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3 **UNITED STATES BANKRUPTCY COURT**

4  
5 **FOR THE DISTRICT OF ARIZONA**

6  
7 **In re**

8 **RICKIE BALLARD and**  
9 **SHERRIE HARTER**

10 **Debtors.**

)  
) **In Chapter 7 proceedings**

)  
) **Case No. 2:10-bk-10055-CGC**

)  
) **UNDER ADVISEMENT DECISION**  
) **REGARDING DEBTORS' MOTIONS**  
) **FOR RECONSIDERATION AND TO**  
) **SET ASIDE AN ORDER SUSTAINING**  
) **TRUSTEE'S OBJECTIONS TO**  
) **EXEMPTIONS**

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16 **I. Introduction**

17 Debtors filed for bankruptcy under Chapter 7 to obtain a fresh start while maintaining  
18 ownership of their family home and several other possessions. Debtors listed their home in Show  
19 Low, Arizona, an inherited IRA, and six months of food fuel and provisions as exempt property.  
20 As a result of counsel's failure to file a timely response to Trustee's objections to these claimed  
21 exemptions, Debtors are faced with the possibility of losing their home and other personal  
22 property which they may be entitled to claim as exempt. Debtors' counsel has filed a motion to  
23 alter or amend the judgment sustaining Trustee's objections, or, in the alternative, to set aside the  
24 judgment. Because the Court finds that Debtors have carried their burden of showing excusable  
25 neglect, and because the Court would prefer to determine the validity of the exemptions on the  
26 merits before stripping Debtors of some of their most valuable remaining possessions, Debtors'  
27 motion to set aside the judgment will be granted. Therefore, the Court need not consider  
28 Debtors' motion to alter or amend the judgment.



1 court decisions concluding that inherited IRA accounts are not exempt under various state law  
2 exemption statutes.

3 Debtors failed to respond to any of Trustee’s objections and on August 30, 2010, Trustee  
4 docketed a certificate of service and no objections, as well as a proposed order sustaining the  
5 objections raised in his Second Amended Objection. The Court signed the order sustaining  
6 Trustee’s objections (Order) later that day.

7 *A. Motion for Reconsideration*

8 Four days after the Court entered the Order, on September 3, 2010, Debtors filed a  
9 motion for reconsideration or to alter or amend the judgment under Fed. R. Civ. P. 59(e)<sup>1</sup>  
10 (Reconsideration Motion). In the Reconsideration Motion, Debtors argue that no legal or factual  
11 basis existed for sustaining Trustee’s objections and that the Order should not have been entered.

12 With regard to the homestead exemption, Debtors claim that the only case cited by  
13 Trustee to support his objection was clearly inapposite and that Trustee failed to allege any other  
14 facts or law supporting his objection. Instead, Trustee simply stated that he objected because he  
15 was conducting an investigation into the propriety of the claimed exemptions. Debtors claim a  
16 similar deficiency in Trustee’s objection to the exemption of food, fuel and provisions, which  
17 simply stated that more information was required to determine the validity of the claimed  
18 exemptions.

19 Debtors also argue that the cases cited by Trustee in support of his objection to  
20 exemption of Ms. Harter’s inherited IRA were not on point. Each of the cases, except one, which  
21 did not address exemptions, dealt with state law exemption statutes with language different from  
22 the Arizona statute. Further, Debtors claim that case law indicates that the inherited IRA is  
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27 <sup>1</sup> Fed. R. Bankr. P. 9023 makes Fed. R. Civ. P. 59 applicable in bankruptcy cases.

1 exempt under Bankruptcy Code §§ 522(b)(3)(C) and (b)(4),<sup>2</sup> which were added by BAPCPA  
2 and exempt tax-free retirement funds even in states that opt-out of the federal exemption scheme.

3 At the November 16, 2010 Reconsideration Motion hearing, in addition to reiterating  
4 arguments made in their motion, Debtors also explained that they had failed to respond to  
5 Trustee's objections because Debtors were in the process of switching counsel and, as a result,  
6 neither prior counsel nor new counsel was aware that the other had failed to respond. Trustee  
7 raised a concern that what Debtors were actually seeking at the hearing was relief from the Order  
8 under Fed. R. Civ. P. 60(b)<sup>3</sup> due to counsel's alleged excusable neglect, but that Debtors had not  
9 provided any reason in their motion why they did not respond to Trustee's objection, and had  
10 made a motion under Rule 59, not Rule 60(b).

11 *B. Motion for Relief from the Order*

12 In response to the concerns raised at the November 16 hearing, Debtors filed a motion for  
13 relief from the Order (Rule 60(b) Motion) on December 3, 2010. The Rule 60(b) Motion  
14 reiterated Debtors' belief that Trustee had not provided sufficient factual or legal support to  
15 carry his burden of proving, under Rule 4003(c), that the exemptions were not properly taken.  
16 Debtors also raised several new arguments, including alleged procedural deficiencies and an  
17 argument that Debtors were negotiating in good faith and providing the information requested by  
18 Trustee, and were under the impression that Trustee would not seek entry of an order sustaining  
19 the objections until Debtors were notified that the documentation provided was insufficient. This  
20 reliance, Debtors claim, constitutes the type of mistake, surprise or excusable neglect required to  
21 set aside the Order under Rule 60(b).

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24 <sup>2</sup> Debtors argue in their Reconsideration Motion that the inherited IRA is exempt under both Arizona law and  
25 Federal law. However, Debtors' Schedule C lists the exemption under Arizona law only. The Court will consider  
26 Debtors' Schedule C to be amended in accordance with the claims made in their Reconsideration Motion,  
27 *see In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. Aug. 30, 2010), but Debtors will be required to formally  
28 amend their schedules within 14 days of the entry of this decision to indicate that an exemption is claimed under §  
522(b)(3)(C). If Debtors fail to amend their schedules within 14 days of the date on this decision, Debtors'  
exemption on the inherited IRA will be limited to Arizona state law.

<sup>3</sup> Fed. R. Bankr. P. 9024 makes Fed. R. Civ. P. 60 applicable in bankruptcy cases.



1 been providing documents requested by Trustee. No evidence exists suggesting that Debtors  
2 were refusing to provide substantiating documentation, or were otherwise attempting to delay  
3 Trustee in bad faith. To the contrary, the ongoing discussions and disclosure between the parties  
4 indicates good faith and a belief that the parties could reach a consensual resolution of the  
5 objections without the need for Court intervention. Though counsel's assumption that Trustee  
6 would not seek default judgment may have been ill-advised, especially in the absence of a  
7 written agreement, counsel's actions certainly do not indicate a "devious, deliberate, willful, or  
8 bad faith" motive.

9 Likewise, Debtors' quick response to the entry of the Order indicates good faith. *See*  
10 *Pinson*, 316 Fed. Appx. at 750. Debtors filed the Reconsideration Motion just four days after  
11 entry of the Order. Although the Rule 60(b) Motion was not filed until several months later, the  
12 expeditious filing of the Reconsideration Motion indicates that Debtors truly were caught off  
13 guard. The Court concludes default entry of the order sustaining Trustee's objections did not  
14 result from the culpable conduct of Debtors or their counsel.

15 *B. Prejudice*

16 A party seeking relief from a default judgment must also show a lack of prejudice to the  
17 non-moving party. Prejudice to the non-moving party requires more than a simple delay in  
18 resolution of the case. *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615  
19 F.3d 1085, 1095 (9th Cir. 2010). Rather, "the standard is whether [plaintiff's] ability to pursue  
20 his claim will be hindered." *TCI*, 244 F.3d at 701 (citing *Falk v. Allen*, 739 F.2d 461, 463 (9th  
21 Cir. 1984)); *see Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996) (to  
22 be considered prejudicial, "the delay must result in tangible harm such as loss of evidence,  
23 increased difficulties of discovery, or greater opportunity for fraud or collusion").

24 Trustee in this case has not suggested that any prejudice would result from setting aside  
25 the Order. Trustee simply argues that Debtors missed their time to object, and they should not be  
26 given a second bite at the apple. For their part, Debtors point out that the Reconsideration  
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1 Motion was filed four days after entry of the Order, that they continued to provide  
2 documentation until one week before entry of the order, and Debtors' counsel continued to  
3 cooperate with Trustee's requests for information. Debtors' cooperation indicates that there may  
4 be a *greater* opportunity for discovery. Aside from delay in the resolution of the Second  
5 Amended Objection, the Court finds that Trustee will not suffer any tangible harm. No evidence  
6 will be lost and it is likely that Trustee will be able to gather more information, more easily  
7 regarding the claimed exemptions. As a result, the Court concludes that no prejudice to Trustee  
8 exists in this case.

9 *C. Meritorious Defense*

10 In addition to showing lack of culpable conduct and an absence of prejudice to the  
11 opposing party, Debtors must also prove the existence of a meritorious defense. *Employee*  
12 *Painters' Trust*, 480 F.3d at 1000. "[T]he burden on a party seeking to vacate a default judgment  
13 is not extraordinarily heavy." *Signed Personal Check No. 730*, 615 F.3d at 1094 (quoting *TCI*,  
14 244 F.3d at 700). To satisfy the criterion of a "meritorious defense," the defense need not be  
15 ultimately persuasive at this stage. *Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57,  
16 61 (2d Cir. 1996). Instead, Debtors must simply show that there is some possibility that the  
17 outcome, after a full trial, will be contrary to the result upon default. *Haw. Carpenters' Trust*  
18 *Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). In making its determination, the Court must  
19 take facts presented by the movant as true. *Signed Personal Check No. 730*, 615 F.3d at 1094.

