

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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FILED
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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 10-05562-PB7
12)
13 THOMAS C. SEELIG and) ORDER ON TRUSTEE'S
MELANIE A. SEELIG,) OBJECTION TO CLAIM OF
14) EXEMPTIONS
Debtors.)

15 On or about April 2, 2010 Thomas and Melanie Seelig filed a
16 joint Chapter 7 petition. On Schedule B they listed interests in
17 Mr. Seelig's pension from Honeywell and two Allianz IRAs, one
18 valued at \$39,000 and the other at \$113,000. On Schedule C, they
19 claimed all three as exempt. The Allianz IRAs were claimed
20 exempt under California Code of Civil Procedure § 704.115(a)(3),
21 (b), (e).

22 On June 28, 2010 the Chapter 7 trustee filed and served her
23 notice of objection to the claims of exemption for the two
24 Allianz IRAs on the ground that they were "simple premium
25 annuities that are not exempt under C.C.P. § 704.115." Prior to
26 filing her objection, the IRAs were a subject of discussion at

1 the § 341(a) meeting of creditors, and of document production.
2 Mr. Seelig was in hospice care, and died on or about
3 May 21, 2010. Subsequently, Mrs. Seelig responded to the
4 trustee's objection through counsel, and set out the history of
5 Mr. Seelig's IRA which was rolled over into the Allianz annuity
6 contracts in 2003 when he retired from Honeywell.

7 In late August, 2010 the trustee served her reply, stating
8 that her ground for continuing objection was that "the entire
9 amount is not reasonably necessary to provide for the support
10 of Mrs. Seelig, taking into account all resources that are
11 available for her support." Mrs. Seelig promptly filed her own
12 declaration, setting out that after her husband's death her
13 income dropped by about \$1,740 per month because of the
14 elimination of her dependent Social Security income (she stepped
15 into her late husband's share to receive his benefits), plus a
16 reduction in the Honeywell pension income. Her expenses were
17 approximately the same, and left her with a monthly shortfall of
18 \$1,069 per month. She stated she was 69 years old, and had not
19 worked outside the home since 1964. Moreover, she has two
20 artificial knees, which need periodic replacement, with
21 associated uncovered copays of about \$2,000 each time.

22 Meanwhile, around late summer 2010, after Mr. Seelig died,
23 Mrs. Seelig met with the family financial advisor, Mr. Epstein.
24 He recommended that Mrs. Seelig take advantage of the "high water
25 value" of the Allianz contracts which was a form of special death
26 benefit, as well as move the funds from the Allianz contracts,

1 which had variable interest exposure, to no-risk annuity
2 contracts, one for a fixed term of six years, and the second
3 deferred until the first expired and a lifetime monthly benefit
4 thereafter. Apparently, approximately \$12,300 was taken as a
5 distribution by Mrs. Seelig at the time of conversion to help
6 with repaying burial expenses, among other things. Allianz also
7 charged almost \$6,000 as a fee at conversion.

8 The Court has subject matter jurisdiction over these
9 proceedings pursuant to 28 U.S.C. § 1334 and General Order
10 No. 312-D of the United States District Court for the Southern
11 District of California. This is a core proceeding under
12 28 U.S.C. § 157(b)(2)(B).

13 Both sides point to the 1990 decision of the Bankruptcy
14 Appellate Panel in In re Moffat, 119 B.R. 201. There, after
15 noting the absence of authority on the phrase "reasonably
16 necessary for support", the court developed a non-exhaustive list
17 of factors for courts "to use in determining whether a given
18 asset is reasonably necessary for the debtor's support."
19 119 B.R. at 206.

20 These factors include the following: the
21 debtor's present and anticipated living
22 expenses and income; the age and health of
23 the debtor and his or her dependents; the
24 debtor's ability to work and earn a living;
25 the debtor's training, job skills and
26 education; the debtor's other assets and
their liquidity; the debtor's ability to save
for retirement; and any special needs of the
debtor and his or her dependents.

