

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

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DARLENE HAST  
*Debtor(s).*

Bankruptcy No. 98-03318S  
Chapter 7

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### TRUSTEE'S OBJECTION TO EXEMPTION CLAIM

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The trustee objects to the debtor's claim of exemption in an individual retirement annuity. Hearing was held March 17, 1999 in Sioux City. Wil L. Forker, the trustee, appeared on his own behalf. Thomas R. Eller appeared for Darlene Hast, the debtor. The court has jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and the District Court's order of reference. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

#### Findings of Fact

Darlene Hast filed her chapter 7 bankruptcy petition on November 5, 1998. She is a retired housewife and lives in Denison, Iowa. She is 69 years old and a widow. Her late husband, August, died in 1985. Mr. Hast had opened an individual retirement account (IRA) which he funded using his pay from his job at a bottling plant and from proceeds from the sale of a farm. Mrs. Hast made no contributions to the account. Upon Mr. Hast's death, the IRA account became property of Darlene Hast. She maintained the account at the American Federal Savings & Loan in Denison.

On January 11, 1991, on the advice of an insurance agent, she applied to transfer her IRA account into an IRA annuity with IDS Financial Services, Inc. (IDS). She paid a single premium of \$38,937.17 for the annuity. The annuity contract was issued January 15, 1991 (Exhibit A, page 2). The contract was intended to qualify as an individual retirement annuity under 26 U.S.C. § 408(b).

Mrs. Hast was 61 years old when she purchased the annuity from IDS. The first annuity payment under the contract was to be made on January 15, 2001, the "retirement date" (Exhibit A, page 2). There is no evidence as to how this date was selected, but under the contract, Mrs. Hast could unilaterally change the date on 30 days' notice to IDS. Upon reaching the retirement age, Mrs. Hast could select from among five payment plans. Whatever plan was selected, it would have to provide for substantially equal payments over a period either (1) no longer than the life of the annuitant or (2) which did not exceed the life expectancy of the annuitant (Exhibit A, numbered page 11).

The accumulation value of the contract increased by the retention of interest (Exhibit A, numbered page 10). IDS guaranteed certain minimum accumulation values and minimum surrender values for ten years (Exhibit A, numbered page 3). Mrs. Hast could obtain the surrender value of the account at any time (*id.*, numbered page 10). She could also obtain partial surrenders of the account (*id.*).

Surrender charges affected the surrender payment she received. During the first contract year, the surrender charge was 10 per cent of the amount surrendered (Exhibit A, numbered page 4). The surrender charge decreased by a percentage each contract year thereafter until the eleventh year, in which there was no charge (id.).

There was no surrender charge for surrenders in any contract year which totaled up to 10 per cent of the accumulation value of the account as of the beginning of the year (id.). Mrs. Hast obtained partial surrenders at regular intervals, nearly monthly, beginning in January 1992. From then until the filing of her bankruptcy in November 1998, she received payments totaling \$31,719.82. On those payments, she paid surrender charges of \$356.07.

The annuity payments are necessary to Mrs. Hast's support. Her other income includes social security payments of \$666.00 per month and approximately \$1,000.00 per year from another, exempt, annuity. She also receives a small amount of money, about \$16.00 per week, for babysitting her great-grandson.

When she filed bankruptcy, the annuity had an accumulated value of approximately \$24,000.00. She has made withdrawals of \$3,256.51 since filing.

## Discussion

### A. Pension, Annuity or Similar Plan or Contract

Mrs. Hast may exempt from property of the estate "[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..." Iowa Code § 627.6(8)(e) and 11 U.S.C. § 522(b)(2)(A). The contribution limitations contained in the Iowa statute are not relevant to this case. Iowa Code § 627.6(8)(e).

Not just any annuity is exempt under the statute. The Court of Appeals for the Eighth Circuit has held that the statute exempts plans or contracts which, like pensions, "provide benefits in lieu of earnings after retirement, whether funded by the employer or purchased by the employee or the self-employed." Eilbert v. Pelican (In re Eilbert), 162 F.3d 523, 527 (8<sup>th</sup> Cir. 1998).

Several factors must be considered in determining whether an annuity is intended to fall within the exemption statute. According to the Circuit Court, the Iowa statute contemplates the exemption of plans which have been funded by contributions over time. Id. Thus, "most [single premium] annuities are outside the purview of § 627.6(8)(e)." Id. However, Mrs. Hast's payment of a single premium should not place the annuity outside the statute's protection. Mr. Hast funded his annuity out of his wages, over time, presumably to fund the couple's retirement years. Mrs. Hast was the beneficiary of his plan. Her use of a lump sum benefit to pay her single premium should not detract from the fact that the IDS annuity is the result of a long-term investment out of wages.

Mr. Hast's employer apparently did not make contributions to his plan. Iowa Code § 627.6(8)(e) has been held to contemplate multiple contributors to plans within the statute. Eilbert v. Pelican, 212 B.R. 954, 959 (B.A.P. 8<sup>th</sup> Cir. 1997). However, the absence of multiple contributors to a plan is not dispositive of the exemption issue. Id. at 958.

Another factor to be considered in determining whether an annuity or other plan is exempt is the return on investment. Id. at 959. The Bankruptcy Appellate Panel in Eilbert has reasoned that plans which return no more than investment plus interest are less likely to be exempt. Id. Mrs. Hast's

contract bases the annuity payments on her life span or her estimated life span. Such a contract provision makes it more likely that this type of annuity falls within the statute. Id.

The Appellate Panel also has determined that the extent of the debtor's control over the assets is a factor in determining whether the annuity is of the kind contemplated by § 627.6(8)(e). Id. "[I]f the debtor has complete discretion to withdraw the entire corpus, then the contract resembles a non-exempt investment." Id. Application of this factor is detrimental to Mrs. Hast's claim. She has been able under the contract to take out substantial sums over time, and within certain limits, without penalty. Moreover, she retained the right to obtain the surrender of the entire corpus. The only inhibition was a declining penalty on aggregate annual surrenders exceeding 10 per cent of the annuity's value at the beginning of the pertinent year. Surrender charges under this contract are not a significant restriction on her discretion over the annuity. In re Huebner, 141 B.R. 405, 408 (N.D. Iowa 1992), aff'd, Huebner v. Farmers State Bank (In re Huebner), 986 F.2d 1222 (8<sup>th</sup> Cir. 1993). Last, she retained the right to change the retirement date at any time on 30 days' notice to IDS. Under the contract, she could have begun receiving annuity payments, as opposed to surrender payments, almost immediately.

Primarily because of Mrs. Hast's unfettered control over the payments under the annuity, I conclude that the IDS annuity is not an annuity within the coverage of Iowa Code § 627.6(8)(e).

#### B. Payments on Account of Age

The control of the debtor over the right to receive payments under the contract and the debtor's discretion to obtain a surrender of the annuity prevent the annuity from being one which provides payments "on account of age" under Iowa Code § 627.6(8)(e). Debtor's control over contract payments is a critical factor in determining whether an annuity is covered by the statute. Eilbert v. Pelican (In re Eilbert), 212 B.R. 954, 959-60 (B.A.P. 8<sup>th</sup> Cir. 1997), aff'd, 162 F.3d 523, 527-28 (8<sup>th</sup> Cir. 1998).

### **Conclusion**

Darlene Hast's annuity contract # 9310-2548554 with IDS Life Insurance Company is not exempt under Iowa Code § 627.6(8)(e). The trustee's objection to her claim of exemption must be sustained. Because I conclude this is not a covered annuity, I need not reach the issue of whether the corpus of an annuity plan may be claimed as exempt. See Huebner, 986 F.2d at 1224.

### **ORDER**

IT IS ORDERED that the objection of the trustee to Darlene Hast's claim of exemption in an annuity contract with IDS Life Insurance company is sustained. Judgment shall enter accordingly.

SO ORDERED THIS 20<sup>th</sup> DAY OF MAY 1999.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed by U.S. mail or provided a copy of this order and a judgment to Wil Forker, Thomas Eller, and U.S. trustee.