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NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
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.	EC-05-1136-MaSB
)		
STEVE WILLIAM STANLEY,)	Bk. No.	04-34637-C7
)		
Debtor.)		
_____)		
)		
STEVE WILLIAM STANLEY,)		
)		
Appellant,)		
)		
v.)		
)		
PREM N. DHAWAN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

MEMORANDUM¹

Argued and Submitted on October 20, 2005
at Sacramento, California

Filed - February 2, 2006

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding.

Before: Marlar, Smith and Brandt, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 **INTRODUCTION**

2
3 The bankruptcy court sustained an objection by the chapter 7²
4 trustee ("Trustee") to the debtor's claimed exemptions in a
5 \$60,000 annuity and \$2,656.40 in alleged annuity payments being
6 held in a bank account.³

7 Because the debtor had purchased the annuity at age 76 as an
8 income substitute and had no other retirement plan, he contended
9 that the annuity and its payments were "on account of age" and,
10 therefore, exempt under California Code of Civil Procedure
11 ("CCCP") § 703.140(b)(10)(E). The bankruptcy court ruled that the
12 annuity was simply a nonexempt single-premium immediate annuity
13 and sustained Trustee's objection.

14 We conclude that the "on account of age" statutory language
15 modifies "payment," and does not refer to the purchaser's age or
16 retirement status. Here, the annuity contract was merely an
17 investment of the debtor's nonexempt funds, and the payments to
18 him simply began 30 days after purchase. As it did not qualify
19 for an exemption under state law, we AFFIRM.

20
21
22 _____
23 ² Unless otherwise indicated, all chapter and section
24 references are to the unamended Bankruptcy Code, 11 U.S.C. §§ 101-
25 1330, in effect when this case was filed, and prior to the
26 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
("BAPCPA"). Rule references are to the Federal Rules of
Bankruptcy Procedure (Fed. R. Bankr. P.), Rules 1001-9036.

27 ³ The bankruptcy court order also overruled Trustee's
28 objection to a claimed exemption in an additional \$834 in the
savings account which represented social security benefits. That
portion of the order is not before us.

1 **FACTS**

2
3 Steve William Stanley ("Debtor") filed a voluntary chapter 7
4 petition in December, 2004, at age 76. Prepetition, he had been
5 self-employed and did not have a retirement plan. After he had
6 retired, he and his wife lived on their social security benefits.

7 Prepetition, Debtor's wife had been seriously ill. Fearing
8 that he would not be able to meet the monthly expenses on his
9 benefits alone, Debtor sold their residential real property and
10 received approximately \$106,000 in sale proceeds. Debtor's wife
11 died in 2004. Debtor consulted with a financial advisor who
12 determined that "based on his age and his lack of future earnings
13 or income," purchasing an annuity would be his best option for use
14 of the cash equity. See Decl. of Edward Outland (Mar. 14, 2005),
15 at ¶ 7.

16 Debtor then paid \$65,000 to purchase a single-premium
17 immediate annuity with a five-year guaranteed payment period. The
18 monthly payments of \$1,083.75 commenced 30 days after the purchase
19 date. While Debtor maintained that the five-year option was based
20 on his life expectancy, it was also clear that 60 months' worth of
21 payments would amount to a \$65,025 return or, roughly, the
22 annuity's original value. The annuity was irrevocable,
23 unassignable and had no cash surrender value. If Debtor died
24 before the five years, the guaranteed payments would revert to his
25 named beneficiaries.

26 At the petition date, the annuity was worth approximately
27 \$60,000, and Debtor had allegedly deposited \$2,656.40 in annuity
28 payments in a savings account. On Schedule C, Debtor claimed an

1 exemption for the annuity and savings account funds under CCCP
2 § 703.140(b)(10)(E). Trustee objected to the exemption claim in
3 the annuity solely on the grounds that the payments were not "on
4 account of illness, disability, death, age, or length of service,"
5 as required in the statute. He also objected to the alleged
6 annuity payments in the savings account as not meeting the
7 "annuity" standard under the statute nor any of the "on account
8 of" conditions.

