UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Ronald M. Bueno, Debtor.	**Bky. No. 97-31489** **Chapter 7 Case** **ORDER**

This matter came on for hearing on June 29, 1999, on the Trustee's objection to the Debtor's claimed exemption of an annuity. The Trustee was represented by Randall Seaver, the Debtor was represented by Charles W. Ries. This is a core proceeding and the Court has jurisdiction under 28 U.S.C. §157 and 1334. Based on the Federal and Local Rules of Bankruptcy Procedure, the Court makes the following **ORDER**:

I. Facts

The Debtor, Ronald M. Bueno, filed a voluntary petition and plan under Chapter 13 on March 5, 1997. His 100%, sixty month, Chapter 13 plan was confirmed by this Court on June 12, 1997. On his Schedule C - Property Claimed as Exempt, he listed a flexible annuity with IDS with an exempt value of $3000.

On February 16, 1999 the Chapter 13 Trustee filed a motion for dismissal or conversion of the case for failure to make scheduled plan payments. Mr. Bueno voluntarily converted his case to Chapter 7 on March 8, 1999. His Schedule C - Property Claimed as Exempt, filed at time of conversion, showed the IDS annuity with a value of $8.111.06. The parties have stipulated that the $8,111.06 includes $5000 of post petition, pre-conversion contributions, which they agree did not become property of the estate in the converted case.

Mr. Bueno entered into a deferred annuity contract with IDS Life Insurance, contract number 9300-03098814, on September 15, 1992. The contract shows an anticipated retirement date of September 15, 2026.

The contract allows Mr. Bueno to change ownership of the contract or to assign the contract by providing written notice to IDS Life Insurance. The contract also allows surrender of the account, with the return of Mr. Bueno's investment. Finally, Mr. Bueno can begin receiving payments under the annuity on thirty day written notice. While the contract places limits on how long the retirement (payout) date can be delayed, Mr. Bueno has complete control of when payments begin by his right to set a new retirement date at any time.

Annuity funds can be withdrawn by Mr. Bueno immediately: all the funds by paying a surrender charge; or monthly annuity payments after re-setting the retirement date as soon as thirty days into the future.

II. Analysis

Exemptions are controlled by §522 which limits a debtor's exemptions to: "any property that is exempt under Federal . . . or State or local law that is applicable on the date of the filing of the petition[.]" 11 U.S.C. §522(b)(2)(A). The annuity is claimed as exempt under Minn. Stat. §550.37, subd. 24 which allows:

> 550.37 Property exempt
> Subdivision 1. The property mentioned in this section is not liable to attachment, garnishment, or sale on any final process, issued from any court.
> . . .
> Subd. 24. Employee benefits.
> (a) The debtor's right to receive present or future payments, or payments received by the debtor, under a stock bonus, pension, profit sharing, annuity, individual retirement account, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service:
> (1) to the extent the plan or contract is described in section 401(a), 403, 408, or 457 of the Internal Revenue Code of 1986, as amended, or payments under the plan or contract are or will be rolled over as provided in section 402(a)(5),

> 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986, as amended; or
> (2) to the extent of the debtor's aggregate interest under all plans and contracts up to a present value of $30,000 and additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor. Minn. Stat. § 550.37.

Under Rule 4003(c) the Trustee has "the burden of proving that the exemptions are not properly claimed." Fed R. Bankr. P. 4003(c). The Trustee objects to Mr. Bueno's exemption of the IDS annuity claiming that it is not an employee benefit "on account of illness, disability, death, age, or length of service[.]" Minn. Stat. 550.37 Subd. 24.

Mr. Bueno argues that since the annuity was purchased for retirement purposes it is exemptable under subdivision 24(a). The Trustee objects based on In re Gagne, 166 B.R. 362 (Bankr. D. Minn. 1993), which held:.

> 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 of 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 (Bankr. D. Minn. 1993).

Mr. Bueno seeks to distinguish these facts from the holding in Gagne by arguing that since the annuity benefits are only payable upon retirement, the investment is of the type anticipated by the statute, even though the annuity was not purchased as part of any qualified retirement plan. Mr. Bueno fails to cite any supporting case law for his supposition.

Mr. Bueno's right to receive payments under the annuity are not on account of illness, disability, death, age, or length of service. The contract does not require deferral of annuity payments to retirement based on age or length of service, but it allows Mr. Bueno to change his retirement date at any time for purposes of receiving distribution.

> Change of Retirement Date
> You may change the retirement date shown for this contract. Tell us the new date by written request. . . . if you select a new date, it must be at least 30 days after we receive your written request at our home office." Annuity Provisions at 12.[1]

Mr. Bueno's argument is unavailing, this issue was settled by In re Gagne in 1993:

> [W]hile the word annuity appears in subd. 24, it is there to cover those instances where an annuity is created by an employer to provide for retirement or income protection for an employee or a similar annuity is created on an ongoing basis by a self employed person to similarly provide such retirement benefit or income protection. 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. That is the reason that the statute specifically provides that such annuities can be claimed as exempt, only if the payments to the debtor are on account of the debtor's illness, disability, death, age, or length of service. Since the debtor's annuity here does not meet the requirements of Minn. Stat. § 550.37, subd. 24, the trustee's objection to that exemption is sustained and the exemption claimed is disallowed. Id. at 365.

The $3000 annuity owned by Mr. Bueno at the time he filed his Chapter 13 case is not exempt. As such it is property of the bankruptcy estate and any appreciation remains property of the estate. Conversion of the case to Chapter 7 does not change this conclusion.

> 348. Effect of conversion
> (a) Conversion of a case from a case under one chapter of this title to a case under another chapter . . . does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.
> . . .
> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title–
> (A) Property of the estate in the converted case shall consist of property of the estate, as of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;" 11 U.S.C. § 348.

[1]A verified copy of the annuity contract is attached as Exhibit B to the Trustee's Notice of Hearing and Motion Objecting to Claimed Exemption.

III. Disposition

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

That the Trustee's objection is sustained, and:

1. The Debtor's claimed exemption of an IDS annuity in the amount of $3,000 at filing, and any appreciation accumulated thereon to the date of conversion is disallowed, and said property remains property of the bankruptcy estate. Postpetition contributions by the Debtor in the amount of $5,000, together with any appreciation accumulated thereon at conversion, did not become property of the estate in the converted case and are not subject to this order.

Dated: July 20, 1999.

By the Court:

/e/ Dennis D. O'Brien
Dennis D. O'Brien
Chief U.S. Bankruptcy Judge