

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re:

RICHARD A. QUAID,

Case No. 6:10-bk-05920-ABB

Chapter 7

Debtor.

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**ORDER**

This matter came before the Court on the Amended Objection to Claimed Exemption (Doc. No. 25) filed by the Creditors Baybrook Homes of Polk County, LLC, Braxton Green, Jr., Eleanor Green, and Estates of Lake Wales, LLC (collectively “Baybrook”) against Debtor Richard A. Quaid’s exemption of an interest in the Tommie A. Quaid Trust (the “Trust”). The final evidentiary hearing was held on October 4, 2010 at which Debtor, Baybrook, and their respective counsel appeared.

Judgment is due to be entered in favor of Baybrook and against Debtor for the reasons set forth herein. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

**FINDINGS OF FACT**

*The Trust*

Debtor’s wife, Tommie Quaid (“Tommie”), established the Trust on March 2, 2005. The Trust designated Tommie as the Trust’s Grantor and Trustee, and granted her sole authority to manage, control, and withdraw Trust assets (D’s Exh. A, Arts. I, II).

Debtor, while Tommie was alive and able to manage the Trust's business affairs, was not permitted to control the Trust's assets.

The Trust provides, upon Debtor surviving Tommie's death, Debtor and his son Jesse Quaid ("Jesse") are to become Co-Trustees, and Edward Fernandez ("Mr. Fernandez"), Debtor's close friend, is to be the successor Trustee upon Debtor's and Jesse's resignations (Id., Art. IV). Trust assets are to be used for three purposes upon Tommie's death:

- (1) To pay to or on behalf of Tommie's Personal Representative for Tommie's final medical expenses, debts, claims, administration of her estate, and estate taxes (Id., Art. I.4.A.1).
- (2) To pay obligations due to Riverbluff Cooperative, Inc., which operates a facility where Tommie's father lives, for as long as Tommie's father continues to live in the facility (Id., Art. I.4.A.2).
- (3) To establish a Marital Trust and a Credit Shelter Trust for Debtor's benefit (Id., Art. I.4.B-C). The Marital Trust is to consist of the maximum amount allowable by the federal estate tax marital deduction. The Trustee is to make quarterly distributions to Debtor of all the Marital Trust's income, and discretionary distributions of principal. The Credit Shelter Trust is to consist of assets remaining after paying Tommie's final expenses, Tommie's father's living expenses, and funding the Marital Trust. The Trustee is directed to make discretionary payments of income and principal from the Credit Shelter Trust.

The Trust does not define either a specific amount of money, or a percentage of Trust assets to be used for each purpose, and does not quantify each of the three purposes' interest in the Trust's assets.

The Trust provides it is to become irrevocable upon Debtor's death, and contains a spendthrift clause:

The interest of each beneficiary hereunder, other than Grantor, shall be held as a spendthrift trust. No income or principal payable to or held for any beneficiary shall, while in the possession of the Trustee, be alienated, disposed of, or encumbered in any manner other than by Trustee action authorized hereby. Throughout the duration of this trust, no beneficiary (other than [Tommie]) shall have the power voluntarily or involuntarily to sell, alienate, convey, assign, transfer, mortgage, pledge or otherwise dispose of or encumber any principal or income thereof or any interest whatsoever therein until physical distribution or payment is made to him or her, and no interest of any beneficiary in or claim to any trust assets or benefits shall be subject to the claims of any of his or her creditors or to judgment, levy, execution, sequestration, garnishment, attachment, bankruptcy or other insolvency proceedings, or any other legal or equitable process.

(Id., Art. VI.3).

#### ***Bank Accounts Held as Tenants by the Entirety***

Debtor and Tommie for many years maintained a Bank of America account they held as tenants by the entirety ("TBE"). Funds held in the Bank of America account could not be reached by creditors holding claims against Debtor or Tommie individually because the money was held as TBE. Some of the money transferred into the Bank of America account came from earnings of Debtor's companies, which were held by a trust Debtor established to benefit Tommie. Money generated by Debtor's companies was not held as TBE before it was transferred into the Bank of America account.

