

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

March 27, 1997

Rick A. Yarnall, Esq.
Chapter 7 Trustee
Post Office Box J
Sioux Falls, South Dakota 57101

Wanda Howey-Fox, Esq.
Counsel for Debtor
Post Office Box 18
Yankton, South Dakota 57078

Subject: ***In re Autumn A. Erickson,***
Chapter 7; Bankr. No. 96-40398

Dear Trustee and Counsel:

The matter before the Court is the Trustee's objection to Debtor's claim of an exemption in certain rights to payment under a personal injury settlement agreement. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor's right to periodic payments under the Settlement Agreement with American States Insurance Company is property of the estate that she has not declared exempt. If she does declare it exempt, the exemption will be limited to \$250.00 per month as provided by S.D.C.L. § 58-12-8.

SUMMARY OF FACTS. As a minor, Autumn A. Erickson received a severe, permanent injury in an automobile accident. She and her parents received a large lump-sum payment from American States Insurance Company. Autumn Erickson and her parents also executed a Settlement Agreement with the insurance company. Under the Settlement Agreement, the insurance company promised to pay Autumn Erickson \$1,000.00 per month for the remainder of her life for the physical damages she received in the accident. In exchange, Autumn Erickson and her parents gave up all present and future claims against the insurance company. Under the terms of the Settlement Agreement, the insurance company could assign its responsibility for making periodic payments and the insurance company or its assignee could also purchase an annuity. The annuity would remain the property of the insurance company or its assignee, not Autumn Erickson. She would only be the payee on the annuity. The

Re: Autumn A. Erickson
March 27, 1997
Page 2

Settlement Agreement specifically described Autumn Erickson as a general creditor of the insurance company and the Settlement Agreement provided that Autumn Erickson could not assign or transfer her right to the monthly payments. Due to the nature of her injuries, Autumn Erickson has a protective payee for the monthly payments from the insurance company.¹

On May 24, 1996, Autumn Erickson (Debtor) filed a Chapter 7 petition. In her schedules filed June 7, 1996, Debtor listed as part of her personal property an annuity with GE Capital Assurance Company that had a lifetime interest of \$1,000.00 per month. Debtor declared exempt under S.D.C.L. § 43-45-2 her wearing apparel and jewelry, under S.D.C.L. § 43-45-4 her unspecified "personal property" valued at \$4,000.00, and under S.D.C.L. §§ 58-12-6, -7, and -8 an annuity valued at \$250.00 per month, presumably the same one with GE Capital Assurance listed on Debtor's schedule of personal property.

On July 23, 1996, Trustee Yarnall objected to the claimed exemptions on the grounds that the value of the personal property exceeded the \$4,000.00 limit of S.D.C.L. § 43-45-4. On August 16, 1996, Trustee Yarnall filed a supplemental objection on the grounds that the annuity listed on Debtor's schedule of exempt property does not qualify under S.D.C.L. § 58-12-6 because the monthly payment exceeds \$250.00. On August 29, 1996, Debtor filed a response to the Trustee's objections in which she stated that she was now removing the annuity from her schedule of personal property because she did not have an interest in the annuity. With the response, Debtor filed an amendment to her schedule of personal property to delete the annuity. Debtor did not amend her schedule of exempt property to delete the annuity.

The parties eventually submitted the matter on stipulated facts and briefs. Trustee Yarnall argued that the monthly \$1,000.00 payments do not qualify as exempt annuity payments under the South Dakota Code and that even if they do, they exceed the allowed amount of \$250.00. Debtor, based on her amended schedules, says the annuity payments are not property of the estate at all. However, Debtor also argued that the Settlement Agreement qualified as a "hybrid" annuity contract under S.D.C.L. § 58-12-5.

¹ The parties indicated in their stipulated facts that they would file a copy of the protective payee order but it was not received.

Re: Autumn A. Erickson
March 27, 1997
Page 3

DISCUSSION. Section 58-12-6 of the South Dakota Code provides (emphasis added):

The benefits, rights, privileges and options which under any annuity contract heretofore or hereafter issued are due or prospectively due **the annuitant**, shall not be subject to execution nor shall **the annuitant** be compelled to exercise any such rights, powers, or options, nor shall creditors be allowed to interfere with or terminate the contract, except as provided by §§ 58-12-7 to 58-12-9, inclusive.

From the terms of the statute, it is clear that the exemption is limited to the **annuitant**, that is, the one who is entitled to receive an annuity. Under the terms of the Security Agreement, though, Debtor does not own the annuity nor does she have any rights to payments under it. The insurance company or its assignee has only directed GE Capital Assurance to make the payments directly to Debtor for their convenience. Consequently, Debtor does not have any rights under the annuity that she may declare exempt under § 58-12-6 as the annuitant. Her rights arise from the Security Agreement.

Debtor has not amended her schedule of exemptions to claim exempt any interest she has under the Settlement Agreement.² Nonetheless, in the interest of judicial economy, the Court will determine whether the monthly payments Debtor receives under the Security Agreement can be declared exempt under S.D.C.L. § 58-12-6.

The Court is satisfied that the language of § 58-12-5, which defines an annuity contract for the purpose of the exemption under § 58-12-6, covers this Security Agreement based on the nature of the Agreement and the terms of the payments to Debtor. The exemption is limited to \$250.00 per month under S.D.C.L. § 58-12-8 so the remaining \$750.00 is estate property that the Trustee may collect until Debtor's pre-petition debts are paid.

Because the Minnesota exemption statute at issue in *Christians v. Dulas*, 95 F.3d 703 (8th Cir. 1996), which Trustee Yarnall cited, is quite different from South Dakota's, that case provides little

² At this time, the entire \$1,000.00 is estate property because Debtor has not amended her schedule of exemptions to claim any interest under the Settlement Agreement.

Case: 96-40398 Form id: 122 Ntc Date: 03/28/97 Off: 4 Page : 1
Total notices mailed: 4

Debtor Erickson, Autumn Ann 2501 Capital #104, Yankton, SD 57078
Aty Howey-Fox, Wanda PO Box 18, Yankton, SD 57078
Trustee Yarnall, Rick A. PO Box J, Sioux Falls, SD 57101
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321