that the various IRA and pension accounts listed above had been combined into one IRA account by the Debtor pre-Petition, and that said

single IRA was now being claimed as exempt by the Debtor under Schedule B-4.

Additionally, the Debtor amended Schedule B-4 to claim various items of household furnishings as exempt. In his Brief in Support of Declarations of Exemptions filed herein on November 2, 1990, the Debtor acknowledged that the creditor's objections to the exemptions in the household furnishings were well taken to the extent that the value of the exemption exceeded $600.00 worth of household furnishings as exempt, and accordingly, those items of personal property listed in Schedule B-3 which are not claimed as exempt in Schedule B-4 must be turned over to the Trustee for liquidation and distribution to the creditors herein. Those items of property are as follows:

Item	Value
Bar Stools (4)	$ 50.00
Coffee Table	10.00
Dining Room Chairs (2)	20.00
Dresser	10.00
Dresser (water damaged)	25.00
Dresser and Cabinet	50.00
End Table	10.00
Gun Vault (homemade)	80.00
Ladder Back Chairs (2)	100.00
Recliner (plastic)	20.00
Recliner	25.00
Rocker (wood)	25.00

Sofa	25.00
Stuffed Chair	10.00
Stuffed Chair	25.00
Waterbed	50.00

The Debtor's original Schedules also sought to exempt a Duracraft canoe. In his amendments and subsequent Brief, the Debtor also conceded the validity of the Union's objection to this exemption. The Duracraft canoe is no longer claimed exempt on the Debtor's amended Schedule B-4 and therefore must also be turned over to the Trustee for liquidation.

The Debtor has also amended his Schedule B-4 to reflect a $1,200.00 vehicle exemption. However, said vehicle was purchased post-petition with proceeds from the Debtor's IRA account. (Stipulation of Fact, paragraph 7). Accordingly, this exemption is tied directly to challenge against the IRA account and need not be addressed by the Court. The remaining issues raised by the Union's objection deal with the claim of exemption of a computer under Section 25-13-609(3), Mont. Code Ann., as a tool of the trade and the exemption of the Debtor's IRA account.

As to the computer, under the agreed facts, the Debtor uses the computer in his occupation as a farm laborer to keep production records on his employer's ranch, even though such record keeping is not a requirement of the Debtor's employment. The specific exemption under amended Schedule B-4 lists the computer as "office equipment" valued at $2,000.00.

Section 25-13-609(3), Mont. Code Ann., allows a personal

exemption from execution of --

> "(3) the judgment debtor's interest, not to exceed $3,000 in aggregate value, in any implements, professional books, and tools, of the trade of the judgment debtor or a dependent of the judgment debtor;"

An exemption statute is to be liberally construed for the benefit of the Debtor. McMuller v. Shields, 96 Mont. 191, 29 P.2d 652 (1944); In re Frazier, 5 F.Supp. 903 (D. Mont. 1934). The Montana legislature in 1987 changed many of Montana's exemption statutes, particularly those dealing with personal property items, by setting aggregate dollar amounts on all classifications of personal property and eliminating any requirement of necessity. See, In re Neutgens, 7 Mont. B.R. 43 (Bankr. Mont. 1989) for a discussion of Montana new exemption statutes. And, after this Court's decision of In re Mutchler, 95 B.R. 748, 6 Mont. B.R. 388 (Bankr. Mont. 1989), the 1989 Montana legislature again changed § 25-13-609(3) to reduce the value of each item of personal property listed in such sub-section to an "aggregate" value of $3,000.00. Id. at 757, Ftn.1.

I find the language of In re Siegman, 757 P.2d 820 (Okla. 1988), certified to the Supreme Court of Oklahoma by the Oklahoma bankruptcy court on the issue of interpretation of the Oklahoma tool of the trade exemption statute, to be instructive because of the close similarity in language (except as to value) of the Montana and Oklahoma exemption statutes.

> "The intent and purpose of the statute in question is apparent on its face. The statute reflects an intent to insure that

> the items necessary to allow a person to continue to work to support himself are secured to that person exempt from seizure and sale. The statute reflects no limitation in terms of type of equipment, size, source of power, mobility or mode of operation in regard to the tools or apparatus which would come within the coverage of this limitation." Id. at 822.

After approving of the holding of the Montana Supreme Court in McDonald v. Mercill, 220 Mont. 146, 714 P.2d 132, 135 (1986), the Oklahoma court concluded:

> " We now hold that the tools of the trade exemption under 31 O.S.Supp. 1987 § 1(A)(6) applies to any property which comes within the scope of the terms tools, apparatus or books, is used in the trade or professional of the debtor or a dependent of the debtor, and is reasonably necessary, convenient or suitable for production of work in that trade or profession regardless of size, source of power, mobility or mode of operation." Id. at 824.

Further, Matter of Knight, 75 B.R. 839 (Bankr. S.D. Iowa 1987), interpreting a similar Iowa statute on tool of the trade exemption, holds:

> "The ubiquity of computers in the business world attests to their importance to the effective and efficient operation of business. * * * The Court acknowledges the trustee's assertion that a computer is not a necessary component of the debtor's insurance business. * * * However, the debtor need not show that the computer is a necessity. * * *, all that need be shown is that the tool or instrument be a 'proper tool or instrument' that is usually adapted to the debtor's employment." Id. at 840.

In the present case, the Debtor has satisfied the test. Whether the computer is used by him as a convenient item to perform

his trade (although not a necessity of his continued employment), or to keep the tax records of his former business, it is an implement or a tool of the Debtor's trade, and as such, is exempt under § 25-13-609(3), Mont. Code Ann. The Union's objection to the exemption is therefore without merit and is denied.

The final issue raised by the Union's objections presents the issue of the constitutionality of Section 31-2-106(3), Mont. Code Ann., under which the Debtor exempts his IRA account. The challenge is a sequel to this Court's decision of In re Locke, Jr., 120 B.R. 563, 9 Mont. B.R. 31 (Bankr. Mont. 1990). Locke held that Title I of the Employee Retirement Income Security Act (ERISA) did not pre-empt Section 31-2-106(3) in the case of an IRA exemption, so that the Debtor may claim an exemption under that state statute to an IRA account in existence on the bankruptcy petition date. Locke noted in Ftn. 3 that one court had held a state's enactment of exemptions of an IRA pension account where the statute governed rights to exemption of only bankruptcy Debtors was unconstitutional. In re Mata, 115 B.R. 288 (Bankr. Colo. 1990). The union now relies on Mata and In re Lennen, 71 B.R. 80 (Bankr. N.D. Cal. 1987) to sustain its argument that Montana's state exemption statute § 31-2-106(3) applies only in bankruptcy and is invalid as applicable only to Debtors filing bankruptcy and not other Debtors in the state. Mata, at 291; Lennen, at 83. The Union further argues that § 31-2-106(3) violates the equal protection clause of the U.S. and Montana Constitutions. Finally, the Union states that if § 31-2-106(3) is declared constitutional,

to the extent that Debtor's contributions to his IRA during the one-year period preceding the petition date exceed 15% of Debtor's gross income, said sum is non-exempt by reason of the specific statutory language. The Debtor resists each constitutional challenge and asserts that the IRA is totally exempt. The Court and Union gave notice to the Attorney General of the State of Montana pursuant to 28 U.S.C. 2403(b) of his right to intervene in this matter by reason of the constitutional challenge to a state statute, but the Attorney General has not intervened.

The relevant statute is as follows:

> 31-2-106. Exempt property -- bankruptcy proceeding. No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in 11 U.S.C. 522(d). An individual may exempt from the property of the estate in any bankruptcy proceeding:
>
> (1) That property exempt from execution of judgment as provided in 19-3-105, 19-4-706, 19-5-704, 19-6-705, 19-7-705, 19-8-805, 19-9-1006, 19-10-504, 19-11-612, 19-13-1004, 19-21-212, Title 25, chapter 13, part 6, 33-7-511, 33-15-512 through 33-15-514, 35-10-502, 39-51-3105, 39-71-743, 39-73-110, 53-2-607, 53-9-129, Title 70, chapter 32, and 80-2-245;
>
> (2) the individual's right to receive unemployment compensation and unemployment benefits; and
>
> (3) the individual's right to receive benefits from or interest in a private or governmental retirement, pension, stock bonus, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, excluding that portion of contributions made by the individual within 1 year before the filing of the petition in bankruptcy which exceeds 15% of the individual's gross income for that 1-year period, unless:
>
> (a) the plan or contract was established by or under the auspices of an insider that employed the individual at the time the individual's rights under the plan or contract arose;
>
> (b) the benefit is paid on account of age or length of service; and
>
> (c) the plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(b), 408, or

409).

As can be readily discerned from the statute, Montana has opted-out of the federal exemptions allowed under 11 U.S.C. § 522(d). Subsection (1) contains a compilation of existing Montana State statutes applicable to a plethora of public retirement, disability insurance, public assistance benefits, general exemptions of personal property, and the Montana homestead exemption law. Subsection (2) provides exemptions for unemployment compensation benefits, which is a right granted non-bankruptcy Debtors under § 39-51-3105, Mont. Code Ann. Subsection (3) grants exemptions, with some restriction, in private and public benefit plans. Subsection (3) closely parallels the federal bankruptcy exemption found in § 522(d)(10)(E) of the bankruptcy Code, except it does not include any limiting words "reasonably necessary for the support of the Debtor." It is conceded by the parties that a non-bankruptcy Debtor does not enjoy any exemption rights in an IRA retirement account under Montana law. Accordingly, to a non-bankruptcy Debtor, his IRA account would be subject to levy and attachment by creditors. The Union argues that result violates the doctrine of geographic uniformity set forth in Hanover National Bank v. Moyses, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113 (1901), which decision forms the basis of the Mata and Lennen holdings.

Moyses held, in interpreting Article I, Section 8, Cl. 4 of the U. S. Constitution that Congress has the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States":

> "We * * * hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states." Id. at 190.

In the Mata and Lennen cases, interpreting Colorado and California exemption statutes, respectively, which provided exemptions in bankruptcy cases only, the courts held:

> "'Measured by the geographic uniformity test, the exemption scheme of section 703.140 [Cal.Civil Code] must fail. The exemptions made available there apply only to a debtor in federal bankruptcy court; they are not available to a next-door neighbor who has not filed a bankruptcy petition. In addition, the statutory working of section 522(b)(2)(A) that the debtor may claim property as exempt under "state or federal law that is applicable" should not, in view of constitutional considerations, be interpreted so liberally as to allow a state exemption scheme which is applicable only in federal bankruptcy court.' Ibid. at 83.
>
> This court concurs with the result reached by the Lennen court. The State of Colorado may fully adopt exemption statutes which serve to exempt a judgment debtor's assets from levy and exemption by judgment creditors in this state. These statutes will also allow debtors to exempt those same assets from the reach of the trustee in bankruptcy pursuant to 11 U.A.C. § 522(b)(2)(A). That is the scheme mandated and approved by Congress. However, the State of Colorado cannot, under the guise of adopting an exemption statute, adopt a federal bankruptcy exemption for residents who file bankruptcy." Mata, at 291.

Reflecting upon Mata and Lennen, I think each case misconstrues Moyses and overlooks a significant constitutional

doctrine which has been articulated in Matter of Sullivan, 680 F.2d 1131 (7th Cir. 1982), cert. denied, 459 U.S. 992, 103 S.Ct. 349, 74 L.Ed. 388 (1982). Sullivan, in discussing the opt-out provision of § 522(b)(1) of the 1978 bankruptcy Code,[2] which the Montana legislature implemented in § 31-2-106, and whether Congress has the power to permit states to set their own bankruptcy exemption levels, states:

