No.

In the Supreme Court of the United States

BRANDON C. CLARK AND HEIDI K. HEFFRON-CLARK,
PETITIONERS

v.

WILLIAM J. RAMEKER, TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual retirement account that a debtor has inherited is exempt from the debtor's bankruptcy estate under Section 522 of the Bankruptcy Code, 11 U.S.C. 522, which exempts "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain provisions of the Internal Revenue Code.

PARTIES TO THE PROCEEDING

Petitioners are Brandon C. Clark and Heidi K. Heffron-Clark. Respondents are William J. Rameker, Trustee, and Rusul Adili and Zinije Adili, d/b/a Kegonsa Plaza.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Brandon C. Clark and Heidi K. Heffron-Clark respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 714 F.3d 559. The opinion of the district court (App., *infra*, 9a-21a) is reported at 466 B.R. 135. The opinion of the bankruptcy court (App., *infra*, 22a-35a) is reported at 450 B.R. 858.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2013. A petition for rehearing was denied on May 21, 2013 (App., *infra*, 8a). On August 2, 2013, Jus-

tice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 18, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 522(b)(3)(C) and (d)(12) of Title 11 of the United States Code provides that a debtor may exempt the following property from the bankruptcy estate:

> [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.

STATEMENT

This case is a compelling candidate for the Court's review, presenting a clean question of statutory interpretation on which the courts of appeals are in conflict. In Section 522 of the Bankruptcy Code, Congress provided that a debtor may exempt from the bankruptcy estate "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain provisions of the Internal Revenue Code. This case presents the question whether an individual retirement account (IRA) that the debtor has inherited qualifies for that exemption.

In this case, petitioners, a husband and wife, declared bankruptcy under Chapter 7 of the Bankruptcy Code. In the bankruptcy proceedings, they claimed an exemption from the bankruptcy estate for an IRA that had passed to the wife when her mother died. Respondents, the bankruptcy trustee and unsecured creditors, objected to the claimed exemption. The bankruptcy court sustained respondents' objection, App., *infra*, 22a-35a, but the district court reversed, *id.* at 9a-21a.

The court of appeals then reversed the district court and rejected the claimed exemption. App., *infra*, 1a-7a. In an opinion written by Judge Easterbrook, the court of appeals held that an individual retirement account that the debtor has inherited does not qualify for the "retirement funds" exemption in Section 522. In so doing, the court expressly recognized that it was creating a circuit conflict on the interpretation of the "retirement funds" exemption. Because this case presents an ideal vehicle for resolving that conflict on an important and recurring question of bankruptcy law, the petition for certiorari should be granted.

1. Approximately 1.5 million American families and individuals file for bankruptcy every year. See 1 Henry J. Sommer, *Consumer Bankruptcy Law and Practice* § 1.1.1, at 1 (9th ed. 2009). When a debtor files for bankruptcy, the debtor's property becomes part of the bankruptcy estate. See 11 U.S.C. 541(a). Congress has created various exceptions and exemptions from the bankruptcy estate, which reflect policy judgments about certain types of property that debtors should be permitted to retain.

Of note here, Section 522 of the Bankruptcy Code establishes the regime by which a debtor may claim exemptions from the bankruptcy estate. A debtor may elect either to claim exemptions from a lengthy list of federal exemptions pursuant to Section 522(b)(2), or to claim exemptions under state law (as supplemented by a shorter list of federal exemptions) pursuant to Section 522(b)(3). See 11 U.S.C. 522(b)(1).

This case involves the exemption in Section 522 for "retirement funds." Congress added that exemption in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA). Before the enactment of BAPCPA, this

Court had held that various types of retirement funds, including individual retirement accounts, were exempt or excluded from the bankruptcy estate under other provisions of the Bankruptcy Code. See *Rousey* v. *Jacoway*, 544 U.S. 320, 334-335 (2005); *Patterson* v. *Shumate*, 504 U.S. 753, 765-766 (1992).

In enacting the "retirement funds" exemption, Congress sought to "expand the protection for tax-favored retirement plans or arrangements that may not be already protected under * * * state or Federal law." H.R. Rep. No. 31, 109th Cong., 1st Sess., Pt. I, at 63-64 (2005). In order to ensure that the exemption would be available "regardless of the State policy on exemptions," *id.* at 43, Congress enacted identically worded provisions for debtors who elect to pursue the state and federal exemption schemes, respectively. See 11 U.S.C. 522(b)(3)(C) (state exemption scheme); 11 U.S.C. 522(d)(12) (federal exemption scheme). The same "retirement funds" exemption is therefore available to all debtors as a matter of federal law.

The "retirement funds" exemption provides that a debtor may exempt from the property of the bankruptcy estate "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. 522(b)(3)(C) and (d)(12). While it may not be obvious from the enumerated list of Internal Revenue Code provisions, the exemption covers all of the most familiar types of retirement accounts, including qualified pension, profit-sharing, and stock-bonus plans, see 26 U.S.C. 401; employee annuity plans, see 26 U.S.C. 403; IRAs, see 26 U.S.C. 408; Roth IRAs, see 26 U.S.C. 408A; certain defined-benefit retirement plans, see 26 U.S.C. 414; deferred-compensation plans of state and local govern-

ments and tax-exempt organizations, see 26 U.S.C. 457; and retirement plans for certain tax-exempt entities, see 26 U.S.C. 501(a).

This case presents the question whether an "inherited" IRA—that is, an IRA that a non-spouse beneficiary has acquired "by reason of the death of another individual," 26 U.S.C. 408(d)(3)(C)(ii)(I)—qualifies for the "retirement funds" exemption. An inherited IRA retains its tax-exempt status, with funds being taxed, if at all, only upon distribution. See 26 U.S.C. 408(e)(1); 26 U.S.C. 408A(a). The beneficiary of an inherited IRA, however, may not contribute to the IRA or roll it over into another retirement account. See 26 U.S.C. 408(d)(3)(C); IRS, Publication 590: Individual Retirement Arrangements (IRAs) 17 (2013) (IRS Publication 590).[1] In addition, the beneficiary may withdraw funds from the account and is required to withdraw a specified minimum amount annually. See IRS Publication 590, at 33-35.

2. Petitioners Brandon Clark and Heidi Heffron-Clark are a husband and wife who live in Stoughton, Wisconsin, with their six-year-old son. In 2000, Mrs. Heffron-Clark's mother, Ruth Heffron, established an IRA. In 2001, Mrs. Heffron died, and the IRA passed to Mrs. Heffron-Clark, who had been named as the primary beneficiary. After she assumed the IRA, Mrs. Heffron-Clark began taking the required minimum distributions in accordance with the rules governing inherited IRAs; under those rules, she is entitled to continue doing so for the remainder of her lifetime. C.A. App. 30-31.

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[1] When the beneficiary is a spouse of the decedent, the spouse may elect to step into the decedent's shoes and become the IRA's owner. A spouse who does so possesses the right to contribute to the IRA or roll it over. See IRS Publication 590, at 16-17.

After their business failed during the recent recession, petitioners could no longer satisfy their debts and the living expenses of their family. Accordingly, on October 29, 2010, they filed a Chapter 7 petition for bankruptcy in the United States Bankruptcy Court for the Western District of Wisconsin.

In the bankruptcy proceedings, petitioners claimed that the IRA that Mrs. Heffron-Clark had inherited from her mother qualified for the "retirement funds" exemption in 11 U.S.C. 522(b)(3)(C).[2] At the time of the bankruptcy, the IRA was valued at nearly $300,000 and was by far petitioners' most valuable asset aside from their home (which was exempt under state law). See C.A. App. 37-41 (listing personal property, including the IRA, totaling some $378,000 in value). Respondents, the bankruptcy trustee and unsecured creditors, objected to the exemption, contending that an inherited IRA does not qualify for the "retirement funds" exemption in Section 522.

The bankruptcy court sustained respondents' objection. App., *infra*, 22a-35a. As is relevant here, the court reasoned that the funds in the inherited IRA did not constitute "retirement funds" because they were "not segregated to meet the needs of, nor distributed on the occasion of, any person's retirement." *Id.* at 30a.[3]

[2] Petitioners also claimed that the IRA qualified for an exemption under Wisconsin law. The bankruptcy court rejected that claim, see App., *infra*, 33a-35a, and petitioners did not appeal from that ruling.

[3] The bankruptcy court stayed its order sustaining the objection pending the completion of all appeals. See Order 1, Bankr. Ct. Dkt. 66 (June 13, 2011). Currently, the trustee retains possession of the IRA, and the required minimum distributions from the IRA to Mrs. Heffron-Clark are being deposited in a trust account maintained by the trustee. See *id.* at 2.

3. The district court reversed. App., *infra*, 9a-21a. The court reasoned that funds set aside in an IRA do not "lose their character" as "retirement funds" when they pass to a beneficiary after the account holder's death. *Id.* at 18a-21a. Rejecting the bankruptcy court's analysis, the district court concluded that the "retirement funds" exemption in Section 522 "do[es] not distinguish between an account built up by a decedent and inherited by the debtor and an account made up of contributions by the debtor herself." *Id.* at 20a. The court added that an inherited IRA expressly remains exempt from taxation under 26 U.S.C. 408(e)(1), one of the enumerated Internal Revenue Code provisions in the "retirement funds" exemption. *Ibid.*

In ruling in favor of petitioners, the district court observed that its decision was consistent with the decisions of every other court to have considered "this precise issue" on facts "indistinguishable from those in this case" (with the exception of a bankruptcy court that had subsequently been reversed). App., *infra*, 16a. After analyzing those decisions, the court concluded that "[the majority's] construction of the applicable statutes is more persuasive" and that "the majority has reached the right result." *Id.* at 21a.

