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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 79,495

In Re:

PAULA L. McCOLLAM,

Debtor.

THOMAS E. LeCROY,

Appellant/Plaintiff,

vs.

PAULA L. McCOLLAM,

Appellee/Defendant.

Certified Question from the United States Court of Appeals, Eleventh Circuit

APPELLEE'S ANSWER BRIEF ON CERTIFIED QUESTION

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PREFACE

This case is before this court on certified question from the Eleventh Circuit Court of Appeals in a case which originated in the Bankruptcy Court in the Southern District of Florida. Appellant/creditor, Thomas E. LeCroy, was the plaintiff/appellant in the lower courts and appellee/debtor, Paula L. McCollam, was the defendant/appellee. The parties are referred to herein as creditor and debtor. The record will be referenced as transmitted to the United States Court of Appeals for the Eleventh Circuit and to the record excerpts filed therein along with the appellant/creditor's brief.

The debtor is a beneficiary/payee under an annuity contract purchased by Travelers Insurance Company pursuant to a structured settlement agreement. The debtor claimed the annuity as an exemption in bankruptcy from the claims of creditors pursuant to Section 222.14, Florida Statutes (1989) (R1-1-60). The creditor objected and the Bankruptcy Court overruled the creditor's objection to the debtor's exception of the annuity (R1-1-32, Item 2 of Record Excerpts; R1-1-8, Item 4 of Record Excerpts). The United States District Court for the Southern District affirmed the Bankruptcy Court's ruling (R1-8-1, Item 5 of Record Excerpts). The creditor appealed to the Eleventh Circuit (R1-10-1), who issued an opinion and certified the following question to this court:

CERTIFIED QUESTION

WHETHER, AS A MATTER OF LAW, AN ANNUITY CONTRACT WHICH IS ESTABLISHED IN LIEU OF A CREDITOR PAYING A DEBTOR A LUMP SUM PRESENTLY OWED IS EXEMPT FROM CREDITOR CLAIMS IN BANKRUPTCY UNDER FLA. STAT. §222.14.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

The debtor accepts the creditor's statement of the course of proceedings and dispositions in the courts below.

STATEMENT OF THE FACTS AND NATURE OF THE CASE

The debtor agrees with the creditor's statement of the facts except for the statement that the annuity contract was purchased only as security for the payment. The documents clearly state that the proceeds of the annuity contract are paid directly to the debtor as beneficiary. Travelers' debt is extinguished with each payment under the annuity. Travelers is only responsible for payment to the debtor if the annuity company does not make the payments.

The creditor's statement also requires supplementation with the following facts, contained in the Bankruptcy Court's order on the objection to exceptions and the District Court's order dismissing the appeal: The debtor is a resident of Florida and the payee/beneficiary under an annuity contract Travelers Insurance Company purchased pursuant to a general release and settlement

agreement dated July 9, 1985 (R1-1-32, Exhibit A, Item 2 of Record Excerpts). The annuity provides payments to the debtor in settlement of her claim for damages against various third parties for her own personal injuries and for the death of her father. The creditors claim against the debtor resulted from an auto accident the debtor's husband had two years after the annuity contract issued. The creditor's claim was not in existence when the annuity contract was issued. The creditor has not alleged any fraud in connection with Travelers' purchase of the annuity.

SUMMARY OF ARGUMENT

The Eleventh Circuit acknowledged that the statute "on its face, appears to exempt all annuity contracts", but that the creditor presented a viable argument against a "literal interpretation of this statute". In Re McCollam, 955 F.2d 678 (11th Cir. 1992). Under well established Florida law, which the Eleventh Circuit may have overlooked, a statute must be given a literal interpretation except where a literal interpretation leads to an "unreasonable or ridiculous conclusion". Holly v. Auld, 450 So.2d 217 (Fla. 1984). It is also well established that the courts of this state are without power to construe an unambiguous statute in a way which would modify or limit its express terms. Id., at 219. In addition, exemption statutes must be liberally construed in favor of the debtor. Killian v. Lawson, 387 So.2d 960, 962 (Fla. 1980).

The creditor makes no argument that the contract under which Executive Life makes periodic payments to the debtor is not an annuity. Nor does the creditor argue that the statute is ambiguous. The creditor only argues that because this annuity was the consideration for settlement of wrongful death and personal injury claims, it should be treated differently under the statute than an annuity which is not the product of the settlement of a tort claim. The only authorities cited by creditor are cases from other jurisdictions in which the exemption statutes are different from Florida's statute.

There is no question but that the debtor's income here is derived from an annuity. To draw a distinction between this annuity and any other annuity, such as a retirement annuity, would be a distinction without a difference. The certified question should be answered in the affirmative.

ARGUMENT

CERTIFIED QUESTION

WHETHER, AS A MATTER OF LAW, AN ANNUITY CONTRACT WHICH IS ESTABLISHED IN LIEU OF A CREDITOR PAYING A DEBTOR A LUMP SUM PRESENTLY OWED IS EXEMPT FROM CREDITOR CLAIMS IN BANKRUPTCY UNDER FLA. STAT. §222.14.

Section 222.14, Florida Statutes (1989), exempts the proceeds of annuity contracts "upon whatever form" issued to citizens or

residents of Florida from attachment, garnishment or legal process and provides in pertinent part as follows:

> [T]he proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless ... the annuity contract was effected for the benefit of such creditor.

Under the unambiguous statutory language, the proceeds of annuity contracts, in whatever form, are exempt from the claim of creditors of the beneficiary of that annuity. As this court held in Holly v. Auld, 450 So.2d 217 (Fla. 1984), on page 219 of its opinion:

> ...[C]ourts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. American Bankers Life Assurance Company of Florida v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968) (emphasis added).'

With all due respect to the Eleventh Circuit, that court's opinion in and of itself demonstrates that there is no ambiguity in the statute. For example, the Eleventh Circuit states on page 680 of its opinion:

> The Florida statute, on its face, appears to exempt all annuity contracts from creditor claims in bankruptcy, regardless of the underlying obligations that the contracts represent. Appellant, however, presents a viable argument against such a literal interpretation of this statute. (Emphasis added) In re McCollam, 955 F.2d 678, 680 (11th Cir. 1992).

It is well established in this state that it is only when a literal interpretation of a statute would lead to "an unreasonable or ridiculous conclusion" that a statute is not interpreted literally. Holly v. Auld, supra; Johnson v. Presbyterian Homes of Synod of Florida, Inc., **239** So.2d 256 **(Fla. 1970)**; State v. Sullivan, 95 Fla. 191, 116 So. 255 (1928). The conclusion that the annuity in this case is an annuity covered by this statute can under no circumstances be considered an unreasonable or ridiculous conclusion.

The United States Supreme Court was recently presented with an analogous situation in John R. Patterson, Trustee v. Joseph B. Shumate, Jr., 6 FLW Fed. S416 (U.S. June **15, 1992),** in which the issue was whether an ERISA-qualified pension plan, which contained a restriction on transfer, was exempt from a bankruptcy estate. The Court rejected arguments based on legislative history, legislative intent, or policy reasons, stating:

> In our view, the plain language of the Bankruptcy Code and **ERISA** is our determinant. ...The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. Id., at S417. (Emphasis added)

The Court went on to conclude that it had to "enforce the statute according to its terms" *so* long as the pension plan satisfied the "literal **terms"** of the statute. **Id.,** at S418. Utilizing the Supreme Court's method of analysis, there is only one conclusion

which can be drawn in this case, that the annuity proceeds are exempt.

The creditor makes no argument that this statute is ambiguous, only that it should not be interpreted literally (Appellant's initial brief, pages 12-13). The creditor's entire argument is that, despite the unambiguous language of the statute, cases in other jurisdictions (with distinguishable statutes) have held that this type of annuity is not exempt.