26 Id.

1 The trustee called as an expert witness accountant
2 Dean Johnson, who testified that if the funds invested in the
3 annuity contracts received at least a five per cent annual rate
4 of return over Ms. Seelig's lifetime, while she only took monthly
5 payments of \$700 per month, the residual balance at the end of
6 her projected life expectancy would have actually increased
7 because the 5% rate of return on the principal would exceed the
8 monthly draws. From that notion, the trustee argued that funds
9 could be withdrawn over a three year period without penalty -
10 although with tax liability - reducing the principal but still
11 paying Ms. Seelig the monthly draw while also providing some
12 return to the unsecured creditors of the estate. No one
13 disagreed with Mr. Johnson's math. Rather, the disagreements
14 came over what he was asked by the trustee to assume.

15 At the center of the disagreement is the use of the amount
16 Ms. Seelig is to receive monthly from the sequential annuity
17 contracts as an amount that is sufficient, together with her
18 other sources of income, to meet her monthly expenses. The
19 uncontroverted testimony is to the contrary, regardless of
20 whether her actual expenses are used or a version of IRS
21 allowances similar to a Means Test calculation is employed, as
22 one of the debtor's experts testified, particularly when the need
23 to pay tax on the withdrawn funds is factored in.

24 The trustee correctly points out that a small amount of
25 debtor's expenses are associated with a vacant lot in Michigan.
26 However, the trustee tried unsuccessfully to sell the lot, and

1 has abandoned it. Moreover, those expenses do not make a
2 material difference in the calculation. Mr. Martin, testifying
3 for debtor, testified if the annuity contract was surrendered at
4 its contractual surrender value, it would only yield about
5 \$94,000, before taxes of about \$15,000. If the trustee received
6 \$34,000 of the net proceeds, there would be about \$45,000 to
7 invest in a new contract, and without a guaranteed interest rate
8 of even 2.25%. If Ms. Seelig took only \$700 per month starting
9 in 2016, the funds would be exhausted well short of her projected
10 life span. More to the point, that \$700, plus \$1,203 from the
11 Honeywell pension, and \$1,567 in Social Security, together each
12 month is about \$270 per month less than her regular monthly
13 expenses. The trustee provided information that the surrender
14 value in June 2011 will increase to \$103,000, but the rest of
15 the numbers do not change enough to persuade the Court that
16 Ms. Seelig's regularly monthly expenses can be met by her income,
17 especially if a component of it is diminished by drawing down on
18 the fund from which a portion of the monthly income is derived.

19 The Court has in the foregoing narrative addressed most of
20 the Moffat factors, virtually all of which favor Ms. Seelig's
21 position in the case. At least one of the issues that has been
22 troubling to the trustee, and concerns the Court as well, is that
23 after the bankruptcy was filed, and after Mr. Seelig died, the
24 trustee filed her objection to the debtors' claim of exemptions
25 in what was then the Allianz contracts. Knowing that the trustee
26 claimed an interest in the funds represented by those contracts

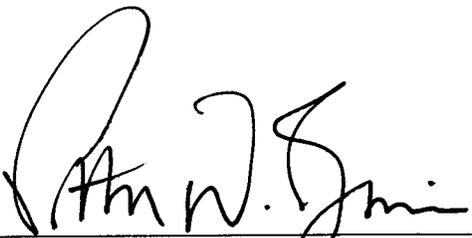
1 on behalf of the bankruptcy estate, Ms. Seelig met with
2 Mr. Epstein and agreed to restructure those contracts to take
3 advantage of the "high water mark" form of death premium while
4 also reducing risk from a variable interest contract, without
5 notice to the trustee or court authorization. Debtor acted as if
6 the trustee's objection to her claim of exemption had already
7 been resolved in debtor's favor and that the estate had no
8 interest in the Allianz contracts. The debtor has not explained
9 how that came about, and the Court remains troubled by that
10 unauthorized conduct.

11 That said, however, what is currently before the Court is
12 the trustee's objection to debtor's claim of exemption. The
13 debtor has persuaded the Court that her current income, including
14 the annuity distribution, is insufficient to meet her regular
15 monthly expenses, and therefore both the current distribution and
16 the deferred one are reasonably necessary for Ms. Seelig's
17 support in light of all her other sources of income, and her
18 expenses.

19 Accordingly, the Court finds and concludes that the
20 trustee's objection to debtor's claim of exemption in the annuity
21 contracts should be, and hereby is overruled.

22 IT IS SO ORDERED.

23 DATED: APR -1 2011

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26 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court