4. The court of appeals reversed, holding that an inherited IRA does not qualify for the "retirement funds" exemption in Section 522. App., *infra*, 1a-7a.

As an initial matter, the court of appeals acknowledged that the Fifth Circuit had held that an inherited IRA does qualify for the "retirement funds" exemption in Section 522. App., *infra*, 3a (citing *In re Chilton*, 674 F.3d 486 (5th Cir. 2012)). The court of appeals nevertheless concluded that funds constitute "retirement funds" under Section 522 only if they are "savings reserved for use after their owners stop working." *Id.* at 7a. The

court reasoned that, when Mrs. Heffron-Clark's mother died, the funds in the inherited IRA "became no one's retirement funds," even though they continued to be held in a retirement account and the account "remain[ed] a tax-deferral vehicle." *Id.* at 4a. The court likened the contents of an inherited IRA to funds withdrawn from the IRA by the original owner and given to the beneficiary as a cash gift. *Ibid.* Because the beneficiary may withdraw funds from the IRA (and must take minimum distributions), the court concluded that the entire IRA is "a pot of money that can be freely used for current consumption" and so should not be "shelter[ed] from creditors." *Ibid.*

The court of appeals proceeded to reject the reasoning of the Fifth Circuit and other courts that had concluded that that an inherited IRA qualifies for the "retirement funds" exemption. App., *infra*, 4a-5a. Specifically, the court of appeals rejected the significance of the fact that an inherited IRA remains an "individual retirement account," contending that "the 'IRA' part of 'inherited IRA' * * * designates the funds' *source*, not the assets' current status." *Ibid.* In the court's view, "an inherited IRA does not have the economic attributes of a retirement vehicle," because of the requirement that the beneficiary take minimum distributions. *Id.* at 5a. The court of appeals was similarly unmoved by the fact that, unlike the other exemptions in Section 522, the "retirement funds" exemption does not refer to "the debtor's" retirement funds or "the debtor's interest" in the exempted property. *Id.* at 5a-6a. Even in the absence of such language, the court asserted, Mrs. Heffron-Clark's ability to invoke the exemption "depend[s] on how [she] use[s] the property, not how her mother used it." *Id.* at 6a.

Notwithstanding the wealth of contrary authority, the court of appeals "d[id] not think the question close," reiterating that "inherited IRAs represent an opportunity for current consumption, not a fund of retirement savings." App., *infra*, 7a. The court thus refused to apply any canon of construction favoring debtors in a dispute regarding the scope of a bankruptcy exemption. *Ibid.*

In holding that an inherited IRA does not qualify for the "retirement funds" exemption, the court of appeals "disagree[d] with the fifth circuit's decision in *Chilton*" and expressly acknowledged that its "conclusion creates a conflict among the circuits" on the interpretation of the exemption. App., *infra*, 7a. Because its decision created a circuit conflict, the panel circulated its opinion to the full court before issuance. *Ibid.*

5. The court of appeals subsequently denied rehearing. App., *infra*, 8a.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict in the courts of appeals on an important and recurring question of statutory interpretation. In the decision below, the Seventh Circuit expressly recognized that it was creating a conflict with the Fifth Circuit on the correct interpretation of the Bankruptcy Code's "retirement funds" exemption. In fact, the Seventh Circuit's decision also conflicts with all of the other valid lower-court decisions to have considered the issue, including the decisions of two bankruptcy appellate panels.

The question presented, moreover, is one of substantial and growing importance. The conflict on that question contravenes the need for uniformity in the interpretation and application of the bankruptcy laws—a need that Congress specifically recognized when it enacted the exemption at issue. And this is an ideal case in which

to consider and resolve that question, which, although frequently litigated, rarely reaches the court of appeals level. Because this case comfortably satisfies the criteria for further review, the petition for certiorari should be granted.

A. The Decision Below Creates A Circuit Conflict

As the Seventh Circuit expressly recognized, see App., *infra*, 7a, the decision below creates a conflict in the courts of appeals concerning whether an inherited IRA qualifies for the "retirement funds" exemption in Section 522 of the Bankruptcy Code. That conflict plainly warrants this Court's review.

1. As the Seventh Circuit noted, see App., *infra*, 3a, the Fifth Circuit has squarely held that inherited IRAs such as petitioners' are covered by the "retirement funds" exemption. See *In re Chilton*, 674 F.3d 486 (5th Cir. 2012). In *Chilton*, as here, one of the debtors was the beneficiary of an IRA that passed to her upon the death of her mother, the account owner. See *id.* at 487. The debtors invoked the "retirement funds" exemption in Section 522(d)(12). See *id.* at 488.[4]

As is relevant here, the Fifth Circuit reasoned that "[t]he plain meaning of the statutory language refers to money that was 'set apart' for retirement." *Chilton*, 674 F.3d at 489. "Here," the court continued, "there is no question that the funds contained in the debtors' inherited IRA were 'set apart' for retirement at the time [the original owner] deposited them into an IRA." *Ibid.*

[4] As noted above, see p. 4, the "retirement funds" exemption is stated twice in Section 522, in subsections (b)(3)(C) and (d)(12); it is identically worded in each instance.

Notably, the Fifth Circuit rejected the argument that the funds in an inherited IRA do not constitute "retirement funds" because a beneficiary who inherits the account may withdraw those funds before reaching retirement age. *Chilton*, 674 F.3d at 489. The court reasoned that "the defining characteristic of 'retirement funds' is the purpose they are 'set apart' for, not what happens after they are 'set apart.'" *Ibid.* Like other courts, the Fifth Circuit found support for its analysis in 11 U.S.C. 522(b)(4)(C), which provides that the direct transfer of retirement funds—such as from the owner's account to an account for the benefit of the beneficiary upon the owner's death—does not cause those funds to "cease to qualify for exemption under [paragraph (3)(C) or] subsection (d)(12)." *Ibid.* (quoting 11 U.S.C. 522(b)(4)(C)). Stating that it "s[aw] no reason to interpret the statutory language differently from its plain meaning," the court concluded that an inherited IRA qualifies for the "retirement funds" exemption in Section 522. *Ibid.*

In so concluding, the Fifth Circuit noted that an inherited IRA remains exempt from taxation under 26 U.S.C. 408(e)(1). *Chilton*, 674 F.3d at 490. The court explained that, "[w]hile inherited IRAs operate differently from [non-inherited] IRAs" in some respects, they "are subject to the same provision as all other IRAs—that is, section 408—for the purpose of determining whether they are exempt from taxation." *Ibid.*

2. Remarkably, the Seventh Circuit's decision conflicts not only with the Fifth Circuit's decision in *Chilton*, but with every other valid lower-court decision to have considered the issue.[5] The courts to have adopted peti-

[5] The only other courts to have reached the same result as the Seventh Circuit in written opinions were the bankruptcy courts in

tioners' interpretation include two bankruptcy appellate panels, see *In re Hamlin*, 465 B.R. 863, 871-873 (B.A.P. 9th Cir. 2012); *In re Nessa*, 426 B.R. 312, 314-315 (B.A.P. 8th Cir. 2010), and district or bankruptcy courts from almost every other circuit in the country, see *In re Trawick*, No. 12-2039, ___ B.R. ___, 2013 WL 4574533, at *12-*15 (Bankr. C.D. Cal. Aug. 29, 2013); *In re Bauer*, No. 13-1562, 2013 WL 2661835, at *1-*2 (Bankr. D.S.C. June 12, 2013); *In re Seeling*, 471 B.R. 320, 322-323 (Bankr. D. Mass. 2012); *In re Stephenson*, No. 11-10848, 2011 WL 6152960, at *2-*4 (E.D. Mich. Dec. 12, 2011); *In re Kalso*, No. 10-72587, 2011 WL 3678326, at *2 (Bankr. E.D. Mich. Aug. 19, 2011); *In re Cutignola*, 450 B.R. 445, 450-452 (Bankr. S.D.N.Y. 2011); *In re Johnson*, 452 B.R. 804, 807-808 (Bankr. W.D. Wash. 2011); *In re Mathusa*, 446 B.R. 601, 603-604 (Bankr. M.D. Fla. 2011); *In re Thiem*, 443 B.R. 832, 843-844 (Bankr. D. Ariz. 2011); *In re Tabor*, No. 10-1580, 2010 WL 8914472, at *1-*2 (M.D. Pa. Dec. 2, 2010); *In re Weilhammer*, No. 09-15148, 2010 WL 3431465, at *4-*6 (Bankr. S.D. Cal. Aug. 30, 2010); *In re Kuchta*, 434 B.R. 837, 843-844 (Bankr. N.D. Ohio 2010). Notably, that list includes two bankruptcy courts that have already considered the issue since the Seventh Circuit's decision in this case and have specifically rejected the Seventh Circuit's reasoning. See, *e.g.*, *Trawick*, 2013 WL 4574533, at *13 (criticizing the Seventh Circuit on the ground that its interpretation "is not based on the plain language of the statute, but appears to be based on the court's own policy considerations").

Chilton and in this case, both of which were reversed on appeal. See *In re Chilton*, 426 B.R. 612, 616 (Bankr. E.D. Tex. 2010), rev'd, 444 B.R. 548, 552 (E.D. Tex. 2011); App., *infra*, 22a-35a, rev'd, *id.* at 9a-21a.