Tommie and Debtor, on May 6, 2009, opened a BB&T account held as TBE and transferred into it \$310,000.00 from the Bank of America account. Funds held in the

BB&T account could not be reached by Debtor's or Tommie's individual creditors. They withdrew all the funds from the BB&T account—\$359,697.46—on September 11, 2009 and transferred it to the Trust. No party besides Debtor and Tommie contributed money or other assets to the Trust. Tommie and Debtor were the only settlors of the Trust. Debtor did not contribute assets to the Trust, other than the \$359,697.46.

Tommie died in January 2010, and Debtor and Jesse became Co-Trustees. Both had authority to manage Trust assets. Debtor resigned as Co-Trustee on February 19, 2010 and Jesse resigned on February 20, 2010 (D's Exh. C). Mr. Fernandez became the Trustee on February 19, 2010 (*Id.*). Mr. Fernandez has never previously served as a trustee, and he is not an accountant or an attorney. Mr. Fernandez, pursuant to the terms of the Trust, has sole authority for managing Trust assets. Debtor remained a beneficiary with an interest in the Trust after he resigned as Co-Trustee.

#### ***Baybrook's Judgment***

Baybrook, after Tommie's death, was awarded a \$3,248,000.00 judgment against Debtor on March 10, 2010 in a lawsuit Baybrook filed in February 2008. Debtor filed his Chapter 7 petition on April 9, 2010 and claimed an exemption for his "1/3 beneficial interest" in the Trust (Doc. No. 11, p. 21). Debtor asserts the Trust's spendthrift provision precludes his creditors from reaching his interest in the Trust, making his interest exempt pursuant to 11 U.S.C. Section 541(c)(2).

#### ***Baybrook's Objection***

Baybrook filed its Amended Objection seeking to disallow Debtor's exemption. Baybrook asserts three theories why Debtor's interest in the Trust is not exempt:

- (1) The spendthrift provision is invalid because Debtor both funded and is a beneficiary of the Trust.
- (2) The \$359,697.46 transferred to the Trust was improperly “funneled” through the Bank of America and BB&T TBE accounts intending to hinder creditors. Placing non-exempt assets into TBE accounts constitutes fraud, and the assets are not exempt from Debtor’s creditors.
- (3) The spendthrift provision is invalid because Debtor exercises control and dominion over the Trust by directing Mr. Fernandez how to manage the Trust.

Debtor, in response, contends the spendthrift provision is valid and prevents his interest in the Trust from becoming part of the bankruptcy estate. He asserts he and Tommie did not transfer non-exempt earnings from his companies into the exempt TBE Bank of America account to hinder creditors, and denies controlling the Trust or Mr. Fernandez as Trustee.

#### ***Validity of Debtor’s Claimed Exemption***

Debtor is a beneficiary and a settlor of the Trust. He is a beneficiary pursuant to the Trust’s terms and became a settlor when he contributed \$359,697.46 of his own money to the Trust. The spendthrift provision provides “no interest of any beneficiary in or claim to any trust assets or benefits shall be subject to the claims of any of his or her creditors.”

Debtor’s status as both a beneficiary and a settlor renders the spendthrift provision ineffective for the money he contributed to the Trust. The spendthrift provision does not preclude Debtor’s creditors from reaching the \$359,697.46 he contributed. The \$359,697.46 lost its TBE status when it was transferred to the Trust because only

Tommie, as Trustee, was able to control the contributed funds. The transferred funds are not exempt from Debtor's creditors, and neither the spendthrift provision nor its former TBE status prevents them from being part of the bankruptcy estate.

Debtor being both a settlor and a beneficiary does not invalidate the entire Trust. All beneficiaries with interests in the Trust, including Debtor, retain their interests. Debtor's status as both a Co-Trustee and a beneficiary did not invalidate the spendthrift provision because he did not have sole discretion to manage the Trust's assets. The spendthrift provision is valid as to other assets, besides the \$359,697.46, the Trust may contain.<sup>1</sup>

Money transferred through the Bank of America and BB&T accounts were not transferred to hinder creditors. Debtor and Tommie maintained the Bank of America account for many years, long before Baybrook brought suit against Debtor in February 2008. The account was not established to hinder creditors, even though some of the assets were originally non-exempt earnings from Debtor's companies. The assets, while they remained in the TBE accounts, remained exempt from Debtor's individual creditors.

Mr. Fernandez is an independent Trustee. His lack of prior experience as a trustee and close friendship with Debtor does not invalidate his authority to manage the Trust. Debtor does not have control or dominion over the Trust. Mr. Fernandez is the only person able to manage Trust assets.

