

October 19, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

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

IN RE JACK JOE KENNEDY, also
known as Jack J. Kennedy, also known
as Jack Kennedy, member of Austin
Bluffs Window & Door, LLC., and
PATRICIA ANN KENNEDY, also
known as Patricia A. Kennedy, also
known as Patricia Kennedy, formerly
doing business as Answer Rite
Telecommunications,

Debtors.

BAP No. CO-05-033

JACK JOE KENNEDY and PATRICIA
ANN KENNEDY,

Appellants,

v.

LYNN MARTINEZ, Trustee,

Appellee.

Bankr. No. 05-10064-ABC
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before McFEELEY, Chief Judge, CLARK, and NUGENT, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Appellants Jack Joe Kennedy and Patricia Ann Kennedy appeal from an order of the Bankruptcy Court for the District of Colorado sustaining the objection of Appellee Lynn Martinez, the Chapter 7 trustee, to their claimed

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

exemption of certain annuity proceeds (the “Order”).¹ We AFFIRM.²

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit,³ unless one of the parties elects to have the district court hear the appeal. The parties did not elect to have this appeal heard by the United States District Court for the District of Colorado, thus consenting to review by this Court.⁴

Statement of the Case

Appellants filed this bankruptcy case on January 3, 2005. Their Schedule B includes a reference to an annuity “with First Colony Life Insurance through Bank1One [sic]”⁵ The Schedule entry further notes that “Debtor borrowed against this annuity, the loan is automatically re-paid with the monthly proceeds.”⁶ According to the Schedules, the monthly payments are \$1,209.28. Mrs. Kennedy owns the annuity. Debtors claimed this annuity and its proceeds as exempt citing Colo. Rev. Stat. § 10-7-106 (1999).⁷ Appellants have not included a copy of the annuity contract as part of the record on appeal.

Appellee filed a timely objection to this exemption, and Appellants filed a written response. From the bankruptcy court’s docket, it appears that a hearing on the objection was set for April 13, 2005, and the docket sheet reflects the

¹ Appellants’ Appendix at 15.

² The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

³ 28 U.S.C. § 158 (a)(1), (b)(1), and (c)(1); Fed R. Bankr. P. 8002.

⁴ 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001(e).

⁵ Appellants’ Appendix at 5.

⁶ *Id.*

⁷ Appellants’ Appendix at 8.

filing of “Minutes of Proceeding” relating to the Appellee’s objection to this exemption. We have not been supplied with either the minutes or a transcript of the hearing. On April 14, 2005, the bankruptcy court entered an Order that states that “the facts are not in dispute concerning this claimed exemption” and holds that in accordance with a prior decision of another bankruptcy court sitting in Colorado, *In re Raymond*,⁸ the Colorado statute “is not an exemption statute.”⁹ This is the entirety of the factual record before us today.

Issue on Appeal and Standard of Review

The parties have framed the issue on appeal not as one of whether the Appellant’s annuity should be exempt under Colo. Rev. Stat. § 10-7-106, but rather, whether that statute is an exemption statute. This issue involves questions of both fact and law. We review the bankruptcy court’s factual findings for clear error and its resolution of any issues of law *de novo*.¹⁰

Analysis

“A claimed exemption is presumptively valid unless a creditor objects.”¹¹ Under Fed. R. Bankr. P. 4003(c), the burden of proof falls upon the objecting

⁸ 132 B.R. 53 (Bankr. D. Colo. 1991) (construing Colo. Rev. Stat. § 13-54-102(1)(I) and holding that cash surrender value of life insurance policy was not exempt; annuity policy was not “life insurance” within meaning of Colorado exemption statute), *aff’d on other grounds*, 987 F.2d 675 (10th Cir. 1993), *abrogated in part by In re Griese*, 172 B.R. 336 (Bankr. D. Colo. 1994) (holding that cash surrender value of life insurance policy was exempt under Colo. Rev. Stat. § 13-54-102(1)(I)).

⁹ Appellants’ Appendix at 15.

¹⁰ *In re Hodes*, 402 F.3d 1005, 1008 (10th Cir. 2005) (validity of claimed state law homestead exemption in monies deposited with a builder for improvements); *In re Lampe*, 331 F.3d 750, 753 (10th Cir. 2003) (tools of the trade exemption).

¹¹ Hon. Barry Russell, *Bankruptcy Evidence Manual* § 301.59 (Thomson/West 2005) (citing 11 U.S.C. § 522(b)).

party to prove that the exemption is not properly claimed.¹² If the objecting party rebuts this presumption of validity, the *burden of production* shifts to the debtor to come forward with evidence to demonstrate the exemption's validity.¹³ We must first consider the merit of Appellee's assertion below that the exemption claim is invalid. If the Appellee successfully overcomes the presumption of validity, we then determine if the bankruptcy court erred in finding that the Appellants failed to carry their burden of production.

