ELECTRONICALLY FILED APR 06, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
No. 19–1994

APPEAL FROM THE
POLK COUNTY DISTRICT COURT
HON. COLEMAN McALISTER, JUDGE PRESIDING
Polk Co. Law No. Case No. CVCV051446

COMMERCE BANK, Plaintiff/Appellees

vs.

ROBERT R. McGOWEN, Defendant/Appellant

DEFENDANT/APPELLANT'S FINAL BRIEF

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Eilbert v. Pelican, 212 B.R. 954, 958 (B.A.P. 8th Cir. 1997)

In Matter of Pedersen, 155 B.R. 750, 758 (Bankr. S.D. Iowa 1993)

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Matter of Pettit, 55 B.R. 394, 397 (Bankr. S.D. Iowa)

St. Malachy Roman Catholic Congregation of Geneseo v. Ingram, 841 N.W. 2d 338, 354 n.9 (Iowa 2013)

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it presents a substantial issue of first impression. *See* Iowa. R. App. P. 6.1101(2)(c). As the district court recognized in the ruling at issue: "The Court cannot find and the parties have not cited any Iowa Appellate case on point [for how to analyze an exemption claim under Iowa Code § 627.6(8)(e)]." (App. 44 (Ruling at n. 1)). In its 1.904 order, the district court reiterated the absence of controlling case law on point. (App. 57 (Order)).

Accordingly, the district court "adopted the analysis set forth in the *Eilbert v. Pelican*[1] decision [because it] concluded the analysis was legally sound and persuasive." (*Id.*) While both parties cited to federal court opinions for guidance regarding analysis under the statutory provision, these are not controlling. Direction from the Iowa Supreme Court is needed.

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[1] The Bankruptcy Appellate Panel first decided the case in *Eilbert v. Pelican*, 212 B.R. 954, 958 (B.A.P. 8th Cir. 1997).

In affirming the outcome, the Eighth Circuit offered its own nuanced and distinct analysis in *In re Eilbert*, 162 F.3d 523 (8th Cir. 1998).

For the convenience of the Court, McGowen will use shorthand references "*Eilbert (B.A.P.)*" and "*Eilbert (8th Cir.)*," respectively, in citing these two decisions.

STATEMENT OF THE CASE

This case arises out of a debtor-creditor relationship between Plaintiff/Appellee Commerce Bank ("Bank") and Defendant/Appellant Robert R. McGowen. The Minnesota District Court for Hennepin County, Fourth Judicial District, entered judgment on behalf of Bank and against McGowen on or about December 18, 2015. (8/3/16 Foreign Judgment). On or about March 3, 2016, Bank filed an Authenticated Transcript of Judgment with this Court. (*Id.*).

McGowen works at McGowen Hurst Clark & Smith, PC (the "Firm" or "MHCS") and is a former employee shareholder. (App. 43 (Ruling at 6)). He receives both a salary and certain payments under a Deferred Compensation Plan (the "Plan"). (App. 7 (5/30/19 Motion to Partially Exempt Funds ¶ 9)).

On or about April 24, 2019, Bank was issued a general execution. (4/24/19 general execution). On or about May 13, 2019, the Firm received a Notice of Garnishment and Interrogatories. (App. 5 (motion to exempt)). On May 30, 2019, McGowen moved to partially exempt certain funds from garnishment. (App. 5-9). While McGowen does not contest that his wages from the Firm are subject to lawful garnishment, he claims his deferred compensation payments are exempt as a "similar plan or contract" under Iowa Code § 627.6(8)(e). (*See, e.g., id.*). Bank opposed McGowen's exemption

claim on August 5, 2019. (App. 10-26). McGowen filed a reply brief in further support of his motion on August 12, 2019. (App. 27-37).

