

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

99 JAN 28 PM 3:30

NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 98-14039  
)  
RAYMOND J. KACZMARCZYK and ) Chapter 7  
SHARON M. KACZMARCZYK, )  
) Judge Pat E. Morgenstern-Clarren  
Debtors. )  
) **MEMORANDUM OF OPINION**

Debtor Sharon Kaczmarczyk ("Ms. Kaczmarczyk") claims an exemption of an annuity policy under the provisions of Ohio Revised Code §§ 3911.10 and 2329.66(A)(6)(b). The Chapter 7 Trustee objected to the exemption (the "Objection") and Ms. Kaczmarczyk responded to the Objection. (Docket 17, 28). For the reasons stated below, the Trustee's Objection is sustained.

**JURISDICTION**

This Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

**FACTS**

The parties submitted this dispute on Stipulations of Fact and briefs. (Docket 38, 41, 43, 47).<sup>1</sup> The Stipulations consist of:

---

<sup>1</sup> The Order setting the briefing schedule stated that the matter would be set for such further hearing as appeared appropriate after the Stipulations and briefs were filed. The parties did not request further oral argument and did not in their Stipulations identify any disputed facts or any issue on which they wished to present other evidence or argument. The Court has not, therefore, set any additional hearing on this issue.

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

- (1) Exhibit A - Ms. Kaczmarczyk's Request for IRA/Direct Rollover or TSA Transfer which she executed on July 27, 1997; and
- (2) Exhibit B - the New York Life Insurance and Annuity Policy Number 58 078 180 issued to Ms. Kaczmarczyk on September 23, 1997 (the "Policy").

The exhibits and undisputed facts in the briefs indicate that Ms. Kaczmarczyk held an interest in a "pension/403(b)" account which she wanted to transfer. To accomplish this, she requested a direct rollover of the funds into an individual retirement annuity with New York Life Assurance and Annuity Corp. ("New York Life"). (Exhibit A). As a result of this request, New York Life issued the Policy. (Exhibit B). The Policy states that it is an individual retirement annuity, under the terms of an attached endorsement. That endorsement changes the Policy's terms so that it qualifies as an individual retirement annuity under Section 408 of the Internal Revenue Code. The endorsement further provides that Ms. Kaczmarczyk has a nonforfeitable interest in the Policy and that the Policy is established for the exclusive benefit of Ms. Kaczmarczyk and the beneficiaries.

Ms. Kaczmarczyk is the annuitant and the Policy owner. The endorsement requires the first income payment under the Policy to be made no earlier than the first day of the year in which Ms. Kaczmarczyk will be age 59½ and no later than April 1 of the year following the year in which she will be age 70½. Ms. Kaczmarczyk can elect to start the payments earlier if she is disabled. In the event of Ms. Kaczmarczyk's death, her beneficiaries under the Policy receive specified benefits; the death beneficiaries are Ms. Kaczmarczyk's children. New York Life has the right under the Policy terms to make changes to it from time to time to comply with the Internal Revenue Code and regulations.

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

**THE POSITIONS OF THE PARTIES**

Ms. Kaczmarczyk listed the Policy as exempt in her bankruptcy schedules. The Trustee objects to the exemption arguing that the "Debtor is the owner of an IRA and that the [P]olicy is an asset within the IRA." (Trustee's Memorandum at 4). The Trustee then contends that such an asset is not an "annuity" within the meaning of Ohio Revised Code §§ 3911.10 and 2329.66(A)(6)(b). Alternatively, he argues that the Policy is not exempt under the other terms of § 3911.10. Ms. Kaczmarczyk's position is that the Policy is an annuity and is exempt under these Ohio provisions.

**ISSUE**

Is the Policy an exempt annuity under Ohio Revised Code §§ 3911.10 and 2329.66(A)(6)(b)?

**DISCUSSION**

**I.**

The Bankruptcy Code provides that all property interests which an individual has at the commencement of a case become property of the bankruptcy estate, with exceptions not relevant here. 11 U.S.C. § 541. The parties agree that the Policy is property of the estate. A debtor's interest in certain property may be exempted, or removed, from the estate under 11 U.S.C. § 522. That section creates several exemptions. States may opt out of those exemptions and instead require their residents to claim exemptions under nonbankruptcy law. Ohio is one of the states that has opted out and so this issue is governed by Ohio law. 11 U.S.C. § 522(b)(1) and Ohio Rev. Code § 2329.662.

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

Exemptions are liberally construed in favor of the debtor. *Lester v. Storey (In re Lester)*, 141 B.R. 157 (S.D. Ohio 1991). The Chapter 7 Trustee has the "burden of proving that the exemptions are not properly claimed." Fed. R. Bankr. P. 4003(c).

II.

Ohio Revised Code § 2329.66(a)(6)(b) permits a debtor to exempt from her bankruptcy estate:

[t]he person's interest in contracts of life or endowment insurance or annuities, as exempted by section 3911.10 of the Revised Code[.]

Ohio Rev. Code Ann. § 2329.66(A)(6)(b) (Banks-Baldwin 1998). Under § 3911.10:

All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the spouse or children, or any persons dependent upon such person . . . shall be held, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, free from all claims of the creditors of such insured person or annuitant . . .

Ohio Revised Code Ann. § 3911.10 (Banks-Baldwin 1998).

The parties dispute whether the Policy is an annuity as that term is used in § 3911.10. The Trustee points out that another section of the Ohio Revised Code specifically exempts a debtor's rights in an individual retirement annuity. § 2329.66(A)(10)(c).<sup>2</sup> He argues that if §§ 2329.66(A)(6)(b) and 3911.10 are interpreted to exempt an individual retirement annuity such

---

<sup>2</sup> Section 2329.66(A)(10)(c) exempts a debtor's "right in the assets held in, or to receive, any payment under, any individual retirement account, individual retirement annuity . . . that provides benefits by reason of illness, disability, death, or age, to the extent reasonably necessary for the support of the [debtor] and any of the [debtor's] dependents." Ohio Revised Code Ann. § 2329.66(A)(10)(c) (Banks-Baldwin 1998). Ms. Kaczmarczyk has not claimed an exemption under this section.

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

as the Policy, there would be no reason for the § 2329.66(A)(10)(c) exemption of these annuities. The Trustee does not, however, argue that the Policy is not an annuity within the plain meaning of that term. Ms. Kaczmarczyk contends that the Policy is a classic annuity and is exempt under those sections. The first question, then, is whether the Policy is an annuity within the terms of §§ 3911.10 and 2329.66(A)(6)(b).

Neither of these statutes defines the word "annuity." In interpreting Ohio law, words and phrases not defined by statute are to be read in context and construed according to the rules of grammar and common usage. Ohio Rev. Code. Ann. § 1.42 (Banks-Baldwin 1998). The plain meaning of a statute is normally conclusive. *Morgan v. Ohio Adult Parole Authority*, 68 Ohio St. 3d 344, 626 N.E.2d 939 (1994). *Accord, United States v. Ron Pair Enters. Inc.*, 489 U.S. 235 (1989). Courts must give effect to the words used in the statute and may not insert words which are not used. *State ex rel Purdy v. Clermont County Bd. of Elections*, 77 Ohio St. 3d 338, 673 N.E.2d 1351 (1997).

The Ohio Supreme Court has defined "annuity" as "an obligation by a person or a company to pay to the annuitant a certain sum of money at stated times during life or a specified number of years, in consideration of a gross sum paid for such obligation." *Bronson v. Glander*, 149 Ohio St. 57, 59, 77 N.E.2d 471, 472 (Syllabus 1) (1948). More particularly, the payments to be made are fixed, periodic payments. Black's Law Dictionary 90 (6<sup>th</sup> ed. 1996 ). An annuity may be deferred, in which case the "[payments] begin at some specified future date provided the beneficiary is alive at such date." *Id.* Applying those concepts to the Policy, the Policy gives Ms. Kaczmarczyk the right to receive fixed payments for a specified term in consideration for her payment of a premium. Those payments begin at a future specified date if Ms. Kaczmarczyk is

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

alive. Based on these characteristics, and bearing in mind that exemptions are to be liberally construed in favor of the Debtor, the Court finds that the Policy is an annuity within the plain meaning of that word. Because the statutory language is unambiguous, there is no basis for adding language to §§ 2329.66(A)(6)(b) and 3911.10 to exclude individual retirement annuities from their scope just because there is a specific exemption for that type of annuity in § 2329.66(A)(10)(c) under somewhat different circumstances. The Policy, therefore, is an annuity within the terms of §§ 3911.10 and 2329.66(A)(6)(b).

**III.**

The Trustee argues alternatively that the Policy does not fall within § 3911.10 because "to be exempt the Policy would have to be payable only to the children of the Debtor, as an annuity, and not to the Debtor as the Annuitant." (Trustee's Reply Brief, Docket 47). He also argues that the Policy is not upon the life of Ms. Kaczmarczyk. Ms. Kaczmarczyk takes the position that this argument is flawed because "the beneficiaries of the death benefits of the Policy are the debtor's children." (Debtor's Brief in Opposition, Docket 43). She argues that the Policy is an annuity upon her life because the Policy income payments are based upon her life expectancy.

Section 3911.10 exempts annuities "upon the life of any person, or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the spouse or children, or any persons dependent upon such person . . . ." To fall within § 3911.10, then, there must be: (1) an interest in an annuity; (2) the annuity must be payable upon the life of a person; and (3) the annuity must have been taken out for the benefit of that person's spouse, children, or dependents; or the annuity must

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

have been made payable by change of beneficiary, transfer, or assignment to that person's spouse, children, or dependents. See *In re Meyers*, 139 B.R. 858 (Bankr. N.D. Ohio 1992).

The first prong of the statutory requirement is not in dispute. Ms. Kaczmarczyk has an acknowledged interest in the Policy. The contested issues are whether: (1) the Policy was taken out for the benefit of Ms. Kaczmarczyk's children; and (2) the Policy is payable upon the life of any person.

The Policy terms state that it is established for the exclusive benefit of Ms. Kaczmarczyk and the beneficiaries, her children. As beneficiaries, the children are only entitled to benefits in the event of Ms. Kaczmarczyk's death. Before that time, it is Ms. Kaczmarczyk who is to benefit from the Policy either in the event of her becoming disabled or reaching the age of at least 59 ½. The decision to have the Policy be for the benefit of both Ms. Kaczmarczyk and her children puts it outside of the statutory terms. The statute does not say that an annuity is exempt where it was taken out for the benefit of people, *at least one of whom* falls into the favored class of spouse, children, and dependents. Instead, it says that an annuity is exempt if taken out "for the benefit" of that group. Applying the same plain meaning criteria discussed above, the statute does not exempt this Policy because its stated purpose is to benefit both Ms. Kaczmarczyk's children, who fall within the favored group, and Ms. Kaczmarczyk, who by definition is not a member of that group.

Additionally, the Policy does not meet the § 3911.10 requirement that an exempt annuity be "upon the life of any person." This qualifying language has been interpreted to limit the exemption to annuities "that have the same function as life insurance." *In re Fichter*, 45 B.R. 534, 536 (Bankr. S.D. Ohio 1984). See also *In re Cullison*, 117 B.R. 314 (Bankr. S.D. Ohio 1990). Cf.

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

*Moskowitz v. Davis (In re Moskowitz)*, 68 F.2d 818 (6<sup>th</sup> Cir. 1934). This Policy specifically calls itself a retirement annuity, with the amount of the income payments to be based on Ms. Kaczmarczyk's life expectancy. Calculating the amount of payments by reference to such an expectancy is not the same as, and is not similar in function to, life insurance. The Policy does not come within the statutory terms because it does not purport to insure Ms. Kaczmarczyk's life and it is not in the nature of life insurance.

**CONCLUSION**

For the reasons stated, the Trustee's Objection to the claim of exemption is sustained. A separate order will be entered in accordance with this decision.

Date: 28 June 1999

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Marvin Sicherman, Esq.  
David Simon, Esq.

By: Joyce L. Gordon, Secretary  
Date: 1/28/99



THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

99 JAN 28 PM 3:31

NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 98-14039  
)  
RAYMOND J. KACZMARCZYK and ) Chapter 7  
SHARON M. KACZMARCZYK, )  
) Judge Pat E. Morgenstern-Clarren  
Debtors. )  
) **ORDER**

For the reasons stated in the Memorandum of Opinion filed this date,

IT IS ORDERED that the Trustee's Objection to the Debtor Sharon Kaczmarczyk's claim  
of exemption is sustained.

Date: 28 Jan 1999

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Marvin Sicherman, Esq.  
David Simon, Esq.

By: Joyce L. Gordon, Secretary  
Date: 1/28/99