

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: March 31 2011

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 10-32504
	)	
Arthur N. Marx, Jr.,	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

**MEMORANDUM OF DECISION AND ORDER REGARDING  
OBJECTION TO EXEMPTION AND MOTION FOR TURNOVER OF ANNUITY**

This case is before the court on the Objection to Exemption and Motion for Turnover of Annuity (“Objection”) [Doc. # 9] filed by the Chapter 7 Trustee (“Trustee”), Debtor’s response [Doc. # 14], and the Trustee’s reply [Doc. # 20]. The court held a hearing on the Objection that the Trustee, Debtor and his attorney all attended in person and at which the parties had the opportunity to present testimony and other evidence in support of their respective positions. In his Schedule C filed with his bankruptcy petition, Debtor claims an exemption in a single premium deferred annuity under Ohio Revised Code §§ 2329.66(A)(6)(b), 3911.10, 3911.12 and 3911.14. In his response to the Objection, Debtor alternatively asserts that he is entitled to exempt the annuity under Ohio Revised Code §§ 2329.66(A)(10)(a) and (b) and 2329.66(A)(11).

The district court has jurisdiction over this Chapter 7 case pursuant to 28 U.S.C. § 1334(a) as a case under Title 11. It has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. A proceeding regarding exemptions from property of the estate is a core proceeding that the court

may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(B).

### **FACTUAL BACKGROUND**

Debtor is seventy-one years old and has a thirteen year old daughter. He retired from the Toledo Police Department in 1998. During his employment as a police officer, he participated in the Ohio Public Employees Deferred Compensation Program. Pursuant to a divorce decree entered September 7, 2000, that ended Debtor's first marriage, in order to effect an equal division of marital assets, he was awarded an interest in the amount of \$59,698.60 in his Deferred Compensation account. [Trustee Ex. 2, pp. 7-8]. According to Debtor, on January 19, 2001, he received \$28,611.59, after taxes, as his final disbursement from the Deferred Compensation Program. He used those funds to purchase a single premium deferred annuity ("Annuity") issued by AIG Life Insurance Company on January 31, 2001. [See Trustee Exs. 3 and 4, pp. 3/11, 5-6/11]. Debtor's application for the Annuity shows that he is both the owner and the annuitant and that his daughter is the beneficiary of the annuity. [Trustee Ex. 4, p. 6/11]. The application also shows under a section entitled "Your Annuity" that Debtor selected "Non-Qualified." [Id.].

The Annuity contract provides for an initial guaranteed interest rate of 7.06% for five years. [Id. at 7/11]. The contract permits Debtor to withdraw funds subject to the imposition during the first five contract years only of certain surrender charges. [Id. at 8/11]. Upon the Annuity commencement date, the Certificate Value, defined as the "dollar value of the Single Premium, less any partial surrenders and increased with interest," will be applied to one of the three annuity options listed in the contract or, alternatively, another option that may be made available on the annuity date. [Id. at 9/11]. As Debtor is both owner and annuitant, upon his death, a death benefit will be paid to his beneficiary in an amount equal to the greater of the single premium paid less amounts previously surrendered or the Certificate Value. [Id.]. Debtor has received no payments under the Annuity.

Pursuant to a divorce decree entered on April 8, 2009, ending Debtor's second marriage, Debtor's ex-wife is required to pay him monthly child support and spousal support. [Trustee Ex. 5, pp. 3 & 6]. Also pursuant to the decree, both he and his ex-wife retained their interests, free and clear from any interest of the other, in their own retirement funds. [Trustee Ex. 5, p.8]. The divorce decree describes Debtor's retirement funds as including the Annuity. [Id.]. According to Debtor, he was able to retain the Annuity because it was property owned by him before his second marriage and because during negotiations with his ex-wife, he agreed that it would be used to pay for his daughter to attend a Catholic high school. The Shared Parenting Plan, which was incorporated into the divorce decree, [id. at 2], indicates that Debtor and his ex-wife have agreed to raise their daughter in the Catholic faith [id. at 5]. With respect to schooling, the Shared Parenting Plan provides that "[i]f the child attends public school, it will be in the school district where

Father lives. The parties further agree that during the time which the child is attending a private Catholic school, Father will pay the child's tuition and Mother will be responsible for all uniforms and school supplies." [*Id.*]. The child referred to in the Shared Parenting Plan is the same daughter who is the beneficiary of the Annuity.

Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. Personal property listed on his bankruptcy Schedule B includes the Annuity, the current value of which is approximately \$45,240. [Trustee Ex. 1, p. 9 and Ex. 6]. As indicated above, Debtor has claimed an exemption in the Annuity under Ohio Revised Code §§ 2329.66(A)(6)(b), 3911.10, 3911.12 and 3911.14, and, in his response to the Trustee's Objection, alternatively asserts that he is entitled to exempt the annuity under Ohio Revised Code §§ 2329.66(A)(10)(a) and (b) and 2329.66(A)(11).

### **LAW AND ANALYSIS**

As authorized by 11 U.S.C. § 522(b)(2), the Ohio legislature opted out of the federal exemptions provided in § 522(d). *See* Ohio Rev. Code § 2329.662. As a result, debtors for whom the applicable exemption law under § 522(b)(3)(A) is Ohio law must claim exemptions under the relevant Ohio statutes and under applicable non-bankruptcy federal law. Ohio exemption law applies to Debtor as he has been domiciled in this state for more than the 730 days preceding the date of the filing of his petition. *See* 11 U.S.C. § 522(b)(3)(A); Doc. # 1, p. 32/55, SOFA Question 15.

Under Bankruptcy Rule 4003(c), the party objecting to the exemption, in this case the Trustee, has the burden of establishing that the debtor is not entitled to the claimed exemption. *In re Andrews*, 301 B.R. 211, 213 (Bankr. N.D. Ohio 2003). In making this determination, and in order to further the fresh-start policy of the Bankruptcy Code, exemption statutes are to be liberally construed in a debtor's favor. *Id.* Nevertheless, "a court cannot create an exemption where one does not exist; nor can a court go contrary to the express language of the statute." *In re Bunnell*, 322 B.R. 331, 334 (Bankr. N.D. Ohio 2005).

#### **I. Exemption under Ohio Revised Code § 3911.10 and 2329.66(A)(6)(c)**

Ohio's general exemption statute, Ohio Revised Code § 2329.66, provides that a person may exempt "the 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 § 2329.66(A)(6)(c). Section 3911.10 provides in relevant part as follows:

All contracts of life or endowment insurance or annuities upon the life of any person. . . which may hereafter mature and which have been taken out for the benefit of . . . the spouse or children, or any persons dependent upon such person, or an institution or entity described in division (B)(1) of section 3911.09 of the Revised Code, or any creditor . . . shall be held, together with the proceeds or avails of such contracts . . . free from all claims of the creditors of such insured person or annuitant.

To qualify for an exemption under this section, an annuity must satisfy two requirements: (1) it must be an annuity “upon the life of any person,” and (2) it must “have been taken out for the benefit of” certain specified beneficiaries, including a spouse, child or other dependent, certain tax-exempt institutions or entities, or a creditor. Ohio Rev. Code § 3911.10. The Trustee argues that the Annuity does not satisfy these requirements.

While there is a dearth of authority as to the meaning of “annuities upon the life of any person,” the courts that have interpreted this language have concluded that it demonstrates that § 3911.10 was intended to exempt annuities that are actually in the nature of life insurance, “the underlying concept of which is to compensate the policy beneficiary for the loss of life of the insured.” *In re Andrews*, 301 B.R. at 214-15 (J. Speer) (finding that a deferred annuity purchased by debtor to provide retirement income was not exempt under § 3911.10); *In re Domanski*, 362 B.R. 824, 827 (Bankr. N.D. Ohio 2006) (J. Speer) (finding annuity issued to the debtor’s husband as a settlement from a postal carrier accident was not exempt as it was more akin to a tort settlement than a life insurance policy); *In re Quintero*, 253 B.R. 832, 835-36 (Bankr. N.D. Ohio 2000) (J. Speer); *In re Cullison*, 117 B.R. 314, 316 (Bankr. S.D. Ohio 1990) (finding Debtor’s interest in his employer’s tax sheltered annuity plan for salaried employees was not exempt under § 3911.10 as it was not in the nature of life insurance but, rather, was an interest in a pension savings plan); *In re Fichter*, 45 B.R. 534, 536 (Bankr. N.D. Ohio 1984) (J. Krasniewski). While an annuity purchased for the purpose of compensating a named beneficiary for the loss of life of an individual appears to meet the requirement that the annuity is “upon the life of any person,” it is not clear to this court that compensation for the loss of life is the only manner in which to meet the requirement.<sup>1</sup> For example, it is not clear to the court that an annuity policy naming the disabled child of the annuity owner as the annuitant and providing the child with payments for life is not an annuity “upon the life of any person,” notwithstanding that its purpose is not to compensate for the loss of life. *See Hoffman v. Weiland*, 64 Ohio App. 467, 471 (1940) (interpreting the predecessor statute, former Ohio General Code § 9394, which was identical in all material respects to § 3911.10, and stating that the provision “must be construed in the light of its purpose, which is to protect the wife, a child, or children, or other relatives, or a creditor, named as a beneficiary). Likewise, it is not clear that a policy naming the annuity owner as the annuitant, as in this case, and providing him a lifetime benefit is not an annuity “upon the life of any person.” In any event, there is no evidence before the court as to the annuity option chosen by Debtor, and the court need not resolve this issue since, even if a lifetime

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<sup>1</sup> Although, as noted in *In re Andrews*, annuities may also be exempt under Ohio Revised Code § 2329.66(A)(10), albeit subject to certain restrictions, 39 B.R. at 215, this “narrow” interpretation of § 3911.10 is not necessarily required in order to harmonize and give effect to both statutes since the latter statute applies only to annuities taken out for the benefit of specified individuals or entities.

benefit to Debtor applies, the court finds that the Annuity does not satisfy the second requirement under § 3911.10.

According to Debtor, the Annuity was taken out for the benefit of his daughter. While it is true that his daughter is named as the beneficiary of the Annuity in the event of Debtor's death, that alone is insufficient to meet the requirement that the Annuity was "taken out for the benefit of" his daughter. *See, e.g., In re Fichter*, 45 B.R. at 536; *In re Cullison*, 117 B.R. at 316 (finding a tax-sheltered annuity contract was not a contract taken out for the benefit of the debtor's spouse, although she may have had rights to the debtor's interest should he die before the interest is paid in full); *In re Quintero*, 253 B.R. at 836-37. In determining whether the second requirement under § 3911.10 has been met, courts look to the provisions of the annuity to determine its primary purpose. *See In re Andrews*, 301 B.R. at 216 (stating that "while the existence of a beneficiary clause does have some relevancy, it is not dispositive. Instead . . . the focus of whether an annuity qualifies as exempt under § 3911.10 is on the actual substance of the underlying transaction"); *In re Quintero*, 253 B.R. at 836-37 (stating that the primary purpose of the annuity was to provide the debtor with a source of income upon retirement); *In re Fichter*, 45 B.R. at 536 (notwithstanding that the debtor's wife was named the beneficiary of his annuity, second requirement is not met since the "main purpose" was to provide for the debtor's retirement).

In this case, Debtor testified, and the Trustee does not dispute, that the Annuity was purchased for the purpose of saving for his daughter's Catholic high school tuition. However, Debtor's subjective intent as to the use of the funds is not the relevant inquiry. The court must look to the provisions of the Annuity to determine the "substance of the contract." *See In re Andrews*, 301 B.R. at 214. The Annuity contract shows that Debtor is both the owner and the annuitant. Thus, under the terms of the Annuity, Debtor, not his daughter, will be the recipient of payments which are to commence at some undisclosed date. As noted by one court, noticeably absent from the list found in § 3911.10 specifying the individuals/entities for whom the annuity's purpose must benefit is the actual owner of the annuity policy. *In re Quintero*, 253 B.R. at 836. Because the primary purpose of the Annuity at the time it was purchased was to provide a source of income to Debtor, the Annuity does not meet the requirement of § 3911.10 that it be taken out for the benefit of one of the specified individuals, notwithstanding the fact that Debtor intends to use the income to be paid to him in a particular manner, *i.e.* to pay for his daughter's high school tuition. *See id.* at 836-37.

Debtor also asserts that pursuant to his 2009 divorce decree and shared parenting plan, he was ordered to pay for his daughter's Catholic school tuition and that he was awarded the Annuity for that purpose. Thus, he argues that the Annuity is exempt under § 3911.10 because it is necessary for the support of himself and his daughter. However, whether the Annuity funds are necessary for the support of the

annuitant or an annuitant's dependent is not a relevant inquiry under § 3911.10 as it is not a condition for exemption under that statute. Moreover, nothing in the 2009 divorce decree and shared parenting plan requires Debtor to send his daughter to a Catholic high school. It simply acknowledges that as an option and requires Debtor to pay for the tuition in the event that she does attend a Catholic high school.

## **II. Exemption under Ohio Revised Code § 3911.12 and § 3911.14**

On Debtor's bankruptcy Schedule C, he also claims that the Annuity is exempt under §§ 3911.12 and 3911.14. However, neither statute applies to the circumstances involving the Annuity at issue in this case.

Section 3911.12 provides in relevant part as follows:

A policy of insurance on the life of any person, or any interest therein, assigned, transferred, or made payable to a married person . . . whether such transfer is made by the spouse of such married person or by another person, shall inure to the benefit of such married person independently of the spouse of such married person or the creditors of the spouse, or of the person effecting or transferring the policy or such person's creditors.

This section simply makes clear that a married person's interest in a life insurance policy "inure[s] to the benefit of such married person independently of the spouse of such married person or the creditors of the spouse." Ohio Rev. Code § 3911.12. The Annuity is not a life insurance policy and Debtor is not a married person.

Section 3911.14 provides in relevant part as follow:

Any life insurance company . . . may hold the proceeds of any life or endowment insurance or annuity contract issued by it upon such terms and restrictions as to revocation by the insured and control by beneficiaries, with such exemptions from legal process and the claims of creditors of beneficiaries *other than the insured*, and upon such other terms and conditions . . . as have been agreed to in writing by such company and the insured or beneficiary. . . . Any life or endowment insurance or annuity contract issued by a domestic, foreign, or alien company may provide that the proceeds thereof or payments thereunder shall not be subject to transfer, anticipation, commutation, or encumbrances by any beneficiary, and shall not be subject to the claims of creditors of any beneficiary *other than the insured* or any legal process against any beneficiary *other than the insured*; if said contract so provides, the benefits accruing thereunder to such beneficiary *other than the insured* shall not be transferable nor subject to commutation, encumbrance, or legal process. (emphasis added).

This section simply *permits* an insurance policy or annuity contract to provide that insurance or annuity proceeds not be subject to the claims of creditors of any beneficiary *other than the insured*. *Menninger v. Schramm (In re Schramm)*, 431 B.R. 397, 403 (B.A.P. 6<sup>th</sup> Cir. 2010). In this case, the Annuity contract before the court includes no such spendthrift provision and, even if it did, it would protect only the interest of a beneficiary other than the insured. *Cf. Wilson v. Dixon*, 73 Ohio App. 3d 706, 708 (1991) (quoting *Sherrow v. Brookover*, 174 Ohio St. 310, 314 (1963) and stating that the annuity at issue cannot be a

spendthrift trust “since an owner of property may not create for himself a spendthrift trust that will be valid against his creditors”). Thus, Debtor’s interest in the Annuity is not exempt under § 3911.14.

### **III. Exemption Under Ohio Revised Code § 2329.66(A)(10)(a) and (b)**

Although not claimed as such on his bankruptcy Schedule C, Debtor alternatively argues that the Annuity is exempt under § 2329.66(A)(10)(a) and (b). Section 2329.66(A)(10)(a) exempts a “person’s right to a participant account in any deferred compensation program offered by the Ohio public employees deferred compensation board, a government unit, or a municipal corporation. . . as exempted by section . . . 148.09.” Ohio Revised Code Chapter 148 relates to the Ohio Deferred Compensation Program. Section 148.09 provides, in relevant part, as follows:

“[A] participant account or any benefit or other right accrued or accruing to any person under this chapter or under a deferred compensation program offered by a government unit, as defined in section 148.06 of the Revised Code, or by a municipal corporation shall not be subject to execution, garnishment, attachment, sale to satisfy a judgment or order, the operation of bankruptcy or insolvency laws, or other process of law and shall be unassignable.”

Debtor asserts that the Annuity is exempt as deferred compensation from the Ohio Public Employees Deferred Compensation Program. This assertion is apparently based on the fact that the Annuity was purchased with funds received by Debtor from the Ohio Public Employees Deferred Compensation Program. It requires the court to consider, first, whether Debtor was entitled to an exemption in the original funds used to purchase the Annuity and, if so, second, whether such funds retained their exempt status when used to purchase the Annuity. Because the court finds that Debtor was not entitled to an exemption in the original funds, the court need not address the second consideration.

Ohio law expressly provides that § 148.09 “appl[ies] to claims against participating employees or continuing members and their employers.” Ohio Rev. Code § 148.04(A). As Debtor had retired from the Toledo Police Department at the time he purchased the Annuity, he was no longer a “participating employee,” which is defined as an “eligible employee who is having compensation deferred pursuant to a contract . . . with the eligible employee’s employer and the Ohio public employees deferred compensation board.” Ohio Rev. Code § 148.01(A)(3). Nor is Debtor a “continuing member,” which is defined as “any former participating employee who is not currently having compensation deferred . . . to whom payment has not been made of all deferred compensation distributions.” Ohio Rev. Code § 148.01(A)(4). According to Debtor, the funds used to purchase the Annuity represented the final disbursement of his interest in the Deferred Compensation Program. Thus, having retired from public service and having received all deferred compensation distributions to which he was entitled, § 148.09 did not apply to the funds used to purchase the Annuity.

Section 2329.66(A)(10)(b) exempts, with certain exceptions, a “person's right to receive a payment under any pension, 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 person and any of the person's dependents. . . .” This provision is not applicable in this case since Debtor’s right to receive payments under the Annuity is not based upon “illness, disability, death, age or length of service.”

#### **IV. Exemption Under Ohio Revised Code § 2329.66(A)(11)**

Finally, Debtor also argues in the alternative that the Annuity is exempt under § 2329.66(A)(11), which exempts a “person’s right to receive spousal support, child support, an allowance, or other maintenance to the extent reasonably necessary for the support of the person’s dependents.” Debtor asserts that the Annuity constitutes “domestic support maintenance reasonably necessary for the support of his daughter.” [Doc. # 14, Debtor’s Reply, p. 2]. According to Debtor, negotiations during his divorce proceeding included him keeping the Annuity in exchange for him accepting financial responsibility to pay for his daughter’s Catholic high school education. However, as noted above, nothing in the 2009 divorce decree and shared parenting plan requires Debtor to send his daughter to a Catholic high school. It simply acknowledges that as an option and requires Debtor to pay for the tuition in the event that she does attend a Catholic high school. Thus, the court cannot find that the Annuity is reasonably necessary for the support of Debtor’s daughter.

Moreover, provisions in the divorce decree addressing support obligations and requiring Debtor’s ex-wife to pay child support and spousal support are found on pages two through six of the decree, while provisions specifically addressing the division of property are found on pages six through eight. [Trustee’s Ex. 5]. The award to the parties to the divorce of their own interests in any retirement funds that they owned at the time of the divorce, which specifically included the Annuity, is clearly set forth within the division of property portion of the decree. [See Trustee’s Ex. 5, p.8]. Thus, the court finds that the Annuity was not a support or maintenance award but was simply an award based on a division of property in the divorce. For these reasons, the court finds that the Annuity does not constitute “maintenance . . . reasonably necessary for the support of a person’s dependents” within the meaning of § 2329.66(A)(11).

#### **CONCLUSION**

In light of the foregoing, the court will grant the Trustee’s Objection to Exemption and Motion for Turnover. A separate order conforming to this memorandum of decision will be entered by the court.