Following a hearing on September 6, 2019, the district court entered its ruling on October 30, 2019. (App. 38-51 (Ruling)). It denied McGowen's motion for partial exemption of funds from garnishment. (App. 50 (*Id.* at 13). McGowen filed a motion to amend or enlarge the ruling under Iowa R. Civ. P. 1.904(2) on November 14, 2019. (App. 52-56). The district court denied this in its entirety on November 19, 2019. (App. 57 (Order)).

McGowen subsequently filed a timely appeal on December 2, 2019, from the ruling and the 1.904 order, and from all adverse rulings and orders entered earlier in the case. (App. 59 (Notice of Appeal)).

STATEMENT OF FACTS

Facts and shorthand designations previously set forth in the Statement of the Case are incorporated here.

The Firm's Deferred Compensation Plan is only available to shareholder employees. (App. 78 (Ex. 1, Art. 1.1 (Plan redacted to protect privacy of other shareholders). It is designed to incentivize them regarding the Firm's growth, profitability, and long-term success; and to recognize long tenure of service to the Firm as a shareholder. (*Id.*)

Under the Plan, there are two types of deferred compensation payments. Type 1 compensation is based on number of years of, i.e., length of service, as a shareholder; payments are 100% vested when earned. (*See* App. 78, 81 (Ex. 1, Art. 2.1 and 3.1)). Type 2 compensation is subject to vesting based on number of years as a shareholder, i.e., length of service; the occurrence of events triggering payment include separation from service to the Firm, attainment of age 67, disability, death or sale by the Firm of substantially all of its assets. (*See* App. 78-79, 81, 82-83 (Ex. 1, Art. 2.2, 3.2 and 4.1)). McGowen receives both types of deferred compensation payments under the Plan. (*See* App. 83 (Ex. 1, Art. 4.2)).

McGowen is 68 years old, and his age was the triggering event to receive the type 2 payments. (*See* App. 43 (Ruling at 6)). Although McGowen "continues to work for the firm, he was removed as a shareholder due to his age . . . ." (*Id.*)

Under the Plan, McGowen is an unsecured general creditor of the Firm regarding any amount to which he may become entitled thereunder. (App. 85-86 (Ex. 1, Art. 7.6)). Interest in the Plan and payments thereunder are nontransferable and not "liable to be reached in any manner by the creditors of, or judgment holders against, any Plan participant." (App. 85 (Ex. 1, Art. 7.4(ii))).

Additional facts are set forth as necessary in the Argument.

ARGUMENT

ISSUE I: THE DISTRICT COURT ERRED IN DENYING McGOWEN'S MOTION TO PARTIALLY EXEMPT FUNDS FROM GARNISHMENT BECAUSE HIS DEFERRED COMPENSATION PAYMENTS ARE EXEMPT UNDER IOWA CODE § 627.6(8)(e).

Preservation of Error

McGowen preserved error on the district court's ruling and 1.904 order by specifically challenging the same on the grounds below in his briefing, at the hearing, and in his 1.904 motion. (*See* App. 5-9, 27-37, 52-56, 62-77 (5/30/19 Motion to Partially Exempt Funds, 8/12/19 Reply (in support of same), 11/14/19 Motion to Enlarge or Amend; 10/6/19 Hearing Transcript)).

Standard of Review

This action regarding applicability of an exemption under Iowa Code § 627.6 is reviewed for error of law. *See Matter of Estate of Deblois*, 531 N.W.2d 128, 130 (Iowa 1995) (reviewing a different subset of the general exemption statute) (citing Iowa R. App. P. 4, now Rule 6.907)).

Argument

"Exemption statutes are construed liberally, but for the purpose of achieving the legislative intent, not to "extend the provisions of the legislative

grant." *In re Eilbert*, 162 F.3d 523, 526 (8th Cir. 1998) (quoting *Iowa Methodist Hosp. v. Long*, 234 Iowa 843, 12 N.W.2d 171, 175 (Iowa 1943). The burden is on the proponent claiming an exemption from execution. *See Kelly v. Degelau*, 58 N.W.2d 374, 376 (Iowa 1953).

