

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

In re:

THOMAS S. UNDERWOOD,

Debtor.

Case No.: 08-411-PMG

ROBERT ALTMAN, as Chapter 7 Trustee,

Plaintiff,

vs.

Adv. No.: 08-151

JUDITH M. UNDERWOOD,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND MEMORANDUM OPINION**

This Proceeding is before the Court to consider the complaint filed by Robert Altman, the Chapter 7 Trustee in the bankruptcy case filed by Thomas S. Underwood, seeking to avoid transfers of property to Judith M. Underwood, pursuant to 11 U.S.C. § 548, and to recover the property transferred pursuant to 11 U.S.C. § 550.

On January 25, 2008, Thomas S. Underwood filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Thomas Underwood's spouse, Judith M. Underwood, did not join in the filing of his bankruptcy petition. Robert Altman was appointed as the Chapter 7 Trustee and is the Plaintiff in this adversary proceeding, and Judith Underwood is the Defendant.

Prior to the filing of this case, the Underwoods sold non-homestead real property located in Georgia. One-half of the net proceeds of the sale (\$129,587.41) was deposited into an account in Judith Underwood's individual name, and the other half (\$129,587.41) was deposited into accounts in the names of both Thomas and Judith Underwood. The Trustee acknowledges that Judith Underwood is entitled to the half of the net proceeds that was deposited into her individual account (\$129,587.41). The Trustee contends, however, that the deposits of the other half of the net proceeds into joint accounts constituted transfers of half of that amount (\$64,793.71) to Judith Underwood, and the Trustee seeks to recover that amount for the estate from Judith Underwood.

Background

The Underwoods have been married for over thirty years. Prior to Thomas Underwood filing the bankruptcy petition, he was the family's sole income earner. Thomas Underwood had started and operated several businesses. (Tr. pp. 73-74). Judith Underwood had not worked for approximately twenty-five years. Thomas and Judith Underwood historically owned their assets and maintained their accounts as tenants by the entireties. (Tr. p. 80) (Pl.'s Ex. 4 at p. 6).

In 2002, Thomas Underwood formed Volusia Construction Operating Company (Volusia Construction), an underground utility contractor. Volusia Construction was formed as a wholly owned subsidiary of U. S. Americorp., Inc., and Thomas Underwood owned 100% of the stock of U.S. Americorp., Inc. (Tr. pp. 25-26, Pl.'s Ex. 2).

In 2003, Thomas and Judith Underwood purchased real property with a house in Sea Island, Georgia (the Georgia Property) (Pl.'s Ex. 5), but they never resided in the house. In January of 2004, the Underwoods deposited \$100,000 with the Sea Island Company to become members of the Sea Island Country Club. Title to the Georgia Property and to the country club membership was held in the names of both Thomas and Judith Underwood. (Pl.'s Exs. 5-6).

During 2005, Volusia Construction began having severe financial difficulties. The collection of receivables by Volusia Construction slowed significantly, and suppliers began to shorten their payment terms. (Tr. pp. 77-78). Thomas Underwood had personally guaranteed approximately \$12 million of promissory notes on which Volusia Construction was primarily obligated. (Tr. p. 26). During 2005, Volusia Construction obtained a \$3.0 million line of credit from Colonial Bank in Florida. Colonial Bank held mortgages on the Georgia Property and the Underwood's Florida homestead, and the line of credit to Volusia Construction was collateralized by assets of Volusia Construction and also by "virtually everything" that the Underwoods owned individually (Tr. p. 77).

In December 2005, Colonial Bank declared the loans to Volusia Construction in default. (Tr. pp. 26-27). Mr. Underwood consulted a bankruptcy attorney to consider the possibility of a business reorganization. (Tr. p. 27). However, the bank seized the company's accounts, and reorganization became impossible. (Tr. pp. 27-28). At that time, Thomas Underwood began consulting with the bankruptcy attorney about personal financial matters as well as the business matters. (Tr. pp. 29-31).

