

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

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DALE ELDON WILEY and DORIS JEAN  
WILEY

Bankruptcy No. 94-50752XS

Debtors.

Chapter 7

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### ORDER RE: OBJECTION TO EXEMPTIONS

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The matter before the court is the trustee's objection to the claim of exemption in an annuity. Hearing was held August 23, 1994. Donald H. Molstad appeared as the case trustee. A. Frank Baron appeared for Doris Wiley. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

#### Findings of Fact

Doris and Dale Wiley filed a pro se Chapter 7 petition on May 5, 1994. Their schedule of personal property listed a "settlement from accident" as Doris Wiley's property. The Wileys claimed the property exempt under Iowa Code § 627.6(8)(e).

On or about July 31, 1983, Doris Wiley was in a motor vehicle accident. She was 15 years old. Her injuries in the motor vehicle accident included a broken ankle, broken femur, third-degree burns, head concussion and whiplash. Doris Wiley claimed damages from the accident. The parties agreed to a structured settlement. On February 6, 1984, a settlement agreement was made between Darlene Weigart (Doris Wiley's mother and conservator) and the Farm Bureau Mutual Insurance Company. Pursuant to the terms of the settlement agreement, Farm Bureau purchased a single premium annuity policy providing for guaranteed payments as follows:

- \$14,000.00 payable on June 29, 1993
- \$25,000.00 payable on June 29, 1998
- \$35,000.00 payable on June 29, 2003.

Exhibit 1. Doris Wiley received the 1993 payment, and it is not at issue.

Farm Bureau is the owner of the policy. Doris Wiley is the annuitant and payee. The terms of the settlement agreement require Farm Bureau to "retain ownership" of the policy. The policy provides:

The Periodic Income is payable to the Payee. You [the owner] can ask us to make the payments to the Annuitant or another person. Your request must be in written form. The terms of the request may not be changed or revoked after the payments start, unless you reserved the right to change them in your request. If you do not reserve this right in your

request, the payments during the Annuitant's lifetime will not be subject to transfer, alteration, claims by creditors before any payment is due or to encumbrance by creditors.

Exhibit 1, General Provisions, Payments of Periodic Income. Farm Bureau has not reserved the right to change payment terms in its application for the annuity.

At the time the settlement agreement was made, Doris Wiley had been told by doctors that she would have long-term physical problems. Since that time, she has had physical examinations revealing that she has continuing problems because of her injuries. She has problems with lifting. She cannot stand very long because standing irritates her burns. The injury to her femur bone causes her to limp after walking or standing too long. She expects these will be permanent disabilities.

Doris Wiley is 26 years old. She graduated in 1988 from a two-year college with accounting clerk and business degrees. She has been employed as a clerk at Iowa Beef Processors (IBP) for five and a half years.

### Discussion

The trustee objects to the claim of exemption for the accident settlement on the ground that a personal injury settlement is not exempt under Iowa law. He argues that Doris Wiley's rights in the annuity do not come within the exemption in Iowa Code § 627.6(8)(e) because the property is essentially a personal injury settlement coincidentally funded through an annuity. Doris Wiley argues that the annuity is exempt under Iowa Code § 627.6(8)(e) as an annuity payable on account of disability or age.

Iowa Code § 627.6(8)(e) provides that a debtor may hold exempt the debtor's rights in:

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.

This court held in In re Buchholz, 144 B.R. 443 (Bankr. N.D. Iowa 1992), that a tort recovery for bodily injury is not exempt under Iowa Code § 627.6(8)(c) as a disability benefit. The term "benefit" implies contractual entitlements. Buchholz, 144 B.R. at 446. In contrast, § 627.6(8)(e) does not use the term benefit; it exempts rights in a "payment." The payments which Doris Wiley claims exempt will be paid under an annuity, a type of contract within § 627.6(8)(e).

The court concludes that Doris Wiley's interest in the annuity constitutes "rights in a payment," one prerequisite for an exemption under § 627.6(8)(e). In re Huebner, 986 F.2d 1222, 1224 (8th Cir. 1993), cert. denied, 114 S.Ct. 272 (1993). There is no evidence that Doris Wiley is able to reach the corpus of the annuity. The evidence is that she is entitled only to periodic payments as set out above. Under the terms of the annuity policy, Farm Bureau may not deprive Doris Wiley of the right to payments. It may not change the terms of payment because the annuity payments have begun. It is irrelevant to the exemption issue that Farm Bureau is the owner of the policy. Only a right in payments is a requirement for exemption and conforms with the definition of an annuity. See In re Johnson's Estate, 238 Iowa 1221, 30 N.W.2d 164, 167 (1947) (an annuity is a fixed sum payable at

intervals; it is a contract creating an income); Black's Law Dictionary 82 (5th ed. 1979) (annuity is a right to receive fixed, periodic payments); 3A C.J.S. § 2 at 866 (1973) (annuitant has an interest only in the payments themselves).

Next the court must decide whether Doris Wiley's rights in the payments are "on account of" age or disability. The court in Huebner rejected the argument that "on account of" age could mean "based on," and that an annuity would be exempt if the payment amounts were based on the age of the annuitant. In re Huebner, 141 B.R. 405, 406 (N.D. Iowa 1992), aff'd 986 F.2d 1222 (8th Cir. 1993). A right to receive payments must be tied to, restricted by, or dependent upon the occurrence of one of the triggering events listed in the statute. Huebner, 141 B.R. at 407-09; 986 F.2d at 1225. "The key issue is whether debtor's ability to withdraw from the annuit[y] is substantially restricted." Huebner, 141 B.R. at 408.

