

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 05-91594  
 )  
SUSAN GILLESPIE, ) Chapter 7  
 )  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **MEMORANDUM OF OPINION**

The debtor Susan Gillespie claims as exempt her interest in an annuity and the chapter 7 trustee objects.<sup>1</sup> For the reasons stated below, the trustee’s objection is overruled.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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 issue on these stipulated facts:<sup>2</sup>

1. [The Debtor] filed her [chapter 7] petition, pro se, on October 13, 2005.
2. Question 11 of Schedule B [of the Debtor’s schedules] lists an AIG Pension Variable Annuity with a value of \$33,000.00. The Debtor claimed the entire amount as exempt pursuant to [§]2329.66(A)(10)(b) [of the Ohio Revised Code].

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<sup>1</sup> Docket 5.

<sup>2</sup> Docket 24, 26.

3. The Trustee filed an Objection to [the] Debtor's claim of Exemption[.]. The Debtor filed a response stating that she believed that she was not entitled to receive any of the pension funds that she had at her previous place of employment until she reached the age of retirement. She further stated that she would not have filed a bankruptcy had she known that she could have taken the money out of the account.
4. The Debtor furnished a copy of the features and benefits of the AIG Valic Portfolio Director Fixed Variable Annuity. There is no beneficiary included in that information. See Exhibit A[.]
5. The value of the Annuity pursuant to a statement dated [March 31, 2005] is \$33,606.34. See Exhibit A[.]

The parties attached as exhibit A to the stipulation a description of the features and benefits of VALIC's Portfolio Director Fixed and Variable Annuity and one of the debtor's annuity account statements. There is no statement in exhibit A that the debtor's annuity is held in trust. The exhibit states that the annuity is an individual tax sheltered annuity, but does not state the specific terms which control it.

### **THE ISSUES**

The debtor argues that the annuity account is excluded from the bankruptcy estate or, alternatively, if it is part of the estate, that she is entitled to exempt it under Ohio revised code § 2329.66(A)(10)(b). The trustee opposes the exemption claim by arguing that the annuity account is a retirement investment vehicle that is not in the nature of insurance and thus does not come within that statute.

## DISCUSSION<sup>3</sup>

### I.

The bankruptcy code permits a chapter 7 debtor to retain certain property despite a bankruptcy filing. This is primarily accomplished through two statutory sections. The first section provides that only certain property becomes property of the bankruptcy estate, *see* 11 U.S.C. § 541, and the second provides that the debtor is entitled to exempt, or remove, certain property from the estate. *See* 11 U.S.C. § 522.

A chapter 7 estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). “Legislative history indicates section 541 is intended to be given a broad definition[.]” *Johnston v. Hazlett (In re Johnston)*, 209 F.3d 611, 613 (6th Cir. 2000). There is, however, a narrow exception found in § 541(c)(2). That section excludes property from the estate under these circumstances:

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2). A debtor bears “the burden of demonstrating that all the requirements of § 541(c)(2) have been met[.]” *Rhiel v. Adams (In re Adams)*, 302 B.R. 535, 540 (B.A.P. 6th Cir. 2003).

A debtor’s interest in certain property may be exempted from the bankruptcy estate under 11 U.S.C. § 522. In this case, the property that can be exempted is set out in Ohio revised code § 2329.66. *See* 11 U.S.C. § 522(b)(1) and(3) (permitting a state to opt-out of the federal

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<sup>3</sup> The debtor filed her case on October 13, 2005, before the effective date of most of the amendments made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. All references to the bankruptcy code are to the version that was in effect on the date the case was filed.

exemptions and use state exemptions instead) and OHIO REV. CODE § 2329.662 (in which Ohio opts-out of the federal bankruptcy exemptions). A trustee bears the burden of showing that an exemption should not be allowed. *See Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999).

## **II. Property of the Estate § 541**

The debtor argues that the annuity is not an asset of her bankruptcy estate because it is a voluntary arrangement under 26 U.S.C. § 403(b) as opposed to an ERISA-qualified plan. To the extent the debtor is attempting to show that the annuity is excluded from her estate under § 541(c)(2), she has failed to do so because the stipulations and exhibit do not provide a factual basis for concluding that her interest in the annuity is subject to the requisite express trust. *See Adams*, 302 B.R. 535.

Based on the evidence presented, the court can only conclude that the annuity is property of the chapter 7 estate.

## **III. Ohio Revised Code § 2329.66(A)(10)(b)**

Ohio Revised Code § 2329.66(A)(10)(b) permits a debtor to exempt from her bankruptcy estate:

(b) . . . [her] right to receive a payment under any pension, annuity, or similar plan or contract not including a payment from a stock bonus or profit-sharing plan or a payment included in division (A)(6)(b) or (10)(a) of this section, on account of illness, disability, death, age, or length of service to the extent reasonably necessary for the support of the person and any of the person's dependents . . .

OHIO REV. CODE § 2329.66(A)(10)(b). By its terms, this provision “requires [a] three-part analysis: (1) a right to receive a payment under an annuity or similar plan; (2) the payment must be on account of illness, disability, death, age, or length of service; and (3) the payment must be reasonably necessary for the support of the debtor or his dependents.” *In re Guikema*, 329 B.R.

607, 614 (Bankr. S.D. Ohio 2005). The trustee, who has the burden of proof on this point, has not challenged or provided evidence that the debtor's annuity does not meet these requirements.

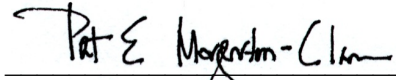
The trustee argues instead that the exemption should be disallowed because the annuity is an investment annuity rather than an insurance policy. This argument lacks merit, however, because § 2329.66(A)(10)(b) does not require an annuity to be in the nature of insurance. There is, in fact, another statutory provision that exempts a debtor's "interest in contracts of life or endowment insurance or annuities, as exempted by section 3911.10 of the Revised Code[.]" OHIO REV. CODE § 2329.66(A)(6)(b). Because the debtor here relies solely on § 2329.66(A)(10)(b), there is no legal basis to import into that section the (A)(6)(b) concept that the property be in the nature of an insurance policy before it can be exempted from the estate.

The case law cited by the trustee does not support the objection. In *In re Andrews*, the debtor claimed her annuity as exempt under § 2329.66(A)(6)(b). The court held that the debtor could not exempt the annuity under that statute because it was not in the nature of life insurance. *In re Andrews*, 301 B.R. 211 (Bankr. N.D. Ohio 2003). The *Andrews* court stated specifically that the parties had not briefed the applicability of § 2329.66(A)(10) and made no ruling on that point. Similarly, this court's decision in the *Kaczmarczyk* case was limited to a consideration of the § 2329.66(A)(6)(b) exemption. *In re Kaczmarczyk*, case no. 98-14039 (Bankr. N.D. Ohio Jan. 28, 1999). The *Monro* decision, on the other hand, does discuss the § 2329.66(A)(10)(b) exemption, but does not provide support for the trustee's insurance argument. *In re Monro*, 282 B.R. 841, 846-47 (Bankr. N.D. Ohio 2002).

Based on the stipulated evidence, the trustee has not met her burden of proving that the annuity is not exempt under § 2329.66(A)(10)(b).

**CONCLUSION**

For the reasons stated, the trustee's objection to the debtor's exemption is overruled. A separate order will be entered in accordance with this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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In re: ) Case No. 05-91594  
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SUSAN GILLESPIE, ) Chapter 7  
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Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the trustee's objection to the debtor's exemption of her annuity is overruled. (Docket 5).

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Pat E. Morgenstern-Clarren". The signature is written in a cursive style with a large initial "P" and "M".

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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge