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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	NC-04-1102-MaSP
)		
BARBARA MARIE PAYNE,)	Bk. No.	03-12246
)		
Debtor.)		
_____)		
ESTATE OF DEAN SHORT,)		
)		
Appellant,)		
)		
v.)	<u>O P I N I O N</u>	
)		
BARBARA MARIE PAYNE; CHARLES)		
E. SIMS, Chapter 7 Trustee,)		
)		
Appellees.)		
_____)		

Argued and Submitted on November 17, 2004
at San Francisco, California

Filed - March 30, 2005

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding.

Before: MARLAR, SMITH and PERRIS, Bankruptcy Judges.

1 MARLAR, Bankruptcy Judge:

2

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INTRODUCTION

4

5 Before us is the bankruptcy court's order allowing the
6 debtor's claimed exemption in a guaranteed minimum annuity with a
7 life contingency feature as "life insurance." An objecting
8 creditor, joined by the chapter 7 trustee, maintained that the
9 annuity was merely an investment and therefore did not qualify as
10 life insurance under the relevant California exemption statute.
11 The bankruptcy court determined that both parties to the annuity
12 contract had assumed risks and that such risks qualified the
13 annuity as exempt life insurance.

14 We hold that, while risk is one characteristic of life
15 insurance, the bankruptcy court applied an incorrect legal
16 standard in that it failed to consider other relevant factors,
17 including the primary purpose of the annuity, in making a
18 determination as to whether it was exempt life insurance.
19 Therefore we reverse the bankruptcy court's order, and remand for
20 application of the correct legal standard.

21

22

FACTS

23

24 Debtor filed a voluntary chapter 7¹ petition on September 16,
25 2003. At the time, she was 78 years old, single and lived in a
26 mobile home park in Novato, California.

27

28 ¹ Unless otherwise indicated, chapter and section references
are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 Debtor's largest scheduled debt was an unsecured personal
2 loan debt of \$139,773 owing to the Estate of Dean F. Short ("the
3 Estate").

4 Included in Debtor's monthly income was an annuity payment of
5 \$1,032.70. Debtor claimed a full exemption in the annuity as a
6 "matured life insurance policy," as that term is defined in
7 California Civil Procedure Code ("Cal. Civ. Proc. Code")
8 § 704.100(c). In 2002, at age 77, Debtor had purchased the
9 single-premium annuity for \$125,000 from Cova Financial Life
10 Insurance Company, a/k/a MetLife Investors Insurance Company
11 ("MetLife").

12 The Estate, joined by the chapter 7 trustee filed a timely
13 objection to the claimed exemption on the grounds that the annuity
14 did not qualify as life insurance. They conceded, however, that
15 the annuity was necessary for Debtor's support.

16 Debtor responded that the annuity was a life insurance
17 policy, and declared that its purpose was to provide support for
18 herself as well as death benefits for a relative.²

19 The detailed terms of the annuity were as follows. Debtor
20 applied on a "single premium immediate annuity" form. The policy
21 cover page stated, on the top line: "Single Premium Annuity
22

23 ² Alternatively, Debtor requested leave from the court to
24 file an amended claim to exempt the annuity as a private
25 retirement plan under Cal. Civ. Proc. Code § 704.115. The
26 bankruptcy court did not resolve this issue and we do not need to
27 address it. Debtor did not file an amended exemption claim under
28 Cal. Civ. Proc. Code § 704.115, nor did she either cross-appeal or
argue the issue in her appellee's brief. Therefore, Debtor has
waived this alternative claim for purposes of this appeal. See
Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona
Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998) (an issue not briefed
is deemed waived).

1 Contract." But, farther down on the page, it read: "YOU HAVE
2 PURCHASED A LIFE INSURANCE POLICY." The contract schedule page
3 described the plan as a "life annuity with period certain."
4 Under "Income Options," the checked box was entitled "Life Income
5 With 10 Years Guaranteed"--an option "with a life contingency."

6 Thus, the annuity was a "period certain guaranteed minimum"
7 annuity. See Moffat v. Habberbush (In re Moffat), 119 B.R. 201,
8 204 n.4 (9th Cir. BAP 1990), aff'd, 959 F.2d 740 (9th Cir. 1992).
9 See also Cal. Ins. Law & Prac. § 20.21[2][b] (Matthew Bender
10 2004).³ The guaranteed ten-year payments of \$123,924 (\$1,032.70 x
11 120 months) were slightly less than the \$125,000 single premium
12 payment.

