

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:)
) Bankr. Case No. 94-10095
RONALD OWEN TORGERSON)
Social Security No. 501-46-9803) Chapter 7
)
and) MEMORANDUM OF DECISION RE:
) TRUSTEE'S OBJECTION TO
CHARLENE RAE TORGERSON) EXEMPTION OF ANNUITY
Social Security No. 502-48-1384)
)
Debtors.)

The matter before the Court is the Trustee's objection to certain exemptions claimed by Debtors. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that the annuity claimed exempt by Debtors may be allowed.

I.

Ronald O. and Charlene R. Torgerson obtained loans totaling \$6,500.00 on April 19, 1994 from two of their siblings. The Torgersons gave their siblings security interests in two vehicles, a 1989 Jeep and a 1989 Ford Probe. Prior to April 19, 1994, these two vehicles were free of encumbrances. The siblings' security interests are listed on the vehicle titles. The Torgersons make monthly payments totaling \$209.73 to these secured claim holders.

Ronald Torgerson, at age 46, used the loan proceeds to purchase an annuity from the John Alden Life Insurance Company on

April 25, 1994. The annuity matures October 23, 2012. Charlene Torgerson is the beneficiary. The annuity contract allows Ronald Torgerson to surrender the contract but there is a declining penalty if it is surrendered during the first ten years.

The Torgersons filed a Chapter 7 petition on June 14, 1994. Among other items, Debtors claimed exempt the \$6,500.00 annuity with John Alden.

Debtors have small retirement accounts with their present employers. Debtor Ronald Torgerson also has \$1,600.00 in a retirement account with a former employer. While Debtor Ronald Torgerson had a thirteen year career in the military, he did not disclose any military pension he may receive.

Trustee William J. Pfeiffer filed an objection to claimed exemptions on August 22, 1994. Debtors resisted the objection. A hearing was held September 20, 1994. The Court directed Trustee Pfeiffer to amend his pleading to set forth with particularity the objections he had. Trustee Pfeiffer filed his amended objection on October 3, 1994. Therein, he claimed, *inter alia*, that Debtors could not claim the annuity exempt because it was purchased with an intent to defraud creditors, contrary to S.D.C.L. § 58-12-6.

Debtors responded to the amended objection on October 13, 1994 and argued, among other things, that the objection to the annuity was not timely because it was not raised in the first objection.

The Court conducted an evidentiary hearing on November 21,

1994. The Trustee's objection to the annuity was allowed to be heard because the parties had discussed that objection and the annuity contract before and at the September 20, 1994 hearing.

II.

Section 58-12-6 of the South Dakota Code exempts benefits under any annuity contract with two exceptions.¹ One exception provides that § 58-12-6 does not apply to amounts paid as premiums on the annuity "with the intent to defraud creditors." S.D.C.L. § 58-12-7.

Whether a debtor acted with fraudulent intent in converting nonexempt property into exempt property is a question of fact. *Abbott Bank-Hemingford v. Armstrong (In re Armstrong)*, 931 F.2d 1233, 1237 (8th Cir. 1991). Fraudulent intent may be manifested by extrinsic evidence. *Federal Savings & Loan Insurance Corp. v. Holt (In re Holt)*, 894 F.2d 1005, 1008 (8th Cir. 1990)(cites therein).

'[E]xtrinsic' must mean some evidence other than the conversion of the property into exempt form itself, the debtor's insolvency, and the debtor's purpose to put the property beyond the reach of creditors.

Hanson v. First National Bank, 848 F.2d 866, 870 (8th Cir. 1988)(Arnold, J., concurring)(relying on *Forsberg v. Security State*

¹ Exemptions are to be construed liberally in the debtor's favor. *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d 630, 631 (8th Cir. 1991).

Bank, 15 F.2d 499 (8th Cir. 1926)). Factors to consider, when the exempt asset purchased is life insurance or related benefits, include: the amount of existing coverage, *Holt*, 894 F.2d at 1008; whether the amount of additional coverage purchased was reasonable, *Id.*; whether funds placed into the additional coverage were borrowed or whether property was purchased on credit and then sold with the proceeds used for exempt property, *Hanson*, 848 F.2d at 869; whether the debtor materially misled or deceived creditors, *Armstrong*, 931 F.2d at 1237; whether all proceeds from the sale of non exempt property are accounted for, *Hanson*, 848 F.2d at 869; and whether any sale of non exempt property was at fair market value. *Id.*

Dealings with family members alone do not constitute extrinsic evidence of fraud. *Hanson*, 848 F.2d at 869. However, a debtor is entitled to only a fresh start, not a head start. *Norwest Bank v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988)(quoting *In re Zouhar*, 10 B.R. 154, 156 (Bankr. D. N.Mex. 1981)).

III.

Based on the evidence presented and the factors set forth above, this Court concludes that Debtors did not act fraudulently when they converted the non exempt equity in their vehicles into an exempt annuity. They did not have substantial life insurance or retirement benefits when the annuity was purchased, the annuity

purchased was reasonable in amount, the security interest given in their vehicles was documented properly, and Debtors have been repaying the car loans.

Two factors labor against them. First, they borrowed money to purchase the annuity and those loans will be reaffirmed, contrary to other, older debts that will be discharged. Second, the transaction was with family members. Without more, though, this Court cannot conclude Debtors acted with fraudulent intent. A sale of the vehicles, rather than a loan against them, may have deprived Debtors of needed transportation. The transaction with family members was at arm's length. Therefore, it appears that Debtors maximized their exemptions through lawful, pre-bankruptcy planning, as intended by Congress when it adopted the Bankruptcy Code.

As under [the Bankruptcy Act], the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), reprinted in 1978 U.S.Code cong. & Ad.News 5963, 6317; S.Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5862 (cited in *Tveten*, 848 F2d. at 874).

An order will be entered overruling the Trustee's objection to the annuity exemption.

Dated this _____ day of February, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)