It is undisputed that the debtor is the beneficiary and payee under an annuity contract. The creditor argues that the court should ignore the unambiguous statutory language and the undisputed fact that the proceeds in dispute derive from an annuity contract, and hold that the annuity proceeds are akin to accounts receivable and, therefore, not exempt. Under the creditor's analysis, the proceeds from the annuity cannot be exempt because,

> In the beginning, there was a debt owed by Travelers Insurance Company to Paula Lea McCollam, and without the existence of that debt, there never would have been an annuity. (Appellant's Initial Brief page 5).

The creditor argues that this court should ignore the annuity payment structure and focus on the existence of the original debt. The creditor's entire argument inappropriately focuses on the source of the funds for the annuity. According to the creditor, the annuity paid by Travelers to the debtor is merely a debt settlement, structured as a stream of payments, and, therefore, an

accounts receivable rather than an annuity. As the District Court found in its order affirming the Bankruptcy Court and dismissing the appeal, however,

> The annuity itself is not what is exempted by Florida Statute 5222.14. The proceeds from the annuity contracts, because they are paid directly to a beneficiary who is a Florida resident, are protected by the exemption. (R1-8-1, Item 5 af Record Excerpts).

As the District Court further stated,

> The statute merely requires that the proceeds of the annuity contracts be **paid** to a Florida resident, and does not state any requirement as to the annuity contract itself. **...** (R1-8-1, Item 5 of Record Excerpts),

In In re Mart, ***88*** B.R. 436 (Bankr. S.D. **Fla. 1988),** the Bankruptcy Court for the Southern District of Florida rejected a creditor's attempt to go behind an annuity, relying on In re Gefen, 35 B.R. 368 (Bankr. **S.D.** Fla. **1984),** which held **as** follows on page **371 of** the opinion:

> It is not the role of the Court to determine whether the state exemption statutes are imprudent nor that the authority granted by Congress to state legislators is too broadly granted. Thus, the Courts' role is restricted to an interpretation of what exemptions have been enacted and to that extent the debtors' right thereto without a value judgment of whether the state legislature has spoke too liberally or too conservatively. If abuses to enacted exemptions are deemed to exist, the remedy is by means other than judicial legislation. In re Worthington, 28 **B.R. 736** at **737** (W.D. Kentucky **1983).** (Emphasis added)

Matter of Wommack, 80 B.R. 578 (Bankr. M.D. Ga. 1987), upheld the debtor's entitlement to exempt his interest in an annuity based upon a structured settlement for the wrongful death of his minor son. The court noted that the test for exemptibility "focuses on the terms and restrictions governing the administration of the plan or contract, rather than the source of funds in the account." Id., at 580.

Under the terms of the annuity in Wommack, the debtor had no right to withdraw funds beyond the monthly allotment and could not cash in the annuity or invade the principle. Similarly, the summary of benefits provided to the debtor with the Travelers' annuity provides:

> Under the terms of your settlement agreement and in order to protect the favorable tax treatment of these payments, you are not entitled to surrender, change the payment schedule or make loans against such payments or seek a lump sum payment for such benefit.

The language in the settlement agreement itself indicates that the debtor's benefits are not reachable by her creditors:

> (5) No amount of future funds or payments referred to above may be accelerated for any reason or cause whatsover [sic]. Further, all settlement funds shall be free from anticipation, assignment, pledge or obligations, and the Defendant, TRAVELERS INSURANCE COMPANY a/k/a TRAVELERS INDEMNITY COMPANY or its successors or assigns, and such funds shall not be subject to attachment, exclusion or any other legal process whatsoever. (R1-1-32, Exhibit A, Item 2 of Record Excerpts).

Obviously, all parties intended that the settlement proceeds be free from "anticipation, assignment, pledge or obligation, and "not be subject to attachment, exclusion or any other legal process whatsoever." The language in the agreement tracks the language in Section 222.14, which exempts the proceeds of annuity contracts from "attachment, garnishment or legal process... ."

Section 222.14 unambiguously exempts "the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, ..." This is the reasoning applied in Wommack and the reasoning employed by all Florida Courts in construing exemption statutes. As this Court stated in Killian v. Lawson, 387 So.2d 960, 962 (Fla. 1980), "exemption statutes ... should be liberally construed in favor of the debtor so that he and his family will not become public charges." *See* also, In re Gefen, supra. The Eleventh Circuit recognized on page 680 of its opinion in the present case that the language used in this statute is "broad." In re McCollam, supra, 680. If the specific wording of this statute is broad, if it must be given a literal interpretation under Florida law, and if it must be liberally construed in favor of the debtor, there is only one possible conclusion to be drawn: This annuity is an annuity, and, therefore, exempt.

The In re Benedict cases at *88* B.R. 387 (Bankr. M.D. Fla. 1988), and *88* B.R. 390 (Bankr. M.D. Fla. 1988), are directly on point and, as here, involved a settlement arising out of a tort

action. The creditor's attempt to distinguish the Benedict cases is unavailing. The Benedict cases construed Section 222.14, Florida Statutes, while the cases on which the creditor relies construed statutes peculiar to their states, none of which is identical to Florida's. In re Benedict, supra, at 389 specifically addressed the creditor's concern here, that the debtor continues to have a claim against Travelers for nonpayment, and found it does not change the result that the annuity proceeds are exempt:

> The fact that the debtor may have a claim against Merrill Lynch for nonpayment does not change the result. Ordinarily, all claims, whether legal or equitable, are deemed property of the estate. 11 U.S.C. § 541. However, where the debtor has a right to exempt such property or claim from the estate, the trustee's right to succeed to that claim must give way.

The creditor primarily relies upon Matter of Young, 806 F.2d 1303 (5th Cir. 1986), which interpreted a Louisiana Statute as not exempting attorney's fees paid to the debtor in the form of an annuity from the bankruptcy estate. According to the Fifth Circuit, the substance of the arrangement rather than the label affixed to it determines whether the payments are exempt under the Louisiana Statute as proceeds from an annuity or as accounts receivable. The court reasoned that an annuity based upon a structured settlement resembles an accounts receivable more than an annuity and, therefore, is not exempt. Unlike the analysis courts have applied to Section 222.14, Florida Statutes, under the Louisiana Statute, the "substance of the arrangement rather than

the label affixed to it determines whether the payments are exempt." Id., at 1307.

The creditor's reliance on In re Simon, 71 B.R. 65 (Bankr. N.D. Ohio 1987), is also misplaced. Simon construed an Ohio Statute which provided in pertinent part:

> 2329.66 (A)(10)(b) The person's right to receive a payment under any pension, annuity, or similar plan or contract ... on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the person and any of his dependents ...

Ohio also had another statute which expressly dealt with exemptions for payments on account of personal injury. There was no objection to the exception taken under that section. Simon construed "annuity" within the context of the statute as not including annuity payments based upon structured tort settlements because they were not in the nature of future earnings. See also In re Rhinebolt, 131 B.R. 973 (Bankr. S.D. Ohio 1991), which followed Simon. Conversely, Section 222.14 contains no language that relates in any sense to future earnings. Instead, Section 222.14 exempts "the proceeds of annuity contracts ... upon whatever form... ."

The North Dakota Bankruptcy Court denied an exemption under its statute in In re Johnson, 108 B.R. 240 (Bankr. D.N.D. 1989), where the statute provided as follows:

> 28-22-03.1(3) Pensions: Annuity policies or plans; life insurance policy upon which the

> death of the insured would be payable to his spouse... ; investment retirement accounts (IRA's); Keogh's and simplified employee benefit plans ... .