Doris Wiley's argument that the payment is on account of age is without merit. The property was placed in a conservatorship because Doris Wiley was a minor at the time of the settlement agreement. However, her right to payments under the annuity are not tied in any way to her age.

The term "disability" has a number of meanings, depending upon its context. In a personal injury case, disability to the body is an item of damage allowable to compensate for impairment of physical function, which is distinct from an award for loss of earning capacity. Michels v. United States, 815 F.Supp. 1244, 1257 (S.D. Iowa 1993), aff'd \_\_\_ F.3d \_\_\_, 1994 WL 400298 (8th Cir. 1994), citing Schnebly v. Baker, 217 N.W.2d 708, 726 (Iowa 1974). In a workers' compensation case, the term disability means loss of earning capacity. Armstrong v. State of Iowa Bldgs. & Grounds, 382 N.W.2d 161, 166 (Iowa 1986). A disability insurance policy is to protect the insured against loss of earning capacity. Kantor v. New York Life Ins. Co., 219 Iowa 1005, 258 N.W. 759, 760 (1935). After considering the other types of property included in § 627.6(8), the court concludes that the exemption for payments on account of disability in § 627.6(8)(e) is intended to include payments for loss of earning capacity, not for loss of bodily function. Cf. H.R. Rep. No. 595, 95th Cong., 1st Sess. 361-62 (1977), discussing 11 U.S.C. § 522(d)(10) (exemptions there are "akin to future earnings").

Evidence of loss of bodily function may be evidence of lost earning capacity. The impairment of physical capacity creates an inference of lessened earning capacity in the future. Michels v. United States, 815 F.Supp. at 1258, citing Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525 (Iowa App. 1977). Factors which a court may consider in evaluating a claim for loss of earning capacity include:

the plaintiff's poor health, education and opportunity for education, age, intelligence, industriousness, manner of living, sobriety or temperance, frugality or lavishness or other personal characteristics which affect ability to secure business or earn money.

Michels v. United States, 815 F.Supp. at 1258, quoting Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

Doris Wiley has testified that the motor vehicle accident left her with physical impairment which she described as permanent disability. The court infers from her descriptions of her injuries and her physical limitations that she has some level of partial disability in the sense of lost earning capacity. If the annuity payments were intended to compensate for the disability, the court concludes that the annuity payments would be "on account of" disability. The right to payments then would be tied to the occurrence of the disability.

One difference between an annuity purchased for the settlement of a personal injury claim and other types of annuities is that in the case of the settlement annuity, the disability occurs before the purchase of the annuity. If the purpose of annuity payments is to compensate for disability, it should make no difference whether the disability occurred before purchase or later. The appellate court in Huebner was concerned that the debtor's access to the corpus of the privately purchased annuity was substantially unlimited. The purchase of such unrestricted access annuities on the eve of bankruptcy could constitute a fraudulent transfer. Huebner, 141 B.R. at 408 and n.1. Those concerns would not be present in the case of an annuity purchased to compensate a tort victim for disability. A tort victim has no control over the occurrence of a disability.

The settlement agreement states that Farm Bureau "shall be released and discharged from any and all claims arising under [its insurance policy] for and on account of any loss or damage sustained by reason of an accident . . . occurring on or about the 31st day of July, 1983." Exhibit 2. The document does not further specify the type of losses or damages that the annuity is intended to compensate. The settlement likely intended to compensate Doris Wiley for her loss of earning capacity which constituted disability. However, it is also likely the settlement was intended to compensate for other losses and damages. These could have included items such as future medical expenses, past and future pain and suffering, and past and future loss of bodily function. Michels v. United States, 815 F.Supp. at 1256. The court is unable to find that the entire annuity was intended to compensate Doris Wiley for losses because of disability.

At the hearing on the trustee's objection, there was little evidence relevant to the factors listed in Michels for evaluating a claim for lost earning capacity. Doris Wiley is young, has achieved a fairly high level of education, and has had steady employment for over five years. Neither the trustee nor Doris Wiley argued the effect of these factors. Doris Wiley did not quantify her physical limitations. Her testimony was that she has "problems" with lifting and that her injuries become irritated and cause her to limp after standing or walking "too long." She did not offer medical evidence of her loss of bodily function. Medical evidence would have been helpful in evaluating the strength of the inference of lessened earning capacity created by the loss of physical capacity.

The court believes it would be unfair to decide the exemption issue on an all-or-nothing basis. The court finds that the annuity is likely attributable to other components of a personal injury claim in addition to loss of earning capacity. Because of the lack of evidence, particularly medical evidence, which would allow the court to establish with some certainty what portion of the annuity could be attributed to payments for loss of earning capacity, the court concludes that 10 per cent of Doris Wiley's rights in the annuity payments is exempt.

There is no evidence to support a claim of exemption in the annuity by Dale Wiley. To the extent he may have claimed an interest exempt, the trustee's objection to his claim will be sustained.

### ORDER

IT IS ORDERED that the trustee's objection to exemptions is sustained in part and overruled in part. Doris Wiley's interest in payments under the annuity are exempt to the extent of 10 per cent of the payments. The trustee's objection to any claim of exemption in the annuity by Dale Wiley is sustained. Judgment shall enter accordingly.

SO ORDERED ON THIS 20th DAY OF SEPTEMBER, 1994.

William L. Edmonds

Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order and a judgment by U. S. mail to: A. Frank Baron, Donald Molstad and U. S. Trustee.