In the face of that abundance of authority, there appears to be little prospect that the Seventh Circuit will back down and eliminate the conflict that it created in the decision below. To the contrary, in his opinion for the Seventh Circuit, Judge Easterbrook gave that authority the back of his hand. See App., *infra*, 7a (stating that "[w]e do not think the question close"). Pursuant to circuit policy, moreover, the panel circulated its opinion to the full court before issuance, and the court subsequently denied rehearing en banc. See *id.* at 7a-8a. The resulting conflict therefore requires this Court's intervention.

B. The Question Presented Is An Important And Recurring One That Warrants Review In This Case

The question presented—whether inherited IRAs are exempt from bankruptcy estates—is a question of obvious importance that is frequently litigated in the bankruptcy courts. At the same time, however, that question rarely reaches the courts of appeals. The Court should therefore take this opportunity to resolve the circuit conflict and grant the petition for certiorari.

1. To begin with, the question presented is of exceptional practical and legal importance, as demonstrated by the number of Americans likely to be affected by its resolution and the sheer amount of money potentially implicated. Some 40% of American households—almost 50 million in all—own IRAs. See Sarah Holden & Daniel Schrass, *The Role of IRAs in U.S. Households' Saving for Retirement, 2012*, 18 ICI Research Perspective No. 8, at 1, 3 (Dec. 2012) <tinyurl.com/roleofiras> (*Role of IRAs*). As of June 2012, approximately $5.1 trillion was held in IRAs, representing more than 25% of all retirement assets in the United States. *Id.* at 2. In fact, IRAs make up 10% of all household *financial* assets—up from

just 5% only twenty years ago. *Ibid.* Not surprisingly, as this case vividly illustrates, an IRA will often be the largest personal-property asset in a debtor's bankruptcy estate. See p. 6, *supra*.

As IRAs have become more common, so too has the passing of IRAs to beneficiaries upon the owner's death. IRA ownership is concentrated in older segments of the population, with the aging "baby boom generation" having the highest percentage of ownership. See *Role of IRAs* 4; Sarah Holden & Daniel Schrass, *Appendix: Additional Data on IRA Ownership in 2012*, 18 ICI Research Perspective No. 8A, at 4-5 (Dec. 2012) <tinyurl.com/iraappendix>. And IRA owners who have reached retirement age are overwhelmingly likely to base withdrawals on their required minimum distributions, thus raising the likelihood that there will be funds left over in their IRAs at the time of death. See *Role of IRAs* 22-23.

Given the swelling amount of assets held in IRAs and the likelihood that a substantial percentage of those assets will be inherited, the question whether inherited IRAs are exempt from bankruptcy estates has taken on heightened importance. As commentators have noted with specific reference to the question presented here, "[t]his issue is significant not only because more families in the United States are facing creditor problems, but also due to the fact that many American families are largely placing the bulk of their wealth into retirement accounts." James L. Boring et al., *Protection of Inherited IRAs*, 36 ACTEC L.J. 577, 579 (2010).

2. In addition, the conflict in the lower courts on this important question contravenes the necessary uniformity in the interpretation and application of the bankruptcy laws. By virtue of the conflict, debtors and creditors face divergent rules on the exemption of inherited IRAs from bankruptcy estates depending on where debtors file for

bankruptcy relief. See, *e.g.*, *Bauer*, 2013 WL 2661835, at *1 n.3 (noting that the debtor, who had filed for bankruptcy in South Carolina, had previously lived in Indiana, and that, "[h]ad [the debtor] filed his bankruptcy case there * * * , he would have no exemption" for his inherited IRA as a result of the Seventh Circuit's decision). For debtors such as petitioners, those divergent rules can lead to dramatic differences in the lives they lead after emerging from bankruptcy.

As a preliminary matter, uniform interpretation is fundamental to the proper administration of the Bankruptcy Code. The Constitution itself acknowledges the importance of uniformity in bankruptcy law, granting Congress the power "[t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4; see *Railway Labor Executives' Association* v. *Gibbons*, 455 U.S. 457, 471-472 (1982). The power to create a uniform system was considered necessary, *inter alia*, to "secur[e] equality of rights and remedies among the citizens of all the states." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1102, at 6 (1833). Accordingly, this Court routinely grants certiorari to resolve disagreement among courts of appeals concerning the correct interpretation or application of provisions of the Bankruptcy Code. See, *e.g.*, *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (2013); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n.1 (2012); *Ransom* v. *FIA Card Services, N.A.*, 131 S. Ct. 716, 723 & n.4 (2011).

In this case, the interest in uniform interpretation of the bankruptcy laws is all the more acute because, "[a]lthough Congress has generally given latitude to the states regarding exemptions, it enacted a uniform exemption for tax-favored retirement funds that applies even if a debtor selects non-bankruptcy law or lives in a

state that has opted out of federal exemptions." App., *infra*, 11a; see H.R. Rep. No. 31, *supra*, Pt. I, at 43. As the National Association of Consumer Bankruptcy Attorneys explained in an amicus brief below, "Congress's enactment of BAPCPA was intended to make the availability of exemptions for inherited IRAs uniform, replacing the patchwork of conflicting state law exemptions that had previously governed that inquiry." NACBA C.A. Br. 12. The current conflict in the circuits frustrates Congress's intent to establish a uniform exemption for "retirement funds" that is available to all debtors regardless of where they are located across the Nation.

3. The Court should take this opportunity to resolve the circuit conflict because, although the question presented arises often in bankruptcy cases, see pp. 11-12, *supra* (citing cases), it rarely percolates up to the courts of appeals. That is unsurprising, because the parties in bankruptcy cases often lack the financial resources to pursue protracted litigation. As one commentator has explained, "[t]he nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation." Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010). For example, only one out of every 1,580 bankruptcy cases reaches the courts of appeals level, compared to one in every twelve non-prisoner civil suits. *Id.* at 783. Despite the massive number of bankruptcies in the United States, moreover, bankruptcy appeals represent only 1.2% of all appeals filed in the regional circuits; including business bankruptcies, there are now fewer than 700 bankruptcy appeals per year, on any issue, in the whole country. See United States Courts, *Judicial Facts and Figures 2011*, tbl. 2.3 <tinyurl.com/appealsfiledtable>.

There is therefore considerable uncertainty about when, if ever, the Court would have another opportunity to resolve the question presented if it were to deny review in this case. It cannot be disputed that the question is a recurring one of great importance to litigants and the administration of the Bankruptcy Code. See National Association of Bankruptcy Trustees C.A. Br. 2 (noting that this case "raises a significant issue of national importance to trustees"). Nor can it be disputed that there is a clear circuit conflict on the question in the wake of the Seventh Circuit's decision. Because this case is an ideal vehicle in which to consider that question, the Court should grant review and resolve the conflict on the proper interpretation of the "retirement funds" exemption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 12-1241 & 12-1255

In the Matter of: BRANDON C. CLARK and HEIDI HEFFRON-CLARK, Debtors-Appellees.

Appeal of: WILLIAM J. RAMEKER, Trustee.

Argued: September 6, 2012
Decided: April 23, 2013

Before EASTERBROOK, Chief Judge, and FLAUM and WILLIAMS, Circuit Judges.

EASTERBROOK, Chief Judge.

Congress has decided that funds set aside for retirement need not be used to pay pre-retirement debts. This policy is implemented through 11 U.S.C. § 522(b)(3)(C) and (d)(12), which exempt retirement funds from creditors' claims in bankruptcy. This appeal presents the question whether a non-spousal inherited individual retirement account ("inherited IRA" for short) is exempt.

Section 522(b)(3)(C) and (d)(12) are identical. Each exempts from creditors' claims any "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." An individual retirement account by which a person provides for his or her own retirement meets this

requirement. If a married holder of an IRA dies, the decedent's spouse inherits the account and can keep it separate or roll it over into his or her own IRA. Either way, the money remains "retirement funds" in the same sense as before the original owner's death: the surviving spouse cannot withdraw any of the money before age 59½ without paying a penalty tax and must start withdrawals no later than the year in which the survivor reaches 70½. Because the money entered the IRA without being subject to the income tax, all withdrawals are taxed at ordinary rates.

Different rules govern inherited IRAs. We illustrate using the facts of this case. At her death, Ruth Heffron owned an IRA worth approximately $300,000. Ruth's daughter Heidi Heffron–Clark was the designated beneficiary. Ruth's account passed to Heidi. It remains sheltered from taxation until the money is withdrawn, but many of the account's other attributes changed. For example, no new contributions can be made, and the balance cannot be rolled over or merged with any other account. 26 U.S.C. § 408(d)(3)(C). And instead of being dedicated to Heidi's retirement years, the inherited IRA must begin distributing its assets within a year of the original owner's death. 26 U.S.C. § 402(c)(11)(A), incorporating 26 U.S.C. § 401(a)(9)(B). Payout must be completed in as little as five years (though the time can be longer for some accounts). In other words, an inherited IRA is a time-limited tax-deferral vehicle, but not a place to hold wealth for use after the new owner's retirement. This statutory treatment allows the beneficiary to avoid paying income tax immediately after the original owner's death (recall that money in a normal IRA is pre-tax dollars; unlike assets that pass with a decedent's estate, the contents of an inherited IRA are taxable) while limiting the duration of tax deferral. If recipients of inherited

IRAs could hold the wealth until their own retirement, tax deferral might become tax exemption, as capital held in IRAs could pass down through the generations without ever being subject to income tax.