Like Ohio, North Dakota has a separate statute which contains a specific exemption for payments on account of personal injury. The North Dakota Bankruptcy Court construed the annuity statute in the context of the entire chapter and held that the section deals with the type of instruments mainly concerned with retirement or death; therefore, the North Dakota Legislature intended to exempt only retirement instrument annuities and not annuities based on tort settlements.

There is no similar inference in the Florida Statutes. Although legislative history is irrelevant where the wording of a statute is clear, Maryland Cas. Co. v. Sutherland, 125 Fla. 282, **169 So.** 679 (1936), the legislative history does not support the creditor's position, despite amicus curiae's arguments to the contrary. The legislative history of the 1978 amendment to Section 222.14, which amended the statute to include proceeds of annuity contracts, provides as follows:

> **I. SUMMARY:**
>
> Exempts form legal process the proceeds of annuity contracts issued to citizens or residents of Florida.
>
> **II. PURPOSE:**
>
> A. Present Situation:
>
> In 1977 the definition of "life insurance" in the Insurance Code, ch. 624-632, F.S., was expanded to include annuity contracts

(ch. 77-295). Currently, §222.14, which is not in the Insurance Code, exempts the cash surrender value of life insurance from attachment, garnishment or legal process. It is not clear whether the term "life insurance" as used in § 222.14 includes proceeds of annuities.

B. Effect on Present Situation:

This bill specifically insulates the proceeds of annuities from the claims of creditors if the annuity is issued to a citizen or resident of Florida. A creditor of the annuity beneficiary cannot attach or garnish the proceeds unless the annuity contract was acquired for the benefit of the creditor.

Obviously, if the legislature had intended to limit Section 222.14 to certain annuity contracts, it would not have included the language, "upon whatever form", and, instead, would have defined annuity as including only certain annuity contracts. The legislature's use of the comprehensive term indicates its intent to include everything embraced within the term. Florida State Racing Commission v. McLaughlin, 102 So.2d 574, 576 (Fla. 1958).

In McLaughlin, the Supreme Court was called upon to construe the following language in Section 550.05, Florida Statutes, "a location for which a permit has been issued and a racing plant located". The court held that since "racing plant" includes a running horse racing plant, a harness horse racing plant, and a dog racing plant, the phrase should be construed as though each of

these type of racing plants had been specifically enumerated because,

> [T]here is nothing is the context which suggests a different meaning. On the contrary, the simplicity with which a different meaning could have [been] indicated by the addition of the words "of the same kind" suggests it was not the legislative intent to convey this different meaning. Id.

The legislature is presumed to have intended to broadly define "annuity"; otherwise, it would have worded the statute differently. Courts are to take, construe, and apply a statute in the form enacted. Thaver v. State, 335 So.2d 815, 817 (Fla. 1976). Courts must assume that the legislature knows the meaning of words and has expressed its intent by the use of the words found in the statute. Id.

As the Bankruptcy Judge found in his order overruling the creditor's objection to the exemption:

> I am convinced from the fact of the humanitarian loss for which the annuity compensates this debtor that there can be no suggestion of fraud or any improper conduct by the debtor to avoid creditors in establishing the annuity. Therefore, the policy argument set forth in the objector's Brief which compares the debtor's annuity to an annuity purchased tc pay off a lottery debt or a lawyer's fee is totally unrelated to the facts here.
>
> The debtor is not an attorney collecting an account receivable, and therefore, In re Young, 64 B.R. 611 (E.D.La. 1986), aff'd, 806 F.2d 1303 (5th Cir. 1987), cited by the creditor, is not applicable to the facts before me. (Rl-1-8, Item 4 of Record Excerpts), [Footnote Om.]

The debtor is not an attorney seeking to protect her fees. She is a non-professional, collecting an annuity to support herself, based on damages sustained as a result of the wrongful death of her father and personal injuries sustained by her. This clearly negates the policy arguments set forth in the creditor's brief which compare the debtor's annuity to an annuity purchased to pay off a lottery win or attorney's fees.

The debtor's right to claim the annuity as exempt must be determined under Florida law. In Florida, exemption statutes are liberally construed in favor of the debtor so that the debtor will not become a public charge. The debtor is a beneficiary under an annuity contract. This is sufficient in and of itself to allow her to exempt those proceeds under Florida law.

The creditor's entire argument seems to be based on the fact that Travelers Insurance Company is responsible to pay the amounts contained in the agreement if Executive Life of New York does not pay those amounts. The fact that Travelers has to make the payments if Executive Life does not make them, does not change the fact that this is an annuity. All it means is that a different party has to make the annuity payments. Black's Law Dictionary defines annuity as "a yearly payment of money for life or years." The obligation of Travelers to make payments, if Executive Life does not make them, comes within the above definition. The fact

that Travelers may be obligated to make these payments, therefore, does not preclude application of the statute.

IF THIS COURT HOLDS THAT THIS ANNUITY IS NOT EXEMPT, THIS HOLDING SHOULD BE PROSPECTIVE ONLY, BECAUSE IT WILL IMPAIR THE VALIDITY OF CONTRACTS ENTERED INTO IN RELIANCE ON PRIOR LAW.

Normally, court decisions are retrospective and prospective in operation, unless the opinion provides that it is only prospective. There is precedent in this state, however, where property or contract rights have been acquired under "prevailing judicial interpretation of the statutes in force", that a decision will be declared by this court to be prospective only. Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (1944). In that case, the appellant in a worker's compensation case had relied on the existing judicial interpretation of statutes as to the procedure for review of compensation orders. This court. subsequently rendered an opinion, interpreting the statutes differently, and making the appeal subject to dismissal. This court held that under those circumstances its decision would have prospective effect only.

In the event this court holds that the annuity here is not an annuity within the meaning of Section 222.14, it is respectfully submitted that this court should make that holding prospective, only. In In Re Gefen, 35 B.R. 368 (Bankr. S.D. Fla. 1984), the

bankruptcy court interpreted the word "annuity" very broadly, quoting from In Re Talbert, 15 B.R. 536 (Bankr. W.D. La. 1981), in which that court defined an annuity as:

> ...a yearly payment of a certain sum of money granted to another in fee for life or for years, and chargeable only on the person of the grantor; or more briefly, as an agreement to pay a specified sum annually during the life of the annuitant ... In its broader sense it designates a fixed sum, granted or bequeathed, payable periodically, at aliquot parts of a year, at stated intervals, and not necessarily annually. Id. at 537.

Structured settlements in personal injury cases by means of annuities are commonplace. Every court applying Florida law, except the Eleventh Circuit in the present case, has held that this type of annuity is an annuity. Although the Eleventh Circuit certified the question to this court, even the Eleventh Circuit acknowledged that the language of the statute was broad and that under a literal construction the creditor would not prevail. The Eleventh Circuit may well have overlooked Florida law which affords no leeway to the interpretation of a statute which is unambiguous, and only allows a non-literal interpretation where a literal interpretation would produce an absurd or unreasonable result.

CONCLUSION

This court should answer the certified question in the affirmative and hold that an annuity contract established in lieu of a party's paying another party a lump sum currently owed is

exempt from creditor claims and bankruptcy under Section 222.14, Florida Statutes (1989). The Bankruptcy Court was correct when it overruled the objection to exempt the proceeds from the debtor's annuity. The District Court was correct in affirming that ruling. This court should also affirm and hold that the annuity is a properly exempt asset under the applicable law.

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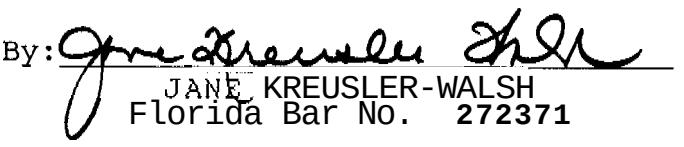
By: 
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I CERTIFY that a copy of the foregoing has been furnished, by mail, this 30th day of June, 1992, to:

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