

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re:
Estella W. Andersen and
Harry R. Andersen,
Debtors.

Bky. No. 99-36040
Chapter 7 Case

**AMENDED ORDER
SUSTAINING OBJECTION
TO EXEMPTIONS**

This matter came before the Court on April 19, 2000 on objection to claimed exempt property filed by the Trustee. Attorney Charles W. Ries appeared as Trustee, and attorney Michael P. Kircher appeared for the Debtors, Estella and Harry Anderson. This is a core proceeding and the Court has jurisdiction under 28 U.S.C. § 157 and 1334. On August 1, 2000, this Court issued its order sustaining the Trustee's objection, but the order was titled incorrectly, making it appear that the objection was overruled. Pursuant to the Federal and Local Rules of Bankruptcy Procedure, the Court now issues this **AMENDED ORDER**:

I. Introduction

The facts in this dispute are stipulated. The Debtors' chapter 7 petition was filed with the Court on December 10, 1999 and the Debtors claimed the Federal exemptions under 11 U.S.C. § 522(b)(1), as allowed by § 522(d). The Trustee's only remaining objection¹ is to the exemption of a IDS Annuity,

¹The Trustee originally objected as well to the exemption of three life insurance policies: an AAL policy owned by Estella with a cash value of \$2,574, AAL policy owned by Harry with a cash value of \$3,014, and an IDS policy owned by Estella with a cash value of \$11,295. The Trustee confirms on briefs that Mr. Andersen's policy is within the exemption allowed under 11 U.S.C. § 522 (d)(8), and conceded that Ms. Anderson's policies are exemptible in part under § 522 (d)(8). The \$5244 in cash value that is not allowed under § 522 (d)(8) is covered by part of the "catch all" exemption available to Ms. Anderson under § 522 (d)(5). While not relevant to the analysis in this

owned by Ms. Andersen, and claimed exempt under 11 U.S.C. (d)(10)(E) which exempts:

(10) The debtor's right to receive –

(E) a payment under a stock bonus, pension, profit-sharing, 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, unless, –

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a) 403(b), or 408 of the Internal Revenue code of 1986. 11 U.S.C. § 522 (d)(10).

Ms. Andersen is seventy-two and Mr. Andersen is seventy-nine years old. As detailed on their Schedule J, they have necessary monthly living expenses of \$1279. Schedule I shows current income of \$1357 per month. Both Debtors are retired, \$1021 of their monthly income is from Social Security, the remaining \$336 is a guaranteed monthly payment from the annuity which is the subject of this objection.

Under Rule 4003(c) the Trustee has “the burden of proving that the exemptions are not properly claimed.” Fed. R. Bankr. P. 4003(c). Since the Trustee fails to respond to the Debtors’ contention that the annuity payment is “reasonably necessary for support” as required under 11 U.S.C. § 522 (d)(10), the only remaining question before the Court is whether Ms. Andersen’s annuity is of the type described by Congress for exemption under § 522 (d)(10).

II. Exemption of the IDS annuity

Ms. Andersen worked for many years at a company that did not provide retirement benefits, and in 1986 she purchased a deferred annuity contract from IDS with a \$40,000 inheritance. In 1991

matter, Ms. Anderson has a remaining \$2893 in exemptions available under § 522 (d)(5).

she made an election to convert the annuity contract to a monthly payment stream of \$335.75, the monthly payment is guaranteed for the longer of the Debtor's life, or fifteen years. The monthly payments began on January 19, 1992, at which time the original \$40,000 investment had appreciated to \$46,891.90. Once Ms. Andersen made her 1991 election she lost her ability to withdraw, settle, or surrender the contract's value. Her only remaining right under the contract is to receive the month payment amount of \$335.75.

The Trustee relies on *In re Gagne*, 166 B.R. 362 (Bankr. D. Minn. 1993)²:

While it may have been the debtor's intention to provide income and property for his retirement years, the payments that he received are "on account of" his investment in the annuity, not on account of any the reasons stated in the statute. It is no less of a financial investment than a purchase of stock, bonds, real estate, or a simple bank account.

A series of cases decided in this district unanimously supports this conclusion. *In re Gagne*, 166 B.R. 362 at 364 (Bank. D. Minn. 1993).

The Debtor argues that this case is distinguishable from *In re Gagne* because the *Gagne* Court found objectionable the use of an annuity for bankruptcy planning. This Court has no reason to doubt Ms. Andersen's assertion that the annuity purchase had nothing to do with bankruptcy planning, but notes: "It does not appear in the statute to allow people, whether or not in anticipation of bankruptcy, to purchase an investment nominally called an annuity and then claim that annuity as exempt in a subsequent bankruptcy case." *Id.* at 365.

Ms. Andersen also cites a more recent Eighth Circuit decision, *In re Eilbert*, 162 F.3d 523 (8th Cir. 1998). In *Eilbert* the debtor used the proceeds of her husband's estate to purchase a single

²While *In re Gagne* was decided under Minnesota state law exemptions, Minn. Stat § 550.37 "Property exempt," subd. 24, "Employee benefits" contains effectively identical language to the Bankruptcy Code in describing the debtor's rights "to receive present or future payments . . . on account of illness, disability, death, age, or length of service[.]" Minn. Stat. § 550.37, subd. 24.

premium annuity. Ms. Eilbert was seventy-four years old when she purchased her annuity to protect her inherited assets from a potential tort claim against her late husband. Reviewing the annuity's exemption under Iowa law, the Eighth Circuit affirmed both the Bankruptcy Appellate Panel and bankruptcy court's determination that:

Eilbert's contention, if adopted, would convert a statute intended to protect "benefits that are akin to future earnings"--which for the elderly are typically retirement earnings--into a statute conferring vastly broader bankruptcy protection. As the bankruptcy court observed:

If annuity payments were "on account of age" merely because the debtor purchased the annuity when she was past retirement age, all persons past retirement age should move their assets into such an annuity and then file bankruptcy.... Under this scheme, no debtor past retirement age would have any assets subject to execution, could live in a million-dollar home, have a substantial stream of income, virtually live off his creditors, and yet be judgment proof. *In re Eilbert*, 162 F.3d 523 at 526 (8th Cir. 1998).

Ms. Anderson would like this Court to carve out an exception from the clearly established principles of *Gagne* and *Eilbert* for annuities not purchased in anticipation of bankruptcy. But to do so would disregard the controlling law that determines qualification for the exemption under the statute based on the nature of the investment. The legislative history and comment to 11 U.S.C. § 522(d)(10) requires exemptions to be "benefits that are akin to future earnings of the debtor."

Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor. These include social security, unemployment compensation, or public assistance benefits, veteran's benefits, disability, illness, or unemployment benefits, alimony, support, or separate maintenance (but only to the extent reasonably necessary for the support of the debtor and any dependents of the debtor), and benefits under a certain stock bonus, pension, profitsharing, annuity or similar plan based on illness, disability, death, age or length of service.

11 USCA § 522, House Report (House Reform Act of 1978).

The *Eilbert* Court concluded that an annuity purchased with inherited assets was not exempt under this analysis:

The payments do not replace lost income, and the annuity was not purchased with contributions over time as part of a long term retirement strategy. Instead, the annuity was purchased with non-exempt, inherited assets as a prebankruptcy planning measure by a prospective debtor who happened to have already reached retirement age. We agree with the Bankruptcy Appellate Panel that this investment was not a "pension, annuity, or similar plan or contract" *In re Eilbert*, 162 F.3d 523 at 527 (8th Cir. 1998).

The operative state statutes relied upon in *Gagne* and *Eilbert* were based on the language in 11 U.S.C.

§ 522(d)(10). The Trustee's objection must be sustained.

III. Disposition

Based on the foregoing, it is hereby **ORDERED**:

That the Trustee's objection is sustained, and the Debtor's claimed exemption of an IDS annuity under 11 U.S.C. (D)(10)(E) is disallowed.

Dated: August 7, 2000

By the Court:

/s/ Dennis D. O'Brien

Dennis D. O'Brien

Chief U.S. Bankruptcy Judge

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ELECTRONIC NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on <u>August 7, 2000</u> Patrick G De Wane, Clerk By <u>DLR</u> Deputy Clerk

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Doretta Raymond, hereby certify: That I am the Judicial Assistant for Chief Judge Dennis D. O'Brien of the United States Bankruptcy Court for the Third Division of the District of Minnesota, at St. Paul, Minnesota; that on August 7, 2000, true and correct copies of the annexed **ORDER** were placed by me in individually stamped official envelopes; that said envelopes were addressed individually to each of the persons, corporations, and firms at their last-known addresses appearing hereinafter; that said envelopes were sealed and on the day aforementioned were placed in the United States mails at St. Paul, Minnesota, to:

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and this certificate is made by me.

/e/Doretta Raymond

Filed On August 7, 2000
Patrick G. De Wane, Clerk
By dlr, Judicial Assistant