

IT IS SO ORDERED.

Dated: May 20, 2014  
04:50:52 PM

  
*Kay Woods*  
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Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

	*	
IN RE:	*	
	*	CASE NUMBER 13-42243
RONALD G. McCONNELL and	*	
CAROL A. McCONNELL,	*	CHAPTER 7
	*	
Debtors.	*	HONORABLE KAY WOODS
	*	

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MEMORANDUM OPINION REGARDING TRUSTEE'S OBJECTION TO EXEMPTION  
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This cause is before the Court on Trustee's Objection to Debtors' Claimed Exemption ("Objection") (Doc. 19) filed by Richard G. Zellers, Chapter 7 Trustee, on February 5, 2014. The Trustee objects to the Debtors' claimed exemption in an Annuity for which Debtor Carol A. McConnell is the beneficiary.<sup>1</sup> For the reasons set forth herein, the Court finds that the Trustee has failed to establish by a preponderance of the evidence that the

<sup>1</sup>"Annuity" is defined *infra* at 2.

Annuity is not exempt pursuant to Ohio Revised Code ("O.R.C.") § 2329.66(A)(10)(b). Accordingly, the Court will overrule the Objection.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this District pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

## **I. BACKGROUND**

### **A. Petition and Schedules**

On October 14, 2013, Debtors Ronald G. McConnell and Carol A. McConnell filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code. In Schedule B – Personal Property, the Debtors disclose that Ms. McConnell has an interest in "MetLife structured settlement for loss of daughter – \$336.15/month for 30 years" ("Annuity"). (Doc. 1, Sched. B at 1.) In Schedule C – Property Claimed as Exempt, the Debtors claimed that the Annuity was exempt pursuant to O.R.C. §§ 2329.66(A)(6)(b), 3911.10, 3911.12 and 3911.44. (Doc. 1, Sched. C at 1.) On April 3, 2014, the Debtors filed fourth amended Schedule C (Doc. 33), in which they presently claim that the Annuity is exempt pursuant to O.R.C. § 2329.66(A)(10)(b).

## **B. Arguments of the Parties**

On March 3, 2014, the Debtors filed Response in Opposition to Trustee's Objection to Debtors' Claimed Exemption ("Response") (Doc. 25). The Debtors state that the Annuity was funded as part of "a structured settlement for wrongful death proceeds from the death of Debtors' daughter." (Resp. ¶ 2.) Ms. McConnell, as beneficiary of the Annuity, is to receive \$336.15 per month for the remainder of her life. The Debtors assert that the Annuity is necessary for their support because (i) Ms. McConnell is disabled and pursuing Social Security benefits; and (ii) Mr. McConnell is disabled and receiving Social Security benefits. Consistent with their first amended Schedule C (Doc. 21), the Debtors claimed in the Response that the Annuity was exempt pursuant to O.R.C. § 2329.66(A)(12)(b).

The Court held a hearing on the Objection on March 6, 2014, at which appeared (i) the Trustee; and (ii) Irene K. Makridis, Esq. on behalf of the Debtors. The hearing was adjourned to April 3, 2014 to allow the Trustee to review the Annuity contract.

On March 27, 2014, the Debtors filed Debtors' Supplemental Response in Opposition to Trustee's Objection to Debtors' Claimed Exemption ("Supplemental Response") (Doc. 31).<sup>2</sup> The Debtors clarify that the Annuity was issued in July 2004 and initially

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<sup>2</sup>On March 27, 2014, the Debtors filed two Supplemental Responses (Docs. 30-31), which are identical except that the referenced exhibits are attached to Doc. 31.

provided for the payment of \$294.00 per month, which increases 1.5 percent annually, for the longer of Ms. McConnell's life or 30 years; however, Ms. McConnell has no ownership rights in the Annuity. In the Supplemental Response, the Debtors claim that the Annuity is exempt pursuant to O.R.C. § 2329.66(A)(10)(b) because (i) Ms. McConnell's right to receive payments is in the form of an annuity; (ii) the payments are on account of the death of the Debtors' daughter; and (iii) the payments are necessary for the support of the Debtors.

At the April 3, 2014 hearing, the Trustee stated that he had received an offer from an unrelated third party to purchase the Annuity for approximately \$40,000.00, which sum would enable him to distribute a 100 percent dividend to all creditors in this case and return a portion of the proceeds to the Debtors. The Trustee asserted that the Debtors were not dependents of their daughter at the time of her death and, thus, O.R.C. § 2329.66(A)(12)(b) is not applicable. Regarding O.R.C. § 2329.66(A)(10)(b), the Trustee merely stated that division (A)(10)(b) is not applicable.

Ms. Makridis represented to the Court that the only exemption claimed by the Debtors is based on O.R.C. § 2329.66(A)(10)(b), as reflected in the Supplemental Response. The Debtors' failure to list any exemptions in the second amended Schedule C (Doc. 29) was a scrivener's error. To clarify the record, the Court found that (i) the Debtors claim an exemption pursuant to O.R.C.

§ 2329.66(A)(10)(b); and (ii) the Trustee's objection relates thereto. The Court directed the parties to brief whether the Annuity is exempt pursuant to division (A)(10)(b) and indicated that, consistent with the holding of Judge Harris in *In re Jadud*, Case No. 12-10292, 2012 Bankr. LEXIS 4723 (Bankr. N.D. Ohio Oct. 4, 2012), the Annuity appeared to be exempt.

On April 4, 2014, the Debtors filed Debtors' Second Supplemental Response in Opposition to Trustee's Objection to Debtors' Claimed Exemption ("Second Supplemental Response") (Doc. 34), in which they largely restate the arguments set forth in the Supplemental Response. On that same date, the Debtors filed the fourth amended Schedule C to claim the exemption pursuant to O.R.C. § 2329.66(A)(10)(b).

On April 22, 2014, the Trustee filed Brief of Trustee (Doc. 35). The Trustee advances three arguments to support the position that the Annuity is not exempt pursuant to O.R.C. § 2329.66(A)(10)(b): (i) allowing the exemption would permit a debtor to convert any asset to an annuity to avoid creditors' rights; (ii) the Annuity is not a substitute for lost wages; and (iii) the Annuity is not a retirement account.

## **II. STANDARD AND EXEMPTION**

### **A. Standard**

Pursuant to Federal Rule of Bankruptcy Procedure 4003 – Exemptions, "In any hearing under this rule, the objecting party

has the burden of proving that the exemptions are not properly claimed.” FED. R. BANKR. P. 4003(c) (2014). The objecting party must establish by a preponderance of the evidence that the exemption should be disallowed. *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999) (citations omitted). “Upon the introduction of sufficient evidence to rebut the *prima facie* validity of the exemption, the burden shifts to the debtors to demonstrate that the exemption is proper.” *In re Abbott*, 466 B.R. 118, 124 (Bankr. S.D. Ohio 2012) (quoting *In re Rhinebolt*, 131 B.R. 973, 975 (Bankr. S.D. Ohio 1991)). To further the fresh start policy of the Bankruptcy Code, exemption statutes are construed liberally in favor of the debtor. *In re Traut*, Case No. 11-33554, 2012 Bankr. LEXIS 1129, 4-5 (Bankr. N.D. Ohio Mar. 15, 2012) (citations omitted).

## **B. Exemption**

Ohio has opted out of the federal exemptions; thus, a debtor who is domiciled in Ohio is limited to the exemptions in O.R.C. § 2329.66.<sup>3</sup> See O.R.C. § 2329.662 (2014). Section 2329.66(A)(10)(b) of the O.R.C. exempts the following:

(b) Except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code,<sup>4</sup> the person’s rights to receive or interests in receiving a payment or other benefits under any pension, annuity, or similar plan or contract, not including a payment or

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<sup>3</sup>There is no dispute that the Ohio exemptions apply in this case.

<sup>4</sup>These exceptions relate to child support payments and do not affect this case.

benefit from a stock bonus or profit-sharing plan or a payment included in division (A)(6)(b) or (10)(a) of this section,<sup>5</sup> 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, except if all the following apply:

(i) The plan or contract was established by or under the auspices of an insider that employed the person at the time the person's rights or interests under the plan or contract arose.

(ii) The payment is on account of age or length of service.

(iii) The plan or contract is not qualified under the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.<sup>6</sup>

O.R.C. § 2329.66(A)(10)(b) (2014) (emphasis added).

The corresponding federal exemption is found in 11 U.S.C.

§ 522(d)(10)(E), which exempts:

(10) The debtor's right to receive—

\* \* \*

(E) a payment under a stock bonus, pension, profitsharing, 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 debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

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<sup>5</sup>Generally speaking, divisions (A)(6)(b) and (A)(10)(a) exempt life insurance and retirement benefits, respectively. Neither exception affects this case.

<sup>6</sup>The exception in subdivisions (i)-(iii) does not affect this case.

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E) (2014) (emphasis added).

O.R.C. § 2329.66(A)(10)(b) and 11 U.S.C. § 522(d)(10)(E) do not contain any differences material to this case. "Because the Ohio exemption statute is substantially similar to the corresponding federal Bankruptcy Code provisions . . . , we may look to the intent of Congress in adopting the similar exemption [and] then logically infer the intent of the Ohio State legislature in adopting the similar exemption." *Baumgart v. Alam (In re Alam)*, 359 B.R. 142, 148 (B.A.P. 6th Cir. 2006) (citations omitted).

### **III. ANALYSIS**

In the fourth amended Schedule C, the Supplemental Response and the Second Supplemental Response, the only exemption the Debtors claim is O.R.C. § 2329.66(A)(10)(b). At the April 3, 2014 hearing on the Objection, the Court also found that the Debtors are not asserting any exemption other than division (A)(10)(b). However, the Trustee uses the majority of his Brief to analyze O.R.C. § 2329.66(A)(6)(b) and (A)(12)(b), which the Trustee recognizes "clearly [do] not apply." (Br. of Trustee at 1.) Because the Debtors are not claiming an exemption pursuant to O.R.C. § 2329.66(A)(6)(b) or (A)(12)(b), the Trustee's Objection is overruled as moot with respect thereto. The sole issue before

the Court is whether the Annuity is exempt pursuant to O.R.C. § 2329.66(A)(10)(b).

In his Brief, the Trustee cites two cases to support his position: (i) *In re Quintero*, 253 B.R. 832 (Bankr. N.D. Ohio 2000), in which the debtors claimed an exemption pursuant to O.R.C. § 2329.66(A)(6)(b); and (ii) *In re Abbott*, 466 B.R. 118 (Bankr. S.D. Ohio 2012), in which the debtor claimed an exemption pursuant to O.R.C. § 2329.66(A)(12)(b). Following his discussion of these cases, the Trustee states, “[The Annuity] does not qualify under § 3911.10 of the Ohio Revised Code as an exemption, which is a precursor to § 2329.66 exemption statutes. And even assuming if it did, it is believed this exemption does not apply because it is more akin to an investment than [sic] a life insurance policy.” (Br. of Trustee at 5.)

Simply put, O.R.C. § 3911.10 is not a “precursor to § 2329.66 exemption statutes.” The exemption in O.R.C. § 3911.10 is only a prerequisite to the exemption in O.R.C. § 2329.66(A)(6)(b), not the entirety of O.R.C. § 2329.66. See O.R.C. § 2329.66(A)(6)(b) (“The person’s interest in contracts of life or endowment insurance or annuities, as exempted by section 3911.10 of the Revised Code[.]”). The Trustee also wrongly conflates O.R.C. §§ 2329.66(A)(10)(b) and 3911.10 when he states that the Annuity is not exempt because it is “more akin to an investment [than] a life insurance policy.” O.R.C. § 3911.10, not O.R.C.

§ 2329.66(A)(10)(b), references life insurance proceeds. See O.R.C. § 3911.10 ("All contracts of life or endowment insurance or annuities upon the life of any person . . ."). Accordingly, the Trustee has failed to cite any case law relevant to O.R.C. § 2329.66(A)(10)(b).

In *Rousey v. Jacoway*, 544 U.S. 320 (2004), the issue before the Supreme Court was whether the debtors could exempt their IRAs pursuant to 11 U.S.C. § 522(d)(10)(E) – the corresponding federal exemption to O.R.C. § 2329.66(A)(10)(b). The bankruptcy court and the bankruptcy appellate panel concluded that the IRAs were not exempt because (i) the debtors could access the funds in their IRAs at any time by paying a penalty; thus, the IRA payments were not on account of age; and (ii) the IRAs were not similar to a stock bonus, pension, profitsharing plan or annuity. The Supreme Court first concluded that the IRA payments were on account of age because, prior to reaching a certain age, the debtors could not access the entire balance of their IRAs without penalty. The Court interpreted the phrase "on account of" to mean "because of," *id.* at 326-27, and held that the required causal connection existed between the IRA payments and the age of the debtors.

The Court next concluded that the IRAs were similar to a stock bonus, pension, profitsharing plan or annuity. The Court found that, like all of the sources of payment in 11 U.S.C. § 522(d)(10)(E), the IRAs provided income to substitute wages:

The common feature of all of these plans is that they provide income that substitutes for wages earned as salary or hourly compensation. . . . But the plans are dissimilar in other respects: Employers establish and contribute to stock bonus, profitsharing, and pension plans or contracts, whereas an individual can establish and contribute to an annuity on terms and conditions he selects. Moreover, pension plans and annuities provide deferred payment, whereas profitsharing or stock bonus plans may or may not provide deferred payment. And while a pension provides retirement income, none of these other plans necessarily provides retirement income. What all of these plans have in common is that they provide income that substitutes for wages.

*Id.* at 331.

An issue similar to the dispute in this case was addressed by Judge Harris in *In re Jadud*, Case No. 12-10292, 2012 Bankr. LEXIS 4723 (Bankr. N.D. Ohio Oct. 4, 2012). In *Jadud*, the trustee objected to the O.R.C. § 2329.66(A)(10)(b) exemption because the annuity at issue was not a retirement account. Instead, the annuity was purchased on behalf of the debtor's son in settlement of a personal injury claim. Following the death of the debtor's son, the debtor inherited the annuity and became its beneficiary. The Bankruptcy Court denied the trustee's objection on the basis that he had failed to meet his burden of proof.

In reaching its holding, the Bankruptcy Court rejected the trustee's assertion that only retirement income is exempt pursuant to O.R.C. § 2329.66(A)(10)(b):

In *Rousey*, the Supreme Court emphasized that the exemptions under section 522(d)(10) all involved substitutions for wages. [The distinction] between annuities in the nature of retirement and disability

pension plans and those set up to fund tort settlements . . . is inconsistent with the plain meaning of the statute. Subject to certain exceptions not applicable to this case, the statute exempts "the person's right to receive a payment under any . . . annuity . . . 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 . . . ." The statute therefore exempts payment under any annuity "on account of" – or, as the Supreme Court would say, "because of" – illness, disability, death, age, or length of service.

*Id.* at 14-15 (citing *Rousey*, 544 U.S. at 326-27).

The Bankruptcy Court ultimately concluded that the trustee had failed to meet his burden of proof:

While the factual record in this contested matter is sparse, . . . [t]he payment stream . . . may very well qualify as a substitution for wages lost as a result of the debtor's son being rendered partially or totally disabled. The record in this case is unclear. Under Rule 4003(c), however, the trustee as the objecting party "has the burden of proving that the exemptions are not properly claimed." Given that Ohio exemptions are to be liberally construed in favor of the debtor, payments on an annuity from a structured settlement may be exempt under § 2329.66(A)(10)(b) under appropriate circumstances – for example, where the compensation is related to the person being rendered partially or totally disabled. Under such circumstances, the payments under the annuity are a substitution for wages "on account of" or "because of" a disability just as payments under an annuity that substitutes wages "on account of" or "because of" a person's age or length of service.

*Id.* at 15-16 (internal citation omitted).

Much like in *Jadud*, the factual record in this case is sparse at best. The Trustee does not dispute that (i) the Annuity is actually an annuity; (ii) the Annuity is on account of the death

of the Debtors' daughter; and (iii) the Annuity is necessary for the support of the Debtors. The entirety of the Trustee's argument with respect to O.R.C. § 2329.66(A)(10)(b) is as follows:

[If the Court were to allow the Debtors' claimed exemption], this would allow a debtor in pre-bankruptcy planning to convert any asset to an annuity to avoid creditors' rights. . . . This I do not believe was the intention of the bankruptcy code, or previous interpretations by other Bankruptcy Courts.

Additionally this is not a substitution for wages lost of the Debtor [sic], as in this instance, it is payment for the death of a child under a wrongful death litigation. . . . [T]he determining factor in a structured settlement, or annuity, is whether it is a retirement account, which would make it exempt, or an investment, which is not exempt.

(Br. of Trustee at 2.)

The Trustee's assertion that a debtor could exempt "any asset" merely by converting it to an annuity is wholly unfounded. Pursuant to the plain language of O.R.C. § 2329.66(A)(10)(b), only an annuity on account of illness, disability, death, age or length of service is exempt. The exemption in division (A)(10)(b) is also limited to the amount reasonably necessary for the support of the debtor and dependents of the debtor, which further discredits the Trustee's argument. There is also nothing in the record to suggest that the Debtors engaged in pre-bankruptcy planning to shield assets and, in fact, the Annuity was issued in 2004 – nearly ten years before the petition date.

More importantly, the Trustee provides no factual support for his statement that the Annuity is not a substitute for wages because it resulted from the death of the Debtors' daughter. However, two arguments are implicit in this statement: (i) only an annuity created on account of the debtor's death is exempt; and (ii) only an annuity created on account of the death of a person upon whom the debtor is a dependent is exempt. Because O.R.C. § 2329.66(A)(10)(b) exempts annuities on account of death, the statute necessarily excludes the debtor's death as the lone qualifying event. Furthermore, there is simply no requirement in division (A)(10)(b) that the debtor be a dependent of the deceased. The Ohio legislature included such a limitation in other exemptions and chose not to do so with respect to O.R.C. § 2329.66(A)(10)(b). See, e.g., O.R.C. § 2329.66(A)(12)(b) ("A payment on account of the wrongful death of an individual of whom the person was a dependent on the date of the individual's death . . . .").

Finally, the Trustee's argument that the Annuity is only exempt if it is a retirement account was expressly rejected by the Supreme Court in *Rousey* and the Bankruptcy Court in *Jadud*. The Supreme Court stated, "[W]hile a pension provides retirement income, none of these other plans [in 11 U.S.C. § 522(d)(10)(E)] necessarily provides retirement income." *Rousey*, 544 U.S. at 331. Rather, the common feature of all the forms of payment in O.R.C.

§ 2329.66(A)(10)(b) is that they provide income that substitutes for wages.

#### **IV. CONCLUSION**

As the party objecting to the claimed exemption, the Trustee has failed to meet his burden of proof and demonstrate by a preponderance of the evidence that the Annuity is not exempt pursuant to O.R.C. § 2329.66(A)(10)(b). Pursuant to the plain language of division (A)(10)(b), the Annuity is a "payment . . . under any . . . annuity . . . on account of . . . death . . . ." Moreover, the Supreme Court found that the forms of payment in 11 U.S.C. § 522(d)(10)(E) – the corresponding federal exemption to O.R.C. § 2329.66(A)(10)(b) – are intended to serve as substitute wages. There is nothing in the record to indicate that the Annuity is not income that substitutes for wages.

As a consequence, the Court hereby overrules the Objection. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: May 20, 2014  
04:50:52 PM



*Kay Woods*  
 \_\_\_\_\_  
 Kay Woods  
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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RONALD G. McCONNELL and	*	CASE NUMBER 13-42243
CAROL A. McCONNELL,	*	
	*	CHAPTER 7
Debtors.	*	
	*	HONORABLE KAY WOODS
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\*\*\*\*\*  
 ORDER OVERRULING TRUSTEE'S OBJECTION TO EXEMPTION  
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This cause is before the Court on Trustee's Objection to Debtors' Claimed Exemption ("Objection") (Doc. 19) filed by Richard G. Zellers, Chapter 7 Trustee, on February 5, 2014. The Trustee objects to the Debtors' claimed exemption in an Annuity for which Debtor Carol A. McConnell is the beneficiary.

For the reasons set forth in Memorandum Opinion Regarding Trustee's Objection to Exemption entered on this date, the Court hereby:

1. Finds that the Trustee has failed to meet his burden of proof and demonstrate by preponderance of the evidence that the Annuity is not exempt pursuant to O.R.C. § 2329.66(A)(10)(b); and
2. Overrules the Objection.

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