In February, 2006, Volusia Construction ceased doing business. (Tr. p. 30).

Also in February, 2006, Hertz Equipment Rental Corporation filed a lawsuit against Volusia Construction for breach of credit agreement and against Thomas Underwood for breach of personal guaranty. A consent final judgment was entered in November, 2007, against Volusia Construction and Thomas Underwood in the amount of approximately \$60,000. (Pl.'s Ex. 16).

In March, 2006, Ring Power Corporation filed a lawsuit against Volusia Construction for unpaid invoices. (Pl.'s Ex. 14). Summary judgment was entered in August, 2006, against Volusia Construction for the sum of approximately \$90,000 (Pl.'s Ex. 14).

Also in March, 2006, Volusia Construction and the Underwoods reached an agreement with Colonial Bank regarding the disposition of Volusia Construction assets and the Georgia property, and the retention of the Underwood's Florida homestead. (Pl.'s Ex. 7)

Also in March, 2006, Thomas and Judith Underwood opened a bank account at Fifth Third Bank in Daytona Beach, Florida (the Fifth Third Account). Prior to opening this account, the Underwoods held a joint bank account at Wachovia. The Underwoods closed the Wachovia account and used the funds to open the Fifth Third Account because Thomas Underwood had personally guaranteed Volusia Construction VISA cards issued by Wachovia. (Tr. p. 39). The Fifth Third Account is in the names of "Thomas S. or Judith M. Underwood." Thomas Underwood testified that he requested the account be opened with his wife as tenants by the entirety, that he understood that the bank no longer established accounts in that manner, and that he added the phrase "tenants by the entirety" on the signature card in his own handwriting. (Tr. p. 81).¹ Thomas Underwood further testified that although he hand-wrote tenants by the entirety on the signature card, his wife's name was on the account "for survivorship purposes," and he viewed and maintained the account as his account, out of which he paid his bills. (Tr. p. 81). Although Thomas Underwood and his wife were jointly liable for some of the bills that Thomas Underwood paid out of the account, such as the mortgage payment, Thomas Underwood testified that he was obligated on all the bills. (Tr. p. 82).

In October, 2006, Arch Insurance Company (Arch) filed a lawsuit against Volusia Construction, Thomas Underwood, and Judith Underwood for defaults on performance bonds issued by Arch to Volusia Construction and guaranteed by the Underwoods. (Pl.'s Ex. 17).

Also in October, 2006, FCCI Insurance Company filed a lawsuit against Volusia Construction for failure to pay premiums for workers' compensation insurance. A default judgment

¹ The signature card on the Fifth Third Bank Account is not in evidence.

was entered in March, 2007, against Volusia Construction in the amount of approximately \$170,000.

On December 8, 2006, Thomas and Judith Underwood opened a bank account at Coastal Bank of Georgia in the names of Thomas Underwood and Judith Underwood, and indicated on the Deposit Account Agreement that the ownership of the account was "Joint—with survivorship." (the Joint Georgia Account) (Pl.'s Ex. 9). Thomas Underwood testified that his wife's name was on this account for survivorship purposes, that she did not have checks or an ATM card for this account, and that she did not write checks on this account. (Tr. pp. 85-86).

On December 15, 2006, the Underwoods sold the Georgia Property for \$1,600,000.00. From the sale proceeds, \$60,000 was sent to the Internal Revenue Service as a capital gains tax estimate, and \$48,000.00 was sent to the Georgia Department of Revenue as an estimate of state tax due on the gain from the sale. (Tr. pp. 34-35, Pl.'s Ex. 7). After deducting other closing costs and payments, the net amount to Thomas and Judith Underwood was \$55,958.56. (Tr. p. 35, Pl.'s Ex. 5).

On December 15, 2006, after the closing of the sale of the Georgia Property, Judith Underwood opened an Individual Premium Money Market Account at the Coastal Bank of Georgia in the name of Judith Underwood (the Individual Georgia Account). The initial deposit into the account was \$27,979.28, and was one half of the net proceeds from the sale of the Georgia Property. (Tr. p. 36, Pl.'s Ex. 8).