9 Debtor filed an opposition stating, among other things, that
10 the payments were "on account of age" and filed the affidavit of
11 his financial advisor, who averred, in pertinent part:

12 5. I consulted with Mr. Stanley in regards to his
13 age, health, life expectancy, and his current income
requirements.

14 6. After exploring several investments [sic]
15 options, we settled upon the Single Premium Immediate
Annuity that Mr. Stanley later opened

16 7. This annuity was determined to be the best option
17 for Mr. Stanley based on his age and his lack of future
earnings or income.

18 8. The terms and payments of the annuity were based
19 entirely on Mr. Stanley's age, 76, and his life expectancy
of living 5 years or attaining the age of 81 years old.

20 Decl. of Edward D. Outland (Mar. 14, 2005), p. 2.

21 At the hearing, on March 29, 2005, Trustee waived his right
22 to an evidentiary hearing in order to cross-examine the financial
23 adviser.⁴ On the evidence and argument presented, the bankruptcy
24 court ruled:

25 [T]his [annuity] is not calculated on the basis of age in
26 the way that 703.140(b)(10)(E) means, and therefore I'll

27 ⁴ Therefore, Trustee waived his right to an adversary-like
28 proceeding to resolve any disputed factual issues, as provided for
under Fed. R. Bankr. P. 9014(d).

1 sustain the objection, but that's without prejudice to
2 attempting to claim the property as exempt on some other
basis.[⁵]

3 Tr. of Proceedings (Mar. 29, 2005), p. 10:8-12 (footnote added).

4 The bankruptcy court therefore sustained Trustee's objections
5 to both of Debtor's exemption claims.⁶ The order was entered on
6 April 4, 2005, and was timely appealed by Debtor.

7
8 **ISSUE**

9
10 The sole issue is whether Debtor's annuity and annuity
11 payments were "on account of age," under the terms of CCCP
12 § 703.140(b)(10)(E), so as to be exempt assets.

13
14 **STANDARD OF REVIEW**

15
16 We review issues involving statutory construction, including
17 the bankruptcy court's application and interpretation of
18 California law, de novo. Cohen v. Tran (In re Tran), 309 B.R.
19 330, 333 (9th Cir. BAP 2004); Rawlinson v. Kendall (In re
20 Rawlinson), 209 B.R. 501, 502 (9th Cir. BAP 1997). Therefore, the
21 interpretation of the words "payment . . . on account of . . .
22 age," in CCCP § 704.140(b)(10)(E), is a legal question which we

23
24 ⁵ For example, the parties discussed with the court the
25 possibility of Debtor's purchase of the annuity in lieu of a
26 homestead exemption. Trustee's attorney opined that Debtor was
not entitled to a homestead exemption because he had not filed a
declaration of homestead. See CCCP § 704.960.

27 ⁶ Thus, the bankruptcy court did not need to determine
28 whether the \$2,656.40 in the savings account was traceable to the
annuity payments. Nor do we need to remand on that issue, based
on our disposition.

1 review de novo. See Estate of Dean Short v. Payne (In re Payne),
2 323 B.R. 723, 727 (9th Cir. BAP 2005). Whether Debtor's annuity
3 meets that definition is mixed question of law and fact which we
4 review de novo. See Searles v. Riley (In re Searles), 317 B.R.
5 368, 373 (9th Cir. BAP 2004) ("A mixed question of law and fact
6 exists if historical facts are established, the rule of law is
7 undisputed, and the issue is whether the facts satisfy the legal
8 rule.")

9 10 **DISCUSSION**

11 12 **A. Burden of Proof**

13
14 Once a debtor claims an exemption, a presumption arises that
15 the claim is valid. See 11 U.S.C. § 522(1). "[T]he objecting
16 party has the burden of proving that the exemptions are not
17 properly claimed." Fed. R. Bankr. P. 4003(c). Rule 4003(c)
18 purports to place both the burden of going forward with evidence
19 to rebut the presumption and the ultimate burden of proof on the
20 objecting party. See Carter v. Anderson (In re Carter), 182 F.3d
21 1027, 1029 n.3 (9th Cir. 1999) (construing an exemption under
22 California law and holding that the burden of persuasion,
23 according to Rule 4003(c), "always remains with the objecting
24 party").

25 However, such an allocation of the burden of proof may run
26 afoul of the Supreme Court's decision in Raleigh v. Ill. Dept. of
27 Rev., 530 U.S. 15 (2000). The Court held, in a proof of tax claim
28 matter, that when the dispute is governed by nonbankruptcy

1 substantive law, the burden of proof is dictated by that same
2 nonbankruptcy law. Id. at 21-22. Under California law, Debtor
3 had the ultimate burden of proving the propriety of his claimed
4 exemption. See CCCP § 703.580(b).

5 In this case, the bankruptcy court ruled that Debtor had the
6 ultimate burden of proof, and neither party has disputed this
7 conclusion.⁷ Moreover, as this appeal involves a legal question
8 applied to undisputed facts, there would be the same result if the
9 burden were placed upon either party.

10
11 **B. Statutory Interpretation: Annuity Payments**
12 **Were Not "On Account of Age"**

13 California has opted out of the federal exemption scheme and
14 provides its own bankruptcy exemptions. See § 522(d); CCCP
15 § 703.140(a), (b). Debtor claimed exemptions for his annuity
16 valued at \$60,000, as well as for annuity payments already
17 received in the amount of \$2,656.40, under CCCP
18 § 703.140(b)(10)(E), which is essentially identical to the federal
19 exemption under § 522(d)(10)(E). Thus, case law interpreting the
20 federal statute is applicable to our analysis of the state
21 statute. See Farrar v. McKown (In re McKown), 203 F.3d 1188,
22 1189-90 (9th Cir. 2000); Rawlinson, 209 B.R. at 503.

23 As with federal policy, under California law the purpose of
24 the exemption statutes is to "sav[e] debtors and their families
25 from want by reason of misfortune or improvidence." Little v.

26
27 ⁷ Judge Klein has opined that post-Raleigh, the Code's
28 procedural rule does not trump the applicable nonbankruptcy
substantive law. See Gonzales v. Davis (In re Davis), 323 B.R.
732, 740-45 (9th Cir. BAP 2005) (J. Klein, concurring op.).

1 Reaves (In re Reaves), 285 F.3d 1152, 1156 (9th Cir. 2002)
2 (alteration in original) (citation omitted). Thus, the California
3 exemption statutes are construed liberally. Payne, 323 B.R. at
4 727.

5 California's rules of statutory interpretation require that
6 courts "give effect to statutes according to the usual, ordinary
7 import of the language employed in framing them." Reaves, 285
8 F.3d at 1156 (citation omitted).

9 CCCP § 703.140(b)(10)(E) provides, in pertinent part (an
10 exception is inapplicable here), that the debtor may exempt:

11 (10) The debtor's right to receive any of the following:

12

13 (E) A payment under a stock bonus, pension,
14 profit-sharing, annuity, or similar plan
15 or contract on account of illness,
16 disability, death, age, or length of
service, to the extent reasonably
necessary for the support of the debtor
and any dependent of the debtor, . . .

17 CCCP § 703.140(b)(10)(E).

18 California's statute is essentially the same as the federal
19 statute. Under the federal counterpart, § 522(d)(10)(E)⁸,
20 Debtor's annuity must meet three requirements to be exempted:

21 (1) the right to receive payment must be from "a stock
22 bonus, pension, profitsharing, annuity, or similar

23 ⁸ Section 522(d)(10)(E) provides, in relevant part, an
24 exemption for a "debtor's right to receive":

25 (E) a payment under a stock bonus, pension, profit-
26 sharing, annuity, or similar plan or contract on
27 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,

28 11 U.S.C. § 522(d)(10)(E).

1 plan or contract”;

2 (2) the right to receive payment must be “on account of
3 illness, disability, death, age, or length of
service”;

4 (3) even then, the right to receive payment may be
5 exempted only “to the extent” that it is “reasonably
6 necessary to support [sic]” the accountholder or his
dependents.