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<sup>1</sup> Debtor submitted financial statements with his post-hearing brief suggesting the Trust contains assets other than the \$359,697.46. Doc. No. 48, Ex. A. These financial statements were not admitted into evidence and cannot be used to establish facts in this Order.

## **CONCLUSIONS OF LAW**

Baybrook, as the party objecting to a claimed exemption, has the burden of establishing by a preponderance of the evidence Debtor is not entitled to the exemption claimed. In re Rightmyer, 156 B.R. 690, 692 (Bankr. M.D. Fla. 1993).

### ***Debtor's Contribution to the Trust***

Section 541 of the Bankruptcy Code provides property of the estate consists of all property in which a debtor has a legal or equitable interest at the time of filing the bankruptcy petition. 11 U.S.C. § 541(a)(1). Section 541(c)(2) is an exception to the scope of Section 541(a)(1), and preserves restrictions on a debtor's property interests imposed by applicable non-bankruptcy law. 11 U.S.C. § 541(c)(2); Menottes v. Brown (In re Brown), 303 F.3d 1261, 1265 (11th Cir. 2002). A debtor's assets are not part of the bankruptcy estate pursuant to Section 541(c)(2) if state law precludes a debtor's creditors from reaching the assets, such as if they are held as TBE or there is a valid spendthrift clause. In re Brown, 303 F.3d at 1265.

### ***Issues***

The cornerstone issues in this matter are whether the \$359,697.46 remained TBE when Debtor and Tommie transferred it into the Trust, and whether the spendthrift provision is valid.

### ***Effect of Transfer from TBE Account to the Trust***

Assets held as TBE transferred to another TBE account retain their TBE status and are exempt from creditors holding a claim against one of the owners individually. Berlin v. Pecora, 968 So. 2d 47, 51 (Fla. 4th DCA 2007). Transferring assets held TBE to a trust destroys the assets' TBE status when the terms of the trust allow only one of the

owners to exercise control over the assets. Rollins v. Alvarez, 792 So. 2d 695, 696 n.2 (Fla. 5th DCA 2001); Passalino v. Protective Group Securities, Inc., 886 So. 2d 295, 297-98 (Fla. 4th DCA 2004).

The \$310,000.00 transferred from the TBE Bank of America account to the TBE BB&T account remained exempt property because it was transferred from one exempt account to another exempt account. The \$359,697.46, when transferred from the TBE BB&T account to the Trust, lost its TBE status because only Tommie, pursuant to the Trust's terms, could control the funds. Debtor's inability to control the \$359,697.46 destroyed its TBE status once the funds were transferred to the Trust.

#### ***Validity of Spendthrift Provision***

A spendthrift provision does not apply to assets in a self-settled trust, a trust where a beneficiary is also a settlor because the beneficiary contributed assets to the trust. In re Brown, 303 F.3d at 1266. A spendthrift provision is invalidated if a beneficiary has sole discretion to manage a trust. In re Gillett, 46 B.R. 642, 644 (Bankr. S.D. Fla. 1985).

Florida law defines a settlor as:

a person . . . who creates *or contributes* property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

Fla. Stat. Sec. 736.0103(16) (2010) (*emphasis added*). Florida law provides, regardless of whether a trust contains a spendthrift provision:

[w]ith respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, *the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.*

Fla. Stat. Sec. 736.0505(1)(b) (2010) (*emphasis added*). Each party who owns property as TBE has ownership of all the property. Passalino, 886 So. 2d at 296-97.

Debtor's contribution to the Trust renders him a settlor of the Trust and his creditors can reach the money he contributed. He had ownership over the entire \$359,697.46 he and Tommie contributed to the Trust. Debtor being both a settlor and a beneficiary renders the spendthrift provision invalid as to the assets he contributed. Debtor's creditors can reach the \$359,697.46 he contributed, and Section 541(c)(2) does not prevent the \$359,697.46 from being part of the bankruptcy estate. The \$359,697.46 is property of the estate pursuant to 11 U.S.C. 541(a)(1) because Debtor had an interest in the money when he filed his bankruptcy petition and it is not exempted from the bankruptcy estate pursuant to Section 541(c)(2).