The Appellee's objection was primarily legal in nature, denying that Colo. Rev. Stat. § 10-7-106 creates a statutory exemption for annuity payments. The statute reads as follows:

§ 10-7-106. Exclusive right of insured in proceeds

Whenever, *under the terms of any annuity or policy of life insurance, or under any written agreement supplemental thereto, issued by any insurance company, domestic or foreign, lawfully doing business in this state, the proceeds are retained by such company at maturity or otherwise, no person, other than the insured, entitled to any part of such proceeds or any installment of interest due or to become due thereon shall be permitted to commute, anticipate, encumber, alienate, or assign the same, or any part thereof, if such permission is expressly withheld by the terms of such policy or supplemental agreement; and, if such policy or supplemental agreement so provides, no payments of interest or of principal shall be in any way*

¹² *Hodes*, 402 F.3d at 1010; *Lampe*, 331 F.3d at 754.

¹³ *See In re Gregory*, 245 B.R. 171, 174 (10th Cir. BAP) (If the objecting party can produce evidence to rebut the exemption, the burden then shifts back to the debtor to come forward with evidence to demonstrate that the exemption is proper.), *aff'd without published opinion*, 246 F.3d 681 (10th Cir. 2000); *Farm Credit Bank v. Hodgson (In re Hodgson)*, 167 B.R. 945, 950 (D. Kan. 1994) (noting distinction between burden of proof and burden of production); *Gagne v. Bergquist*, 179 B.R. 884, 886 (D. Minn. 1994) (in a case where debtor's claimed exemption in annuity was denied, the debtor never produced the annuity to the trustee and therefore, the trustee did not present evidence in support of his objection to the claimed exemption; the bankruptcy court must still make a determination that the claimed exemption reasonably falls within an exempt category); *In re Barnes*, 275 B.R. 889, 898-99 (Bankr. E.D. Cal. 2002) (debtors' annuity was not exempt under California's unmaturing life insurance policy exemption statute; debtors are duty bound by 11 U.S.C. § 521(4) to provide a copy of the annuity contract to the trustee; bankruptcy court refused to place the trustee in the "impossible position" of objecting to the exemption without knowing what is in the annuity contract.).

*subject to such person's debts, contracts, or engagements nor to any judicial processes to levy upon or attach the same for payment thereof.*¹⁴

Although this law has been in the Colorado statute books since 1925, there are no published Colorado appellate court decisions interpreting it. As noted by the parties, a number of states have adopted a substantially similar, if not identical, version of this statute.

Carefully parsing this statute, it provides that when an insurer or provider of an annuity is, under the terms of the contract, to retain the contract's proceeds for payment to the beneficiary or annuitant, the beneficiary or annuitant may only assign or otherwise alienate them if the contract specifically so provides. Similarly, if the contract specifically provides that the proceeds shall not be subject to the beneficiary's debts, the proceeds will be protected from the beneficiary's creditors. In a case treating a similar Kansas statute,¹⁵ one bankruptcy court has stated:

[T]he statute establishes two conditions for the operation of the language in the main clause: (1) there must be a contract of annuity entered into with a person for the benefit of another person, and (2) the contract must contain provisions that restrict the beneficiary's right to alienate the annuity or its proceeds or the ability of his or her creditors to attachment [sic] them. When these conditions are met, the beneficiary is prohibited from alienating and his creditors from attaching the proceeds. Only when the contract contains provisions stating that the person entitled to the proceeds cannot alienate them and that they cannot be attached by creditors can the main clause be operative.¹⁶

We have not been provided with any legislative history concerning the Colorado statute. Nor have we been afforded an opportunity to review the provisions of the annuity contract at issue. We therefore cannot tell whether the contract contained language restricting the alienation of proceeds by the

¹⁴ Colo. Rev. Stat. § 10-7-106 (1999) (Emphasis added).

¹⁵ Kan. Stat. Ann. § 40-414a (2000).

¹⁶ *In re Hayes*, 168 B.R. 717, 730 (Bankr. D. Kan. 1994).

beneficiary or the execution upon those proceeds by a creditor. In the absence of the annuity contract it cannot be determined whether its provisions would satisfy the requirements of the Colorado statute.

We observe that two courts that have examined statutes similar to Colorado's have concluded that the statutes render a beneficiary's interest exempt only when the terms of the annuity or insurance contract expressly prohibit assignment or alienation of the beneficiary's rights.¹⁷ We also note that, outside the bankruptcy context, the Pennsylvania Supreme Court has determined that the purpose of an identical statute¹⁸ is to protect the family of a beneficiary.¹⁹

To determine whether Colo. Rev. Stat. § 10-7-106 is an exemption statute, we must consider the Colorado statutory exemption scheme as it relates to annuities and life insurance. First, we are directed to no Colorado statute that expressly establishes an exemption in any form of an annuity.²⁰ The Colorado Legislature has provided that group life insurance policies and their proceeds are

¹⁷ See *Id.* (Kan. Stat. Ann. § 40-414a does not operate to exclude annuity payments where the annuity contract contains no language restricting alienation or shielding from creditors.). See also *In re Sloss*, 279 B.R. 6, 13 (Bankr. D. Mass. 2002) (“The section is narrowly focused and protects a beneficiary’s interest from his or her creditors only where the terms of the policy *expressly* prohibit the beneficiary from ‘commut[ing], anticipat[ing], encumber[ing], alienat[ing] or assign[ing]’ that interest in the policy. Mass. Gen. Laws ch. 175, § 119A”).

¹⁸ 40 Pa. Stat. Ann. §§ 514, 517 (1923) (current version of § 517 at 42 Pa. Stat. Ann. § 8124(c)).

¹⁹ *Resolute Insurance Co. v. Pennington*, 224 A.2d 757, 759-60 (Pa. 1966) (“[T]his statute was intended to protect the family of the insured, and their creditors may not attach proceeds due them under a life insurance contract, so long as such funds remain in the hands of the insurance company.”).

²⁰ Annuities are fundamentally different from policies of life insurance. As succinctly stated by one commentator, an annuity is a purchased right to receive fixed or periodic payments for life or a stated period of time. The annuitant has an interest only in the right to receive the payments, not in the principal fund that is their source. Life insurance, by contrast, is an absolute obligation for a stipulated consideration to pay a sum certain at the death of the insured. See 1 *Couch on Insurance* §§ 1:22, 1:39 (3rd ed. 2003).

exempt.²¹ It has also enacted an exemption of the cash surrender value of life insurance policies up to a limit of \$50,000.²² This provision is found within the statute that enumerates many of Colorado’s exemptions, Colo. Rev. Stat. § 13-54-102(1), and states in part:

The following property is exempt from levy and sale under writ of attachment or writ of execution:

. . . .

(I)(I)(A) The cash surrender value of policies or certificates of life insurance to the extent of fifty thousand dollars for writs of attachment or writs of execution issued against the insured; except that there is no exemption for increases in cash value from moneys contributed to a policy or certificate of life insurance during the forty-eight months prior to the issuance of such writ of attachment or writ of execution; and

(B) The proceeds of policies or certificates of life insurance paid upon the death of the insured to a designated beneficiary, without limitation as to amount, for writs of attachment or writs of execution issued against the insured.²³

The exemption is very limited, though, as § 13-54-102(1)(I)(II) denies protection from the “attachment or execution of the proceeds of any policy or certificate of life insurance to pay the debts of a beneficiary of such policy or certificate,”²⁴ and subparagraph III similarly denies protection from attachment or execution on proceeds of the policy where the beneficiary is the estate of the insured.²⁵

In short, Colorado’s legislature has enacted a carefully-wrought, limited life insurance exemption. These limitations are entirely inconsistent with the Appellants’ broad interpretation of § 10-7-106, which, according to their argument, would exempt the proceeds of her annuity in their entirety, assuming

²¹ Colo. Rev. Stat. § 10-7-205 (1999).

²² Colo. Rev. Stat. § 13-54-102(1)(I)(A) (2005).

²³ *Id.* § 13-54-102(1)(I).

²⁴ *Id.* § 13-54-102(1)(II).

²⁵ *Id.* § 13-54-102(1)(III).

that the annuity contract contained the necessary language abridging her right to alienate her interest in the proceeds. Considering that § 13-54-102 has been amended as recently as 2002²⁶ and that § 10-7-106 has remained in the statute book undisturbed since 1925, we may confidently predict that a Colorado state appellate court would conclude that the specific application of § 13-54-102(1)(I) trumps the broad ambit of the elder statute absent proof that the language of the insurance or annuity contract provided a restriction on alienation or execution.

In the Order, the bankruptcy court relied on a previous Colorado bankruptcy case, *In re Raymond*,²⁷ to hold that § 10-7-106 is not an exemption statute. In *Raymond*, the debtor sought to exempt all of the cash value of an insurance policy, \$9,850, under the then-effective version of § 13-54-102(1)(I), which limited the life insurance exemption to the “avails of policies . . . to the extent of five thousand dollars.”²⁸ The debtor argued that § 10-7-106 provided an unlimited exemption in the insurance policies. After concluding that “avails” meant the proceeds or death benefit as opposed to cash value, the *Raymond* court held that § 10-7-106 was enacted as a prohibition against the alienation of the insured’s interest in the policy by anyone other than the insured “if permission to do so is expressly withheld by the terms of the policy.”²⁹ The court further commented that the “obvious” purpose of the statute was to protect insurers from administrative uncertainty arising from multiple assignments of or executions

²⁶ Prior to the 1981 amendment, § 13-54-102(1)(I) exempted “[t]he avails of policies or certificates of life insurance to the extent of five thousand dollars.” The 1995 amendment redesignated this section as sub-subparagraphs (1)(I)(A) and (B). See Historical and Statutory Notes, Colo. Rev. Stat. § 13-54-102 (2005).