7 Rousey v. Jacoway, 544 U.S. 320, ___, 125 S. Ct. 1561, 1566, 161
8 L. Ed. 2d 563 (2005) (quoting § 522(d)(10)(E)) (alteration
9 added).⁹

10 The only issue before us is whether the annuity met the
11 second requirement, and, specifically, whether it was “on account
12 of age.”¹⁰ Debtor makes three arguments why it was, as follows.

13
14 ⁹ Because Rousey was decided immediately after entry of the
15 order on appeal, we must consider its retroactive effect.
16 Retroactive application of judicial decisions is the general rule
17 unless one of three exceptions applies. Coopers & Lybrand v. Sun-
18 Diamond Growers of CA, 912 F.2d 1135, 1138 (9th Cir. 1990). The
19 three excepting factors are: “[t]he case must (1) establish a new
20 principle of law, either by deciding an issue of first impression
21 or by overruling clear past precedent; (2) state a rule for which
22 retroactive application would retard more than further the rule's
23 operation in light of its prior history, purpose, and effect; and
24 (3) avoid injustice or hardship if applied only prospectively and
25 produce substantial inequitable results if applied retroactively.”
26 Id. (quoting Orozco v. United Air Lines, Inc., 887 F.2d 949, 952-
27 53 (9th Cir. 1989)).

28 None of the exceptions applies in this case. Rousey affirmed
the Ninth Circuit’s position in McKown. Its reasoning clarifies
the interpretation of the exemption statute. Therefore, we may
consider Rousey in deciding this appeal.

¹⁰ Trustee only objected to the second requirement, but in
his pleadings and appellate brief stated that he was not conceding
that the annuity met the requirement of the first prong, that a
plan or annuity be a “substitute[] for wages earned as salary or
hourly compensation.” Rousey, 544 U.S. at ___, 125 S. Ct. at
1569. See also Appellee’s Brief (June 14, 2005), p. 18. Since
the first prong is a factual inquiry which was not addressed in
the bankruptcy court, we do not consider it for the first time in
this appeal. Nor do we need to remand, based on our decision,
today, that the annuity did not meet the second prong.

1 **Debtor's Argument No. 1: An Annuity Based on Life**
2 **Expectancy is "on Account of Age"**

3 Debtor purchased his annuity at age 76. His financial
4 adviser stated that its terms and payments "were based entirely on
5 [Debtor's] age, 76, and his life expectancy of living 5 years or
6 attaining the age of 81 years old." The amount of the monthly
7 payments was therefore determined by various factors, including
8 his age. Thus, Debtor contends that there was a "causal
9 connection" between his age and his right to receive the annuity
10 payments which meets the qualifications of CCCP
11 § 703.140(b)(10)(E).

12 Trustee counters that the annuity itself does not mention age
13 as a basis for the start date or the amount of the monthly
14 payments, and the payments merely started 30 days after the
15 purchase date.

16 Rousey controls even though the facts of that case differed
17 because it concerned an Individual Retirement Account ("IRA"). In
18 Rousey, the married debtors retired from the same company and were
19 required to take lump sums from their pension plan. They then
20 rolled over the lump sums into two IRAs, which qualified for
21 favorable tax treatment under the Internal Revenue Code ("IRC")
22 § 408(a). Under the IRC, the debtors could not withdraw funds
23 before reaching age 59½ without incurring a ten percent penalty.

24 Several years later, the debtors filed a joint chapter 7
25 bankruptcy petition and sought to exempt their IRAs under
26 § 522(d)(10)(E). The bankruptcy trustee objected, arguing that
27 the exemption statute did not apply to IRAs, and the bankruptcy
28

1 court agreed.¹¹ The court decided that the IRAs were not similar
2 to pensions, etc., because the debtors had "unlimited access" to
3 the assets in their IRAs, notwithstanding a penalty. Both the
4 Eighth Circuit Bankruptcy Appellate Panel and Circuit Court of
5 Appeals agreed. The Supreme Court granted review, largely because
6 the decision conflicted with a number of other circuits, including
7 the Ninth Circuit's McKown decision.

8 In its analysis, the Court examined the "on account of"
9 language. The Court agreed with prior interpretations of "on
10 account of" as meaning "because of," and "thereby requiring a
11 causal connection between the term that the phrase 'on account of'
12 modifies and the factor specified in the statute at issue."
13 Rousey, 544 U.S. at ___, 125 S. Ct. at 1566 (citing Bank of Am.
14 Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship, 526 U.S.
15 434, 450-51 (1999)). Since, in the federal statute, "on account
16 of" modifies "payment," then "'on account of' in § 522(d)(10)(E)
17 requires that the right to receive payment must be 'because of'
18 . . . age" Rousey, 544 U.S. at ___, 125 S. Ct. at 1566.

19 The Court then held that the IRAs' early withdrawal penalty
20 was substantial enough to affect the debtors' right to receive the
21 entire assets of the IRAs prior to age 59½. Thus, it held there
22 was a causal connection between their right to receive payments
23 from the IRAs and age. Id., 544 U.S. at ___, 125 S. Ct. at 1567-
24 68. That holding was consistent with the traditional
25 understanding of the "on account of" factors as being "triggering
26 events" for payment. See Jurgensen v. Chalmers, 248 B.R. 94, 99

27
28 ¹¹ Under BAPCPA, this will no longer be an issue. New
§ 522(d)(12) specifically exempts IRAs.

1 (W.D. Mich. 2000) (stating that the statutory factors are
2 "triggers" for payment); Rawlinson, 209 B.R. at 507 (stating that
3 the right to receive payment, under the California exemption
4 statute, must be triggered by one of the five enumerated
5 events) (citing Carmichael v. Osherow (In re Carmichael), 100 F.3d
6 375, 378 (5th Cir. 1996)); Huebner v. Farmers State Bank, 986 F.2d
7 1222, 1225 (8th Cir. 1993) (annuities lacked triggering event for
8 payment).

9 In the instant case, Debtor's annuity was distinguishable in
10 that it did not contain any contractual triggering language based
11 on age for the start of payments. Payments merely began after 30
12 days and thus were not commenced because Debtor reached a
13 particular age. There was no causal connection between payment
14 and age. Furthermore, an annuitant's present age and life
15 expectancy are always factors in planning for future income. The
16 statutory requirement of a causal connection between the payment
17 and age requires something more, or else every annuity would
18 automatically qualify for an exemption.

19 Therefore, the exemption applies only to those annuity
20 payments made "on account of . . . age" without regard to the
21 annuitant's age at the time of contracting. See Eilbert v.
22 Pelican (In re Eilbert), 162 F.3d 523, 528 (8th Cir. 1998). In
23 other words, "[t]he fact that the debtor is near or at retirement
24 age when the annuity is purchased does not create a presumption
25 that the payments are being made on account of the debtor's age.
26 Rather, *the date the benefit payments are to begin should be*
27 *related to the debtor's age"* Andersen v. Ries (In re
28 Andersen), 259 B.R. 687, 693 (8th Cir. BAP 2001) (emphasis added).

1 Accord, In re Weidman, 284 B.R. 837 (Bankr. E.D. Mich. 2002),
2 aff'd sub nom., Weidman v. Shapiro, 299 B.R. 429 (E.D. Mich. 2003)
3 (immediate annuity that daughter purchased, according to her
4 deceased mother's will, was not "on account of age," even though
5 it was triggered by the mother's death, at which time the daughter
6 was 47 years old).

7 Here, the payments began 30 days after purchase, not upon
8 Debtor's reaching a certain retirement age. Therefore, Debtor's
9 annuity payments were not "on account of age" merely because he
10 happened to be 76 years old when he entered into the contract, or
11 because his life expectancy and age were figured into the
12 investment decision for the annuity type and amount.

13
14 **Debtor's Argument No.2: "On Account of Age" Means**
15 **"Akin to Future Earnings"**

16 Next, Debtor contends that courts hold that the "on account
17 of age" requirement is met when the right to payment is a
18 substitute plan for post-retirement earnings.

19 Trustee disagrees and maintains that this factor is a
20 separate issue from whether a particular asset is "on account of
21 age." In any event, he maintains that Debtor's annuity was a
22 substitute for his deceased wife's social security benefits, not
23 for wages.

24 The Supreme Court in Rousey set forth the three-part test for
25 an exemption under § 522(d)(10)(E), with which the California
26 exemption statute is in accord. The first factor is that there
27 must be some sort of retirement income plan, such as an annuity.
28 See Rousey, 544 U.S. at ___, 125 S. Ct. at 1570. The second

1 factor is that the plan payments be "on account of . . . age."
2 Id. The third factor is that the annuity is exemptible only to
3 the extent that it is reasonably necessary for support. Id.
4 Debtor's argument confuses the elements in the first and second
5 factors, which the Supreme Court analyzed independently.

6 The first factor activates Congress' intent to make
7 § 522(d)(10)(E) an exemption for retirement income plans. "The
8 common feature of all of these plans is that they provide income
9 that substitutes for *wages earned as salary or hourly*
10 *compensation.*" Rousey, 544 U.S. at ____, 125 S. Ct. at 1570
11 (emphasis added). The legislative history to this statute
12 describes paragraph 10 as exempting "certain benefits that are
13 akin to future earnings of the debtor." H.R. Rep. No. 95-595,
14 95th Cong., 1st Sess., at 362 (1977), reprinted at 1978
15 U.S.C.C.A.N. 5787, 6318.

16 The Eighth Circuit, in Rousey, also recognized that the
17 debtors there "opened [their IRAs] with funds rolled over from a
18 pension plan that had been established over time as part of a
19 long-term retirement strategy and to which contributions had been
20 made." Rousey v. Jacoway (In re Rousey), 347 F.3d 689, 692 (8th
21 Cir. 2003), rev'd on other grounds, 544 U.S. 320 (2005). The
22 Eighth Circuit opined "that where an individual retirement account
23 serves as a substitute for future earnings, Congress would
24 probably consider it a 'similar plan or contract' as those
25 explicitly listed in § 522(d)(10)(E)." Id.

26 The Eighth Circuit then affirmed the denial of the exemption
27 because it erroneously held that the IRA payments were not "on
28 account of" illness, disability, death, age, or length of service,

1 see id. at 693, and was reversed by the Supreme Court on that
2 second factor. Nonetheless, the Eighth Circuit and the Supreme
3 Court treated the two requirements separately--yielding
4 requirements (1) and (2).

5 In our case, the bankruptcy court did not determine whether
6 Debtor's annuity was a wage substitute plan for retirement.
7 Instead, it ruled that the annuity did not qualify under the
8 second requirement that it be "on account of age." The issue on
9 appeal has been limited to the second factor.

10 Nonetheless, Debtor contends that an annuity purchased to
11 replace lost income and to serve as a guaranteed source of
12 retirement income is "on account of age." He cites two cases to
13 support this theory, Weidman and Eilbert. We hold that neither of
14 these cases supports Debtor's theory.

15 In Weidman, the debtor had purchased an annuity with a cash
16 inheritance. The bankruptcy and district courts held that the
17 annuity did not replace lost income and was not akin to future
18 earnings so as to qualify for the federal exemption. Weidman, 284
19 B.R. at 840. Weidman does not support Debtor's argument because
20 the bankruptcy court, there, analyzed the § 522(d)(10)(E)
21 requirements separately. The question of whether the annuity was
22 purchased to replace lost income or was akin to future earnings
23 was only applied in the court's determination of the first prong
24 of the statute.

25 In its analysis of the second prong, the court concluded that
26 the annuity was not "on account of age" because the debtor's
27 right to receive payments was not conditioned on any of the
28 factors listed in § 522(d)(10)(E). "Additionally, the fact that

1 the payments began when the debtor was 47 does not make them 'on
2 account of age.' The payments simply began at the time the
3 annuity was purchased, which was shortly after Weidman's mother
4 died." Id. at 841. Therefore, Weidman does not support Debtor's
5 theory.

6 Debtor also relies on Eilbert. In that case the debtor had
7 purchased a single-premium annuity with nonexempt inherited assets
8 and claimed it exempt under Iowa's statute, which was nearly
9 identical to § 522(d)(10)(E).