Iowa law authorizes a defendant to object to the release of garnished funds. *See* Iowa Code § 642.15. A debtor may hold exempt from execution his rights in:

> A payment or a portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, unless the payment or a portion of the payment results from contributions to the plan or contract by the debtor within one year prior to the filing of a bankruptcy petition, which contributions are above the normal and customary contributions under the plan or contract, in which case the portion of the payment attributable to the contributions above the normal and customary rate is not exempt.

Iowa Code § 627.6(8)(e).

As noted, there is a need for Iowa appellate decisions interpreting the language of this provision. However, at least one federal court has found that a deferred compensation plan qualifies as exempt property under Iowa's statutory provision. *See In Matter of Pedersen*, 155 B.R. 750, 758 (Bankr. S.D. Iowa 1993) (on its face, this exemption would have applied to the debtor's deferred compensation plan, but it was not available to him because he filed for bankruptcy before the amendment that resulted in the enactment

of Iowa Code § 627.8(e)). It was error for the district court to ignore this case entirely in denying McGowen's motion.

Meanwhile, when examining the specific language on which McGowen bases his claim here, the *Pedersen* court found in another case that: "It is likely that the legislature's reason for including 'similar plan or contract' in the statute was **to give the courts some latitude in treating varying factual situations under this exemption section**." *Matter of Pettit*, 55 B.R. 394, 397 (Bankr. S.D. Iowa), *aff'd sub nom. In re Pettit*, 57 B.R. 362 (S.D. Iowa 1985) (finding a "profit sharing plan" exempt under Iowa Code § 627.6(9)(e), a predecessor of Iowa Code § 627.6(8)(e) (emphasis added)).

Other federal courts in turn have relied on *Pettit* regarding the meaning of "similar plan or contract." *See In re Huscher*, No. BKRTCY. 04-02200S, 2004 WL 2671705, at *1 (Bankr. N.D. Iowa Nov. 19, 2004) (quoting *Eilbert v. Pelican (In re Eilbert*, 212 B.R. 954, 958 (B.A.P. 8th Cir.1997), *aff'd*, 162 F.3d 523 (8th Cir.1998) (quoting *Matter of Pettit*, 55 B.R. 394 (Bankr. S.D. Iowa 1985)).

Federal courts have analyzed the § 627.6(8)(e) exemption in two parts: first, are the payments under a "similar plan or contract," and second, whether the payments are made "*on account of* illness, disability, death, age, or length

of service." *Huscher*, 2004 WL 2671705 at *1 (quoting *Eilbert*, 212 B.R. at 958 (emphasis in original)).

Here, the district court found McGowen's payments under the Plan failed the first step of the statutory analysis, that it was not necessary to consider the second step, and denied McGowen's exemption request. (App. 45-50 (Ruling at 8-13)). This was error.

Part A below details the district court's errors under the first step concerning whether the Plan at issue satisfies the statutory "similar plan or contract" language. This includes, without limitation:

(1) Near exclusive reliance on the *Eilbert (B.A.P.)* factors, even though that case is highly factually distinguishable, as it involved an elderly woman attempting to thwart judgment creditors by purchasing a single premium variable annuity and claiming the exemption.

(2) Failure to analyze McGowen's arguments favorably under the more factually analogous and appropriate factors in *Matter of Pettit*, which found a profit sharing plan exempt as "a similar plan or contract."

Part B below sets forth the district court's error regarding the second step. It failed to find McGowen satisfied the second step of statutory analysis because his deferred compensation payments are "on account of illness, disability, death, age, or length of service."

A. The Deferred Compensation Plan Is a "Similar Plan or Contract" Under Iowa Code § 627.6(8)(e).

The district court's errors of legal application in this step are as follows.

1. *The district court erred in exclusively analyzing McGowen's claim under the* Eilbert (B.A.P.) *factors.*

The *Eilbert (B.A.P.)* factors that the district court relied on are:

1. Contributions over time;
2. Contributions by others;
3. Return on investment; and
4. Control over claimed exempt asset.

(App. 45-50 (Ruling at 8-13) (citing 212 B.R. at 958)). The district court found all factors but the fourth one favored a finding that the deferred compensation payments are not exempt. (*Id.*). While McGowen agrees he did not control the Plan payments, the other findings were in error. In addition to the fact *Eilbert* is not controlling case law, it is neither factually analogous nor persuasive, as shown below.

A brief overview of the actual *Eilbert* facts is in order. Eilbert's husband died in a car accident, leaving a substantial estate with $489,916 going to Eilbert outside probate. *Eilbert (8th Cir.)*, 162 F.3d at 525. Anticipating that the other party injured in the accident would obtain a large judgment against her, Eilbert purchased a single premium variable annuity for $450,000 and elected for monthly payments to start a few months later. *Id.* Eibert was 74. *Id.* After judgment was awarded against her and her late husband's estate,

Eilbert filed for bankruptcy. *Id.* She argued this asset was exempt under Iowa Code § 627.6(8)(e) **as an "annuity"** she bought more than a year before bankruptcy and for which she began receiving payments "well past retirement age." *Id.* at 526 (emphasis added). She lost. As the Eighth Circuit wrote:

> Eilbert's contention, if adopted, would convert a statute intended to protect "benefits that are akin to future earnings"—which for the elderly are typically retirement earnings—into a statute conferring vastly broader bankruptcy protection. As the bankruptcy court observed:
>
> > If annuity payments were "on account of age" merely because the debtor purchased the annuity when she was past retirement age, all persons past retirement age should move their assets into such an annuity and then file bankruptcy.... Under this scheme, no debtor past retirement age would have any assets subject to execution, could live in a million-dollar home, have a substantial stream of income, virtually live off his creditors, and yet be judgment proof.

Eilbert (8th Cir.), 162 F.3d at 526.

Significantly, the Eighth Circuit's *de novo* review of the B.A.P. decision appropriately and specifically focused on interpretation of "annuity" in the statute, which Eilbert originally relied on for her exemption claim. *Eilbert (8th)*, 162 F.3d at 527. Concerning the "similar plan or contract" language McGowen relies on, the *Eilbert (8th Cir.)* court actually looked to the *Pettit* case—just as McGowen argued the district court should do. *Id.*

Contrast this with the district court's nearly exclusive reliance on the lower B.A.P. ruling for guidance in interpreting the "similar plan or contract" language. (*See* App. 45 (Ruling at 8)).

Moreover, the district court's refusal to consider factors outside *Eilbert (B.A.P.)* is inconsistent with that court's express disclaiming of rote application.

> Determining whether an asset satisfies the "similar plan or contract" language is a peculiarly factual inquiry. We mention a number of factors to be considered, but none are necessarily dispositive nor is it a matter of counting the factors on either side. **As we mentioned, it is a factual inquiry depending on the particular payments at issue.**

Eilbert (B.A.P.), 212 B.R. at 958 (emphasis added).

Application of Eilbert Factors

Moreover, even assuming without conceding that the *Eilbert (B.A.P*) factors apply to the exclusion of any others, the district court erred in finding that they favored denying McGowen's claimed exemption. The court's errors are also expounded upon in application of the *Pettit* factors later on.

Factors #1 and #2: Taking the first two factors together (contributions over time and contributions by others), the district court erred in ignoring that both McGowen and other shareholder employees (the "others") under the Plan give up or otherwise defer income under the Plan, with an underlying value

related to receivables, unbilled works in process, and or intangible value of the Firm, as shown in the Facts. This Plan was first executed in July 1993. (*See* App. 78 (Ex. 1)). This situation is nothing like the *Eilbert (B.A.P.)*'s concern about a "recent change in the nature of the asset" where the debtor purchased an annuity with a one-time "lump-sum" payment after she was past retirement age. 212 B.R. at 959.

Relatedly, the district court erred in requiring that McGowen's payments had to serve as wage substitutes after retirement. (*See* App. 46 (Ruling at 9)). Although the application of these factors to the specific facts of the *Pettit* case concerned assets intended for retirement, the court's original description of the factors does not require exclusive use as retirement income; it also includes income deferred for "future support." *See Pettit*, 55 B.R. at 398. This is consistent with the *Eilbert (B.A.P.)* decision that the exemption "is *primarily* designed to protect those payments which serve as wage substitutes after retirement." *Eilbert*, 212 B.R. at 958. This is likewise consistent with the actual statutory language recognizing a number of events "on account of" which payments issue that are not based on age or retirement. *See* Iowa Code § 627.6(8)(e).

Factor #3: The district court erred in overemphasizing this factor and requiring its presence. Although the Bankruptcy Appellate Panel in *Eilbert*

mentioned "return on investment" this as one factor that courts "may" consider, the Eighth Circuit in reviewing the same did not consider it significant enough to mention as part of its de novo review. *See Eilbert (B.A.P.)*, 212 B.R. at 959; *see also generally Eilbert (8th Cir.)*, 162 F.3d 523. That certainly undercuts any suggestion it is an important consideration with the power to disqualify an otherwise valid exemption, especially when taking into account other cases like *Pettit*, as discussed below.

Factor #4: McGowen agrees with the district court "he does not self-direct his interest in the Plan as the same way the debtor in *In re Eilbert* had the ability to self-liquidate the asset at issue in that case at any time" or otherwise control the Plan payments. *See* (App. 49 (Ruling at 12)). In applying the *Pettit* factors below, McGowen sets forth additional arguments he made to the district court on this issue. This Court can affirm on any ground urged to the district court. *See St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W. 2d 338, 354 n.9 (Iowa 2013).

Given that the facts of *Eilbert* and *Pettit* are so dissimilar—and that the exemption claimants in both cases relied on different statutory language—it is not surprising the Eighth Circuit did not delve further into the *Pettit* decision. However, given how explicit the *Pettit* court was in setting forth factors for "similar plan or contract," as shown below, we can infer from the

Eighth Circuit's approving reference that it did not disagree with the *Pettit* court as it relates to "similar plan or contract," again—in direct contrast to *Eilbert*'s reliance on "annuity" under § 627.6(8)(e). *See generally Eilbert (8th),* 162 F.2d at 526-27.

2. *The district court erred in failing to consider and follow the* Pettit *factors that support McGowen's exemption.*

Matter of Pettit involved a bankruptcy debtor who successfully argued her interest in a profit sharing plan with her employer was exempt. *See generally* 55 B.R. 394, 395 (Bankr. S.D. Iowa), aff'd sub nom. *In re Pettit,* 57 B.R. 362 (S.D. Iowa 1985). The *Pettit* case is better suited than *Eilbert* to inform analysis of whether the deferred compensation payments at issue fall within the statutory language of Iowa Code § 627.6(8)(e), and the district court erred in not relying on it to determine the relevant factors.

The *Pettit* court analyzed the meaning of "similar plan or contract" in the statute—the same language on which McGowen bases his claim. *See Pettit,* 55 B.R. at 397. As detailed below, it did not consider contributions over time, contributions by others, or return on investment as the *Eilbert (8th)* court did in analyzing "annuity."

The district court erred in rejecting McGowen's argument that relying on *Pettit* is not inconsistent with *Eilbert,* but rather analogizes to a factual

situation with more similarities. In fact, the *Eilbert (8th Cir.)* court sanctioned the *Pettit* court's analysis. *See Eilbert (8th Cir.)*, 162 F.3d at 527. ("Likewise, the catchall provision, "similar plan or contract," includes within the exemption other types of retirement plans or investments that are "created to fill or supplement a wage or salary void.") (quoting *Pettit*, 55 B.R. at 397–98). The 8th Circuit also relied on *Pettit* in another case when it found an employee savings and investment plan whose purpose was to incentivize employees to "save money for long-range goals, such as retirement" an exempt "similar plan or contract" within the meaning of the statute. *See In re Hutton*, 893 F.2d 1010, 1011 (8th Cir. 1990). The district court also erred in ignoring this significance.

