

In the United States Bankruptcy Court

for the Northern District of Iowa

BRIDGET ANN JOHNSON
aka Bridget Frost
aka Bridget Lord
Debtor.

Bankruptcy No. 96-61936KW

Chapter 7

ORDER RE OBJECTION TO EXEMPTION (RE ANNUITY)

This matter came on for hearing before the undersigned on January 29, 1997 on Trustee's Objection to Property Claimed Exempt by Debtor. Michael Dunbar appeared as Chapter 7 Trustee. Attorney Dan Block represented Debtor Bridget Ann Johnson. After the presentation of evidence and argument, the Court took the matter under advisement. This matter is a core proceeding pursuant to 28 U.S.C. 157 (b)(2)(B).

STATEMENT OF THE CASE

Trustee objects to exemption of Debtor's interest in payments from TIAA/CREF annuities. Debtor resists Trustee's objection. She argues that the payments from the annuities are exempt as payments under a pension plan pursuant to Iowa Code sec. 626.7(8)(e).

Trustee also objected to exemption of a .357 handgun under Iowa Code sec. 627.6(2). Debtor did not resist and the Court entered an Order sustaining the objection to exemption on December 23, 1996 as to the .357 handgun.

FINDINGS OF FACT

Prior to 1995, Debtor Bridget Johnson was employed as a Public Safety Officer at the University of Northern Iowa for more than five years. Debtor contributed to UNI's TIAA/CREF annuity plan during this employment. In 1994, Debtor was off work and received disability income because of a work-related injury. She was unable to return to her job at UNI after she became disabled. For that reason, Debtor was terminated from UNI and the TIAA/CREF payments began. Debtor started her current employment as a booking clerk in the Black Hawk County Sheriff's Department in September 1995.

After Debtor's employment at UNI ended, she withdrew 10%, or approximately \$1,500, from the TIAA/CREF plan. The remainder of her interest in the TIAA/CREF plan was converted into three annuity certificates. Debtor receives payments of approximately \$920 per year from these annuities. The three annuity certificates were entered into evidence as Joint Exhibits A, B and C.

All three annuity certificates state that they may not be assigned or transferred, do not provide for cash surrender or loans, and are exempt from the claims of creditors. Debtor testified that she has no control over disbursements from the annuities. Because Debtor had been employed at UNI more than

five years, she had no control over any funds in the TIAA/CREF plan. Even after termination of employment, Debtor had no access to the funds except for the ability to cash out ten percent. She attempted to discontinue payments after she became employed at the Sheriff's Office and was unable to do so.

CONCLUSIONS OF LAW

Before addressing the exemption issue, the Court must determine whether the property in dispute is property of the bankruptcy estate. Property of the debtor's estate is broadly defined in 541 to include all the debtor's interests in property. Section 541(c)(2) makes the following exception:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

The U.S. Supreme Court holds that a debtor's interest in an ERISA-qualified pension plan may be excluded from property of the bankruptcy estate pursuant to 541(c)(2). Patterson v. Shumate, 504 U.S. 753, 760 (1992). The Court found that the plain language of 541(c)(2) requires the conclusion that "applicable nonbankruptcy law" refers not only to state spendthrift law but also to ERISA requirements. Id. at 759. Both ERISA and coordinate sections of the Internal Revenue Code (29 U.S.C. 1056(d)(1) and 26 U.S.C. 401(a)(13), respectively) impose restrictions on the transfer of a debtor's interest in an ERISA-qualified plan. These restrictions are "enforceable" as required by 541(c)(2). See In re Kunkle, No. 93-60077LW, slip op. at 4 (Bankr. N.D. Iowa June 4, 1993).

This Court has considered whether a debtor's interest in TIAA/CREF annuities is excluded from property of the estate in In re Montgomery, 104 B.R. 112, 113 (Bankr. N.D. Iowa 1989). It concluded that the annuities' restrictions on transfer were enforceable, making them spendthrift trusts which are excluded from the estate under 541(c)(2). Id. at 118; see also Morter v. Farm Credit Servs., 937 F.2d 354, 359 (7th Cir. 1991), cert. denied 505 U.S. 1204 (1992) (holding that TIAA/CREF funds are excluded from bankruptcy estate). TIAA/CREF annuities have also been held to be ERISA-qualified pension plans which are excluded from a debtor's bankruptcy estate. In re Bennett, 185 B.R. 4, 6 (Bankr. E.D.N.Y. 1995) (following Patterson).

Essentially all courts which have considered whether TIAA/CREF interests are includable in the bankruptcy estate have agreed that they are not. In re Lyons, 148 B.R. 88, 93 (Bankr. D.D.C. 1992); In re Kelvington, 146 B.R. 358, 360 (Bankr. W.D. Pa. 1992). This holding applies not only to the corpus of the annuities but also to the debtor's right to a future income stream. Lyons, 148 B.R. at 94. The court in Morter found TIAA/CREF funds excluded from the bankruptcy estate after the debtor had retired. 937 F.2d at 359.

Even if Debtor's TIAA/CREF annuity payments are considered property of the estate, they are exempt under Iowa law. Iowa Code sec. 627.6(8)(e) provides that a debtor may hold exempt from execution 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." The Court's determination on this issue is made with a view toward the general rule that courts should construe exemption statutes liberally in favor of the debtor in light of the purposes of the exemption. In re Wallerstedt, 930 F.2d 630, 631 (8th Cir. 1991); Chariton Feed & Grain, Inc. v. Kinser, 794 F.2d 1329, 1331 (8th Cir. 1986) (applying Iowa law); Frudden Lumber Co. v. Clifton, 183 N.W.2d 201, 203 (Iowa 1971). The exemption of payments under a pension or similar plan is intended to protect payments which function as wage substitutes after retirement or disability, to support the basic requirements of life at a

time when the debtor's earning capacity is limited. In re Pettit, 55 B.R. 394, 398 (Bankr. S.D. Iowa), aff'd, 57 B.R. 362 (S.D. Iowa 1985).

This exemption under the Iowa Code does not exempt the undistributed corpus of an annuity contract, but rather exempts the debtor's right in an annuity payment. In re Huebner, 986 F.2d 1222, 1224 (8th Cir.), cert. denied 510 U.S. 900 (1993); In re Caslavka, 179 B.R. 141, 145 (Bankr. N.D. Iowa 1995). If the debtor's present right to receive annuity payments is triggered by illness, disability, death, age or length of service, the annuity payments are exempt under sec. 627.6(8)(e). Huebner, 986 F.2d at 1225.

In order for payments from an annuity to be exempt under this section, the annuity contract must have the characteristic that pensions and annuities have in common, that access to the funds are restricted by limiting conditions such as retirement or disability. In re Hutton, 893 F.2d 1010, 1011 (8th Cir. 1990). When the annuity contract gives the debtor unfettered discretion to receive payment at any time without any of the triggering events occurring, the annuity and payments from the annuity are not exempt because the result is the equivalent of a savings account with tax advantages. Huebner, 986 F.2d at 1225; In re Matthews, 65 B.R. 24, 25 (Bankr. N.D. Iowa 1986). However, if limitations are put on the control of distributions or the withdrawal of funds, the annuity and payments from the annuity may be held as exempt. Huebner, 986 F.2d at 1225. The burden of proof in establishing that an exemption is not properly claimed is on the objector. Bankr. R. 4003.

In Caslavka, this Court held that periodic payments from annuities, traceable to an exempt lump sum payment from a profit-sharing plan, were exempt as payable on account of the debtor's age and retirement. 179 B.R. at 147. In In re Ziegler, 156 B.R. 151, 154 (Bankr. W.D. Pa. 1993), the court considered whether disability annuity payments from the debtor's retirement plan were exempt under 522(d)(10)(E), the Federal exemption which is similar to Iowa Code sec. 627.6(8)(e). It found that the annuity was not property of the estate under 541(c)(2). Id. The court further concluded that, even if the annuity was property of the estate, it was exempt because the debtor had no access to the funds except for receiving the disability payments. Id.

Based on the foregoing, the Court concludes that Debtor's TIAA/CREF annuities are not property of the estate under 541(c)(2). The annuities contain restrictions on transfer which are enforceable under ERISA or other nonbankruptcy law. Both the corpus of the annuities and the income stream are excluded from property of the estate.

Furthermore, the periodic payments Debtor receives from the annuities are exempt as payments under an annuity plan on account of disability under Iowa Code sec. 627.6(8)(e). Because Debtor had worked at UNI more than five years, she had no right to withdraw her TIAA/CREF funds at termination other than because she was disabled. See Montgomery, 104 B.R. at 117. Trustee has failed to prove that Debtor is not entitled to claim the payments exempt as payable on account of disability.

WHEREFORE, Trustee's Objection to Property Claimed Exempt by Debtor is DENIED.

FURTHER, the TIAA/CREF annuities are excluded from property of the estate under 541(c)(2).

FURTHER, payments Debtor receives from the TIAA/CREF annuities are exempt under Iowa Code sec. 627.6(8)(e).

SO ORDERED this 11th day of February, 1997.

Paul J. Kilburg
U.S. Bankruptcy Judge