10 The Eighth Circuit analyzed the requirements separately.
11 First, the court found that the annuity payments were "not 'akin
12 to future earnings,'" and thus the annuity was "not a 'pension,
13 annuity, or similar plan or contract.'" Eilbert, 162 F.3d at 527.
14 Next, in examining the "on account of age" prong, the court did
15 not mention "lost income" or "wage substitute" as being a factor.
16 It concluded that the payments were not "on account of age"
17 because the debtor chose to begin receiving payments only two
18 months after the purchase date and had relatively unfettered
19 discretion over the corpus of the annuity. Id. at 527-28.
20 Therefore, neither does Eilbert support Debtor's theory.

21 We agree with Trustee that Debtor unnecessarily confused the
22 issues in making his argument. We conclude that the question of
23 whether or not Debtor chose an annuity as an income or wage
24 substitute is not a factor in analyzing whether the annuity
25 payments were "on account of age."

26

27

28

1 **Debtor's Argument No. 3. Annuity Was Exempt**
2 **Because Debtor Had No Access or Control**

3 Finally, Debtor contends that a self-employed individual who
4 does not have a retirement plan must nonetheless be able to claim
5 retirement income exempt. In this regard, he argues that an
6 annuity to which he has no access and over which he has no
7 unfettered control qualifies for exempt status.

8 Debtor maintains that the facts of this case are nearly
9 identical to those in Andersen, a pre-Rousey case. In 1986, at
10 age 58, the debtor in Andersen received an inheritance which she
11 used to purchase a single-premium annuity for \$40,000. Five years
12 later, in 1991, she elected to receive monthly payments starting
13 the next year upon her retirement, at age 64. She had been
14 receiving those benefits for about seven years when she filed a
15 chapter 7 bankruptcy petition, in 1999. She claimed the annuity
16 exempt under § 522(d)(10)(E), but the bankruptcy court denied the
17 claim.

18 On appeal, the Eighth Circuit BAP applied a series of factors
19 and determined that the annuity was a wage substitute, as required
20 under the first prong of § 522(d)(10)(E).

21 Next, the BAP examined whether the payments were "on account
22 of the debtor's age." Andersen, 259 B.R. at 693. For this
23 analysis, it applied the test used in Huebner v. Farmers State
24 Bank (In re Huebner), 986 F.2d 1222 (8th Cir. 1993), where
25 Huebner's "access to and complete control over the timing of the
26 annuity payments" had precluded a finding that the payments under
27 the contracts were on account of his age. Id. at 1225.
28 Similarly, it applied the same test used in Eilbert, where "the

1 claim of exemption failed because the debtor, already beyond the
2 age of seventy, selected a date only two months after the
3 annuity's effective date, not one linked to her age, and she had
4 complete discretion to make larger withdrawals or surrender the
5 annuity for a lump sum distribution." Andersen, 259 B.R. at 693
6 (discussing Eilbert).

7 The BAP concluded that the debtor's situation was
8 distinguishable from both Huebner and Eilbert, in that she had
9 purchased the annuity 13 years before bankruptcy as retirement
10 income, she elected for her payments to begin upon her retirement,
11 and, after election, she had no discretion as to the timing or
12 amount of the payments and no right to access the corpus.¹² Id. at
13 694.

14 Debtor contends that his inability to access the annuity
15 funds or control the amount of the payments means that his
16 payments are similarly "on account of age." We believe Debtor has
17 distorted the analysis. Andersen actually holds that access and
18 control can only affect the "on account of age" analysis if there

19
20 ¹² In Andersen, the BAP emphasized other factors going to the
21 first prong analysis, such as the debtor's annuity being a
22 substitute retirement plan which was purchased five years before
23 the date the debtor actually retired and 13 years before filing
24 bankruptcy. Without addressing the first prong, we note that, in
25 contrast to the facts in Andersen, here, Debtor purchased his
26 annuity with nonexempt sale proceeds after he was retired and
27 approximately six months prior to filing bankruptcy. As was the
28 case in Eilbert, prebankruptcy planning was involved. See
Eilbert, 162 F.3d at 527. In Payne, another recent case where we
held that the debtor's annuity was not exempt life insurance under
CCCP § 704.100(c), a similar fact pattern emerged. Although we
remanded for a factual analysis, we viewed the exemption as simply
an attempt to shift a nonexempt asset into an exempt form, albeit
transparent, and stated: "A court cannot rewrite California
exemption law to accommodate debtors who might fail in their
attempt to convert nonexempt assets into exempt assets." Payne,
323 B.R. at 731.

1 is unfettered access and control over payments which are already
2 "on account of age." Although its examination of that issue is
3 somewhat opaque, the BAP concluded that the debtor's election to
4 start payments immediately upon her retirement was "on account of
5 age." Id. The BAP did not hold that the payments were "on
6 account of age" merely because the debtor did not have access and
7 control. Moreover, to the extent that the BAP so held in reliance
8 on the "access and control" test of Huebner and Eilbert (which
9 also applied the Huebner test) its analysis must be read in light
10 of the reversal concerning IRAs in Rousey.

11 Huebner concerned two annuities which qualified as Individual
12 Retirement Annuities under the IRC. They provided that the debtor
13 could "withdraw all or part of the cash value . . . on any date
14 while [he was] still alive." Huebner, 986 F.2d at 1224. However,
15 the three payment options were subject to penalties for any
16 withdrawals before age 59½. Id. at 1225. The Eighth Circuit held
17 that the annuities were not "on account of age" because the debtor
18 had "unfettered discretion to receive payments at any time under
19 any of the three payment options, subject only to relatively
20 modest penalties for withdrawals before age 59½." Id.

21 Ten years after Huebner, the Eighth Circuit followed its
22 precedent in holding that IRAs were not exempt because the debtors
23 had unlimited access to the funds despite an early withdrawal
24 penalty before age 59½. Rousey, 347 F.3d at 693. However, that
25 decision was overturned on appeal to the Supreme Court, which
26 found that the penalty for withdrawal before age 59½ substantially
27 restricted the debtors' access and control of the IRAs. Because
28 the debtors had some but not complete access and control of the

1 corpus before age 59½, the court determined that the IRA payments
2 were "on account of age." Rousey, 544 U.S. at ___, 125 S. Ct. at
3 1567.

4 Here, it was agreed that Debtor has no access to the corpus
5 of the annuity nor any control over the timing of payments, rather
6 than having some or unfettered control. Significantly, the
7 payments were not linked to a specific age. Our facts do not
8 concern an IRA, an early withdrawal penalty related to age, nor
9 any other "trigger" as to age and the start of the annuity
10 payments, and thus our case is distinguishable from Andersen. We
11 therefore conclude that Debtor's lack of any access to and control
12 over the annuity was not a determinative factor as to whether the
13 annuity payments were "on account of age."

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15 In summary, Debtor's annuity simply provided for monthly
16 payments to Debtor to begin immediately after his purchase of the
17 annuity and to continue for five years, either to him, or if he
18 died, to his beneficiaries. The annuity payments were not "on
19 account of age," and therefore did not meet all of the
20 requirements for an exemption under California law.

21 We conclude that the bankruptcy court did not err in holding
22 that Debtor's right to receive the annuity payments was not exempt
23 under CCCP § 703.140(b)(10)(E).

24
25 **C. \$2,656.40 in Bank Account Was Not Exempt**

26
27 Because we affirm the bankruptcy court's decision that the
28 annuity was nonexempt, we also affirm the decision that the

1 \$2,656.40 in annuity payments, which were held in the bank
2 account, were likewise nonexempt.

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CONCLUSION

When Debtor sold his home in order to live off of the nonexempt equity, his purchase of an annuity for that purpose was not a right to receive the annuity payments "on account of age," as that term is used in CCCP § 703.140(b)(10)(E). The bankruptcy court correctly interpreted and applied California law in determining that Debtor's annuity did not meet all of the requirements for an exemption under state law. Therefore, we AFFIRM the bankruptcy court's order sustaining Trustee's objection.