Debtor being both a Co-Trustee and a beneficiary during the period between Tommie's death in January 2010 and resigning as Co-Trustee in February 2010 did not invalidate the spendthrift provision. Baybrook did not establish Debtor had sole authority to manage the Trust. Jesse was a Co-Trustee during Debtor's tenure as Co-Trustee and had authority to control the Trust. Debtor did not have exclusive authority to manage the Trust's assets, and his status as a Co-Trustee is not a basis to invalidate the spendthrift provision.

The Trust is otherwise not affected by the \$359,697.46 being part of the bankruptcy estate. The Trust is valid and all the Trust's beneficiaries, including Debtor, retain interests in the Trust. No other party, including those to receive distributions for Tommie's father's living expenses or Tommie's final expenses, contributed to the Trust or is a settlor. The spendthrift provision is valid as to these other parties' interest in other

assets the Trust may hold, other than the \$359,697.46 Debtor contributed. The spendthrift provision is valid as to Debtor's interest in Trust assets, other than the money he contributed.

***Transferring non-exempt assets to exempt accounts***

A transfer of non-exempt assets to exempt assets is not fraudulent per se, and is not automatically grounds to disallow an exemption. In re Allen, 203 B.R. 786, 792 (Bankr. M.D. Fla. 1996). A creditor must establish the debtor's intent to hinder, delay, or defraud creditors, which can be inferred from extrinsic evidence. Crew v. First Colony Life Insurance Co. (In re Mackey), 158 B.R. 509, 512 (Bankr. M.D. Fla. 1993).

Baybrook has not met its burden to establish Debtor intended to defraud his creditors when he transferred non-exempt earnings from his businesses into exempt TBE accounts. Debtor and Tommie established the TBE Bank of America account many years ago, long before Baybrook filed its suit against Debtor. Baybrook did not present evidence suggesting Debtor intended to hinder or defraud creditors. Debtor converting non-exempt assets into exempt assets is not sufficient to find the assets were fraudulently transferred. The money was not transferred with an intent to hinder or defraud creditors, and the transfer is not grounds for invalidating the exemption.

***Debtor's Control Over the Trust and Mr. Fernandez as Trustee***

A spendthrift provision will fail when a beneficiary has the right to require the trustee to convey trust property to him. In re Gillett, 46 B.R. at 644. A beneficiary cannot control a trust if the terms of the trust provide sole managerial authority to the trustee. Miller v. Kresser, 34 So. 3d 172, 175-76 (Fla. 4th DCA 2010). A spendthrift

clause is not invalidated even if the beneficiary has effective control over the trustee to such an extent the trustee has abdicated his duties to manage the trust. Id.

Debtor does not have authority to manage the Trust. The Trust provides Mr. Fernandez has sole authority to manage Trust assets. Mr. Fernandez, though he is Debtor's close friend, is an independent trustee. Debtor has no authority or ability to control the Trust. Debtor does not exert control or dominion over the Trust, and his personal relationship with Mr. Fernandez does not invalidate the spendthrift provision.

### *Conclusion*

Debtor transferred to the Trust assets he now seeks to shield from creditors. Debtor, as a Trust beneficiary and settlor, cannot shield assets from creditors by putting them in the Trust and declaring them exempt because of the spendthrift provision. The \$359,697.46 can be reached by Debtor's creditors, and is part of the estate.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the relief sought in Plaintiff's Amended Objection (Doc. No. 25) is hereby **SUSTAINED**; and it is further

**ORDERED, ADJUDGED and DECREED** that the \$359,697.46 Debtor contributed to the Trust is **NOT EXEMPT** pursuant to 11 U.S.C. Section 541(c)(2) and is property of the bankruptcy estate pursuant to 11 U.S.C. Section 541(a)(1); and it is further

**ORDERED, ADJUDGED and DECREED** that all provisions of the Trust, including the spendthrift provision, are valid, other than the spendthrift provision's application to the \$359,697.46; and it is further

**ORDERED, ADJUDGED and DECREED** that Debtor's interest in the Trust, other than the \$359,697.46, is **EXEMPT** pursuant to 11 U.S.C. Section 542(c)(2) and is not property of the bankruptcy estate pursuant to 11 U.S.C. Section 541(a)(1).

Dated this 26th day of January, 2011.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge