ORDERED.

**Dated: March 11, 2020**

Catherine Peek McEwen
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**
www.flmb.uscourts.gov

In re:

Andrew B. Glass,

Debtor.
_____/

Case No. 8:18-bk-02707-CPM
Chapter 7

**ORDER DEFERRING FOR DECISION BY THE DISTRICT COURT TRUSTEE'S MOTION FOR CERTIFICATION OF DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

THIS CASE came before the Court for hearing on February 10, 2020,[1] on the Trustee's Motion for Certification of Direct Appeal to the United States Court of Appeals for the Eleventh Circuit Pursuant to 28 U.S.C. § 158(d) (Doc. 223) (the "Motion for Certification") filed by Dawn A. Carapella, in her capacity as Chapter 7 Trustee (the "Trustee") in this case and the Debtor's Motion in Opposition to Trustee's Motion for Certification of Direct Appeal to the United States Court of Appeals for the Eleventh Circuit Pursuant to 28 U.S.C. § 158(d) (Doc. 226) (the "Opposition") filed by Andrew B. Glass.[2] At the conclusion of the hearing, for the reasons

[1] As this order makes clear, the Court should not have scheduled or held this hearing.
[2] In his Opposition, the Debtor states that he is confident that the district court would affirm the bankruptcy court's decision and he "hopes that this affirmation would be sufficient to discourage further appeal." At the hearing, however, counsel for the Trustee advised the Court that should the district court affirm the Exemption Orders, the Trustee would appeal to the Eleventh Circuit.

stated orally and recorded in open court, the Court announced its intent to grant the Motion for Certification. Since then, upon further review of the applicable rules (and after having almost completed a certification for direct review in the Court of Appeals for the Eleventh Circuit), the Court has determined that, as of the time of the hearing, it no longer had the authority to make the requested certification.

Rule 8006 of the Federal Rules of Bankruptcy Procedure[3] governs certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals. Under Rule 8006(b), a certification for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) must be filed with the clerk of court where the matter is pending. "For purposes of this rule [Rule 8006], a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought. A matter is pending in the district court or BAP thereafter." The Trustee filed her Motion for Certification on the 30th day following the filing of the Notice of Appeal. Thus, the Trustee properly filed the motion with the bankruptcy court because the matter remained pending with the bankruptcy court at that time.

However, under Rule 8006(d), "[o]nly the court where the matter is pending, as provided in subsection (b), may make the certification." Consequently, on the 31st day following the filing of the Notice of Appeal—one day after the Motion for Certification was filed—the authority to make the certification shifted from the bankruptcy court to the district court.[4] Thus, the Motion for Certification now straddles both courts. Rule 8006 appears to make no provision for circumstances such as occurred here, where jurisdiction to make a certification for direct

[3] All subsequent citations to Rules are to the Federal Rules of Bankruptcy Procedure.

[4] *See Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2017 Bankr. LEXIS 2016, *6 (Bankr. S.D.N.Y. July 19, 2017) (finding that as of the 31st day after the notice of appeal was filed, the bankruptcy court lacked jurisdiction to enter an order on a motion for certification for direct review by the court of appeals).

review in a court of appeals shifts to the district court while a timely motion for certification properly filed with the bankruptcy court remains unresolved. Because the authority to make the certification is now within the exclusive domain of the district court, this Court finds that it is appropriate to transfer the Motion for Certification, as well as the Opposition thereto, to the district court and defer to the district court ruling on the same.[5]

Accordingly, it is

**ORDERED**:

1. Ruling on the Trustee's Motion for Certification and the Opposition thereto is deferred for decision by the district court, given that the matter on appeal to which it relates is now pending in the district court.

2. Within three business days of entry of this order, the Trustee is directed to file in *Dawn A. Carapella, Chapter 7 Trustee v. Andrew Glass,* Case No. 8:19-cv-3050-T-02, currently pending in the United States District Court for the Middle District of Florida, Tampa Division, copies of the Motion for Certification and the Opposition thereto, as well as a copy of this order explaining how the authority for making the certification shifted from the bankruptcy court to the district court.

3. Attached for the district court's information as "Appendix A" is this Court's "Draft Certification" that includes a description of the issue on appeal and grounds for certification for direct review in the Court of Appeals for the Eleventh Circuit which, had this Court retained the authority to make the certification, would have supported certification. The

[5] *See id.* at *7 (leaving to the district court the question of whether the district court could rule on the motion for certification, which motion was timely filed with the bankruptcy court, but for which, by the time the bankruptcy court realized that it had lost jurisdiction to rule on the motion, the time to file such motion with the district court had lapsed). In this Court's opinion, it would be absurd to interpret Rule 8006 as requiring the Trustee to make a second filing in the district court when her initial filing was properly and timely filed with the bankruptcy court. Instead, it makes more sense to transfer the motion to the district court for the district court's consideration.

Draft Certification summarizes this Court's ruling on the issue on appeal and explains why the issue merits direct view by the Eleventh Circuit.

Attorney Lynn Welter Sherman is directed to serve a copy of this order on the Debtor and interested non-CM/ECF filers and file a proof of service within three days of entry of this order.

# APPENDIX A

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Case No. 8:18-bk-02707-CPM

Andrew B. Glass,

Chapter 7

Debtor.
_____/

**[DRAFT]**
**CERTIFICATION TO THE COURT**
**OF APPEALS FOR THE ELEVENTH CIRCUIT**

On December 11, 2019, the Chapter 7 Trustee (the "Trustee") assigned to the above-referenced case filed her Notice of Appeal (Doc. No. 207) of this Court's Order Granting Debtor's Motion for Summary Judgment Upholding Exemption of IRA Funds (Doc. No. 198) entered on December 3, 2019; Order Overruling Trustee's Objection to Claim of Exemptions (Doc. No. 201) entered on December 5, 2019; Final Judgment on Objection to Exemptions (Doc No. 203) entered on December 6, 2019; and Order Denying Trustee's Motion for Summary Judgment (Doc. No. 206) entered on December 10, 2019 (collectively, the "Exemption Orders"). On January 10, 2020, 30 days after the Trustee filed the Notice of Appeal, she filed the Trustee's Motion for Certification of Direct Appeal to the United States Court of Appeals for the Eleventh Circuit Pursuant to 28 U.S.C. § 158(d) (Doc. 223) (the "Motion"). On _____, this Court entered an order (Doc. No. __) granting the Motion following a hearing on February 10, 2020.[6]

[6] The February 10th hearing was scheduled after the filing of the Debtor's Motion in Opposition to Trustee's Motion for Certification of Direct Appeal (the "Opposition") (Doc. No. 226). The Opposition states that the Debtor is confident that the district court would affirm the bankruptcy court's decision and he "hopes that this affirmation would be sufficient to discourage further appeal." However, at the hearing, counsel for the Trustee advised the Court that if the district court affirms the Exemption Orders, the Trustee would appeal to the Eleventh Circuit. Thus, this Court found the Opposition unpersuasive.

## ISSUE PRESENTED

The issue on appeal is whether the Debtor's right to receive funds from his former spouse's individual retirement account directly into his own individual retirement account (a "direct IRA-to-IRA transfer") pursuant to a New York judgment entered incident to divorce is exempt under 11 U.S.C. § 522(d)(12) from the Trustee's administration of the Debtor's bankruptcy estate.[7] This subsection allows an exemption for "[r]etirement 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."

To provide some background, the Court notes that prepetition the Debtor filed for divorce in New York, and he and his soon-to-be former spouse entered into a "Stipulation of Settlement" (the "Agreement") providing for the disposition of their assets. Postpetition, the parties' divorce became final, and as contemplated in the Agreement and permitted under applicable New York law, the Agreement was incorporated into and made a part of the final judgment for divorce (the "Judgment").[8] Under both the Agreement and the Judgment, the Debtor was entitled to receive two transfers of funds for a combined total of $900,000 directly into his IRA from his former spouse's IRA.[9]

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[7] The parties agreed that the Bankruptcy Code's federal exemptions apply under the facts of this case pursuant to 11 U.S.C. § 522(b)(3)(A).

[8] The Agreement expressly states in Article IV that the parties intend it to constitute an agreement "pursuant to "[New York] Domestic Relations Law, Section 236(B)(3)." Under this provision, as an alternative to having a matrimonial court determine the equitable disposition of a couple's assets, parties in a matrimonial action may enter an agreement for the disposition of their assets, which agreement "shall be valid and enforceable *in a matrimonial action*" if the agreement complies with specified formalities. (Emphasis added.) *See also*, Article VI of the Agreement (referring to incorporation of the agreement into a decree of divorce or dissolution of marriage).

[9] The parties' agreement provides for direct IRA-to-IRA transfers of two separate amounts, $750,000 and $150,000, the first of which was made contingent upon the Debtor's signing over to his former spouse deeds and titles to certain properties. Because the Debtor satisfied this contingency prior to the petition date, the Court finds the original contingent nature of a portion of this asset has no bearing on the Debtor's entitlement to exempt this asset in its entirety under § 522(d)(12). Nor does case law dealing with interests that are conditional as of the petition date.

Pursuant to applicable New York law, the Debtor's interest in the direct IRA-to-IRA transfer vested upon entry of the Judgment.[10] However, dicta in some case law suggests that parties in a New York matrimonial action acquire a vested interest in marital property upon the execution of an agreement providing for the disposition of the property, such as the one executed between the Debtor and his former spouse.[11] Whether the Debtor's interest had vested as of the petition date or on the later Judgment date is immaterial. That is because the Judgment was entered within 180 days of the petition date, which means that the interest would nonetheless come into his bankruptcy estate under 11 U.S.C. § 541(a)(5) as an interest in property "as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree."[12]

As for the merits, the specific question for consideration on appeal is whether this Court properly overruled the Trustee's objection to the Debtor's claimed exemption of this asset based on the following two reasons. First, the Trustee cannot enlarge the rights of a debtor, and the Debtor's right in this case, and corresponding obligation to his former spouse, is to receive a

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[10] *See Musso v. Ostashko,* 468 F.3d 99, 105 (2d Cir. 2006) (under New York law, "[a] spouse without legal title has no interest in marital property prior to obtaining a judgment creating such interest") and *In re Cole,* 202 B.R. 356, 360 (Bankr. S.D.N.Y 1996) ("The spouses' respective rights in marital property do not vest under New York law, however, until entry of a judgment dissolving the marriage.").

[11] *See Cooper v. Frederes (In re Frederes),* 141 B.R. 289, 292 (W.D.N.Y 1992) ("Because it is not until the debtor acquires an interest in marital property by a property settlement agreement or a divorce decree that such an interest becomes property of the estate, Section 541(a)(5) is consistent with New York law.") and *O'Brien v. O'Brien,* 66 N.Y.2d 576, 583 (1985) (N.Y. Ct. App. 1985) (in New York, interest in "marital property" is a statutory creature and "has no meaning whatsoever during the normal court of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action") (citation omitted). Although neither of these cases involved the parties' having signed an agreement for the disposition of their marital property, the cases suggest that vesting in the property could occur upon the execution of such agreement.

[12] *See In re Wilson,* 694 F.2d 236, 238 (11th Cir. 1982) (property coming into the estate under § 541(a)((3) through (a)(7) after commencement of the case is "property of the estate" and can be claimed by the debtor as exempt under § 522(b)).

direct IRA-to-IRA transfer into the Debtor's retirement account,[13] not simply collect money. Additionally, the funds in question qualify as "retirement funds" under the analysis utilized by the Supreme Court of the United States in *Clark v. Rameker.*[14]

Concerning the first reason, it is impossible for the Trustee to cause the withdrawal of the funds at issue from the IRA of the Debtor's former spouse for the benefit of the estate without triggering negative tax consequences to his former spouse. For example, the Debtor's former spouse would be subject to taxes and penalties for early withdrawal of IRA funds. Further, such withdrawal would increase her taxable income and possibly push her into a higher tax bracket, impacting taxation of all her sources of income.[15]

As to the second reason, case law developed after the Trustee filed her Notice of Appeal warrants this Court's further discussion. In *Clark*, the Court denied exempt status to funds in an *inherited* IRA (which is not the type of IRA at issue in the instant case) after concluding that such funds failed to qualify as "retirement funds." The Court explained that "retirement funds" are "properly understood to mean sums of money set aside for the day an individual stops working."[16] In that case, "[t]he parties agree that, in deciding whether a given set of funds falls within this definition, the inquiry must be an objective one, not one that turns on the debtor's subjective purpose."[17] Rather than engage in a "case-by-case, fact-intensive examination" into how the debtor actually plans to use the funds, courts should instead "look into the legal characteristics of the account in which the funds are held, asking whether, as an objective matter,

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[13] *See Witko v. Menotte (In re Witko)*, 374 F.3d 1040, 1042-43 (11th Cir. 2004) ("Although the estate is construed broadly, Congress expressly cautioned that . . . '[the trustee] could take no greater rights than the debtor himself had.'") (citations omitted).
[14] 573 U.S. 122 (2014).
[15] *See* 26 U.S.C. § 408(d)(6) (transfer of an interest in an individual's IRA to the IRA of a spouse or former spouse under a divorce or separation agreement "is not to be considered a taxable transfer made by such individual").
[16] *Id.* at 127.
[17] *Id.*

the account is one set aside for the day an individual stops working."[18] The Court described the following three legal characteristics of *inherited* IRAs that led the Court to conclude that funds in such accounts are not objectively set aside for retirement and, therefore, do not qualify as "retirement funds" for purposes of § 522(d)(12): 1) the holder of an inherited IRA may never invest additional money into the account; 2) the holder of an inherited IRA is required to withdraw money from such account, no matter how many years away he or she 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.[19] Funds held in an inherited IRA "constitute a 'pot of money that can be freely used for current consumption,' not funds objectively set aside for one's retirement."[20] Basically, an inherited IRA is no different from a piggy bank.

In the present case, the Debtor asserts that because the funds at issue here must be transferred directly into his *traditional* IRA, they will become subject to all of the restrictions on deposits and withdrawals applicable to traditional IRAs. Therefore, the Debtor argues that none of the disqualifying legal characteristics described in *Clark* apply here, and thus the funds at issue *do* qualify for exemption under § 522(b)(12). This Court agrees with him.

The Chapter 7 Trustee, on the other hand, relies heavily on the case of *Lerbakken v. Sieloff and Associates, P.A. (In re Lerbakken),*[21] which was decided after *Clark,* for the proposition that a debtor's entitlement to funds from a former spouse's retirement account pursuant to divorce proceedings cannot qualify as "retirement funds" because the debtor did not

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[18] *Id.*
[19] *Id.* at 128.
[20] *Id.* at 128-29 (internal citation omitted).
[21] 590 B.R. 895 (B.A.P. 8th Cir. 2018). In *Lerbakken,* the debtor claimed an interest in two of his former spouse's accounts: an IRA and a 401(k) account. Because the instant case deals only with an IRA, this certification addresses only how *Lerbakken* and *Lerbakken II, infra,* deal with the IRA.

personally set aside those funds; his former spouse did. In that opinion, the court stated that *Clark* "clearly suggests that the exemption is limited to individuals who create and contribute funds into the retirement account."[22] Relying on this suggestion, the *Lerbakken* court concluded that "[r]etirement funds obtained or received by any other means do not meet this definition."[23]

Subsequent to the Trustee's filing of her Notice of Appeal, the Eighth Circuit Court of Appeals affirmed *Lerbakken ("Lerbakken II")*[24] without relying on a *per se* prohibition against an exemption for funds coming into a debtor's IRA from someone else's IRA. Instead, the *Lerbakken II* court analyzed the funds at issue there in light of the three objective characteristics identified in *Clark* as disqualifying the funds from constituting "retirement funds" for purposes of § 522(d)(12).[25] In so doing, the court in *Lerbakken II* set out and examined additional facts not discussed by the court in *Lerbakken.*

We learn, for example, for the first time in *Lerbakken II* that, prior to the petition date, a state court had ordered an attorney's lien against the debtor for services provided by the law firm that represented him in the dissolution action, expressly permitting the firm to recover unpaid fees from the debtor's interest in his former spouse's IRA and 401(k) accounts. The amount of the fees exceeded the total dollar amount of the debtor's interests in those accounts.[26] Further, as both *Lerbakken* courts touched on, the debtor's interest in the receipt of the funds from his former spouse's IRA as of the petition date was conditioned upon either his former spouse's IRA being renamed or the funds being transferred into an IRA under his name, and no means for

[22] *Id.* at 897.
[23] *Id.*
[24] *Lerbakken v. Sieloff and Assoc., Inc. (In re Lerbakken)*, 949 F.3d 432 (8th Cir. 2020).
[25] *Id.* at 436.
[26] *Id.* at 434.

either option to occur was ever created.[27] Thus, the *Lerbakken II* court concluded that the debtor's conditional interest in his former spouse's IRA did not qualify for exempt status because two of the disqualifying factors discussed in *Clark* applied: Specifically, the court noted that the debtor was required to withdraw his interest in that account to satisfy the attorney's lien (and thus, he could not preserve the account for retirement) and no vehicle existed pursuant to which the funds could be transferred for his benefit into an account subject to traditional IRA restrictions.[28]

**JURISDICTION OVER APPEAL OF EXEMPTIONS ORDERS**

Pursuant to 28 U.S.C. § 158(a), federal district courts may, in addition to reviewing a bankruptcy court's final judgments and orders, also review a bankruptcy court's interlocutory judgments and orders (some as of right and some by exercise of discretion). The federal courts of appeals, on the other hand, under 28 U.S.C. § 158(d), have jurisdiction only over final judgments and orders arising from a bankruptcy proceeding. Thus, whether the Eleventh Circuit has jurisdiction to review the Exemption Orders depends on whether those orders are "final."

Generally, a final order or decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[29] In the context of a bankruptcy case, the Eleventh Circuit has ruled that a particular adversary proceeding or controversy must

[27] By contrast, as of the date the Debtor's right to receive direct IRA-to-IRA came into his bankruptcy estate (whether that was the petition date or the Judgment date), that right was unconditional. Thus, this Court finds the fact that the transfer has not yet occurred is immaterial in determining the Debtor's right to claim this asset as except under § 522(d)(12). Under no possible scenario could the Debtor convert this asset to a "pot of money that can be freely used for current consumption," thus avoiding concerns raised in *Clark*. *Clark*, 573 U.S. at 128-29. *See also* 11 U.S.C. § 522(b)(4)(C) ("A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under [applicable sections] of the Internal Revenue Code . . . shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.").
[28] *Id.* at 436.
[29] *Catlin v. United States*, 324 U.S. 229, 233 (1945).

have been finally resolved rather than the entire bankruptcy litigation.[30] More specifically, the Eleventh Circuit has determined that a district court order affirming a bankruptcy court's order that overruled a trustee's objection to property claimed as exempt—which is what we have here—constitutes a final order for purposes of appeal where the factual record was fully developed and no "significant judicial activity [for] the bankruptcy court involving considerable discretion" remained.[31] Therefore, the Exemption Orders are "final" orders that the Eleventh Circuit has jurisdiction to consider.

**GROUNDS FOR CERTIFICATION**

The grounds for certification for direct review in a court of appeals specified in 28 U.S.C. § 158(d)(2)(A) are:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progression of the case or proceeding in which the appeal is taken.

The issue presented in this case involves a direct transfer from the individual retirement account of a debtor's former spouse to the debtor's individual retirement incident to divorce. Such transfers represent a common vehicle for avoiding negative tax consequences. Thus, the

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[30] *Commodore Holdings, Inc. v. Exxon Mobile Corp.*, 331 F.3d 1257, 1259 (11th Cir. 2003) (citations omitted).

[31] *Silliman v. Cassell (In re Cassell)*, 688 F.3d 1291, 1301, n.2 (11th Cir. 2012). *See also Ritzen Group, Inc. v. Jackson Masonry, LLC*, __ S. Ct. __, 2020 WL 201023 (Jan. 14, 2020) (bankruptcy orders qualify as "final" orders when they "definitively dispose of discrete disputes within the overarching bankruptcy case").

issue constitutes a matter of public importance and is one that will likely recur in the Middle District of Florida and other districts throughout the Eleventh Circuit.

The issue is also one for which no controlling decision of the Eleventh Circuit or the Supreme Court exists. Therefore, this issue raises a matter of first impression in this circuit. Conflicting opinions from other jurisdictions arguably exist. Yet, none of the cases relied upon by the parties or found by the Court's own staff is squarely on point.

Finally, and perhaps most important, the funds in question, which total $900,000, would, if determined to be property of the Debtor's bankruptcy estate, constitute the estate's most valuable asset. And the retirement account in which the funds presently exist could be diminished depending on investment decisions of the Debtor's former spouse, who still controls the account in which the funds are held.[32] Consequently, the timely resolution of this appeal will materially advance the progression of the Debtor's bankruptcy case and may reduce the risk of loss or diminution of this asset. Due to the amount in controversy, coupled with statements previously made by the respective parties in open court, this Court has no doubt that the Eleventh Circuit will ultimately be required to determine the issue presented on appeal in any event.

Accordingly, I CERTIFY the Exemption Orders for direct review in the United States Court of Appeals for the Eleventh Circuit.

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[32] This Court has temporarily enjoined the transfer of funds into the Debtor's IRA from his former spouse's IRA until the question of whether such funds are property of his bankruptcy estate has been finally resolved. *See* Interim Order Granting [in part] Trustee's Motion for Turnover of Funds in IRA Account (Doc. No. 78) (prohibiting the Debtor's former spouse and Fidelity Investments from transferring the funds in her IRA to which the Debtor is entitled to the Debtor or otherwise withdrawing or disbursing those funds pending further order of the Court). *See also* Order Partially Granting Trustee's Motion for Contempt and/or Sanctions (Doc. No. 87) (prohibiting the Debtor from taking action to collect, transfer, or control funds in his former spouse's absent further order of the Court).