> "The final argument urged by the debtors is that Congress lacks such power. They urge that section 522(b)(1) represents an impermissible delegation of Congressional power. The appellants overlook the long-established principle that the states retain the power to enact bankruptcy laws so long as they do not conflict with federal bankruptcy legislation. In Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 4 L.Ed. 529 (1819), Chief Justice Marshall stated:
>
> > '[T]he power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation of the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.'
>
> 17 U.S. (4 Wheat.) at 195-96. Under Sturges, Illinois has the power to establish exemption provisions for bankrupts of that State so long as the state law does not conflict with the federal bankruptcy laws. As we note in Section III, supra, there is no conflict between the

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[2] In re Granger, 754 F.2d 1490 (9th Cir. 1985) explains a state may opt not to allow its residents to claim federal exemptions set forth in 11 U.S.C. § 522(d) by doing just what Montana has done pursuant to § 522(b)(1), i.e., declare by state law that § 522(d) exemptions are not allowed in bankruptcy. At least 36 states have implemented § 522(b)(1) so as to permit a state to enact its own exemption scheme to be used in place of § 522(d). In re Ondras, 846 F.2d 33 (7th Cir. 1988).

> Illinois exemption provisions and section 522(d) because of the express language of section 522(b)(1). Where a State is thus exercising its own power, no unconstitutional delegation of Congressional power can be found. See, e.g., Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 439-40, 66 S.Ct. 1142, 1160, 90 L.Ed. 1342 (1946).
>
> Further, in Moyses, the Supreme Court held that the exemption provisions of the 1898 Act did not constitute an unconstitutional delegation. The Court stated: 'Nor can we perceive in the matter of exemptions, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power.' 186 U.S. at 190, 22 S.Ct. at 861. We find no distinction, relevant to the delegation argument, between the 1898 Act and the Code. Moyses, supported by the Sturges and Prudential opinions, persuades us that the debtors' delegation argument must fail." Id. at 1137.

It seems to this Court that Mata and Lennen confuse geographic uniformity under Article I, Section 8, with the constitutional power of a state to enact bankruptcy exemption statutes so long as the state law does not conflict with the federal scheme. Congress' enactment of § 522(b)(1), described at length in Sullivan, Id. at 1135-1136, was a clear 'signal' to each state, in accordance with the geographic uniformity doctrine, that each state could validly adopt its own bankruptcy exemption scheme. Such concept is what Montana elected to implement, and in doing so satisfies the constitutional power of a state to enact bankruptcy laws, where Congress has effectively not acted. In accord, In re McManus, 681 F.2d 353 (5th Cir. 1982), reh'g denied, 689 F.2d 190 (5th Cir. 1982); In re Holt, 84 B.R. 991, (Bankr. W.D. Ark. 1988) and cases cited therein. Therefore, the underlying premise of Mata and Lennen that it is not permissible for states to seek to enact two different levels of exemptions, one applicable in bankruptcy and one without, simply misstates the applicable constitutional power

of a state to enact bankruptcy laws where Congress has not sought to act. I decline to follow the holdings of Mata and Lennen relied upon by the Union on this issue.

The final constitutional challenge that § 31-2-106(3) violates the equal protection clause of the U.S. and Montana Constitutions (U.S. Const. Amend. 14, Sec. 1; Mont. Const. Art. II, Sec. 4) is likewise without merit. The Union says that the pertinent statute creates two separate classes of Debtors who are in like circumstances and treats them differently, without any rationale basis.

The basis of equal protection is that the challenged classification must be rationally related to a legitimate government interest. Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Stated differently, the ultimate question in any classification challenge is whether the statute has some reasonable basis, not whether some were excluded from such class who may well have been included.

> "The proper test for classification at issue here is the rationale basis test. As explained by the United States Supreme Court, to survive scrutiny under the rationale basis test, classifications must be reasonable, not arbitrary, and they must bear a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Eisenstadt v. Baird, (1972), 405 U.S. 438, 447, 92 S.Ct. 1029, 1035, 31 L.Ed 2d 349, 359." Montana Stockgrowers v. Dept. of Revenue, 238 Mont. 113, 777 P.2d 285, 288 (1989).

I find the Montana exemption statute, which applies only to bankruptcy, passes constitutional muster under the equal

protection clause of both the U.S. and Montana Constitutions. The reasonable basis of § 31-2-106 is premised on the rationale that bankruptcy petitioners are entitled to a "fresh start." The matter is ably discussed in Matter of Bloom, 5 B.R. 451, 453 (Bankr. N.D. Ohio, 1980), which holds:

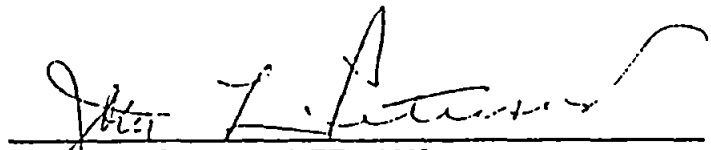
> "Unquestionably, the Ohio Legislature treated bankrupt and non-bankrupt debtors differently. The rationale for the distinction is to provide the former with the requisite 'fresh start'. Being fully aware of the unique problems confronting the bankrupt debtors' quest for financial rehabilitation, the Legislature employed reasonable classification of persons to accomplish this end. The Legislature was cognizant that the commencement of a bankruptcy case creates an estate compromised of all of the debtor's property (Section 541, T.11 U.S.C.A.). Unlike non-bankrupt debtors, the financially distressed bankrupt is in a substantially different posture. He literally relinquishes his earthly possessions without which he is impecunious and relegated to welfare status to his degradation and to the detriment of the tax payers. The alleviation of this onus is a legitimate State interest which justifies a rational basis for resuscitating the bankrupt and relieving the State of an added burden.
>
> To provide bankrupt debtors the necessary 'fresh start' to regain self-respect and resume a productive role in the economy, the Ohio Legislature was compelled to draw the distinction between debtors. 'That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy.' Allied Stores of Ohio, Inc. v. Bowers, Tax Commissioner, 358 U.S. 522, p. 528, 79 S.Ct. 437, p. 441, 3 L.Ed.2d 480 (1959).
>
> 'So long as classifications have a real and substantial basis they can not be said to be violative of the equal protection clause even though the lines drawn there are very narrow.' (cases cited) State v. Greater Portsmouth Growth Corp., supra, 7 Ohio St. 2d p.37, 218 N.E. 2d p. 450, also McClellan v.

Shapiro, 315 F.Supp. 484 (D.C. Conn. 1970)."

It is clear § 31-2-106(3) treats all bankruptcy petitioners alike and has a rationale basis. Accordingly, the constitutional challenge by the Union under the equal protection clause is rejected.

Under the agreed facts, the Debtor made a contribution to the plan within one year of the bankruptcy Petition date of $3,350.89. I cannot determine whether this contribution exceeds a sum in excess of 15% of the gross earnings of Debtor within the one year pre-petition. Accordingly, the Union shall be entitled to submit an Amended Objection to any sum over the allowable 15% amount.

IT IS ORDERED the objections to Debtor's claim of exemptions by the United Food and Commercial Workers Union are denied as to the claim of exemption in a computer and the constitutional challenge to the individual retirement account under § 31-2-106(3), with leave to object to any sum in excess of 15% gross income within one year of the bankruptcy Petition, and sustained to items of household goods and a canoe listed in this Order.



JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, MT 59703

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MONTANA

In re

RICHARD LOCKE, JR., Case No. 90-10361-007

Debtor.

O R D E R

At Butte in said District this 29th day of October, 1990.

In this Chapter 7 case, the Trustee has filed Objections to Debtor's claim of exemptions in an Individual Retirement Account (IRA). The matter has been submitted to the Court on an agreed statement of facts, with stipulated exhibits. Briefs have been filed by each party and the matter is now ready for decision.

The agreed facts are as follows:

1. Debtor Richard Locke worked for Halliburton until September, 1989 when he was terminated. See Exhibit C.

2. During his employment at Halliburton, the Debtor was a participant in the Halliburton Profit Sharing and Savings Plan, a qualified plan under Section 401 of the Internal Revenue Code.

3. The Debtor was found to be "permanently disabled" by his employer as that term is defined by the Halliburton Profit Sharing and Savings Plan after being on sick leave for five months. That company finding permitted him to withdraw all accumulated funds in the Halliburton Profit Sharing and Savings Plan. No court or public administrative agency has found the Debtor to be disabled.