²⁷ 132 B.R. 53 (Bankr. D. Colo. 1991), *aff’d on other grounds*, 987 F.2d 675 (10th Cir. 1993), *abrogated in part by In re Griese*, 172 B.R. 336 (Bankr. D. Colo. 1994).

²⁸ See note 26, *supra*.

²⁹ *Raymond*, 132 B.R. at 55.

against an insured's interests.³⁰ More importantly, the *Raymond* court pointed out that the Colorado legislature knew well how to exempt insurance benefits in their entirety because it enacted § 10-7-205 exempting all group life insurance policies. The *Raymond* court thus concluded that § 10-7-106 "is not an exemption statute."³¹ And, in *Raymond*, as in this case, the bankruptcy court was not offered the insurance policies in evidence and could not determine whether they contained the restricting language that § 10-7-106 authorizes.³² The *Raymond* court also denied debtors' claimed exemption in an annuity policy, determining that an annuity is different from life insurance and did not fall under the life insurance exemption statute.³³

Three years after *Raymond*, the Colorado bankruptcy court decided *In re Griese*.³⁴ The same bankruptcy court that had decided *Raymond* was again faced with a trustee's objection to a claimed exemption in the cash surrender value of a life insurance policy. Noting that a Tenth Circuit decision had effectively overruled its interpretation of "avails" in *Raymond*, the bankruptcy court re-examined its previous decision and this time held that "avails" as used in § 13-54-102(1)(l) included the cash surrender value of life insurance policies.³⁵ But the bankruptcy court in *Griese* did not address § 10-7-106 and did not disturb its earlier conclusion in *Raymond* that § 10-7-106 was not an exemption statute. Nor did it discuss or retreat from its analysis and conclusion in *Raymond* that an

³⁰ *Id.*

³¹ *Id.* at 55-56.

³² *Id.* at 56.

³³ *Id.*

³⁴ 172 B.R. 336 (Bankr. D. Colo. 1994).

³⁵ *Id.* at 337. The same version of § 13-54-102 was in effect when both *Raymond* and *Griese* were decided. The current form of § 13-54-102 was not enacted until 1995.

annuity policy is not a life insurance policy subject to the exemption statute.³⁶

Here, the record on appeal does not include any reference to the admission into evidence of the annuity contract, thus preventing us from knowing whether it contained the provisions restricting alienation and assignment.³⁷ Further, we conclude that Colorado has enacted a comprehensive exemption scheme that provides for the limited exemption of life insurance benefits in certain circumstances.³⁸ As noted above, that scheme is discrete from § 10-7-106, which only has effect when life insurance policies or annuities contain specific language restraining the alienation of the contract's benefits by persons other than the insured.

As a matter of proof, once the Appellee successfully rebutted the exemption's presumption of validity, the burden to produce evidence showing its validity shifted to the Appellants. Because of the paucity of the record,³⁹ we cannot ascertain whether the Appellants even attempted to prove that the annuity contract contained the necessary language to invoke § 10-7-106's protection. We therefore cannot conclude that the bankruptcy court erred either in its factual findings or its legal conclusion. The bankruptcy court's Order sustaining the trustee's objection to the Appellants' claimed exemption in the annuity proceeds is AFFIRMED.

³⁶ *Raymond*, 132 B.R. at 56.

³⁷ *See Barnes*, 275 B.R. at 898-99 (debtors had burden to provide a copy of the annuity contract to the trustee); *Gregory*, 245 B.R. at 174 (once presumption of validity is rebutted by objecting party, the burden then shifts back to the debtor to come forward with evidence to demonstrate that the exemption is proper).

³⁸ Colo. Rev. Stat. § 13-54-102(1)(I) (2005).

³⁹ *See Travelers Indemnity Co. v. Accurate Autobody, Inc.*, 340 F.3d 1118, 1121 (10th Cir. 2003) (Appellant has burden to provide adequate record to show claim of error; failure to include general liability insurance policy that was at issue in declaratory judgment precluded review.); *In re Vaughan*, 311 B.R. 573, 584 (10th Cir. BAP 2004) (It is the responsibility of counsel to see that record excerpts are sufficient for consideration and determination of issues on appeal.).