In the bankruptcy proceeding initiated by Heidi Heffron–Clark and her husband Brandon Clark ("the Clarks"), Bankruptcy Judge Martin held that an inherited IRA does not represent "retirement funds" in the hands of the current owner and so is not exempt under § 522(b)(3)(C) and (d)(12). 450 B.R. 858 (Bankr. W.D. Wis. 2011). The bankruptcy judge concluded that money counts as "retirement funds" (a term that the Bankruptcy Code does not define) only when held for the owner's retirement, while an inherited IRA must be distributed earlier. A district judge reversed, 466 B.R. 135 (W.D. Wis. 2012), adopting the view, first articulated in *In re Nessa*, 426 B.R. 312 (BAP 8th Cir. 2010), that any money representing "retirement funds" in the decedent's hands must be treated the same way in successors' hands. The fifth circuit has since agreed with that approach, *In re Chilton*, 674 F.3d 486 (5th Cir. 2012), observing that § 522(b)(3)(C) and (d)(12) refer to "retirement funds" without providing that they must be the debtor's. It is enough, *Chilton* concludes, if they were ever anyone's retirement funds.

Sometimes assets are exempt in bankruptcy because of how they function in someone else's hands. Suppose Heidi Heffron–Clark were the trustee of a retirement account for the benefit of her sister. Trustees are legal owners of the assets they administer, but the Clarks' creditors could not reach retirement assets that Heidi was holding as trustee. So we follow *Chilton* in observing that exemptions in bankruptcy do not (necessarily) depend on whether an asset is a retirement fund (or an ag-

ricultural tool, or one of the other categories of exemption) as the debtor uses it. But by the time the Clarks filed for bankruptcy, the money in the inherited IRA did not represent *anyone's* retirement funds. They had been Ruth's, but when she died they became no one's retirement funds. The account remains a tax-deferral vehicle until the mandatory distribution is completed, but distribution precedes the owner's retirement. To treat this account as exempt under § 522(b)(3)(C) and (d)(12) would be to shelter from creditors a pot of money that can be freely used for current consumption.

To see this, suppose Ruth had withdrawn the entire $300,000 from her IRA, paying the penalty tax if necessary, waited a month, then given the money to Heidi. The money would have been "retirement funds" while in Ruth's IRA, but not thereafter; in Heidi's bank account the money would be no different from any other assets she could save or spend at will. And that would have been true during the month Ruth banked the funds before sending them to Heidi. Ruth's creditors could have reached the money, notwithstanding the fact that it formerly was part of her retirement account. Why should it make a difference whether the money passed to Heidi on Ruth's death or a little earlier? Either way, the money used to be "retirement funds" but isn't now. We doubt that *Chilton* would think that money expressly withdrawn from an IRA retains its character as "retirement funds." Section 522(b)(3)(C) and (d)(12) provides that the exemption depends on the *conjunction* of tax deferral and assets' status as "retirement funds"; that an inherited IRA provides tax benefits is not enough.

Chilton and *Nessa* give weight to the phrase "inherited individual retirement account." It includes the word "retirement," after all. True enough, but the "IRA" part

of "inherited IRA" (as the Internal Revenue Code uses the phrase) designates the funds' *source*, not the assets' current status. As we have observed, an inherited IRA does not have the economic attributes of a retirement vehicle, because the money cannot be held in the account until the current owner's retirement.

Chilton and *Nessa* also give weight to the fact that many of the other exemptions in § 522 refer to "the debtor's" interests, while § 522(b)(3)(C) and (d)(12) does not. For example, § 522(b)(3)(B) exempts "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law". This sort of language has a temporal effect: what is exempt is the debtor's tenancy when the bankruptcy begins. A debtor who on the date of filing has $100,000 in cash and no real property cannot later invest the $100,000 in a joint tenancy and then claim the property as exempt. Similarly a farmer cannot buy new farm implements after filing for bankruptcy and claim the acquisition as exempt. Section 522(b)(3)(C) and (d)(12) gives debtors a break by omitting a temporal restriction: new value added to a retirement fund during bankruptcy (an employer may continue to make retirement contributions) is outside creditors' reach, even though new real property and new farm tools are not. But temporal differences in the way exemptions work does not suggest that a pot of assets that is not "retirement funds" *any time* during the bankruptcy is exempt just because the debtor's predecessor in interest had saved for retirement.

Consider a parallel situation. The Bankruptcy Code provides a homestead exemption (subject to caps under

state law). So if Ruth had been living at home and had filed for bankruptcy, some or all of the house's value would have been exempt from creditors' claims. Section 522(b)(3)(A) implements this by exempting a "domicile" in which the debtor lived for at least 730 days before filing for bankruptcy. Suppose Heidi had inherited her mother's house and rented it out. She could not claim the property as exempt just because it used to be her mother's home; it would be exempt only if it had been Heidi's home for the two years before the Clarks' filing. Exemption would depend on how Heidi used the property, not how her mother used it. Just so with retirement funds.

At oral argument, the Clarks' lawyer told us that reading the Bankruptcy Code to exempt assets that formerly were someone's retirement funds, but have never been the debtors' retirement funds, would encourage people to save in order to make larger bequests to their children. If parents know that anything in their IRAs could be passed to their relatives free of creditors' claims, they would save more and draw less from IRAs during retirement. That's true enough, but it does not imply an atemporal meaning of "retirement funds." One could equally say that it would promote savings to hold that *any* asset acquired from one's relatives by will, insurance, annuity, or survivorship designation is exempt from creditors' claims. That is not remotely what § 522 provides, however. It is always possible to get more of whatever objective may have prompted a given clause, but "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480

U.S. 522, 525–26 (1987) (emphasis in original). Section 522(b)(3)(C) and (d)(12) does not throw creditors' claims to the wolves in order to enhance the savings and bequest motives. It provides a specific exemption for retirement funds—and inherited IRAs do not qualify, because they are not savings reserved for use after their owners stop working.

The district judge thought the question close and believed that close questions should be decided in debtors' favor. We do not think the question close; inherited IRAs represent an opportunity for current consumption, not a fund of retirement savings. It is therefore unnecessary to decide whether there is or should be an interpretive principle favoring either side in a dispute about the scope of an exemption, or whether any such principle would depend on a combination of federal law (for federal exemptions) plus state law (for state exemptions), as in *In re Barker*, 768 F.2d 191, 196 (7th Cir. 1985).

The bankruptcy judge got this right. We disagree with the fifth circuit's decision in *Chilton*. Because our conclusion creates a conflict among the circuits, we circulated the opinion before release to all judges in active service. None of the judges requested a hearing *en banc*.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 12-1241 & 12-1255

In the Matter of: BRANDON C. CLARK and HEIDI HEFFRON-CLARK, Debtors-Appellees.

Appeal of: WILLIAM J. RAMEKER, Trustee.

May 21, 2013

Before EASTERBROOK, Chief Judge, and FLAUM and WILLIAMS, Circuit Judges.

ORDER

Debtors-appellees filed a petition for rehearing and rehearing en banc on May 6, 2013. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 11-CV-482

In re BRANDON C. CLARK and HEIDI K. HEFFRON-CLARK, Debtors.

BRANDON C. CLARK and HEIDI K. HEFFRON-CLARK, Appellants,

v.

WILLIAM J. RAMEKER, Trustee, and RESUL and ZINIJE ADILI, d/b/a KEGONSA PLAZA, Appellees.

January 5, 2012

OPINION AND ORDER

BARBARA B. CRABB, District Judge.

This appeal from a final decision of the bankruptcy court raises the question whether Inherited Individual Retirement Accounts qualify for exemption from a bankruptcy estate under the Bankruptcy Code. (Inherited IRAs hold funds inherited from persons who established Individual Retirement Accounts for their own use and died before depleting the funds in those accounts.) Bankruptcy Judge Robert Martin concluded in this case that these accounts do not qualify for exemption. With one

exception, every other court to consider the question under federal law has reached the contrary conclusion. The question is an open one in this circuit.

Although Judge Martin analyzed the case in his usual thoughtful manner, I am not persuaded to adopt his conclusion. I conclude instead that the bankruptcy trustee has not met his burden of showing that Heidi Heffron–Clark's Inherited IRA may not be exempted from the appellant's bankruptcy estate.

RECORD FACTS

In August of 2000, Ruth Heffron established an individual retirement account and named appellant Heidi Heffron–Clark, her daughter, as the sole beneficiary. Ruth Heffron died on September 19, 2001. Heffron–Clark established a Beneficiary Individual Retirement Account (commonly referred to as an Inherited IRA) in November 2001 and caused the remaining balance of her mother's account to be distributed to the Inherited IRA in December 2001. Beginning in 2002, Heffron–Clark and her husband, appellant Brandon Clark, took monthly distributions from the Inherited IRA, although neither was retired. (To make things easier for the reader, I will refer to the Clarks as the debtors and use "trustee" to refer to both the trustee and the Adilis.)

On October 28, 2010, the debtors filed a chapter 7 bankruptcy petition. Initially, they claimed the Inherited IRA as exempt under state law (Wis. Stat. § 815.18(3)(j)), but they amended their schedules later to claim it as exempt under federal law (11 U.S.C. § 522(b)(3)(C)) as well. Appellees William Rameker, the bankruptcy trustee, and Resul and Zinije Adili, d/b/a Kegonsa Plaza, a judgment creditor, objected to the debtors' exemption for the Inherited IRA, which was valued at the time at $293,338.