20 i Homestead

21 Debtors first contend that Trustee's objection to exemption of the Show Low Property  
22 should not have been sustained because Trustee failed to present an objection that was sufficient  
23 on its face. Debtors point out that according to Fed. R. Bankr. P. 4003(c), the objecting party has  
24 the burden of proving that an exemption is not properly taken. Debtors contend that Trustee  
25 failed to meet his burden by failing to set forth specific facts requiring disallowance of the  
26 claimed homestead exemption. According to Debtors, Trustee's mere assertion that he was  
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1 investigating the propriety of the homestead exemption was not sufficient to prove that Debtors  
2 were not entitled to the exemption, especially in light of recently provided water bills, which  
3 they claim show that they were residing at the Show Low Property at the time of their petition.

4 Trustee, likewise, indicated at the Reconsideration Motion hearing that he had obtained  
5 utility bills indicating that Debtors did *not* reside at the Show Low Property. Because the Court  
6 did not hear the issue on the merits, it did not have the opportunity to make a factual  
7 determination as to whether Debtors were residing at the Show Low Property. In light of the  
8 utility bills recently provided by Debtors, indicating that Debtors were residing at the Show Low  
9 Property, Debtors have met their burden of showing some possibility that the outcome will be  
10 contrary to the result upon default. *Haw. Carpenters' Trust Funds v. Stone*, 794 F.2d at 513.

11 Of course, Debtors factual allegations cannot overcome binding Ninth Circuit case law  
12 which would disallow the exemptions as a matter of law. In his Second Amended Objection,  
13 Trustee alleged Debtors had made a prepetition transfer of property to a third party without  
14 consideration, and as a result, *In re Glass*, 60 F.3d 565 (9th Cir. 1995) prevents Debtors from  
15 exempting the property. Debtors admit that they transferred the property, but claim that because  
16 the property was transferred back to them prepetition, *In re Glass* is inapplicable. *See Glass*, 60  
17 F.3d at 567 (agreeing with B.A.P. decision requiring a showing that “debtor transferred property  
18 in such a manner as to invoke the trustee's avoidance powers under §§ 510(c)(2), 542, 543, 550,  
19 551 or 553, the transfer was voluntary or the debtor knowingly concealed the transfer or an  
20 interest in the property, and the property was returned to the estate as a result of the trustee's  
21 efforts, not limited to actions directed toward the transferee.”). No evidence has been presented  
22 regarding the prepetition transfer, or whether the requirements of *In re Glass* have been met.  
23 However, the facts set forth by Debtors, which must be taken as true for purposes of the Rule  
24 60(b) Motion, *see Signed Personal Check No. 730*, 615 F.3d at 1094, could change the result on  
25 this issue if it is shown that the transfer back to Debtors was not the result of Trustee’s efforts.





1 exemption of inherited IRAs under the federal exemptions. Debtors point out, however, that  
2 other courts, including the courts in *In re Tabor*, 433 B.R. 469 (Bankr. M.D. Pa. 2010) and *In re*  
3 *Nessa*, 426 B.R. 312 (B.A.P. 8th Cir. 2010) have concluded that inherited IRAs are indeed  
4 exempt under § 522(b)(3)(C).

5 The Court has not considered whether inherited IRAs are exempt under § 522(b)(3)(C).  
6 However, the Court notes that a growing number of decisions exist, including a recent decision  
7 in this district, which conclude that inherited IRAs are exempt under the federal statute as  
8 amended by BAPCPA. *See In re Thiem*, 2011 WL 182884 (Bankr. D. Ariz. Jan. 19, 2011); *see*  
9 *also In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. Aug. 30, 2010). Therefore, the  
10 Court finds that Debtors have raised a defense which could result in a favorable outcome on the  
11 merits and will grant Debtors' Rule 60(b) Motion as to the inherited IRA exemption.

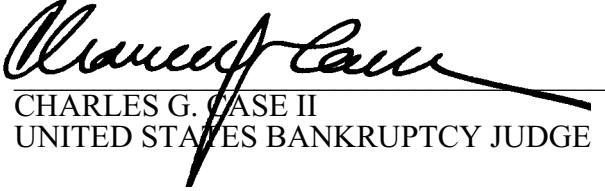
#### 12 **IV. Conclusion**

13 The Court has concluded that Debtors' Rule 60(b) Motion should be granted so that the  
14 propriety of Debtors' claimed exemptions may be determined on the merits. This is consistent  
15 with the policy favoring determination of issues on the merits and disfavoring default judgments.  
16 Debtors have shown that entry the Order was not a result of their culpable conduct. Nor will  
17 Trustee be prejudiced by granting the Rule 60(b) Motion. Further, Debtors have met their burden  
18 of raising meritorious defenses to each of the exemptions objected to by Trustee. The Rule 60(b)  
19 Motion will be granted in its entirety. Because the Court will grant the Rule 60(b) Motion, the  
20 Reconsideration Motion is moot.

21  
22 Debtors are to upload a form of order. Debtor shall file an amended Schedule C within  
23 14 days and the trustee shall have 14 days thereafter to file an amended objection with the  
24 Court setting out a prima facie case for each exemption to which he seeks to object.

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**DATED:** March 15, 2011

  
CHARLES G. CASE II  
UNITED STATES BANKRUPTCY JUDGE

**COPY** of the foregoing mailed by the BNC and/or sent by auto-generated mail to:

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