UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

CLARKE E. BODEN, Case No. 86-3323-C
dba Boden Industrial Services,
dba Boden Consulting, Chapter 7

Debtor.

ORDER ON TRUSTEEIS OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS

On March 25, 1987 the trustee's objection to debtor's claim of exemptions filed on December 15, 1986 and the debtor's resistance filed on January 28, 1987 came on for hearing in Des Moines, Iowa. First National Bank of Ames, Iowa filed a joinder in the trustee's objection on April 6, 1987. Lawrence E. Jahn appeared on behalf of the debtor. The trustee, Robert D. Taha, was present. The matter has been submitted on a transcript of the hearing, briefs and various documents.

FACTUAL BACKGROUND

The debtor is 61 years old, is in good health and is employed as an engineer with CSI Employment. CSI provides services to the J.I. Case plant in Burlington, Iowa. The debtor works full-time at a rate of $12.50 per hour. He anticipated that the J.I. Case project would be completed by December 15, 1987. CSI offers no benefits such as life insurance, pensions, profit sharing programs or paid vacation. The debtor.has been given no guarantee that employment will be available after completion of the project.

The debtor has a bachelor's degree in business administration. He is certified in industrial engineering, manufacturing engineering and process engineering. The debtor taught at Iowa State University from 1961 until 1969. Soon after terminating his employment at Iowa State, he established an engineering consulting concern. He was for the most part self-employed from 1970 until the spring of 1987 when he secured employment at CSI Employment.

In recent years, the debtor's consulting business has been unprofitable. He lost $4,307.00 in 1984 and $637.00 in 1985. The debtor expected a net loss for 1986. He stated that his business would generate between $10,000.00 and $11,000.00 and expenses would total $12,000.00. The debtor attributed the lack of business to the sagging Iowa economy. He had made considerable efforts to re-enter the teaching or professional ranks. He testified that he mailed over 400 resumes and called over 200 businesses. He stated he received only five responses.

The debtor also receives monthly income from a retirement annuity. Beginning with the commencement of his employment at Iowa State, the debtor contributed to a retirement fund. Iowa State contributed to the fund on a dollar for dollar basis. After leaving Iowa State, the debtor continued to pay into the fund.

The fund consisted of two components. The College Retirement Equities Fund (CREF) invested contributions into blue chip stocks. The Teachers' Insurance and Annuity Association (TIAA) invested contributions into mortgages and utility stock. Apparently, the income from CREF fluctuates whereas the TIAA account produces more stable payments. The debtor directed that 75 percent of the contributions be devoted to the CREF account and the remaining 25 percent to the TIAA account.

On November 1, 1986 the debtor transferred the full accumulation of the CREF account into the TIAA account. The debtor stated his reason for doing so was that he preferred the stability of the TIAA payments over the fluctuating CREF payments. The first payment under the annuity was made on December 1, 1986.

The TIAA contract provides for monthly payments of at least $269.66. These payments are guaranteed for a period of 20 years. The $269.66 amount however, is a base payment. The annuity also pays a dividend that reflects the performance of its investment portfolio. In a document entitled "Retirement Annuity Income Illustration," it is estimated that monthly payments with dividends will total $752.62. This estimation was based on certain earnings assumptions. The debtor testified that the monthly checks have averaged about $700.00 per month. On the bankruptcy schedules,, he stated that he receives monthly payments in the amount of $725.00. The schedules also show that the value of the annuity at the time of filing was $80,960.00.

The TIAA contract also provides that the debtor may not assign, pledge or transfer ownership benefits of the contract. Further, the contract states that benefits are exempt from the claims of creditors to the fullest extent permitted by law. The debtor stated that the annuity cannot be liquidated and paid in a lump sum. Nothing in the TIAA contract, however, prohibits liquidation. In fact, the contract appears to contemplate a lump sum payment. Paragraph 2 describes the commuted (discounted) value of a lump sum payment made in lieu of a series of payments. The TIAA account is governed by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. section 1001 et seg. ERISA requires that all qualified retirement plans prohibit the assignment and alienation of plan benefits. See 29 U.S.C. section 1056(d)(1).

Millie M. Boden, wife of the debtor, is employed as a dental assistant. She is not a debtor in this action. She earns $5.75 per hour. Her employer does not provide health insurance. She is 58 years old and is in good health.

Title to the debtor's residence is in Millie M. Boden's name. The debtor is a co-obligor on the mortgage indebtedness encumbering the residence. The balance remaining on this indebtedness is $15,700.00. The value of the residence was listed as $67,500.00.

The debtor's schedule of current income and current expenses shows the following:

INCOME

Debtor's monthly take-home pay (reflecting monthly annuity payment)	$ 725.00
Wife's monthly take-home pay	790.00
Total	$1,515.00

EXPENSES

Mortgage payment		$ 271.00
Utilities		191.42
Electricity	$60.50	
Heat	$63.92	
Water	$16.00	
Telephone	$51.00	
Food		250.00
Clothing		100.00
Laundry and cleaning		26.00
Newspapers, periodicals, and books		11.50
Medical and rug expenses		35.00
Auto insurance		123.80
Life, medical, hospitalization and household insurance		464.12
Transportation		85.00
Professional dues		12.40
Taxes (not deducted from wages)		63.80
Charitable contributions		10.00
Garbage cost		14.00
Total		$1,658.04

This schedule does not reflect the debtor's current situation since it was completed prior to the time the debtor obtained a job at CSI Employment. The debtor' gross monthly income is $2,150.00. The parties adduced no evidence as to his monthly net income. Assuming his take-home pay totals $1,500.00 per month, monthly household income would increase to $3,015.00. Expenses also must be adjusted to account for the fact the debtor's employment requires him to live in Burlington. The debtor rents an apartment for $265.00 per month and must pay an additional $10.00 to $25.00 per month for utilities. A more accurate total for expenses would be $1,940.54 per month.

Prior to securing employment, the debtor liquidated his IRA account and used approximately $23,000.00 to $24,000.00 of savings to meet expenses. The schedules reveal that at the time of filing, the debtor had no cash on hand and had no deposits in savings accounts. The schedules also show that there are unsecured claims equal to $17,607.79. Besides the annuity, the debtor claims an exemption in wearing apparel, a shotgun, a private library, and tools of the trade. The total value of these items is $2,127.50.

DISCUSSION

For his objection, the trustee claims that the cash value of the TIAA annuity is not reasonably necessary for support of the debtor or any dependent of the debtor as is required by Iowa Code section 627.6(8)(e). [1] This provision

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[1] On January 28, 1987 the debtor amended his Schedule B-4 to reflect that he was claiming the exemption in issue under Iowa Code section 627.6(9)(e). This was done in partial response to the trustee's objection to exemptions. The confusion can be attributed to the striking of former subsection 5 of Iowa Code section 627.6 by the 1986 Amendments to Iowa’s exemption laws. The 1986 Amendments apply to actions filed after June 1, 1986. This case was filed in December of 1986.

in part provides:

> A debtor who is a resident of this state may hold exempt from execution the following property:
> ...
>
> 8. The debtor's rights in:
>
> ...
>
> e. A payment under a 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 debtor and any dependent of the debtor.

Id. The trustee does not argue that the annuity is not a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age or length of service. The debtor responds in part by arguing that the annuity is not part of the bankruptcy estate. The trustee has the burden of proving that the debtor's exemption claim is not proper. Bankruptcy Rule 4003(b).

The commencement of a bankruptcy case creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. section 541(a)(1). It is clear Congress considered this provision to include all kinds of property. See S. Rep. No. 989, 95th Cong., 2d Sess., 82 (1978),.reprinted in 1978, U.S. CODE CONG. & ADMIN. NEWS 5787, 5868; H.R. Rep. No. 595, 95th Cong., lst Sess, 367-68 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6322-24. An exception to this rule is found at section 541(c)(2) which excludes trust property from the estate if the trust restricts transfers of a debtor's interest and such a restriction is "enforceable under applicable nonbankruptcy law".

In In re Graham, 726 F.2d 1268 (8th Cir. 1984), the Eighth Circuit held that ERISA plan benefits were part of the estate. The court examined the legislative history of section 541(c)(2) and noted that Congress intended to preserve restrictions on a transfer of only spendthrift trusts to the extent such trusts were valid under state law. Id. at 1272. The Graham court did not equate ERISA plans with spendthrift trusts recognized by state law. The court explained that because pension benefits are subject to the Code's exemption provision (section 522(d)(10)(E)), it necessarily follows that pension benefits are part of the estate. Id. Hence, the TIAA annuity is part of the estate and the issue now becomes whether the annuity is necessary for the support of the debtor and his wife.

Iowa's exemption statute is based upon the premise "that it is better that the ordinary creditor's claims should remain partially unsatisfied than that a resident of the state should be placed in such an impecunious position that he and his family became charges of the state." Note, Personal Property Exemptions in Iowa: An Analysis and Some Suggestions, 36 Iowa L.Rev. 76, 77 (1950). The Iowa Supreme Court has ruled that the purpose of the exemption statute "is to secure to the unfortunate debtor the means to support himself and the family; the protection of the family being the main consideration." Shepard v. Findley, 214 N.W. 676, 678 (Iowa 1927).

In construing section 627.6(8)(e), the court is mindful of the well settled proposition that Iowa's exemption statute must be liberally construed. Frudden Lumber Co. v. Clifton, 183 N.W.2d 201, 203 (Iowa 1971). Yet, this court must be careful not to depart substantially from the express language of the exemption statute or extend the legislative grant. Matter of Hahn, 5 B.R. 242, 244 (Bankr. S.D. Iowa 1980), citing Wertz v. Hale, 234 N.W. 534 (Iowa 1931) and Iowa Methodist Hospital v. Long, 12 N.W.2d 171 (Iowa 1944). In applying the "reasonably necessary" standard of section 627.6(8)(e), the court must look to the debtor's existing income and exempt property in relation to their present and future needs. Matter of Pettit, 55 B.R. 394, 398-99 (Bankr. S.D. Iowa 1985).

Aside from the annuity, the assets claimed exempt by the debtor are of inconsequential value. The month's expenses delineated on the schedule and listed by the debtor at the hearing are reasonable and necessary for basic support. The uncertainty surrounding the debtor's income generating ability leads the court to conclude the annuity is reasonably necessary to the support of the debtor and his wife.

The debtor cannot be certain his present employment will continue after completion of the J.I. Case project. If he is terminated, his prospect of finding equivalent employment is not bright. Although the debtor is well educated and seemingly qualified in his profession, the debtor's age may be an impediment to securing meaningful employment in the engineering field. The fact that the debtor received only five responses to 600 job inquiries is testament to the difficulty people in their sixties face when seeking new employment. If he is terminated, it is clear that the annuity will become an absolute necessity for support. The schedules show that the annuity payment added to Millie Boden's income is insufficient to defray the expenses.

Assuming the debtor continues his current employment, he and his wife will have sufficient income to meet expenses. However, the debtor has depleted his savings and liquidated his IRA account. Therefore, he has no savings to meet unexpected expenses. It can be anticipated that the cost of living will rise and that the debtor's household expenses may increase as the debtor and his wife grow older. Although current income exceeds current expenses by nearly $1,000.00 per month, the continued availability of extra funds and the ability to replenish sufficiently the savings account is tenuous at best.

CONCLUSION AND ORDER

WHEREFORE, for the reasons expressed above, the payments made on account of the TIAA annuity are reasonably necessary for the support of the debtor and his wife.

THEREFORE, the trustee's objection to debtor's claim of exemptions is denied.

Signed and filed this 19th day of January, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE