NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-05-1136-MaSB
STEVE WILLIAM STANLEY,	Bk. No. 04-34637-C7
Debtor.	
STEVE WILLIAM STANLEY,	
Appellant,	**M E M O R A N D U M**[1]
v.	
PREM N. DHAWAN, Chapter 7 Trustee,	
Appellee.	

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.

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[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.

INTRODUCTION

The bankruptcy court sustained an objection by the chapter 7[2] trustee ("Trustee") to the debtor's claimed exemptions in a $60,000 annuity and $2,656.40 in alleged annuity payments being held in a bank account.[3]

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

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

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[2] Unless otherwise indicated, all chapter and section references are to the unamended Bankruptcy Code, 11 U.S.C. §§ 101-1330, in effect when this case was filed, and prior to the 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.

[3] The bankruptcy court order also overruled Trustee's 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.

FACTS

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

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

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

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

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

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

> 5. I consulted with Mr. Stanley in regards to his age, health, life expectancy, and his current income requirements.
>
> 6. After exploring several investments [sic] options, we settled upon the Single Premium Immediate Annuity that Mr. Stanley later opened . . . .
>
> 7. This annuity was determined to be the best option for Mr. Stanley based on his age and his lack of future earnings or income.
>
> 8. The terms and payments of the annuity were based entirely on Mr. Stanley's age, 76, and his life expectancy of living 5 years or attaining the age of 81 years old.

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

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

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

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

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

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

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

ISSUE

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

STANDARD OF REVIEW

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

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[5] For example, the parties discussed with the court the possibility of Debtor's purchase of the annuity in lieu of a 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.

[6] Thus, the bankruptcy court did not need to determine 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.

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

DISCUSSION

A. Burden of Proof

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

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

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

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

B. Statutory Interpretation: Annuity Payments Were Not "On Account of Age"

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

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

[7] Judge Klein has opined that post-Raleigh, the Code's 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.).

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

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

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

> (10) The debtor's right to receive any of the following:
>
> . . . .
>
> (E) A payment under a stock bonus, pension, profit-sharing, 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, . . .

CCCP § 703.140(b)(10)(E).

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

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

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

> (E) a payment under a stock bonus, pension, profit-sharing, 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, ...

11 U.S.C. § 522(d)(10)(E).

plan or contract";

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[12] In Andersen, the BAP emphasized other factors going to the first prong analysis, such as the debtor's annuity being a substitute retirement plan which was purchased five years before the date the debtor actually retired and 13 years before filing bankruptcy. Without addressing the first prong, we note that, in contrast to the facts in Andersen, here, Debtor purchased his annuity with nonexempt sale proceeds after he was retired and approximately six months prior to filing bankruptcy. As was the 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.

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

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

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

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

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

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

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

C. $2,656.40 in Bank Account Was Not Exempt

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

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

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.