In holding that the debtor's profit-sharing plan was exempt, the *Pettit* court interpreted and applied "similar plan or contract" as follows.

> Based on this review of the general characteristics of pensions and annuities, the court finds that the qualities of a "plan or contract" similar to pension plans and annuities include:
>
> > A formal plan or fund established for the benefit of the debtor, usually as part of a relationship with an employer or employee organization.
> >
> > The benefits of the plan or fund are of a nature "akin to future earnings" of the debtor and intended as retirement income **or at least income deferred during the debtor's employment to provide future support for the debtor.**

> Access and control of the plan or fund in the hands of someone other than the debtor with strong limitations on withdrawal or distribution expressed in the formal plan or fund **for the purpose of providing** retirement or **deferred income.**
>
> That payment under the plan or contract is to be on account of illness, disability, death, age, or length of service.

Any plan or contract exhibiting these characteristics **should be** exempt under Iowa Code § 627.6(9)(e).

Reviewing the Debtor's Plan and based on the findings of fact, the court finds that:

> 1. The Plan was established by the Debtor's employer and intended for her retirement.
>
> 2. The fund management and distribution is out of Debtor's control, except upon certain events which are consistent with the purpose of providing future support for the Debtor or her dependents.
>
> 3. The distribution events are related to age, disability, death or length of service. As such, this profit sharing plan falls within the intent of the state exemption statute.

Pettit, 55 B.R. at 398 (emphasis added). The quoted language indicates the *Pettit* court considered these characteristics dispositive where present.

Application of Pettit Factors

Factor #1: "A formal plan or fund established for the benefit of the debtor, usually as part of a relationship with an employer or employee

organization." *Pettit*, 55 B.R. at 398. This characteristic perfectly describes McGowen's Plan. It is a formal plan established for the debtor's benefit with his employer. *See also Huscher*, 2004 WL 2671705 at *3 (citing *Eilbert (8th Cir.)*, 162 F.3d at 527) ("A "similar plan or contract" must be established for the purpose of providing a benefit that is akin to future earnings of the debtor. The plan or contract will usually be established in an employment context.") As detailed in the facts, the Plan here is between McGowen and his employer, along with other employee shareholders, and was created for their "exclusive benefit." Its purpose is to recognize and reward shareholder employees of long tenure. This factor is easily satisfied.

Factor #2: "The benefits of the plan or fund are of a nature "akin to future earnings" of the debtor and intended as retirement income or at least income deferred during the debtor's employment to provide future support for the debtor." *Pettit*, 55 B.R. at 398. The Plan also meets this characteristic. McGowen and the other employee shareholders must be employees during the time income is deferred for their future support. The triggering events contemplate this deferred income will be realized to support the recipient in the event of various future events, which go beyond retirement.

Factor #3: "Access and control of the plan or fund in the hands of someone other than the debtor with strong limitations on withdrawal or

distribution expressed in the formal plan or fund for the purpose of providing retirement or deferred income." *Pettit*, 55 B.R. at 398. Although the district court did not consider factor through the *Pettit* lens, but rather through *Eilbert (B.A.P.)*, it did find in McGowen's favor concerning control over the claimed exempt asset. It rejected the Bank's contrary argument based on its claim McGowen has control over two of the triggering events (separation from service and sale of assets). (*See* App. 49 (Ruling at 12)). For the reasons McGowen argued below and those the district court cited, this Court should affirm that any consideration of a "control" factor weighs in McGowen's favor.

