

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ROBERT B. SILLIMAN, Chapter 7  
Trustee,

Appellant,

v.

LOU ANN CASSELL,

Appellee.

CIVIL ACTION

NO. 1:11-CV-136-CAP

**ORDER**

This bankruptcy action is before the court on the appeal of Robert B. Silliman, Chapter 7 Trustee, from the order of the United States Bankruptcy Court for the Northern District of Georgia in Case No. 10-74119-WLH, dated December 7, 2010. In this order, the bankruptcy court overruled the Trustee's objection to the debtor's exemption of \$220,000 in an annuity which she purchased with inherited funds.

**I. Factual Background**

This bankruptcy action was filed on May 11, 2010, with a companion case, J & L Arborists, LLC, Case No. 10-74115-WLH. In her personal case, the debtor listed as an asset an annuity with National Life Insurance Company. On May 1, 2009, the debtor had purchased the single premium immediate annuity from an insurance company with her inheritance of \$220,000 received in late 2008 from her aunt. This inheritance was the debtor's largest asset. During the bankruptcy proceeding, the debtor sought to protect the annuity

from her creditors under O.C.G.A. § 44-13-100(a)(2)(E), which exempts "a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age or length of service, to the extent necessary for the support of the debtor and any dependent of the debtor." The bankruptcy court found that the annuity is exemptible under O.C.G.A. § 44-13-100(a)(2)(E) and that the payments under the annuity are on account of age. The bankruptcy court also stated that the parties did not submit evidence as to whether the payments under the annuity are reasonably necessary for the support of the debtor or her dependents and that both parties could submit evidence on that point. The Chapter 7 Trustee appealed.

## **II. Legal Standard**

The bankruptcy court's findings of law are subject to a *de novo* review by the district court. See In re Coggin, 30 F.3d 1443, 1452 (11th Cir. 1994). In reviewing the decision of the bankruptcy court, however, the district court must accept the bankruptcy court's findings of fact unless they are clearly erroneous. Id.

Under 11 U.S.C. § 522(b)(2), states can elect to opt out of the exemptions provided by the bankruptcy code and can instead provide their own exemptions. Georgia has opted out of the bankruptcy code exemptions, and O.C.G.A. § 44-13-100 governs the exemptions available to a debtor in bankruptcy in Georgia. Under

Federal Rule of Bankruptcy Procedure 4003(c), the burden is on the party objecting to the exemption, here the Trustee, to establish the objection by a preponderance of the evidence.

To qualify for an exemption for retirement-related benefits, the benefits received must: (1) be in the nature of a "pension, annuity, or similar plan or contract," and (2) arise "on account of illness, disability, death, age or length of service." O.C.G.A. § 44-13-100(a)(2)(E). Also, the benefits are only exempted "to the extent necessary for the support of the debtor and any dependent of the debtor." Id.

### **III. Analysis**

#### **A. Nature of the Plan**

First, to qualify for an exemption for retirement-related benefits, the benefits received must be in the nature of a "pension, annuity, or similar plan or contract." O.C.G.A. § 44-13-100(a)(2)(E). Simply attaching the title "annuity" to a plan or contract does not make it the type of annuity that Congress, and presumably the state of Georgia, intended to exempt. See In Re Michael, 339 B.R. 798, 803 (Bankr. N.D. Ga. 2005). Rather, courts look at whether it is a "contract to provide benefits in lieu of earnings after retirement, whether funded by the employer or purchased by the employee or the self-employed . . . or a plan created to fill or supplement a wage or salary void." In re

Andersen, 259 B.R. 687, 691 (8th Cir. BAP 2001) (citing In re Eilbert, 162 F.3d 523, 527 (8th Cir. 1998)). Courts should examine "the facts and circumstances surrounding the purchase of the contract, as well as the nature and contents of the contract." Id. The following factors are relevant to this inquiry: (1) whether the payments were designed or intended to be a wage substitute; (2) whether the contributions were made over time; (3) whether multiple contributors exist; (4) whether the debtor may exercise control over the asset; and (5) whether the investment was a pre-bankruptcy planning measure. Id.

As to the first factor, the court finds that the debtor intended to use the annuity as a substitute for wages. The debtor testified that it was her intention to use the annuity as a replacement for her income, given her advanced age. She specifically identified the need for funds for nursing home care as one of the reasons for purchasing the annuity. Also, the form of the annuity she selected, fixed with guaranteed income for life, is consistent with this intent. As such, this factor weighs in the debtor's favor.

As to the second and third factors, "the longer the period of investment, the more likely the investment falls within the ambit of the statute and is the result of a long-standing retirement strategy, not merely a recent change in the nature of the asset."

Andersen, 259 B.R. at 691. In this case, the debtor made only a single contribution to establish this annuity. However, these factors do not weigh strongly in the court's analysis because it appears that the debtor has not worked anywhere for a significant enough period of time to allow for a retirement plan in which she (and her employer) could have invested.

As to the fourth factor, the Trustee has enumerated a number of provisions of the annuity over which the debtor has control which the Trustee contends demonstrate that this is not a true retirement device. The Trustee points to the following: (1) initial choices relating to the annuity; (2) whether the debtor can select an annuity certain; (3) spendthrift provisions; and (4) the ability to make changes to the annuity. The court notes the similarity between the level of control permitted to the debtor with this annuity and the level of control permitted to debtors over age 65 with IRA's and other retirement vehicles that are clearly exemptible. The court also notes that there are reasons, beyond the greater level of control permitted with an annuity, that would lead a debtor to choose an annuity over one of these other investment vehicles. However, this factor weighs in the Trustee's favor.

As to the fifth factor, the Trustee suggests that the purchase of the annuity was a pre-bankruptcy planning device because it

represented a conversion from a non-exempt asset in a brokerage account to an exempt asset in the form of the annuity. The Trustee also argues that the debtor's intent is further evidenced by the fact that the annuity was purchased approximately one year prior to the filing of the bankruptcy petition. The debtor stated that she sought advice from a number of different advisors as to the purchase of the annuity; however, there is no evidence as to whether the debtor sought advice for purposes of planning a bankruptcy filing or whether the debtor was seeking advice for other reasons, such as determining the best retirement planning mechanism given her age and her needs. Also, at the time she purchased the annuity, the debtor was paying her debts, business and personal, as they came due. The court concludes that this factor weighs in the debtor's favor.

Having carefully considered the factors above, the court finds that they weigh in the debtor's favor, and as such, the court finds that the annuity is one that is exemptible under O.C.G.A. § 44-13-100(a)(2)(E).

**B. Benefits on Account of Age**

As the annuity is one that is exemptible under O.C.G.A. § 44-13-100(a)(2)(E), the only remaining question is whether the payments are on account of "illness, disability, death, age, or length of service." As the bankruptcy court noted, the only

classification applicable here is age. The debtor testified that it was her age that prompted her to purchase the annuity and to choose the lifetime payment option. Also, the annuity contained penalties for early withdrawal, which weighs in favor of a determination that the annuity was payable on account of age. Therefore, this court finds that the benefits are payable on account of age.

**C. To the Extent Reasonably Necessary**

As stated above, the benefits are only exempted "to the extent necessary for the support of the debtor and any dependent of the debtor." O.C.G.A. § 44-13-100(a)(2)(E). The bankruptcy court did not have sufficient evidence to determine whether the annuity payments were necessary for the support of the debtor. Therefore, this court cannot reach this issue.

**IV. Conclusion**

For the reasons stated above, the annuity at issue in this case is exemptible to the extent reasonably necessary for the support of the debtor, and the order of the bankruptcy court is AFFIRMED. The clerk is DIRECTED to remand this action to the United States Bankruptcy Court for the Northern District of Georgia.

SO ORDERED, this 1st day of June, 2011.

/s/ Charles A. Pannell, Jr.  
CHARLES A. PANNELL JR.  
United States District Judge