

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

JOHN ALBERT EGGINK
Debtor(s).

Bankruptcy No. X89-01622S
Chapter 7

FINDINGS OF FACT

The matter before the court is the trustee's objection to the debtor's claim of exemption in an annuity plan.

Hearing was held on January 26, 1990 in Sioux City, Iowa. The court now issues its findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

FINDINGS OF FACT

John A. Eggink (EGGINK) filed his individual voluntary petition under Chapter 7 of the Bankruptcy Code on October 23, 1989. Eggink listed in his schedules an annuity plan having a value of \$3,584.50. Debtor claimed the pension plan as exempt under Iowa Code § 627.6(8)(e). Eggink, who is 50 years old, is single and has no dependents. He is in reasonably good health, although he may be in need of minor surgery.

Eggink has a high school education and is employed as a residential aide at a custodial care facility where he earns approximately \$745.16 a month. His duties consist primarily of patient care and comfort. Eggink plans to continue working for another fifteen to twenty years before retiring. He does not anticipate changing jobs nor does he expect any significant increase in his income in the future. Although Eggink is currently able to pay his bills as they become due, he states that he is having some trouble supporting himself. other than his annuity, he has no savings. If the trustee recovers the money in his annuity, Eggink doubts he will be able to support himself after retirement.

Eggink applied to participate in his employer's annuity program in January, 1987. Eggink believed all employees at the facility were required to participate in the annuity program. He also believed the annuity was a retirement plan, and that he was not entitled to any of the money paid into the plan until after he retired. In fact, according to the provisions of the "Annuity Application" signed by the debtor (Plaintiff's Exhibit 1) and the "Deferred Annuity Contract" furnished to the debtor (Plaintiff's Exhibit 2), participants in the annuity may, subject to an early withdrawal penalty, withdraw some or all of the fund at any time.

DISCUSSION

Eggink maintains that his annuity is exempt under Iowa Code 627.6(8)(e), which states:

A debtor who is a resident of this state may hold exempt from execution the following property--

8. The debtor's rights in

- e. a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

The trustee contends that the annuity is not reasonably necessary for the support of the debtor, and further that because the debtor can withdraw money from the annuity at his discretion, the annuity is akin to an IRA and therefore is not an exempt asset under § 627.6(8)(e).

Courts must determine whether a debtor's interest in a fund is reasonably necessary on a case-by-case basis. In re Flygstad, 56 B.R. 884, 889 (Bankr. N.D. 1986). In considering whether a debtor's right to payment in a pension plan is reasonably necessary for support, the court should look at a number of factors, including:

1. Debtor's present and anticipated living expenses;
2. Debtor's present and anticipated income from all sources;
3. Age of the debtor and dependents;
4. Health of the debtor and dependents;
5. Debtor's ability to work and earn a living;
6. Debtor's job skills, training and education;
7. Debtor's other assets, including exempt assets;
8. Liquidity of other assets;
9. Debtor's ability to save for retirement;
10. Special needs of the debtor and dependents;
11. Debtor's financial obligations, e.g. alimony or support payments.

In re Flvqstad, 56 B.R. at 889-890.

Eggink's income is barely sufficient to support him at this time. Furthermore, he does not appear to possess any other assets of significant value, claiming only \$1,550.00 worth of property in addition to his annuity as exempt. He has been unable to save any money for retirement; therefore, aside from social security, his only source of income upon retirement will be payments from this annuity plan. As a result, the court is convinced that this annuity plan is reasonably necessary for the support of the debtor.

The trustee also objects to Eggink's claim of exemption because his right to payment from this annuity plan is not limited to "illness, disability, death, age, or length of service" as required by Iowa Code § 627.6(8)(e). Indeed, according to the contract, Eggink is free to remove part or all his interest in the annuity, less surrender and administrative charges, at any time. Consequently, the trustee contends that Eggink's annuity is basically an IRA, and cannot be considered an exempt asset under § 627.6(8)(e).

An annuity is defined as a "right to receive a specified income payment for a fixed or contingent period." Matter of Pettit, 55 B.R. 394, 398 (Bankr. S.D. Iowa 1985), affld. In re Pettit, 57 B.R. 362 (S.D. Iowa 1985).

Typically, an annuity is 'purchased' during a period of employment with an intent to draw the annuity payments during retirement or to provide one's beneficiaries with an income source in the event of one's death. An annuity, therefore, is like the common pension plan in that access to the annuity fund is restricted by limiting conditions (i.e. retirement, disability, death, etc.)

Id. at 398. For such a plan to be considered exempt, benefits must be akin to future earnings to insure benefits are available for the debtor's retirement. In re Matthews, Bankr. No. 85-01744M, slip op. at 4 (N.D. Iowa, June 25, 1986). If a debtor's access to accrued funds in his plan or fund are essentially unrestricted and unrelated to illness, disability, death, age, or length of service, courts have consistently held such plans are not exempt under S 627.6(8)(e). In re Matthews, Bankr. No. 85-01744M, slip op. at 4-5; In re Flygstad, 56 B.R. at 891; Matter of Pettit, 55 B.R. at 398.

Minor penalties assessed for the early withdrawal of annuity funds do not constitute a restriction significant enough to place this plan within the domain of 627.6(8)(e). See In re Matthews, Bankr. No. 85-01744M, slip op. at 3-4. Because Eggink's access to his annuity plan is completely unrestricted, this asset is not exempt. According to his annuity contract, Eggink, at his discretion, could have cashed in his entire interest in the annuity, less a surrender charge, on the day of his bankruptcy.

This surrender charge is determined by applying the total surrender charge calculation as set forth in Eggink's annuity plan. See Appendix 1. The partial surrender charge calculation should not be applied because the value of the debtor's interest in his annuity plan should be calculated as of the day he filed bankruptcy, at which time he would have withdrawn the full amount of the annuity, and not what he would receive if his interest were withdrawn at a later date. The surrender charge for a total surrender is calculated by multiplying the amount representing new purchase payments of the debtor into the annuity plan as of October 23, 1989 by 7% (\$3,584.50 X .07 = \$250.91). This figure is then subtracted from the debtor's interest in the annuity to determine the cash surrender value. Therefore, the cash surrender value of Eggink's annuity plan as of the day of his filing for bankruptcy was \$3,333.59 (\$3,584.50 - \$250.91).

CONCLUSIONS OF LAW

The estate's interest in the cash surrender value of debtor's annuity plan is not exempt under Iowa Code 627.6(8)(e).

ORDER

IT IS THEREFORE ORDERED that the trustee's objection is sustained and the debtor's claim of exemption in his annuity plan is denied.

SO ORDERED THIS 29th DAY OF JANUARY, 1990.

William L. Edmonds
Chief Bankruptcy Judge