McGowen's ability to choose to separate from the firm does not rise to a "control" level disqualifying exemption in the case law. Termination of employment was also specifically identified as an event triggering payment under the profit sharing plan in *Pettit*, and yet the court found it exempt. 55 B.R. at 396 ("Article IX, Sections 2–10 of the Plan call for cash payment in lump sum to participants or their beneficiaries only upon certain specified events. Payment will commence on the earliest of the participant's 60th birthday, retirement, disability, termination of employment or death.") Similarly, the deferred compensation plan at issue in *In Matter of Pedersen* also included separation from service as a triggering event for distributions to

start. 155 B.R. 750, 754 (Bankr. S.D. Iowa 1993). And yet the court said that plan would have qualified on its face as exempt under Iowa Code § 627.6(8(e) except that the bankruptcy was filed several years prior to the statute being amended to exempt the same in 1993. *Id.* at 758.

Finally, the triggering event "sale of assets" does not rise to the level of self-directed control either. That would require McGowen to work together with other shareholders to force a sale in order to force payments. McGowen doesn't have sole discretion where the authority of others is required to act. Where a triggering event depends on decisions of other people, this does not cut against the exemption. For example, in *Hutton*, the 8th Circuit found that the plan satisfied the Pettit factor "that access and control over distribution of the fund be in the hands of someone other than the debtor and that there be strong limitations on withdrawal." *In re Hutton*, 893 F.2d at 1011. Even though the plan allowed for early withdrawal for financial hardship, "the employee has no absolute right to use the funds prior to retirement" because an administrative committee decides whether the debtor's request qualifies as a "financial hardship." *Id.* Similarly, McGowen does not have an "absolute right" to force a sale and trigger the payments.

For all the foregoing reasons, the district court erred in finding that McGowen's interest in the Plan payments does not qualify as a "similar plan or contract" within the meaning of the statute at issue.

B. McGowen Receives Payments Under the Plan "On Account of Illness, Disability, Death, Age, or Length of Service," As Required Under Iowa Code § 627.6(8)(e).

In analyzing whether payments are "on account of" one of the statutory events, courts have emphasized that a plan must be in existence and the payment triggered by an event contemplated by the plan. *See In re Huscher*, 2004 WL 2671705, at *3. That is exactly what happened here.

As shown in the Facts, McGowen actually receives the payments at issue on account of his age and/or length of service to the Firm. These are both squarely within the plan language of the exemption. The Plan provides other triggering events within the plain statutory language (disability and death).

The existence of two other triggering events in the Plan—separation from the Firm (beyond retirement) or sale of its assets—does not change the analysis. McGowen does not receive the payments on account of either of them. As detailed above, inclusion of separation from the Firm as a triggering event is neither dispositive nor otherwise disqualifying given that courts in other cases have still found plans exempt even though termination of employment was also included in them as a triggering event. Again, as set

forth above, McGowen does not have discretion over the sale of assets and cannot force payments to himself on that ground.

The district court should have found that McGowen satisfied step two of the statutory analysis and granted his exemption request. Upon finding that McGowen's Plan payments qualify as a "similar plan or contract," within the first step of the analysis, this Court should find a as a matter of law that receiving payments on account of age and/or length of service necessarily meets the plain language of the statute and entitles the recipient to an exemption.

CONCLUSION

For all the foregoing reasons, this Court should find that all deferred compensation payments at issue are exempt under Iowa Code § 627.8(e). The judgment below denying McGowen's motion to partially exempt funds from garnishment should be reversed and order entered granting his motion in its entirety and for all other relief that this Court deems appropriate. Costs of appeal should be taxed to Bank.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant Robert R. McGowen respectfully requests to be heard orally upon the submission of this appeal.

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CERTIFICATE OF FILING

The undersigned hereby certifies that I, or someone acting on my behalf, filed the foregoing Proof Brief via the Iowa Judicial Branch EDMS system on April 6, 2020.

/s/ Kara M. Simons
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of April, 2020, a copy of the foregoing Proof Brief was served via the Iowa Judicial Branch EDMS system to the attorneys of record, and by mail, postage first-class prepaid, on the parties listed below:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This final brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 4,664 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.9903(1)(g)(1).

2. This final brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally space typeface using Times New Roman 14.

Dated: April 6, 2020

/s/ Kara M. Simons
Kara M. Simons