Their objection was upheld on May 10, 2011, when the bankruptcy court ruled in their favor, denying the exemption under both federal and state law. On this appeal, appellants challenge only the bankruptcy court's ruling regarding the federal exemption under 11 U.S.C. § 522(b)(3)(C). Dkt. # 2, at 1–2.

OPINION

A. *Background*

When a debtor files for bankruptcy, "all legal or equitable interests of the debtor in property" become part of the bankruptcy estate. 11 U.S.C. § 541(a)(1). A debtor may then place certain types of property beyond the reach of creditors to help her make a fresh start with an appropriate standard of living. 11 U.S.C. § 522(b)(1); *Rousey v. Jacoway*, 544 U.S. 320 (2005) (holding under previous version of § 522(d) that exemptions are designed to help debtors make fresh start and that petitioners could exempt their individual retirement accounts under § 522(d)(10)(E)). A debtor may elect to claim exemptions under § 522(d) of the Bankruptcy Code or, in the alternative, under state and federal non-bankruptcy law. *Id.* The Code also permits states to opt out of the substantive federal exemptions, in which case debtors domiciled in those states may not claim the exemptions under § 522(d). *Owen v. Owen*, 500 U.S. 305 (1991).

Although Congress has generally given latitude to the states regarding exemptions, it enacted a uniform exemption for tax-favored retirement funds that applies even if a debtor selects non-bankruptcy law or lives in a state that has opted out of federal exemptions. H.R. Rep. No. 109–31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 132. Both 11 U.S.C. § 522(d)(12) (the state provision) and

§ 522(b)(3)(C) (the federal provision) provide an exemption for "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain sections of the Internal Revenue Code of 1986, including § 408. Thus, property is exempt under these provisions if (1) it qualifies as "retirement funds" and (2) the funds are in a fund or account that is tax-exempt under IRC §§ 401 (pension, profit-sharing and stock bonus plans), 403 (employee annuities), 408 (IRAs), 408A (Roth IRAs), 414 (employee benefit plans), 457 (deferred compensation plans for states and local government and non-profits), or 501(a) (trusts qualifying as exempt organizations).

The parties dispute whether Inherited IRAs of the kind held by appellants satisfy either requirement for exemption. Because a debtor's claim of exemption is presumptively valid, the trustee has the burden to prove by a preponderance of the evidence that the bankruptcy laws do not permit the debtors to claim the Inherited IRA as exempt. 11 U.S.C. § 522(*l*); Fed. R. Bankr. P. 4003(c). To do this, he has to show either that Heffron–Clark's Inherited IRA does not include retirement funds or that it is not tax-exempt under the applicable provisions of the Internal Revenue Code.

One point should be cleared up at the outset. The debtors have objected to what they view as the bankruptcy court's statement that the size of the Inherited IRA in this case was an additional reason to undertake an independent interpretation of § 522(b)(3)(C), instead of simply adopting the reasoning of prior cases. I doubt this is what the bankruptcy court meant, but the comment is irrelevant. Like this court, the bankruptcy court has an independent obligation to interpret the statute in

the absence of controlling authority, whatever the size of the account.

B. *Individual Retirement Accounts*

The traditional IRA is designed to give individuals an incentive to save for retirement. Income tax is deferred on any contributions made to the IRA and on income earned on those assets until they are withdrawn. 26 U.S.C. § 219(a); 26 U.S.C. § 408(e)(1). To promote the preservation of the assets until retirement, the law subjects any assets withdrawn before the account holder turns 59 1/2 to a ten percent penalty. 26 U.S.C. § 408(d)(1) (cross-referencing 26 U.S.C. § 72); *Rousey*, 544 U.S. at 327–29, 332–33 (describing limited exceptions to early distribution penalty). To insure that the funds are used for retirement, the holder of the account must begin taking minimum required distributions no later than the year in which he reaches 70 1/2. 26 U.S.C. § 408(b).

A spouse inheriting a traditional IRA may elect to treat the account as his own retirement account, roll over the funds into his own IRA or be treated as a non-spouse beneficiary. 26 U.S.C. § 408(d)(3); 26 U.S.C. § 401(a)(9)(B); 26 C.F.R. 1.408–8, Q–5. Beneficiaries who choose one of the first two options may make tax-deferred contributions to the account, but their use of the funds is subject to the same restrictions that were in place when the deceased spouse owned the account and that are designed to protect retirement savings in traditional IRAs and insure that the funds are used during retirement.

A variation of the traditional IRA comes into existence when a beneficiary such as Heffron–Clark inherits the assets of an IRA from someone other than her

spouse and puts the assets in an Inherited IRA. The beneficiary cannot treat the account as her own retirement account or roll over the inherited funds into her own IRA. 26 U.S.C. § 408(d)(3)(C)(i) & (ii). She must set up the account and maintain it in the name of the deceased IRA owner for the benefit of the beneficiary. 26 U.S.C. § 402(c)(11)(A); IRS Publication 590 at 20 (2006). She may not make contributions to the Inherited IRA and must begin taking distributions immediately, without regard to her age or employment status. 26 U.S.C. § 401(a)(9)(B). She may withdraw the entire amount immediately; if she does not, she must either withdraw all the funds from the account within five years or take annual minimum distributions over her lifetime. This extension of time enables the beneficiary to reduce the income tax liability she might face if she took the money in one lump sum distribution.

In addition to these IRAs, certain accounts established by employers or associations of employees may qualify for treatment as IRAs, 26 U.S.C. § 408(c), as may Roth accounts. 26 U.S.C. § 408A(a). None of these are at issue in this case.

C. *Exempting Inherited IRAs from Bankruptcy Estate*

1. *The meaning of the term "retirement funds"*

a. The bankruptcy court's interpretation of the term

The bankruptcy judge began his analysis of the question in this case with the plain meaning of the term "retirement funds," as used in 11 U.S.C. § 522(c)(3)(C). As he noted, the general presumption is that "'Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning.'" *In re Clark*, 450 B.R. 858, 862 (Bankr. W.D. Wis. 2011) (quoting *Pioneer*

Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993)).

The Bankruptcy Code does not define retirement funds, so the bankruptcy judge looked to the dictionary definition. *Merriam Webster's Ninth New Collegiate Dictionary*, 1007 (9th ed. 1986), defines retirement as "withdrawal from one's position or occupation or from active working life." From this, the bankruptcy judge determined that the only funds that would qualify for exemption were those that were "retirement funds" in fact, "held in anticipation of 'withdrawal from one's position or occupation.'" *Id.* at 863.

Heffron–Clark's account did not qualify, the bankruptcy judge determined, because the funds she received from her mother could no longer be classified as anyone's retirement funds. Ruth Heffron had died and her daughter was required to take distributions from the account even though she was still working. The bankruptcy court declined to characterize the funds as retirement funds when "[t]hey are not segregated to meet the needs of, nor distributed on the occasion of, any person's retirement." *Id.* In his view, it was "the purpose of the fund and not its name, that determines the plain meaning of the phrase." *Id.*

The bankruptcy judge gave weight to the Internal Revenue Code's treatment of Inherited IRAs, noting the ways in which they were afforded different treatment from that given to traditional IRAs: a holder of an Inherited IRA cannot make contributions to the account, cannot roll over the account to her own IRA and cannot defer taking monthly distributions; a holder of a traditional IRA may do all of these things. He concluded by saying that he had not been able to determine "any primary legal source for the proposition that the debtors' Inherited

IRA is tax exempt." *Id.* at 864. "The debtors' Inherited IRA does not seem to meet any of [the] criteria listed in [26 U.S.C.] 408(a)," such as the requirements that contributions be made in cash and not exceed certain limits, that the account holder's interest in the account balance must be nonforfeitable and that the assets not be commingled with other property. *Id.*

b. The majority's interpretation of the term

As the debtors emphasize, with the exception of this case and one other, all of the bankruptcy courts and district courts that have addressed this precise issue have ruled in favor of the debtors. In all of the cases, the facts have been indistinguishable from those in this case. *In re Nessa*, 426 B.R. 312, 314 (8th Cir. BAP 2010); *In re Stephenson*, No. 11–cv–10848, 2011 WL 6152960 (E.D. Mich. Dec. 12, 2011); *Chilton v. Moser*, 444 B.R. 548, 552 (E.D. Tex. 2011); *In re Johnson*, 452 B.R. 804, 808 (Bankr. W.D. Wash. 2011); *In re Thiem*, 443 B.R. 832, 844 (Bankr. D. Ariz. 2011); *In re Kuchta*, 434 B.R. 837, 840 (Bankr. N.D. Ohio 2010); *In re Tabor*, 433 B.R. 469, 476 (Bankr. M.D. Penn. 2010); *In re Weilhammer*, No. 09–15148–LT7, 2010 WL 3431465 at *16 (Bankr. S.D. Cal. Aug. 30, 2010). The only court to rule otherwise was the bankruptcy court in Eastern Texas, *In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. 2010), and its decision has since been overruled on appeal by the district court. *Chilton*, 444 B.R. 548.

The leading case for the majority view is *In re Nessa*, 426 B.R. 312, decided by the Bankruptcy Appellate Panel for the Eighth Circuit. In *Nessa*, the panel assumed that the term referred to funds set aside for retirement but, unlike the bankruptcy court in this case, it held that the term applied to any account that contained such funds, so long as the funds had been accumulated for re-

tirement purposes originally. The panel was not persuaded that the funds in such an account lost their character as retirement funds when they were transferred by inheritance to a non-spouse by a direct transfer from one trustee to another. In its view, § 522(d)(12) did not make such a distinction. "Section 522(d)(12) requires that the account be comprised of retirement funds, but it does not specify that they must be the *debtor's* retirement funds. The Trustee's definition of retirement funds would impermissibly limit the statute beyond its plain language." *Id.* at 314 (emphasis in original).

The panel found support for its conclusion in § 522(b)(4)(C), which provides that direct transfers of retirement funds from one fund or account exempt from taxation do not cease to qualify for exemption under subsection (d)(12) by reason of such a direct transfer. Section 522(b)(4)(C) was added in 2005 as part of Pub. L. 109–8, April 20, 2005. It provides in relevant part that

> A direct transfer of retirement funds from 1 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, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(Oddly enough, this provision says nothing about where the funds must go, only where they must come from. Presumably the drafters meant to say something to the effect that "the funds are transferred directly to the trustee of another fund or account exempt from taxation," which is how the courts favoring exemption of Inherited IRAs have read it.) The panel read subsection

(C) of § 522(b)(4) as evidence that Congress had not intended the direct transfer of funds from a beneficiary's IRA to her Inherited IRA to change the character of those funds from retirement funds and prevent the beneficiary from claiming the inherited funds as exempt from her bankruptcy estate.

Finally, the panel found that the Inherited IRA was exempt from taxation under 26 U.S.C. § 408, because the funds in such an account are not taxed until they are withdrawn. The panel dismissed the trustee's argument that this was the wrong approach to apply because the rules governing Inherited IRAs are different from those governing traditional IRAs regarding the use, distribution and taxation of funds. Instead, it read § 408(e)(1) as providing that "[a]ny individual retirement account is exempt from taxation" and it pointed out that "[Section 408(e)(1)] does not distinguish between an inherited IRA and traditional types of IRAs." *Id.* at 315.

The panel found that the account at issue contained retirement funds; it had been established as a traditional IRA by the debtor's father; it passed to the beneficiary by inheritance and did not change its character because of the transfer; and it remained tax exempt under § 408(e); therefore, the beneficiary could exempt the funds in the account from her bankruptcy estate.

2. *Resolving the difference between the minority and majority positions*

The difference between the minority and majority positions comes down to one issue: Do retirement funds held in a traditional IRA account lose their character upon the death of the account owner before the funds pass to a non-spouse beneficiary? Judge Martin thought that the funds do not remain retirement funds after transfer

because the term "retirement funds" in § 522 refers only to funds set aside by the debtor to be used for her or her spouse's own retirement. The majority concluded that Congress never put any such qualification on the term. Obviously, the issue cannot be resolved by looking at the plain meaning of the statute. The statute is not clear, or plain, on this point.

One could argue on behalf of the minority position that the issue is not resolved by the fact that of all the property that § 522 specifies as potentially qualified for exemption from the estate, only the provisions relating to retirement funds is not limited by a reference to "the debtor." Such a limitation is implicit in the provisions because they are part of a statute that specifies what property belonging to the debtor can be subject to exemption from bankruptcy. In other words, the omission of any reference to "the debtor's interest" in subsection (C) of § 522(b) or subsection (12) of § 522(d) is of no significance because that qualification can be inferred from the fact all of the other listings relate to property in which the debtor has an interest. Such a reading supports Judge Martin's conclusion that the exemption is available only to "the debtor's retirement funds" and not to retirement funds accumulated by someone else but inherited by the debtor.

On the other hand, it is fair to infer that words excluded from a statute are excluded for a purpose. It is a particularly persuasive inference to draw in this instance, where the drafters omitted the same phrase from two statutes, subsection (C) of § 522(b)(3) and subsection (12) of § 522(d). The omission is particularly noteworthy in § 522(d), which has 11 other subsections, all of which contain a specific reference to "the debtor's interest" in certain property or "the debtor's right" to property. It is

a close call but I believe that the majority has read the statute correctly. I agree with the holding in *In re Nessa*, 426 B.R. at 314, that § 522(d)(12) and the identical provision in § 522(b)(3)(C) do not distinguish between an account built up by a decedent and inherited by a debtor and an account made up of contributions by the debtor herself. *See also Chilton v. Moser*, 444 B.R. at 552; *In re Johnson*, 452 B.R. at 808; *In re Thiem*, 443 B.R. at 844; *In re Kuchta*, 434 B.R. at 840; *In re Tabor*, 433 B.R. at 476; *In re Weilhammer*, 2010 WL 3431465 at *16.

Section § 522(d)(12) requires both that the funds in question be retirement funds and that they be in an account that is exempt from tax after they have been transferred. The parties have agreed that the funds in question were transferred directly from one account exempt from taxation in a trustee-to-trustee transaction to Heffron–Clark's Inherited IRA, so the only remaining question is whether they remained tax exempt after the transfer.

In this case, the bankruptcy court thought that the difference in treatment between traditional IRAs and Inherited IRAs meant that the latter do not qualify as tax-exempt funds after their transfer. It is true that the two funds are subject to different rules about the amounts and timing of distributions and whether they can be rolled over, but in both cases, the principal and interest earnings are exempt from income taxes until they are distributed. This is sufficient to make them both tax exempt. If there were any question about it, it would be resolved by 26 U.S.C. § 408(e)(1), which says expressly that "*[a]ny* individual retirement account is exempt from taxation under this subtitle" (emphasis added), with two exceptions of no relevance to this dispute. *See also Jankelovits v. C.I.R.*, 2008 WL 5330811 at *2 (U.S. Tax

Ct. 2008) (amounts transferred from trustee of decedent's IRA directly to trustee of another account are not treated as taxable distribution to beneficiary).

In summary, I am persuaded that the majority has reached the right result, both because its construction of the applicable statutes is more persuasive and because the result conforms with the directive to interpret close statutes in favor of the debtor. *In re Barker*, 768 F.2d 191, 196 (7th Cir. 1985) ("where an exemption statute might be interpreted either favorably or unfavorably vis-à-vis the debtor, [courts] should interpret the statute in a manner that favors the debtor"). I conclude therefore that the bankruptcy trustee has not met his burden of showing that Heidi Heffron–Clark's Inherited IRA cannot be exempted from the debtors' bankruptcy estate.

As a policy matter, there may be reason to question whether inherited funds should be exempt from bankruptcy just because they were held by the decedent in the form of an IRA and not as stock or gold bullion. It seems incongruous to allow the exemption from bankruptcy of an IRA worth more than a quarter-million dollars while limiting the exemption for a motor vehicle to $3,450. This, however, is a question for Congress and not for this court.

ORDER

IT IS ORDERED that the decision of the United States Bankruptcy Court for the Western District of Wisconsin denying the claim of exemption for appellant Heidi Heffron–Clark's Inherited Individual Retirement Account filed by appellants Heidi Heffron–Clark and Brandon Clark is REVERSED and REMANDED for further proceedings consistent with this opinion.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 10-18035

In re: BRANDON C. CLARK and HEIDI K. HEFFRON-CLARK, Debtors.

May 10, 2011

MEMORANDUM DECISION

ROBERT D. MARTIN, Bankruptcy Judge.

The debtors, Brandon Clark and Heidi Heffron–Clark, filed for bankruptcy on October 29, 2010. Their chapter 7 Trustee, William Rameker ("trustee"), and a judgment creditor, Resul and Zinije Adili, d/b/a Kegonsa Plaza, objected to the debtor's claim of exemption in a Pershing Beneficiary IRA. A hearing was held on February 7, 2011 at which the parties agreed to submit the matter on briefs.

The parties have stipulated to certain facts, including: The debtor, Heidi Heffron–Clark was the beneficiary of an individual retirement account ("IRA"), which was established by her mother, Ruth Heffron on August 10, 2000. Ruth Heffron passed away on September 19, 2001. On November 28, 2001, Heidi Heffron–Clark established a beneficiary individual retirement account ("In-

herited IRA"), and on December 4, 2001, caused the funds from her mother's account to be distributed to the Inherited IRA. Since January 2002 the debtors have received monthly distributions from the Inherited IRA. On the debtors' Schedule C, they claim the Inherited IRA, valued at $293,338, exempt under Wis. Stat. § 815.18(3)(j), and now argue the asset is also exempt under 11 U.S.C. § 522(b)(3)(C).

A debtor's claim of exemptions is presumptively valid. *See* 11 U.S.C. § 522(*l*) ("the property claimed as exempt is exempt" unless "a party in interest objects"). Once a party in interest objects, the burden is on the objecting party to prove, by a preponderance of the evidence, that an exemption is improperly claimed. FRBP 4003(c) ("the objecting party has the burden of proving that the exemptions are not properly claimed . . ."); *see also In re Yonikus*, 996 F.2d 866, 873–74 (7th Cir. 1993); *see In re Moneer*, 188 B.R. 25, 28 (Bankr. N.D. Ill. 1995); *see In re Ross*, 210 B.R. 320, 323 (Bankr. N.D. Ill. 1997). A debtor is not "required to make an affirmative showing . . . that the claimed exemption [is] appropriate." *Gagne v. Bergquist*, 179 B.R. 884, 885 (D. Minn. 1994). But, the debtor must expressly characterize the claimed exemption within one of the exemption statutes. *Id.* at 885; *see e.g. Matter of Patterson*, 825 F.2d 1140, 1146–47 (7th Cir. 1987) (for an example, if not a model, of the analysis to be given to the debtors' characterization of property claimed to be exempt). The trustee must then introduce evidence that rebuts the "prima facie effect of a claimed exemption." *In re Hollar*, 79 B.R. 294, 296 (Bankr. S.D. Ohio 1987).