EXHIBIT "F"

4. On February 7, 1990, Debtor rolled over $103,389.44 of his $105,252.81 from the Plan into an IRA at Paine Webber in Billings.

5. At the time of the rollover of funds from the Plan, the Debtor had the sums listed in Exhibit B:

$88,555.63 invested in the General Investment, $16,216.38 invested in the Halliburton Stock Fund and $480.41 in the Tax Deferred Savings (401k), all within the Plan.

The Halliburton Company made all contributions to the General Investment Fund and Halliburton Stock Fund. Debtor contributed $241.02 of the funds to the Tax Deferred Savings.

6. At the time of his withdrawal of funds from the Plan, Debtor had the option of taking the proceeds as income or rolling the proceeds over into an IRA.

7. After creating the $103,389.44 IRA at Paine Webber, the Debtor withdrew $15,389.44 from the IRA as deferred income.

8. Debtor filed the Petition herein on March 19, 1990.

9. Debtor's gross income for one year prior to the filing of the Petition was $16,162.00.

The withdrawal of funds from the IRA account are now permitted without penalty since the Debtor is disabled. The Trustee's Objection to the claim of exemption is based on the argument that Montana's exemption statute, Section 31-2-106(3) has been pre-empted by the federal statute, 29 U.S.C. § 1144(a), Employee Retirement Income Security Act (ERISA), and therefore, the Debtor has no legal right to the exemption under Montana law. The Trustee

relies on the holding of In re Conroy, 110 B.R. 492 (Bankr. Mont. 1990).[1] Conroy held that Section 31-2-106(3) was pre-empted by ERISA in a case where the pension plan had been established and qualified under Title I of 29 U.S.C. §§ 1 et seq. The pension plan in Conroy contained an anti-alienation and anti-assignment clause which is required by ERISA as a condition of qualification. The Conroy decision discussed the ERISA statute pointing out that Title I of ERISA contains the pension plan qualification conditions, while Title II of that Act is composed almost entirely of amendments to the Internal Revenue Code. Id. at 495. The distinction between Conroy and the case sub judice as to the applicability of Title I of ERISA is critical. As explained in In re Martin, 102 B.R. 639 (Bankr. E.D. Tenn. 1989), dealing with IRA accounts established under 26 U.S.C. § 408(a), which was enacted in Title II of ERISA:

> "The legislative history to IRC § 408 indicates that Congress intended IRAs to provide comparable tax advantages to individuals not participating in an ERISA-qualified plan. The House Report states that the proposed bill establishing IRAs is designed to 'mak[e] available a special deduction for amounts set aside for retirement by employees who are not covered under a qualified plan --' House Rep. No. 807, 93rd Cong., 2nd Sess., reprinted at 1974 U.S. Code Cong. & Admin. News at 463914791." Id. at 643.

It is important to realize that the provisions of Title II of ERISA

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[1]Contrary results to Conroy have been recently reached in Matter of Nuttleman, 117 B.R. 975 (Bankr. Neb. 1990); In re Dyke, ___ B.R. ____, 1990 WL 142499 (D.S.D. Tex. 1990), rev'g In re Dyke, 99 B.R. 343 (Bankr. S.D. Tex. 1989); and In re Messing, 114 B.R. 541 (Bankr. E.D. Tenn. 1990).

are not embodied within the preemptive scope of § 29 U.S.C.A. § 1144(a), which is covered solely in Title I of ERISA. As Martin explains:

> " IRAs such as the one in dispute in the instant proceeding differ in key respect from ERISA qualified plans. IRAs are not plans; they are savings accounts. In re Talbert, 15 B.R. 536, 537 (Bankr. W.D. La. 1981). An IRA is contractual in nature, a contract between the depositor and a depository while a plan's contract is between the employer and its employees. Id. at 538; see also Smith v. Winter Park Software, Inc., 504 So.2d 523, 524 (Ct. App. Fla. 1987)("An IRA is a savings account with tax benefits and gratuitous contributions by the [employee]," quoting In re Peeler, 37 B.R. 517, 518 (Bankr. M.D. Tenn. 1984); Halliburton Co. V. Sam Mor, 231 N.J. Super. 197, 555 A.2d 55 (Super.Ct.N.J. 1988)).
>
> IRAs are not required to contain the anti-alienation clause required under ERISA § 206(d)(1) (29 U.S.C.A. § 1056(d)(1) (West Supp. 1989)). See n.10, supra. See also, Smith V. Winter Park, 504 So.2d 523; Bartlett, 239 Kan. 628, 722 P.2d 551.
>
> ERISA qualified plans and IRAs under IRC § 408(a) also differ relative to the degree of control over the funds. With the former, the employee generally enjoys little or no control; with the latter, the individual's discretion is significant. Unlike ERISA qualified pension plans, an individual can generally revoke an IRA, control the mode of distribution, or make early withdrawals, albeit accompanied by a penalty. See generally, Talbert, 15 B.R. 536.
>
> For the reasons enunciated herein, this court concludes that IRAs established under IRC § 408(a) are outside the preemptive scope of ERISA. Accordingly, Tenn. Code Ann. § 26-2-104(b) (Supp.1988), insofar as it relates to a "retirement plan" under IRC § 408(a), is not preempted by ERISA. This opinion does not in any manner purport to address the preemptive effect of ERISA § 514(a) (29 U.S.C.A. § 1144(a) (West 1985)) within the context of any

> contract on account of illness, disability, death, age, or length of service, excluding that portion of contribution made by the individual within 1 year before the filing of the petition in bankruptcy which exceeds 15% of the individual's gross income for that 1-year period, unless:
> (a) the plan or contract was established by or under the auspices of an insider that employed the individual at the time the individual's rights under the plan or contract arose;
> (b) the benefit is paid on account of age or length of service; and
> (c) the plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(b), 408 or 409."

The fact that the IRA funds were rolled-over from a qualified pension plan trust is of no importance to the Trustee's Objection, because property of the estate under § 541 of the bankruptcy Code, and exemptions under state law in an opt-out state such as Montana, are governed as of the petition date. In re Mutchler, 95 B.R. 748, 6 Mont. B.R. 388 (Bankr. Mont. 1989). In re Fernando Magallanes, 96 B.R. 253, 255 (9th Cir. BAP 1988) holds:

> "Any exemptions claimed by the debtor are also determined as of the Chapter 11 filing date. In re Thurmond, 71 B.R. 596, 598 (D. Or.), aff'd 825 F.2d 414 (9th Cir. 1987). Such exemptions are allowed pursuant only to those federal, state or local laws applicable on the filing date of the petition. 11 U.S.C. Section 522(b)(2)(A) (West 1979)."

See, in accord, In re Chadwick, supra. At the date of the Petition in this case, the Debtor had the clear statutory right under § 31-2-106(3) to claim or exempt his right to "receive benefits -- in a private retirement -- plan - on account of disability" because the plan qualified under 26 U.S.C. § 408. No other issue is presented

in this case by the Trustee's Objection.[3] By reason of this personal right, the Debtor who owns an IRA account at the date of the bankruptcy Petition is entitled in Montana to an exemption of such account. While such result, when compared with Conroy and Ullman, allows this Debtor more favorable treatment it is because of the peculiar nature of each retirement account, Montana's opt-out statute and the technical, but different, applicability of ERISA to each retirement plan.

IT IS ORDERED the Trustee's Objection to Debtor's claim of exemption of an Individual Retirement Account qualified under 26 U.S.C. § 408 is denied.

JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, Montana 59703

[3]For example, one court has held that a state's enactment of exemptions of an IRA pension account where the statute governed rights to exemption of bankruptcy debtors was unconstitutional as to the Trustee. In re Mata, 115 B.R. 288 (Bankr. Colo. 1990)(a separate state-created exemption statute, for bankruptcy only violates, Art. 1, Sec. 8, Cl. 4 of the U.S. Constitution).