

Appeal History:

reversed, 141 B. R. 405 No. [C91-3067](#) (N. D. Iowa April 15, 1992) (Hansen, J.)
aff'd, 986 F.2d 1222 (8th Circuit 1993)
cert. denied, 114 Supreme Court 272 (1993)

In the United States Bankruptcy Court

for the Northern District of Iowa

GLEN H. HUEBNER
Debtor(s).

Bankruptcy No. X90-01961M
Chapter 7

RULING AND ORDER RE: OBJECTIONS TO EXEMPTION

Trustee Habbo Fokkena (TRUSTEE) and Farmers State Bank of Garner, Iowa (BANK) have objected to debtor's claim of exemption in two "flexible premium retirement annuities." Hearing was held on March 13, 1991 in Mason City. The court now issues its findings, conclusions and order. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

FACTS

Glen Huebner, age 65, filed for relief under chapter 11 on November 9, 1990. On November 30, 1990, the case was converted to chapter 7. On his schedule B-4, Huebner claimed exemptions in two Aid Association for Lutherans (AAL) flexible premium retirement annuities pursuant to Iowa Code § 627.6(8)(e). In December, 1979, Huebner purchased an AAL flexible premium retirement annuity, certificate no. 27567591, for an initial \$2,000.00 premium and subsequent annual premiums subject to the maximum contribution allowed by the Internal Revenue Code. On April 21, 1980, Huebner rolled over a previously purchased John Hancock Insurance annuity, valued at \$3,290.39, into an AAL single premium flexible premium retirement annuity, certificate no. 2792166. Huebner, unmarried, purchased the AAL annuities for retirement purposes. His current monthly income is comprised of a \$423.00 social security payment and an estimated \$300.00 rental payment derived from his leasing of his 40-acre farm.

On his schedule B-2, Huebner listed the collective value of the AAL annuities at \$30,000.00. The trustee and Bank do not dispute that both annuities are qualified Individual Retirement Annuities, pursuant to 26 U.S.C. § 408(b) of the Internal Revenue Code. [\(1\)](#)

According to § 408(b), the maximum amount that may be contributed to both annuities is \$2,000.00 per year. Since 1979, Huebner has annually contributed the maximum premium allowed by IRC § 408(b) to annuity no. 2756791. [\(2\)](#) Huebner's most recent contribution was made in 1990. Benefit payments pursuant to a § 408(b) annuity must commence no later than the date upon which the annuitant attains age 70-1/2, however any distribution received from the annuity prior to the annuitant reaching age 59 1/2 is subject to treatment as taxable income and a 10% penalty. Although both annuities provide the annuitant with the opportunity for complete withdrawal of their cash value at any time, Huebner has not exercised such right.

Each annuity provides Huebner with three payment options. According to § 8.2 of the "Certificate of Membership and Annuity", these options include: (1) cash payment in any amount; (2) periodic payments for a chosen length of time, not to exceed 30 years; and (3) periodic payments for the life of the annuitant, with a guaranteed payment amount for a chosen number of years. The guaranteed payment amount under the third option is conditioned on the age and sex of the

annuitant at the time AAL issues the payment contract. Under a lifetime monthly payment contract, Huebner can receive guaranteed monthly payments of \$292.66 for ten years, or under a ten-year payment contract, he could receive guaranteed monthly payments of \$393.22. It was Huebner's expressed intent not to begin receiving such monthly payments until sometime after he reached age 65 which occurred on April 2, 1991.

DISCUSSION

Iowa Code § 627.6(8)(e) provides that a debtor may exempt any rights in 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." Trustee and Bank agree that any payments to be received by Huebner pursuant to the annuity contracts would be reasonably necessary for Huebner's support. But, the trustee and Bank contend that a § 408(b) Individual Retirement Annuity is identical to an Individual Retirement Account (IRA) under § 408(a) and thus is not exempt under Iowa Code § 627.6(8)(e). In support of their position, the objectors rely on In re Matthews, 65 B.R. 24 (Bankr. N.D. Iowa 1986). The latter case concludes that IRAs are not pensions or similar contracts within the ambit of Iowa Code § 627.6(8)(e).