The Bankruptcy Code allows debtors to claim certain property as exempt, using either exemptions allowed under state law, or exemptions provided for in the Code.

See 11 U.S.C. § 522(b)(1). While this choice is available for debtors in Wisconsin and in some other U.S. states, the majority of states mandate that debtors use only the exemptions provided under state law. *See* 11 U.S.C. § 522(b)(1) (states can "opt out" of the exemptions provided by the Bankruptcy Code); *see* Susan V. Kelley, Ginsberg & Martin on Bankruptcy § 6.01[C] (5th ed. 2010) (as of 2010 approximately 34 states had elected to "opt out" of the federal bankruptcy exemptions). So in 2005, Congress saw fit to add two "uniform" exemptions that all debtors could claim regardless of whether they applied federal or state exemption law in their case. 11 U.S.C. § 522(b)(3)(B) & (C); *see* H.Rep. No. 109–31(1), 109th Cong., 1st Sess. 63–64 (2005), U.S. Code Cong. & Admin. News 2005, p. 88, *reprinted in* 2005 WL 832198 (Congress sought to create a uniform exemption for retirement funds, notwithstanding a debtor's possible limitations under state law). One of the new exemptions permits a debtor to claim as exempt:

> Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408(A), 414, 457, or 501(a) of the Internal Revenue Code of 1986. *See* 11 U.S.C. § 522(b)(3)(C).

In addition, Congress recently added § 522(b)(4)(C), which in relevant part states:

> (4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:
>
> . . .
>
> (C) A direct transfer of retirement funds from 1 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, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

This provision, by cross-reference, expands the exemption allowed under § 522(b)(3)(C) by including retirement accounts that resulted from a "trustee to trustee" transfer. *See In re Nessa*, 426 B.R. 312, 315 (8th Cir. BAP 2010). Because both § 522(b)(3)(C) and § 522(b)(4)(C) apply regardless of whether the debtors claim exemptions under state or federal law, the debtors in this case may characterize their Inherited IRA as exempt under 11 U.S.C. § 522(b)(3)(C) or Wis. Stat. § 815.18(3)(j).

In the last year, no fewer than eight bankruptcy courts have decided whether an inherited IRA falls within § 522(b)(3)(C), or § 522(d)(12).[1] *See In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. 2010) *rev'd*, 444 B.R. 548 (E.D. Tex. 2011); *see In re Kuchta*, 434 B.R. 837, 843 (Bankr. N.D. Ohio 2010); *see In re Nessa*, 426 B.R. 312 (8th Cir. BAP 2010); *see In re Tabor*, 433 B.R. 469 (Bankr. M.D. Pa. 2010); *see In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. 2010); *see In re Thiem*, 443 B.R. 832 (Bankr. D. Ariz. 2011); *In re Mathusa*, 446 B.R. 601, 2011 WL 1134680 (Bankr. M.D. Fla. 2011); *In re Johnson*, 2011 WL 1674928 (Bankr. W.D. Wash. 2011).

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[1] The language of § 522(d)(12) is identical to that of § 522(b)(3)(C). *See* 11 U.S.C. § 522(d)(12); *see* 11 U.S.C. § 522(b)(3)(C). Together both sections allow an exemption for retirement accounts, regardless of whether the debtor claims exemptions under federal or state law. *See Id.* As a result, the two sections are often analyzed interchangeably. *See In re Nessa*, 426 B.R. 312 (8th Cir. BAP 2010).

These cases involved indistinguishable facts. *See Id.* Specifically, all include a debtor who inherited a family member's IRA sometime before filing bankruptcy. *See Id.* Upon filing bankruptcy, each debtor sought to exempt their interest in the IRA under either § 522(b)(3)(C), or § 522(d)(12).

The most cited of these cases, *Nessa*, was decided by the Bankruptcy Appellate Panel ("BAP") for the Eighth Circuit. *In re Nessa*, 426 B.R. 312 (8th Cir. BAP 2010). In a short opinion, the BAP found that § 522(d)(12) exempted *any* IRA in the hands of the debtor, whether or not the IRA was established by the debtors' themselves. *Id.* at 314–15 ("even though the contents of the Debtor's inherited account were the Debtor's father's retirement funds, . . . they remain in form and substance, 'retirement funds.'"). *Id.* The BAP also determined that IRC § 408(e) declared the debtor's inherited IRA tax exempt. *Id.* at 315 (*citing* 26 U.S.C. § 408(e) ("[a]ny individual retirement account is exempt from taxation.")). Finally, the BAP cited § 522(b)(4)(C), noting that the transfer of the IRA from the decedent's account to the beneficiary debtor's account "did not destroy the debtor's ability to claim the funds exempt under § 522(d)(12)." *Id.* For these reasons, the BAP concluded that the debtor's claimed exemption of her inherited IRA under § 522(d)(12) was proper.

Most subsequent cases rely on the reasoning of the Eighth Circuit BAP in *Nessa*.[2] *See Kuchta*, 434 B.R. at

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[2] The only case to decide otherwise was *In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. 2010). The bankruptcy court in *Chilton* was convinced that § 522(b)(3)(C) exempted only the retirement funds of the *debtor* and did not apply to a nondebtor's retirement funds that were merely in the hands of the debtor. *Id.* at 618. On appeal the

843; *see Tabor*, 433 B.R. at 475–76; *see Weilhammer*, 2010 WL 3431465, *4–5; *see Thiem*, 443 B.R. at 845. However, none of the cases cited control this court and most of the cases deal with much smaller dollar amounts than we must. *See Chilton*, 426 B.R. at 613; *rev'd*, 444 B.R. 548 (E.D. Tex. 2011) (inherited IRA was worth $170,000); *see Tabor*, 433 B.R. at 470 (inherited account had estimated value of $105,100); *see Weilhammer*, 2010 WL 3431465 at *1 (inherited IRA contained at least $55,000); *see Thiem*, 443 B.R. at 835 (value of inherited IRA was approximately $10,700). Thus an independent analysis as to whether the debtors' Inherited IRA falls within § 522(b)(3)(C) is appropriate.

For a retirement account to fall within § 522(b)(3)(C), two elements must be present—"(1) the amount the debtor seeks to exempt must be retirement funds; and (2) those retirement funds must be in an account that is exempt from taxation under 401, 403, 408, 408(A), 414, 457, or 501(a) of the Internal Revenue Code." *In re Nessa*, 426 B.R. 312, 314 (8th Cir. BAP 2010). Absent evidence of a contrary intent by Congress, this court must assume that "Congress intends the words in its enactments to carry their 'ordinary, contemporary, common meaning.'" *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 389 (1993) (citing *Perrin v. United States*, 444 U.S. 37 (1979)). Where the Bankruptcy Code does not define a specific term, courts must "look to the ordinary meaning of [the] term." *Rousey v. Jacoway*, 544 U.S. 320, 328 (2005); *see also U.S. v. LaBonte*, 520 U.S. 751,

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District Court recently reversed this decision, relying primarily on the reasoning in *Nessa. See In re Chilton*, 444 B.R. 548 (E.D. Tex. 2011). In light of the District Court's decision, this court finds that *In re Chilton*, 426 B.R. 612, is no longer good law.

757 (1997) (all other interpretations of a statute "give way" to the statute's "plain meaning"); *see also Perrin v. U.S.*, 444 U.S. 37, 42, (1979) (a federal court's interpretation of a statute always begins with "the language of the . . . Act itself"). "Retirement funds" is not defined in the Bankruptcy Code so, we must decide if the property at issue constitutes "retirement funds" and only if it does, whether the funds are exempt from taxation under one of the enumerated Internal Revenue Code provisions.

The trustee argues that the Inherited IRA does not constitute retirement funds of the debtor (or any living person) and requests that this court look to the substance of the Inherited IRA and not to its name. The substance of the account, the trustee contends, will reflect funds that no longer hold any attributes of a traditional "retirement" account. The trustee notes that no one can make any contributions to the inherited IRA, as the debtor could to her own IRA (if she had one); and that the debtor does not receive distributions related to her retirement status, as she would with a traditional IRA. Ultimately the trustee argues that the attributes of the Inherited IRA are not those of what might be known in common usage to be a "retirement fund," and should not fall within § 522(b)(3)(C).

In response the debtors, relying heavily on the other cases already decided on this issue, argue that because the name "retirement account" once applied to the funds in the debtors' Inherited IRA the account still contains "retirement funds." Specifically, they point to the "plain meaning" of § 522(b)(3)(C), arguing that the statute does not indicate *whose* retirement the funds were set aside for, but rather requires only that the funds at issue were set aside for *someone's* retirement. The debtors also con-

tend the Inherited IRA is treated like any other IRA and is tax exempt under IRC § 408.[3]

Based on my reading of the plain language of § 522(b)(3)(C), the trustee has the more persuasive argument in this case. The first prong of the analysis requires that—"(1) the amount the debtor seeks to exempt must be retirement funds." *Nessa*, 426 B.R. at 314. Finding no ambiguity in the language of the statute, I must defer to the "common or ordinary meaning" of the phrase "retirement fund." *Rousey*, 544 U.S. at 330. "Retirement" is defined as the "withdrawal from one's position or occupation or from active working life." Webster's Ninth New Collegiate Dictionary 1007 (9th ed. 1986). Thus to qualify as exempt under § 522(b)(3)(C), the funds must be held in anticipation of "withdrawal from one's position or occupation." *Id.*

The debtors' Inherited IRA does not contain *anyone's* "retirement funds." Ruth Heffron established the retirement account, and elected her daughter as a beneficiary of the account. While living, the funds in Ms. Heffron's account were indeed funds for *her* retirement—that is held in anticipation of one day withdrawing from her occupation. After Ms. Heffon passed away, however, the funds passed to her beneficiary. The funds could no longer be classified as anyone's retirement funds—Ms. Heffron had died and was incapable of retiring further or using the funds during her retirement, and her daughter was able (in fact obliged) to take distributions from the account while both of the debtors contin-

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[3] To avoid confusion, hereinafter I will place "IRC" before the code section when I refer to a section from the Internal Revenue Code under title 26 of the United States Code.

ued to work. Currently, the funds are held in anticipation of no person's retirement and likewise cannot, under the plain meaning of the statute, constitute "retirement funds." They are not segregated to meet the needs of, nor distributed on the occasion of, any person's retirement.

Other courts that have directly dealt with this issue have all found that the contents of the inherited IRA remain in form and substance "retirement funds" when they are passed to the beneficiary. *See Nessa*, 426 B.R. at 314–15; *see Kuchta*, 434 B.R. at 843–44; *see Tabor*, 433 B.R. at 475–76; *see Weilhammer*, 2010 WL 3431465 at *5. In arriving at this conclusion, most courts dwell on the fact that inherited IRAs contain funds set aside for *someone's* "retirement" and in most cases are still characterized by the Internal Revenue Service ("IRS") as individual retirement accounts. *See Id.* This reasoning is unpersuasive however, and seems to avoid the plain meaning of the statute. The fact that the funds were once held for a decedent's retirement is irrelevant. As noted above, while the funds may have been set aside originally for retirement purposes, once the decedent dies the funds are no longer held by the beneficiary for that purpose. The IRS may refer to an "inherited IRA" as an "IRA," but that label is without significance. *See* I.R.S. Publication 590, p. 18 (2010) (discussing tax treatment of an "inherited IRA"). It is the purpose of the fund, and not its name, that determines the plain meaning of the phrase. For this reason, I cannot agree with the other courts' interpretation of "retirement funds" in § 522(b)(3)(C).

Were we to peek behind the curtain of "plain meaning" it would seem beyond any quibble that Congress intended to permit debtors to retain amounts saved for

their retirement and not sums inherited from their parents. Because this obvious point supports the common sense reading of the words that Congress chose for the statute, the resort of other courts to rely on income tax labels is hard to explain.

The Tax Code's treatment of "inherited IRAs" also reflects the true nature of the accounts. "Inherited IRAs" and their underlying purpose were contemplated by Congress with the enactment of the Pension Protection Act of 2006. *See* CCH, Pension Protection Act of 2006—Law, Explanation and Analysis, ¶ 945. Specifically, Congress sought to eliminate the adverse tax treatment to a nonspouse beneficiary that occurred when a beneficiary received a lump sum distribution from a decedent's IRA creating an immediate taxable event on the entire amount distributed. *Id.* From this reasoning came Congress' broad endorsement of "inherited IRAs" as a means of deferring the tax owed on the proceeds of a decedent's IRA over the life of the beneficiary. *Id.* In enacting this policy Congress set forth various rules to ensure the holder of an "inherited IRA" was not treated the same as a holder of an IRA. *See* 26 U.S.C. § 408(d)(3)(C). For example, a holder of an "inherited IRA" cannot make contributions to the account, cannot roll the funds in the account over to their own IRA, and must begin taking monthly distributions immediately, regardless of age or employment status, from the account in accordance with the IRS distribution guidelines. *See* 26 U.S.C. § 408(d)(3)(C); *see* 26 U.S.C. § 408(a)(6). This treatment is different for a holder of an IRA, who cannot withdraw, without penalty, funds from their account prior to a designated retirement age, and who can make tax deferred contributions to their account for purposes of saving for their retirement. 26 U.S.C. § 408. In light of these differences, it is clear that Congress did

not intend for "inherited IRAs" to serve as "retirement accounts," but rather to serve as a conduit that allows beneficiaries to defer but not avoid income tax on the distributions from an IRA *that they inherit*.

No one has cited (and I can find none) any primary legal source for the proposition that the debtors' Inherited IRA is tax exempt. As authority that their Inherited IRA is tax exempt the debtors point to IRC § 408(e), which provides that "any individual retirement account is exempt from taxation . . .". 26 U.S.C. § 408(e). While the statute does indeed exempt from tax "any individual retirement account," I find no sources that suggest an "inherited IRA" is considered "any individual retirement account" under IRC § 408. To fall within IRC § 408, the fund must meet certain criteria related to distribution requirements and asset regulation. *See* 26 U.S.C. § 408(a) (requiring that "contributions" into the account be made "in cash" and not exceed the limits set forth under § 219(b)(1)(A); "[t]he interest of an individual in the balance in this account [be] nonforfeitable;" "[t]he assets of the trust not be commingled with other property . . .;" etc.). The debtors' Inherited IRA does not seem to meet any of those criteria listed in IRC § 408(a).

Other courts that have decided this issue have cited other bankruptcy court decisions and/or IRS publications and regulations in support of their finding that "inherited IRAs" are tax exempt. *See Thiem*, 443 B.R. at 839 (citing tax regulations); *See Nessa*, 426 B.R. at 315 (citing generally IRC § 408(e) with no supporting authority); *see Kuchta*, 434 B.R. at 843–44 (citing the *Nessa* decision and generally IRC § 408); *see Tabor*, 433 B.R. at 475–76 (citing the *Nessa* decision); *see Weilhammer*, 2010 WL 3431465 at *5 (citing generally IRC § 408(e) with little other authority). These authorities are unper-

suasive, especially when the IRS publications and regulations seemingly infer that *some* "inherited IRAs" are tax exempt without referencing a primary legal source. *See* I.R.S. Publication 590, p. 18 (2010) ("Like the original owner, [the beneficiary of an inherited IRA] *generally* will not owe tax on the assets in the IRA until you receive distributions from it") (emphasis added). From the secondary tax sources, it is not clear that the debtors' Inherited IRA is indeed tax exempt and the absence of direct legal authority is crippling to the argument that it is so. For this reason, I cannot conclude that the debtors' inherited IRA is governed by IRC § 408 or is tax exempt under that section.

Finally, § 522(b)(4)(C) does not help the debtor in this case. That poorly drafted statute seems to apply only if by reason of a "direct transfer of retirement funds from 1 fund or account that is exempt from taxation" a retirement account loses its exemption status under § 522(b)(3)(C). 11 U.S.C. § 522(b)(4)(C). Here, the debtors' Inherited IRA does not qualify for exemption status because the account does not contain "retirement funds." Each of the required distributions from the fund is taxable and the holding of the funds by itself is not a taxable event. Section 522(b)(4)(C) simply does not apply.

The debtors did initially, and may still, argue that their Inherited IRA qualifies under Wis. Stat. § 815.18(3)(j) as exempt. Wis. Stat. § 815.18(3)(j) states in relevant part:

> (3) EXEMPT PROPERTY. The debtor's interest in or right to receive the following property is exempt . . .
>
> (j) *Retirement benefits*. (1) Assets held or amounts payable under any retirement, pen-

> sion, disability, death benefit, stock bonus, profit sharing plan, annuity, individual retirement account, individual retirement annuity, Keogh, 401–K or similar plan or contract providing benefits by reason of age, illness, disability, death or length of service and payments made to the debtor therefrom.
>
> (2) The plan or contract must meet one of the following requirements: (a) The plan or contract complies with the provisions of the internal revenue code . . . Wis. Stat. § 815.18(3)(j).

On facts indistinguishable from the present case, the issue of whether an inherited IRA could be claimed exempt under Wis. Stat. § 815.18(3)(j) was decided by a bankruptcy court in the Eastern District of Wisconsin. *See In re Kirchen*, 344 B.R. 908 (Bankr. E.D. Wis. 2006). The court first found that the state exemption did not apply to inherited IRAs, because the "benefits" from inherited IRAs were distributed immediately and *not* by reason of "age, illness, disability, death or length of service . . ." as required by the exemption. *Id.* at 912. The court also found that the inherited accounts were not governed by the provisions of IRC § 408, and likewise could not be deemed to comply with the Internal Revenue Code. *Id.* at 913.

The court's reasoning in *Kirchen* is sound and the conclusion that the funds of an inherited IRA are not within the meaning of Wis. Stat. § 815.18(3)(j)(1), which requires that the benefits of such an account be distributed "by reason of age, illness, disability, death . . ." is thus compelled. In this case the debtors received minimum distributions from the Inherited IRA as permitted by the IRS guidelines. The debtors are entitled to re-

ceive benefits immediately with no regard to their age, physical health, or working status. For this reason, the debtors' Inherited IRA does not fall within Wis. Stat. § 815.18(3)(j) or within § 522(b)(3)(C).

The trustee and judgment creditors in this case have met their burden by rebutting the debtors' claimed exemption. The debtors' Inherited IRA does not contain "retirement funds" within the common meaning of § 522(b)(3)(C). The trustee and judgment creditors' objections must be sustained, and the debtors' exemption claimed under Wis. Stat. § 815.18(3)(j) and § 522(b)(3)(C) is disallowed.

ORDER

The trustee and judgment creditors' objections to the debtors' claimed exemption of their inherited IRA is SUSTAINED. The debtors' exemption of their inherited IRA is DISALLOWED.