13 After a hearing on the exemption objections, the bankruptcy
14 court issued a decision that the annuity qualified as life
15 insurance because the total payments were contingent on Debtor
16 living beyond the ten years. The court opined:

17 [Debtor] bet MetLife . . . that she would live more than
18 ten years. If she does so, she wins her bet and MetLife
must pay her more than she paid for the annuity. If she

19 _____
20 ³ This treatise defines a period certain guaranteed minimum
annuity as follows:

21 Period certain annuities guaranty that the payment
22 will be continued for a minimum period of time (typically
23 10 or 20 years). If the annuitant dies prior to the
24 expiration of the minimum period, the payments are
25 continued to the beneficiary of the annuitant until the
26 expiration of the minimum period. If, on the other hand,
27 the annuitant survives the expiration of the minimum
period, the annuitant continues to receive the payment but
the beneficiary receives nothing. Period certain annuities
cost somewhat more than straight life annuities, the
difference being a function of the period certain compared
to the remaining life expectancy of the annuitant when the
benefits commence.

28 Cal. Ins. Law & Prac., supra, § 20.21[2][b].

1 dies in less than ten years, MetLife wins the bet and
2 enjoys the interest-free use of the remaining balance of
3 [Debtor's] premium. There is no doubt that calculating
4 the odds of this bet involved complex considerations
including both interest rate factors and actuarial tables
to determine the probability that [Debtor] would live more
than ten years.

5 Memorandum Decision (February 6, 2004), at 2.

6 The order overruling the objection to exemption was entered
7 on February 13, 2004, and was timely appealed by the Estate.

8
9 **ISSUE**

10
11 The sole issue is whether the period certain guaranteed
12 minimum annuity, under which Debtor will receive monthly payments
13 for the longer of ten years or her lifetime, but in either event
14 no less than approximately what she paid for the annuity,⁴ is
15 exempt life insurance pursuant to Cal. Civ. Proc. Code
16 § 704.100(c).

17
18 **STANDARD OF REVIEW**

19
20 Whether the correct legal standard was applied is an issue of
21 law which is subject to de novo review. Anastas v. Am. Sav. Bank
22 (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996).

23 The scope of an exemption under California law is a legal
24 question which we review de novo. Sticka v. Casserino (In re
25 Casserino), 290 B.R. 735, 737 (9th Cir. BAP 2003), aff'd, 379 F.3d

26
27 _____
28 ⁴ The guaranteed payments of \$123,924 were slightly less
than the \$125,000, but slightly exceeded the net premium after
taxes (\$125,000 minus 2.35% state tax = \$122,062.50).

1 1069 (9th Cir. 2004). Contract interpretation is also a question
2 of law, which we review de novo. Renwick v. Bennett (In re
3 Bennett), 298 F.3d 1059, 1064 (9th Cir. 2002); Smyth v. USAA Prop.
4 & Cas. Ins. Co., 5 Cal. App. 4th 1470, 1474, 7 Cal. Rptr. 2d 694,
5 696 (Ct. App. 1992) (interpretation of an insurance policy, like
6 any other contract, is a matter of law).

7 Whether an annuity is exempt life insurance under the
8 California exemption statute is a factual determination which we
9 review under the clearly erroneous standard. See Turner v.
10 Marshack (In re Turner), 186 B.R. 108, 117 (9th Cir. BAP 1995)
11 (determination of whether an annuity is exempt life insurance
12 requires a factual analysis); Duckor Spradling & Metzger v. Baum
13 Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 782 (9th Cir. 1999)
14 (factual findings are reviewed for clear error).

15 16 DISCUSSION

17 18 Exemption Law and Annuities

19
20 California has opted out of the federal exemption scheme;
21 therefore we apply California exemption law. See 11 U.S.C.
22 § 522(b)(1); Cal. Civ. Proc. Code § 703.130. The California
23 exemption statutes are liberally construed, for their manifest
24 purpose is to protect income and property needed for the
25 subsistence of the judgment debtor. See Turner, 186 B.R. at 113.

26 California's exemption law for "Life Insurance Policies"
27 provides, in pertinent part:
28

1 Benefits from matured⁵ life insurance policies
2 (including endowment and annuity policies) are exempt to
3 the extent reasonably necessary for the support of the
4 judgment debtor and the spouse and dependents of the
5 judgment debtor.

6 Cal. Civ. Proc. Code § 704.100(c).

7 The parties have already agreed that the annuity was
8 necessary for the support of Debtor. The open question is whether
9 a period certain guaranteed minimum annuity, i.e., one which
10 continues for the longer of a specified number of years or the
11 annuitant's life, qualifies as life insurance under Cal. Civ.
12 Proc. Code § 704.100(c). This is a matter of first impression in
13 our circuit.

14 The Ninth Circuit has held that Cal. Civ. Proc. Code
15 § 704.100(c)'s parenthetical reference to "endowment and annuity
16 policies" does not create an independent exemption for endowments
17 and annuities in general. Rather, it merely clarifies that life
18 insurance policies that possess significant features of an
19 endowment or annuity will not lose their exempt character. See
20 Kennedy v. Pikush (In re Pikush), 157 B.R. 155, 157 (9th Cir. BAP
21 1993), aff'd, 27 F.3d 386 (9th Cir. 1994). An example would be a
22 life insurance policy that provides for the beneficiary's receipt
23 of payments in the form of an annuity, rather than a lump sum,
24 upon the death of the insured. Id. at 157-58.

25 In California, life insurance is defined as "'a contract
26 whereby one undertakes to indemnify another against loss, damage,
27 or liability arising from a contingent or unknown event'" where
28 "the contingent or the unknown event is mortality." Pikush, 157

⁵ Undisputedly, the immediate annuity "matured" on its
effective date, July 12, 2002. See Moffat, 119 B.R. at 204-05.

1 B.R. at 156, quoting California Insurance Code ("Cal. Ins. Code")

2 § 22. Its purpose has been described as follows:

3 The basic purpose of life insurance is to address the
4 risks associated with human mortality. Life insurance
5 serves not only a protective function, but also, with
6 certain types of policies, a savings function. In its
7 protective function, life insurance provides funds for
8 estate purposes, income for family members after the death
9 of the insured, and special needs such as the payment of
10 a mortgage.[] In its savings function, certain types of
11 life insurance products allow individuals to accumulate
12 savings[] and provide the policyholder with the ability to
13 borrow against those savings or to obtain the cash
14 surrender value of the policy. The various types of life
15 insurance products emphasize different aspects of the
16 protective and savings functions in varying degrees to
17 serve individual needs.

18 Cal. Ins. Law & Prac., supra, § 20.01[1] (footnotes omitted).

19 "An annuity, by contrast, is a right to receive fixed,
20 periodic payments, either perpetually or for life or a stated
21 period of time. . . . Thus, annuities are more in the nature of
22 investments rather than insurance." Pikush, 157 B.R. at 156-57
23 (citation omitted).

24 More specifically:

25 With an annuity, the person designated as the
26 recipient (the annuitant) is usually the person paying the
27 money. The annuitant pays a fixed sum, in return for
28 which the company must then perform a series of
obligations over a period of years, at designated times.
The hazard of loss is no longer upon the company, but upon
the recipient, who may die before any benefits are
received. Instead of creating an immediate estate for
benefit of others, the annuitant has reduced the
annuitant's immediate estate in favor of future contingent
income. Annuity contracts must, therefore, be recognized
as investments rather than as insurance.

29 Cal. Ins. Law & Prac., supra, § 20.20[2][a].

30 Pikush concerned three single-premium fixed-term annuities.

31 There, we rejected an argument that the Insurance Code's
32 classification of an annuity as "life insurance," under Cal. Ins.

1 Code § 101, was dispositive evidence of the annuities' exempt
2 status. Pikush, 257 B.R. at 158-59. We held that the purpose of
3 the Insurance Code's classification system is the licensing and
4 regulation of insurance and annuities and has "no bearing on the
5 interpretation of California's exemption laws." Id. at 159. We
6 concluded that the annuities were not exempt as life insurance
7 under Cal. Civ. Proc. Code § 704.100(c), because they involved "no
8 risks, contingencies or unknown events," id., and the Ninth
9 Circuit affirmed the decision.

10 In Bernard v. Coyne (In re Bernard), 40 F.3d 1028 (9th Cir.
11 1994), cert. denied, 514 U.S. 1065 (1995), the Ninth Circuit again
12 affirmed the principle that an annuity was not exempt life
13 insurance because it provided "a guaranteed stream of income over
14 the term of the contract" but "no contingencies that can divest
15 the [debtors] of their right to receive payment" Id. at
16 1032.

17 Both Pikush and Bernard involved annuity policies with
18 guaranteed fixed-term payouts and no contingencies. In Pikush,
19 the terms were five and ten years; Bernard did not address the
20 terms, except to indicate that the annuity was comparable to those
21 in Pikush. However, apparently, neither policy contained a life
22 contingency or lifetime payout.

23 In Turner, in contrast, the debtor sought to exempt an
24 unmatured annuity policy under which he would receive a monthly
25 payment for life commencing upon his 60th birthday. Before
26 remanding the case for additional factfinding, we suggested that
27 "there is some stretching room [under Pikush and Bernard] for
28 [annuities] that would be life insurance" because they "appertain

1 to human life (life annuities).” Turner, 186 B.R. at 117. We
2 noted that insurance policies and annuities are both used for
3 investment purposes and that “there is an intimate relationship
4 between life insurance and annuities” in a practical sense. Id.
5 at 115 n.10 (citation omitted). Finally, Turner pointed out that
6 the example given in Pikush of a life insurance annuity did not
7 exclude the possibility that an annuity involving “risks,
8 contingencies, or unknown events” could be exempt because it is
9 the functional equivalent of life insurance. See Pikush, 157 B.R.
10 at 159; Turner, 186 B.R. at 115.

11 The authorities agree that “annuities and life insurance have
12 much in common.” Cal. Ins. Law & Prac., supra, § 20.20[2][b]. As
13 with life insurance, the uncertainty facing the annuitant is the
14 length of his or her life. However, the risks are typically
15 different. “With an annuity, the risk insured is that death will
16 be postponed; with life insurance, the risk insured is that death
17 will be premature.” Id. In addition, the two are considered
18 alike for some purposes, such as licensing, regulation, or taxes,
19 and innovative policies may combine the characteristics of both to
20 appeal to a sophisticated market, as insurers compete with
21 financial institutions in noninsurance activities. Id. and
22 § 3A.05[3].

23 Turner recognized the complexity of determining whether an
24 annuity is an investment or life insurance and held that it
25 involves a factual analysis on a case-by-case basis.⁶ Turner, 186

27 ⁶ The suggestion in Turner that whether or not the annuity
28 was purchased as part of prebankruptcy planning is factually
(continued...)

1 B.R. at 117. In making that determination, the court should
2 consider a number of factors, including:

3 1) Is the annuity truly contingent; (2) Can [the debtor]
4 accelerate the maturity date; 3) May [the debtor] borrow
5 against the policy; 4) Who owns the policy; 5) Was the
6 payment of the premium consistent with an investment or a
7 payment; 6) Was [the issuer of the annuity] licensed to
8 sell life insurance in California; 7) What was the opinion
9 of the experts; 8) What provisions of the application are
10 also part of the policy; and 9) Must life insurance in
11 California contain a death benefit?⁷

12 Id. (footnote added).

13

14 Application of Law to Debtor's Annuity

15

16 Contrasting her annuity with those in Pikush and Bernard,
17 Debtor therefore argued, and the bankruptcy court agreed, that
18 even though her annuity contained guaranteed payments for a fixed
19 ten-year period, it qualified as life insurance since its
20 additional lifetime benefit was contingent on Debtor's life
21 expectancy beyond the ten years.

22 The Estate countered by arguing that the annuity was merely

23

24

25 ⁶(...continued)
26 relevant, see Turner, 186 B.R. at 116-17, is questionable in view
27 of the subsequent Ninth Circuit opinion holding that prepetition
28 conversion of nonexempt property to exempt property, without more,
is not fraudulent. See Gill v. Stern (In re Stern), 345 F.3d
1036, 1044 (9th Cir. 2003) (conversion of nonexempt assets into
exempt assets is nonfraudulent "as a matter of law") (citation
omitted), cert. denied, 541 U.S. 936 (2004).

⁷ Arguably, the ninth factor is meant to examine the risks
involved in the transaction in light of the inherent differences
between annuities and life insurance. "In a life insurance policy
the risk assumed is to pay upon the assured's death; in a pure
annuity contract the risk assumed is to pay as long as the assured
may live." Equitable Life Assur. Soc. of United States v.
Johnson, 53 Cal. App. 2d 49, 57, 127 P.2d 95, 99 (Ct. App. 1942).

1 an investment annuity whereby Debtor paid \$125,000 in return for
2 the "right to receive fixed, periodic payments, either perpetually
3 or for life or a stated period of time." Pikush, 157 B.R. at 156
4 (defining an annuity).

5 To resolve this issue, we first examine the annuity contract,
6 applying the doctrine that "[t]he law respects form less than
7 substance." Cal. Civ. Code § 3528.

8 The contract, entitled a "Single Premium Annuity Contract,"
9 indicated that Debtor had chosen a "life contingency" annuity for
10 "Life Income With 10 Years Guaranteed." The "contract schedule"
11 page referred to the plan as a "life annuity with period certain."
12 The cover sheet, however, also indicated that she was purchasing a
13 "LIFE INSURANCE POLICY." The investment/payout terms indicated
14 that Debtor's initial investment of \$125,000 would largely be paid
15 back within ten years (without interest), yielding about \$123,924.
16 Thereafter, if she was still living, MetLife would continue the
17 monthly payments until her death.

18 There was no death benefit per se, nor was there a provision
19 for borrowing against the policy. Debtor had the right to name a
20 new owner and could also assign the contract.

21 The overall language of the annuity clearly shows that this
22 transaction was a "period certain guaranteed minimum" annuity
23 contract. See Moffat, 119 B.R. at 204 n.4; Cal. Ins. Law & Prac.,
24 supra, § 20.21[2][b]. Under such terms, MetLife agreed to make
25 payments to Debtor for her lifetime, but if she died prior to the
26 end of the guaranteed ten-year period, the company would make
27 payments to her beneficiary for only the duration of the
28 guaranteed ten-year period. Id.

1 Such an annuity would be considered "life insurance" under
2 the California Insurance Code for purposes of licensing and
3 regulation, and hence the cover page note that it was a "LIFE
4 INSURANCE POLICY." However, that lone designation does not change
5 the substance of the contract as an annuity and not life
6 insurance. See Pikush, 157 B.R. at 159.

7 Next, we may consider the California Insurance Code, which
8 provides that "[a]n insurance upon life may be made payable," in
9 relevant part, as follows:

- 10 (a) On the death of the insured.
- 11 (b) On his surviving a specified period.
- 12 (c) Periodically as long as he lives.
- 13 (d) Otherwise contingently on the continuance or
14 determination of life.
- 15 (e) Upon such terms and conditions and subject to such
16 restrictions as to revocation by the policyholder and
17 control by beneficiaries as shall have been agreed to in
18 writing by the insurer and the policyholder. . . .

19 Cal. Ins. Code § 10170.

20 The annuity provided a contingent payout similar to an
21 insurance policy under options (c) or (d). However, only if
22 Debtor lived beyond ten years and beyond age 87 would she realize
23 a return beyond her investment/premium.

24 The bankruptcy court ruled that there was a mutual risk in
25 this arrangement and stated that "[t]here is no doubt that
26 calculating the odds of this bet involved complex considerations
27 including both interest rate factors and actuarial tables to
28 determine the probability that [Debtor] would live more than ten
years." Memorandum Decision, supra, at 2.

 However, the bankruptcy court did not consider all of the

1 Turner factors. Both the court and counsel treated the question
2 as one of law, and apparently focused solely on whether there was
3 any risk at all. Because there was some risk, the court concluded
4 that the annuity qualified as life insurance. As Turner
5 recognized, there is more to the analysis than simply risk, and
6 the court should have taken into consideration other factors
7 besides risk.

8 Where the annuity contains some attributes of insurance and
9 some of investment, consideration of the fifth Turner factor must
10 include a determination of the primary purpose of the annuity. If
11 the primary purpose is investment, then the annuity would not
12 qualify as life insurance for purposes of the exemption statute.

13 This is similar to the analysis of exemption of IRAs under
14 Cal. Civ. Proc. Code § 704.115(a)(3), where, if an IRA has dual
15 purposes, the court considers whether the principal purpose is to
16 provide for retirement or to provide for current needs. See
17 Dudley v. Anderson (In re Dudley), 249 F.3d 1170, 1176-77 (9th
18 Cir. 2001).

19 Here, although technically a lifetime annuity with some risk,
20 Debtor's annuity would repay her or her beneficiary the
21 consideration which she paid out after ten years, when she would
22 be 87 years old. Therefore, on remand, the bankruptcy court
23 should examine whether the annuity was primarily an agreement to
24 indemnify Debtor in the event of a contingency or merely a
25 convenient way of making an investment.

26 Finally, Debtor urges a liberal application of the exemption
27 laws in her favor in order to protect her necessary level of
28 subsistence. While a debtor's financial circumstances are an

1 important consideration, a court cannot rewrite California
2 exemption law to accommodate debtors who might fail in their
3 attempt to convert nonexempt assets into exempt assets.
4

5 **CONCLUSION**

6
7 An annuity may be exempt life insurance under California law
8 if it primarily contains attributes of life insurance. That
9 determination is a factual one, to be made on a case-by-case
10 basis. Here, the bankruptcy court concluded that the risks
11 assumed by the debtor and the issuer established that the annuity
12 was life insurance, but the court did not examine other relevant
13 factors, such as those set forth in Turner, or whether the primary
14 purpose of the annuity was for investment or life insurance.
15 Therefore, we REVERSE the order allowing Debtor's exemption, and
16 REMAND for application of the correct legal standard.
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