Privately purchased annuity policies were intended by the Iowa legislature to be exempt under Iowa Code § 627.6(8)(e). In re McCabe, 74 B.R. 119, 120 (Bankr. N.D. Iowa 1986). Despite the similarities between the AAL annuities established and qualified pursuant to 26 U.S.C. § 408(b) and an IRA established and qualified pursuant to 26 U.S.C. § 408(a), the court holds that Huebner's AAL contracts are privately purchased annuity policies which are exempt under Iowa Code § 627.6(8)(e). This result comports with In re Pingel, 63 B.R. 652, 653 (Bankr. N.D. Iowa 1986), which holds that an Individual Retirement Annuity established and qualified under § 408(b) of the Internal Revenue Code constitutes an exemptible annuity under § 627.6(8)(e). *See also*, In re Gefen, 35 B.R. 368, 372 (Bankr. S.D. Fla. 1984).

The objectors' reliance on Matthews, to support their argument is unpersuasive. In Matthews, the issue before the court was whether an IRA established pursuant to § 408(a) of the IRC was exempt. Matthews did not address the issue as to whether an Individual Retirement Annuity established under § 408(b) of the IRC was exempt. Although there are similarities between Individual Retirement Annuities and IRAs, it must be noted that both types of policies are separately established pursuant to their own distinct statutory subsections. The trustee and Bank agree that both of Huebner's AAL contracts qualify as Individual Retirement Annuities pursuant to IRC § 408(b). Thus, had Huebner intended to establish a valid IRA, he would have to comply with § 408(a), not § 408(b), of the IRC. Cf. In re Talbert, 15 B.R. 536, 537 (Bankr. W.D. La. 1981) (rejecting debtor's argument that IRAs should be exempt as an annuity, by noting that had debtors intended to establish an annuity with special tax treatment, they could have done so pursuant to § 408(b) instead of § 408(a)).

Although neither AAL annuity expresses a specific age upon which payments are to commence, the court finds that the fact the annuity is payable during Huebner's retirement years satisfies the "on account of age" requirement of § 627.6(8)(e). To hold that such payments are not payable "on account of . . . age" would be to allow "form to triumph over substance." Matter of Lilienthal, No. 86-971-W, slip op. at 4 (Bankr. S.D. Iowa, July 22, 1986); *aff'd*. 72 B.R. 277 (S.D. Iowa 1987). According to Lilienthal:

Had the instant annuity been drafted to read "payable upon Doris Lilienthal's 70th birthday", there would be no dispute as to the annuity's exempt status. Such language, however, would not have altered the method or timing of the contract payments. Moreover, the fact that this annuity is payable during the debtor's retirement years comports with the "on account . . . age, or length of service" language of section 627.6 (8)(e) .

Lilienthal, slip op. at 4-5. Consequently, the court finds that Huebner's AAL annuities satisfy the "on account of . . . age", requirement of § 627.6(8)(e). See In re Gilbert, 74 B.R. 1, 2 (Bankr. N.D. Iowa 1985); McCabe, 74 B.R. at 120.

ORDER

IT IS ORDERED that the objections filed by the trustee and Farmers State Bank of Garner, Iowa to Glen Huebner's claim of exemption in two Aid Association for Lutherans flexible premium retirement annuities are overruled. Judgment

shall enter accordingly.

SO ORDERED ON THIS 22nd DAY OF MAY, 1991.

William L. Edmonds
Chief Bankruptcy Judge

In The United States District Court
For The Northern District of Iowa
Central Division

IN RE:)	
)	
)	Bankr. No. X90-
01961M)	
GLEN H. HUEBNER,)	NO. C 91-3067
)	
Debtor.)	ORDER

This matter is before the court on appellant Farmers State Bank, Grafton, Iowa's (Farmers State) appeal of an order of the bankruptcy court, entered May 22, 1991, which denied Farmers State's objections to debtor's claim of exemption. Appellee/debtor resists appellant's appeal and urges the court to affirm the bankruptcy court's decision. Both sides have filed briefs outlining their arguments.

The facts of this matter are undisputed. Debtor filed a petition under Chapter 11 of the Bankruptcy Code on November 9, 1990. The case was converted to a Chapter 7 proceeding on November 30, 1990. Debtor claims as exempt two Aid Association for Lutherans Flexible Premium Retirement Annuities (AAL annuities) pursuant to the exemption set forth in Iowa Code § 627.6(8)(e). Debtor initially purchased those annuities in 1979 and 1980 and has been making irregular annual contributions to the annuities. Each annuity provides debtor with three payment options: (1) cash payment in any amount up to the cash value; (2) periodic payments for a chosen length of time, not to exceed 30 years; and (3) periodic payments for the life of the annuitant, with a guaranteed payment amount for a chosen number of years. *See* order of the bankruptcy court, filed May 22, 1991, at 3. The payment amount under the third option is conditioned upon the age and sex of the annuitant at the time AAL issues the payment contract. Debtor's expressed intent was to begin receiving monthly payments sometime after he reached age 65. *See* debtor's affidavit, dated February 8, 1991. Debtor turned 65 on April 2, 1991.

Iowa Code § 627.6(8)(e) provides an exemption for "[t]he debtor's rights in . . . [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 parties stipulate that the payments under the annuities would be "necessary for the support of the debtor."

The parties also stipulate that the two annuities are qualified individual retirement annuities pursuant to the Internal Revenue Code, 26 U.S.C. § 408(b). Under the federal tax laws, benefit payments from a § 408(b) qualified individual retirement annuity must commence no later than the date on which the annuitant reaches age 70-1/2. Any distribution prior to reaching age 59-1/2 is subject to treatment as taxable income and a 10 percent penalty. The court also notes that one of the annuities (No. 2792166) provides a small penalty (1-4 percent) for withdrawals made within eight years of the issue date. *See* certificate of membership and annuity (No. 2792166) at § 5.1.

In In re Gilbert, 74 B.R. 1 (Bkrtcy. N.D. Iowa 1985), the court construed the "on account of" language of the Iowa exemption statute. In Gilbert, the debtors (ages 63 and 56) purchased a single premium annuity contract with monthly payments to begin one month after purchase and to end on the date of death of the survivor. Presumably the monthly payment amount was based on the ages of the annuitants. The court noted that "on account of" could mean "triggered by" and that "an annuity would be exempt if payments were commenced because the debtor obtained a specified age." *Id.* at 2. The court also noted that "on account of" could mean "based on" and that an annuity would thus be exempt if the payment amounts were based on the age of the annuitant. *Id.* The court noted that the Supreme Court of Iowa has held that the exemption statutes should be liberally construed in favor of the debtor. *Id.* (citing Frudden Lumber Co. v. Clifton, 183 N.W.2d 201, 203 (Iowa 1971)). The court found that the more liberal "based on" interpretation would effectuate the purposes of the exemption law and held that the annuity involved was exempt. The court stated that it saw no difference between an annuity contract which specifically begins payments at age 63 and an annuity contract which starts immediate payments to a person who happens to be age 63. Gilbert, 74 B.R. at 2. In In re McCabe, 74 B.R. 119 (Bkrtcy. N.D. Iowa 1986), the court followed Gilbert and held that a privately purchased annuity contract fell within the scope of the exemption where the contract provided that the amount of the payment was dependent upon the age and sex of the annuitant. In Matter of Lilienthal, 72 B.R. 277 (S.D. Iowa 1987), the United States District Court for the Southern District of Iowa followed Gilbert and McCabe. There is no indication in the courts' decisions that the annuities involved in Gilbert, McCabe, and Lilienthal qualify under 26 U.S.C. § 408(b).

In In re Lawrence, 57 B.R. 727 (Bkrtcy. N.D. Iowa 1986), the court held that a Keogh plan is exempt under Iowa law. The question in Lawrence was whether a Keogh plan is a "pension, annuity, or similar plan or contract" under the statute. In In re Pingel, 63 B.R. 652 (Bkrtcy. N.D. Iowa 1986), the court, following Lawrence and seeing no distinction between a Keogh plan and an individual retirement annuity, held that an individual retirement annuity established and qualified under 26 U.S.C. § 408(b) is exempt under Iowa law. Again, the question was whether the annuity was a "pension, annuity, or similar plan or contract" under the statute. The court did not discuss the "on account of" provision of the statute.

In In re Matthews, 65 B.R. 24 (Bkrtcy. N.D. Iowa 1986), the court held that an individual retirement account (IRA) established pursuant to 26 U.S.C. § 408(a) is not exempt under Iowa Code § 627.6(8) (e). The court reasoned that the owner of an IRA has relatively unrestricted control and use of the IRA funds and that access to the IRA is unrelated to illness, disability, death, age, or length of service. *Id.* at 25-26. The court distinguished Lawrence on the basis that a pre-retirement withdrawal from a Keogh plan bars contributions to the plan for five years, a restriction not present in an IRA. The court did not discuss Pingel, Gilbert, McCabe, and Lilienthal. In Matthews, the court discussed the nature of pensions, noting that pension benefits are "akin to future earnings," i.e., sums paid as deferred wages during the employee's retirement years. Matthews, 65 B.R. at 25. The court went on to note that benefits are akin to future earnings when the funds may only be withdrawn after retirement. *Id.* at 25-26. In a more recent unpublished decision, a United States Bankruptcy Judge for the Southern District of Iowa, citing Matthews, concluded that an individual retirement annuity is not exempt under Iowa Code § 627.6(8)(e). See Matter of Grimes, No. 88-2554-WH (Bkrtcy. S.D. Iowa 1990). The court found no distinction between an IRA under § 408(a) and an individual retirement annuity under § 408(b). *Id.*, slip op. at 6 n.1.

The court is also guided by In re Pettit, 55 B.R. 394 (Bkrtcy. S.D. Iowa 1985), *aff'd*, 57 B.R. 362 (S.D. Iowa 1985), In re Hutton, 893 F.2d 1010 (8th Cir. 1990), and In re Lingle, 119 B.R. 672, 676 (Bkrtcy. S.D. Iowa 1990). These cases construe the language "similar plan or contract" in Iowa Code S 627.6(8)(e). These cases reason that pensions and annuities have a common characteristic of control of the fund by someone other than the debtor and strong limitations on withdrawals from the fund. Hutton, 893 F.2d at 1011; Lingle 119 B.R. at 676. The Hutton court found that the savings and investment plan involved in that case, which restricted withdrawal from the plan until retirement except for financial hardship, qualified as a "similar plan or contract," as the plan was controlled by debtor's employer and as there were strong limitations on withdrawal. *Id.* In Lingle, the court examined a retirement annuity established under ERISA and concluded that the annuity met the criteria for a "pension, annuity or similar plan or contract" under Iowa Code § 627.6(8) (e).

In order to qualify for the exemption under Iowa Code § 627.6(8)(e), a payment under an annuity contract must be "on account of illness, disability, death, age, or length of service." The annuity contracts at issue in this case provide that "

[t]he owner may withdraw all or part of the cash value of this certificate on any date while the annuitant is alive." Certificates of Membership and Annuity at § 5.1. The annuitant may chose among several payment options including a lump sum cash payment, periodic payments over a period of time (not to exceed 30 years), or payment for life with a guaranteed number of years. *Id.* at § 8.2. Although the payment amounts under the third option are tied to the age and sex of the annuitant, the right to receive payments from the AAL annuities is not tied to or restricted by the annuitant's age.

After having considered the above somewhat inconsistent authorities, the court concludes that the annuities at issue in this matter are not exempt under Iowa Code § 627.6(8)(e). The key issue is whether debtor's ability to withdraw from the annuities is substantially restricted. See Matthews, 65 B.R. at 26; Hutton, 893 F.2d at 1011. Debtor's ability to withdraw from the AAL annuities is substantially unrestricted, except for the penalties established by the tax code and the minor contractual restrictions established in one of the annuities. This court agrees with Grimes and does not find a relevant distinction between the AAL annuities and an IRA established under 26 U.S.C. § 408(a).

In this matter, the bankruptcy court reasoned that "[a]lthough neither AAL annuity expresses a specific age upon which payments are to commence, the court finds that the fact the annuity is payable during Huebner's retirement years satisfies the 'on account of age' requirement of § 627.6(8) (e)." Order, filed May 22, 1991, at 5. The bankruptcy court cited Lilienthal, Gilbert, and McCabe in support of that conclusion. The court does not find debtor's expressed intent to begin receipt of payments after his sixty-fifth birthday to be dispositive. While debtor may have personally intended to begin payments from the annuity when he reached age 65, his options under the annuity contract were not so limited. Unlike the bankruptcy court below, the court believes that it must look to the nature of the annuity and the options available to the annuitant, rather than to debtor's subjective intentions as to how he will exercise his withdrawal rights under the annuity. The court finds that a test which would depend on the annuitant's intent is unworkable and is prone to manipulation. The court notes that in Gilbert, Lilienthal, and McCabe, the annuity involved was purchased, presumably with nonexempt assets, by the debtor only a few days before filing the bankruptcy petition.⁽³⁾

Further, an annuitant might purchase the annuity with the intent of using it as a tax deferment vehicle and to withdraw the funds as needed after age 59-1/2, but declare on the eve of bankruptcy that he or she intended to begin receiving payments at age 65. Finally, an intent test opens the door to questions of whether other assets would qualify under Iowa Code § 627.6(8)(e). For example, could a debtor argue that she intends to begin withdrawals of the funds in her passbook savings account at age 65 with the amount of each withdrawal to be determined based on her life expectancy at age 65? The court does not find that a test which looks to the debtor's intent to treat an otherwise unrestricted asset as an age based retirement fund is contemplated by the Iowa statute.

While this court readily acknowledges that it is well settled Iowa law that Iowa's exemption statutes are to be liberally construed in favor of the debtor, Frudden Lumber, 183 N.W.2d at 203, the court also should not "depart substantially from the express language of the exemption statute or extend the legislative grant." Matter of Knight, 75 B.R. 838, 839 (Bkrcty. S.D. Iowa 1987) (citations omitted). Consequently, this court respectfully disagrees with the reasoning of Gilbert and the cases following Gilbert. This court finds that "on account of" is more appropriately interpreted to mean "triggered by." The word "age" cannot be read in isolation, as the Gilbert court does. The statute reads "on account of illness, disability, death, age, or length of service." The other terms in the list, particularly illness, disability, and death, connote a "triggering" event for the payment. Under a pension plan, benefit payments are generally triggered by reaching a specified age or specified length of service. Although the amount of each payment may be based on age or length of service, the court finds that the words "on account of" are more appropriately read as "triggered by."

Debtor's right to payment from the AAL annuities is not triggered by any specific event. An AAL annuitant has an essentially unrestricted right to design a payment schedule, subject to the tax penalties for withdrawal prior to age 59 1/2. In this case, as debtor turned 59-1/2 prior to filing his bankruptcy petition, the tax penalties do not even operate as a restriction. The court finds that the AAL annuities are not exempt under Iowa Code § 627.6(8)(e). Accordingly, the decision of the bankruptcy court will be reversed.

ORDER:

Accordingly, It Is Ordered:

The bankruptcy court's order of May 22, 1991, is reversed. This matter is remanded to the bankruptcy court for further proceedings in light of the text of this order.

Done and Ordered this 15th day of April, 1992.

David R. Hansen

UNITED STATES CIRCUIT JUDGE
SITTING BY DESIGNATION

1. Section 408(b) provides:

Individual retirement annuity.--For purposes of this section, the term "individual retirement annuity" means an annuity contract, or an endowment contract (as determined under regulations prescribed by the Secretary), issued by an insurance company which meets the following requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract--

(A) the premiums are not fixed,

(B) the annual premium on behalf of any individual will not exceed \$2,000, and

(C) any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a) (9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of the owner.

(4) The entire interest of the owner is nonforfeitable. Such term does not include such an annuity contract for any taxable year of the owner in which it is disqualified on the application of subsection (e) or for any subsequent taxable year. For purposes of this subsection, no contract shall be treated as an endowment contract if it matures later than the taxable year in which the individual in whose name such contract is purchased attains age 70-1/2; if it is not for the exclusive benefit of the individual in whose name it is purchased or his beneficiaries; or if the aggregate annual premiums under all such contracts purchased in the name of such individual for any taxable year exceed \$2,000.00.

2. Prior to 1981, the maximum annual premium allowed to be contributed under § 408(b) was \$1,500.00.

3. That concern is not involved in this case, as the annuities were originally purchased approximately ten years prior to debtor's filing of his bankruptcy petition. *Cf. Pingel*, 63 B.R. at 653 ("I particularly note the lack of any indication of abuse of creditors by the setting up and funding of the retirement plan . . . contributions were not made in contemplation of a bankruptcy filing."). Deposition exhibits 4 and 5 set forth several contributions to and one withdrawal from the annuities by debtor.

The court notes that on April 13, 1992, the Governor signed an act which amended the language of § 627.6(8)(e) to exempt:

A payment or a portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, unless the payment or a portion of the payment results from contributions to the plan or contract by the debtor within one year prior to the filing of a bankruptcy petition, which contributions are above the normal and customary contributions under the plan or contract, in which case the portion of the payment attributable to the contributions above the normal and customary rate is not exempt.

Act Relating to the Exemption From Execution for a Debtor's Rights in a Payment Under a Pension, Annuity, or Similar

Plan or Contract, S.F. 2275, § 1 (April 13, 1992). The Act applies retroactively to all bankruptcy matters pending on January 1, 1992. *Id.* § 2. The court finds that these changes in the exemption statute do not affect the analysis of this opinion, and leaves it to the bankruptcy court on remand to determine if this Act otherwise affects this case.

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