

In the United States Bankruptcy Court

for the Northern District of Iowa

DANIEL HOLMES
JUDY ANN HOLMES

Bankruptcy No. 99-01961-W

Debtor(s).

Chapter 7

ORDER

This matter came before the undersigned for hearing on November 17, 1999. Attorney Thomas Verhulst represented Debtors, Daniel and Judy Ann Holmes. The Trustee, Michael Dunbar also appeared. After the presentation of evidence and argument, the Court took the matter under advisement. The parties waived the filing of briefs and the matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B).

STATEMENT OF THE CASE

Mrs. Holmes is the beneficiary of an annuity that Debtors claim is exempt from their bankruptcy estate under Iowa Code section 627.6(8)(e). The Trustee argues Debtors are not entitled to exempt the annuity from the estate because payments from the annuity are not made "on account of age."

FINDINGS OF FACT

Mrs. Holmes purchased a "Single Premium Deferred Annuity" (the "Annuity") from Illinois Mutual Life and Casualty Company on April 2, 1996. Under the terms of the Annuity, Mrs. Holmes may determine the date upon which payments from the Annuity will begin. (Debtors' Ex. A at 6.) Mrs. Holmes may withdraw all or part of the accumulated value of the Annuity at any time. (Debtors' Ex. A at 4.) If Mrs. Holmes withdraws more than ten percent of the accumulated value before April 2, 2004, she must pay a scaled "surrender charge." (Debtors' Ex. A at 4-5.) If Mrs. Holmes were to make a full withdrawal today, she would have to pay an eight percent "surrender charge."

Debtors filed for relief under Chapter 7 of the Bankruptcy Code on July 26, 1999 claiming the Annuity as exempt from their bankruptcy estate. The Trustee filed an objection to Debtors' claimed exemption on September 16, 1999.

CONCLUSIONS OF LAW

The Code allows debtors to exempt certain property from their bankruptcy estate. 11 U.S.C. §522. Iowa has elected to limit debtors to exemptions allowed under Iowa law. 11 U.S.C. §522(b)(1); Iowa Code §627.10. Under Iowa law, a debtor may claim as exempt "[a] payment or a portion of a payment under a pension, annuity, or similar plan ... on account of illness, disability, age, or length of service...." Iowa Code §627.6(8)(e). Debtors claim Mrs. Holmes's annuity payments will be made on "account of age."

An annuity payment is not made "on account of age" if the beneficiary maintains unfettered discretion over the annuity. In re Eilbert, 162 F.3d 523, 527 (8th Cir. 1998); In re Huebner, 986 F.2d 1222, 1225 (8th Cir. 1993). In Eilbert, the Eighth Circuit held that a debtor's right to determine the date upon which payments will begin, and the right to withdraw all or part of the corpus subject to a seven percent penalty constituted "unfettered control." Eilbert, 162 F.3d at 528.

Under Eilbert, Mrs. Holmes's payments from the Annuity will not be "on account of age." Mrs. Holmes maintains complete control over the date on which payments under the Annuity will begin. She could currently withdraw up to ten percent of the corpus of the Annuity without penalty. Mrs. Holmes could withdraw the entire corpus of the annuity for a penalty of eight percent. Beginning in April of 2004, she could withdraw the entire corpus of the Annuity without any penalty. Because payments from the Annuity will not be made "on account of age," Debtors are not entitled to exempt the Annuity from their bankruptcy estate.

CONCLUSION

Mrs. Holmes retains unfettered control over the Annuity. This control prevents payments from the Annuity from being "on account of age." Because the Annuity does not contemplate payments "on account of age," Debtors are not entitled to exempt the Annuity from the bankruptcy estate.

WHEREFORE the Trustee's objection to Debtor's claimed exemption is SUSTAINED.

SO ORDERED this 22nd day of November, 1999.

Paul J. Kilburg
Chief Bankruptcy Judge