On December 18, 2006, the other half of the net proceeds from the sale of the Georgia Property, the amount of \$27,979.28, was deposited into the Joint Georgia Account. (Tr. p. 37, Pl.'s Ex. 9).

In January of 2007, Thomas and Judith Underwood received a check in the amount of \$101,426.82 from the Sea Island Company as a refund for their club membership. (Pl.'s Exs. 6, 7). On January 22, 2007, one-half of the refund, the amount of \$50,713.41, was deposited into Judith

Underwood's Individual Georgia Account, and one-half of the refund (\$50,713.41) was deposited into the Joint Georgia Account. (Pl.'s Exs. 8, 9).

In January, 2007, the amount of \$53,000 was paid from the Joint Georgia Account to Arch Insurance Company (Arch) to settle the litigation brought by Arch against both of the Underwoods on the Indemnity Agreement they had given to Arch to secure performance and payment bonds that Arch had issued for Volusia Construction. (Pl.'s Ex. 17).

In April 2007, Thomas Underwood wrote a check to Judith for exactly one-half of the balance in the Fifth Third Account, with the check to Judith containing the notation: "50% - Joint Acct." (Pl.'s Ex. 10).

In mid-August of 2007, Thomas and Judith Underwood received a refund check from the IRS in the amount of approximately \$66,000.00 (the IRS Refund). (Tr. p. 40). The refund resulted mainly from the \$60,000.00 paid from the net proceeds of the sale of the Georgia Property to the IRS as a capital gains tax estimate. (Tr. p. 48). Upon receiving the IRS Refund, Thomas Underwood deposited the funds into the Fifth Third Bank Account. (Tr. p. 42). On August 15, 2007, Thomas Underwood wrote a check to Judith Underwood in the amount of \$33,044.50, which he indicated was an amount equal to one-half of the IRS Refund. (Tr. pp. 50, 73) (Pl.'s Ex. 3, pp. 41-45; Pl.'s Ex. 11).

In early October of 2007, Thomas and Judith Underwood received a refund check from the Georgia Department of Revenue in the amount of \$35,700.44 (the Georgia Refund), which was deposited into the Fifth Third Account. (Tr. p. 54). The refund was from the \$48,000.00 paid to the Georgia Department of Revenue from the net proceeds of the sale of the Georgia Property. (Tr. p. 54). On October 5, 2007, Thomas Underwood wrote Judith Underwood a check for \$17,850.22, an amount equal to one-half of the Georgia Refund. (Tr. p. 55). (Pl.'s Ex. 3, pp. 47-48; Pl.'s Ex. 12).

Judith Underwood subsequently deposited the checks for \$33,044.50 and \$17,850.22 into her Individual Georgia Account. (Tr. p. 55).

Thomas Underwood testified that the funds in the Fifth Third Bank Account and the Joint Georgia Bank Account were used to pay for his and his wife's obligations and living expenses. (Tr. pp. 56, 63) (Pl.'s Ex. 3. pp. 21-22, 25, 46-48) (Pl.'s Ex. 4, pp. 21, 29-30). Thomas Underwood had been the family's sole source of income and had paid the household expenses during most of their marriage, and the majority of the household accounts had been opened in his name. For example, amounts from the accounts were paid to GMAC Mortgage (their mortgage holder), AAA Auto Club, Bright House, their church, their alarm system provider, and their healthcare insurance provider. (Pl.'s Ex. 4 pp. 19-20) (Pl.'s Ex. 9). Although Thomas Underwood had provided Judith Underwood a "household allowance" while he was employed, he discontinued that practice after his employment ceased. Thomas Underwood testified that none of proceeds of the sale of the Georgia Property deposited into the Fifth Third Account or the Joint Georgia Account were used to pay for his wife's personal expenses. (Tr. p. 96).

Thomas Underwood has been unemployed since Volusia Construction ceased doing business in February, 2006. In October, 2008, Judith Underwood obtained modest employment, but does not earn enough to cover all of the Underwoods' expenses. (Tr. p. 107).

By the date of the petition, almost all of the funds in the Fifth Third Account and the Joint Georgia Account had been spent. (Pl.'s Exs. 9, 10). The amount contained in Judith Underwood's Individual Georgia Account as of her husband's petition date was approximately \$132,230.20. (Pl.'s Ex. 8). On December 2, 2008, when Judith Underwood was deposed, she testified that she was using the money in the Individual Georgia Account to pay the household bills and that there was approximately \$85,000.00 left in the account. (Pl.'s Ex. 4, pp. 10-11). At the time of the trial, Judith

Underwood testified that there was approximately \$65,000.00 left in the account and that she intended to continue using the funds in the account to pay for her and her husband's living expenses.

(Tr. p. 107).

Discussion

I. Summary of Accounts and Issues

The net proceeds of the sale of the Georgia Property, the club refund, and the tax refunds were deposited into three accounts.

	Individual Georgia Account	Joint Georgia Account	Fifth Third Account
Closing of sale (Dec. 2006) net 55,958.56	27,979.28	27,979.28	
Country Club refund (Jan. 2007) total 101,426.82	50,713.41	50,713.41	
IRS refund (Aug. 2007) total 66,089.00			66,089.00
check to Judith	33,044.50		-33,044.50
balance remaining			33,044.50
Georgia tax refund (Oct. 2007) total			35,700.44
check to Judith	17,850.22		-17,850.22
balance remaining	_____	_____	<u>17,850.22</u>
 Total Proceeds of Sale	 129,587.41	 78,692.69	 50,894.72

Simply stated, the ultimate net proceeds of the sale of the Georgia Property were divided equally between Thomas and Judith Underwood, one-half (\$129,587.41) was deposited into the individual account of Judith Underwood (the Individual Georgia Account), and one-half (\$129,587.41) was deposited into the two joint accounts (the Joint Georgia Account of Judith and Thomas Underwood and the Fifth Third Account of Judith or Thomas Underwood).

The Trustee does not contest the equal division of the ultimate net sales proceeds between Thomas and Judith Underwood. Also, the Trustee does not assert that the payment by Thomas Underwood of the family expenses or the joint liabilities of Thomas and Judith Underwood are inappropriate transfers. The Trustee contends that the deposits of the half of the sales proceeds allocable to Thomas Underwood (\$129,587.41) into joint accounts with Judith Underwood constituted inappropriate transfers of half of that amount (\$64,793.71) to Judith Underwood, and seeks the avoidance of those transfers.

II. Section 548 (a)(1). Fraudulent transfers and obligations

Section 548(a)(1) of the Bankruptcy Code provides:

11 U.S.C. § 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

...

A. Transfers of Funds

To avoid transfers, the Trustee must first show that transfers were made. The Trustee contends that when Thomas Underwood placed his one-half of the sale proceeds of the Georgia Property and tax refunds into the Joint Georgia Bank Account and Fifth Third Bank Account, a total of \$129,587.41, he fraudulently transferred \$64,793.71 to Judith Underwood because she was

a joint holder of the accounts. Pursuant to 11 U.S.C. § 548(a)(1)(A) and § 548(a)(1)(B), the Trustee alleges that these transfers should be avoided.

Section 101(54) of the Bankruptcy Code defines transfer to include:

11 U.S.C. § 101 Definitions

(54) The term "transfer" means--

...

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

- (i) property; or
- (ii) an interest in property.

"The definition of transfer is as broad as possible ... [A] deposit in a bank account or similar account is a transfer." In re Levine, 134 F.3d 1046, 1049 (11th Cir. 1998)(quoting S. Rep. No. 95-989, 95th Cong., 2d Sess. 26-27 (1978), reprinted in the 1978 U.S. Code Cong. & Admin. News 5787, 5813.).

1. The Joint Georgia Account

On December 8, 2006, the Underwoods opened the Joint Georgia Account. The Deposit Account Agreement shows that the ownership of the account was "Joint – With Survivorship." (Pl.'s Ex. 9). Mr. Underwood testified that it was his intent that his wife's name appear on the account for survivorship purposes. (Tr. p. 85). Mrs. Underwood did not have checks or an ATM card for the account, and did not write checks on the account. (Tr. p. 86).

On December 15, 2006, the Underwoods sold the Georgia Property for \$1,600,000.00 and received net proceeds from the sale of \$55,958.56. Following the sale, Mrs. Underwood opened an account at Coastal Bank of Georgia in her name alone, the Individual Georgia Account. One-half of the net proceeds of the sale, the amount of \$27,979.28, was deposited into Mrs. Underwood's

Individual Georgia Account. On December 18, 2006, the other half of the net proceeds was deposited into the Joint Georgia Account. (Pl.'s Ex. 9).

In January of 2007, the Underwoods received the amount of \$101,426.82 from the Sea Island Company as a refund of their membership deposit. (Pl's. Exs. 6, 7). One-half of the refund, \$50,713.41, was deposited into the Individual Georgia Account, and one-half of the refund was deposited into the Joint Georgia Account. (Pl's. Exs. 8, 9).

In bankruptcy cases, property rights are generally determined under applicable state law. The Georgia Property was located in Georgia, of course, as was the Joint Georgia Account. Accordingly, applicable Georgia law applies. In re McLain, 2004 WL 5309101, at *7 (Bankr. N.D. Ga.).

With respect to the ownership of joint bank accounts in Georgia, section 7-1-812(a) of the Georgia Code provides:

7-1-812 Ownership during lifetime

(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Ga. Code § 7-1-812(a). See Caldwell v. Walraven, 490 S.E. 2d 384, 388 (Ga. 1997) (the mere act of depositing funds into a joint account is not a "gift" of the funds by the depositing owner, to the other account holder.).²

"Section 7-1-812(a) creates a presumption that funds held in a joint account are owned in proportion to the contributions made by the joint account holders and that the party funding the

² "OCGA § 7-1-812(a) is identical to § 6-103(a) of the Uniform Probate Code, as originally approved in 1969. Cases and commentaries unanimously agree that § 6-103(a) (as well as statutes based upon it) creates a presumption that a party funding a joint account does not intend to make a gift of the funds of the account during her life, but that the presumption is subject to rebuttal by clear and convincing evidence of a contrary intent. We adopt this meaning for § 7-1-812(a)." Caldwell, 490 S.E. 2d at 388.

account does not intend to make a gift of the funds deposited into the account to the joint account holder." McLain, 2004 WL 5309101, at *7. Additionally, "[t]he fact that the joint account holder has the authority to withdraw funds from the joint account is irrelevant to the determination of ownership." Id.

It is clear that the net proceeds of the sale of the Georgia Property and the refund of the Sea Island club membership deposit were divided evenly between Judith Underwood and Thomas Underwood. The Trustee does not contest the division of these funds. Additionally, it is clear that Judith Underwood's half of these funds was deposited into her Individual Georgia Account, and that Thomas Underwood's half of these funds was deposited into the Joint Georgia Account. Accordingly, since the amounts on deposit in the Joint Georgia Account were entirely attributable to the contributions of Thomas Underwood, the presumption arises that the Joint Georgia Account belonged, during the lifetime of the Underwoods, to Thomas Underwood, pursuant to Ga. Code § 7-1-812(a), and that the deposit by Thomas Underwood of these amounts into the Joint Georgia Account did not constitute a gift of the present ownership of half of the amounts to Judith Underwood.

This presumption was not rebutted. Thomas Underwood testified that when he opened the account he wanted it set up in his name only, but after discussions with the bank employee he put his wife's name on the account as a way to protect her in case he passed away. (Tr. p. 85). Thomas Underwood testified that Judith Underwood did not have checks or an ATM card for the account, and that she did not write checks on the account. (Tr. pp. 85-86). Further, Thomas Underwood wrote checks on this account for his obligations and for family expenses for which he was liable. (Tr. pp. 56,63). By the time of the filing of the petition, the account had a remaining balance of only

\$0.05. Accordingly, the funds deposited in the account belonged to Thomas Underwood, and the present ownership of half of those funds was not transferred to Judith Underwood.

2. The Fifth Third Account

The check from the Georgia Department of Revenue in the amount of \$35,700.44 and the check from IRS in the amount of approximately \$66,000.00 were refunds to the Underwoods from the taxes withheld from the sale of the Georgia Property. These checks were deposited into the joint Fifth Third Account. Following the deposits of these checks, Thomas Underwood wrote checks for one-half of these amounts to Judith Underwood as her share of the refunds (Tr. pp. 54-55), and she deposited these checks into her Individual Georgia Account. (Tr. pp. 46-47).

The Trustee contends that the deposit of these refunds and the retention of Thomas Underwood's share of these refunds in the joint Fifth Third Account constituted the transfer of half of Thomas Underwood's share to Judith Underwood.

At the hearing, Thomas Underwood testified that although the account was created as a joint account, it was his original intent to open it as a tenancy by the entireties account. (Tr. p. 81). The Underwoods contend that, regardless of how the account was set up, the end result is the same because Thomas Underwood viewed the account as his checking account and maintained complete dominion and control over the account.

In Florida, in certain circumstances, a presumption arises that a bank account in the names of both spouses is held as a tenancy by the entireties.

. . . [A]s between the debtor and a third-party creditor (other than the financial institution into which the deposits have been made), if the signature card of the account does not expressly disclaim the tenancy by the entireties form of ownership, a presumption arises that a bank account titled in the names of both spouses is held as a tenancy by the entireties as long as the account is established by husband and wife in accordance with the unities of possession, interest, title, and time and with right of survivorship.

Beal Bank v. Almand and Associates, 780 So.2d 45, 58 (Fla. 2001).

The Joint Fifth Third Account was initially established in March, 2006, with the funds from a joint account at another bank, and the presumption that the account was established as a tenancy by the entireties may arise. If so, the presumption is rebutted by Thomas Underwood's testimony and by the facts of the subsequent handling of the account. Thomas Underwood testified that Judith's name was on the account for survivorship purposes and that he viewed the account as his account. Additionally, Thomas Underwood wrote all of the checks on the account after it was established, and was liable on all of the debts that were paid from the account. (Pl.'s Ex. 10). Further, in April, 2007, he wrote a check to Judith for exactly one-half of the balance in the account, and following that split of the amounts in the account, the only significant deposits into the account were the IRS refund and the Georgia tax refund, which were then divided equally by checks to Judith for one-half of each refund and the retention of the other half of each refund in the account. The testimony and the facts establish the Fifth Third Account as a joint tenancy with the right of survivorship.

"Although a tenancy by the entireties and joint tenancy with right of survivorship share all of the same characteristics of form, there are significant differences in the legal consequences between the forms of ownership when creditors of one spouse seek to garnish these assets, when one spouse declares bankruptcy, or when one spouse attempts to recover monies transferred without his or her permission." Beal Bank, 780 So.2d at 53.

In Florida, a joint account holder has an interest in the account "to the extent of his original contribution and pro rata share of accretions, if any, which could not be reached for application to the debt of his co-depositor." Antuna v. Dawson, 459 So. 2d. 1114, 1117 (Fla. 4th DCA 1985). "In order to establish that a non-depositing party is entitled to funds held in a joint account, that party must show: (1) that the depositor/donor had a clear intention to transfer a present interest; (2)

delivery by surrender of dominion and control to the donee; and (3) acceptance of the gift by the donee." In re Kellman, Jones v. Kellman, 248 B.R. 430, 434 (Bankr. M.D. Fla. 1999).³

The funds at issue were Thomas Underwood's share of the tax refunds resulting from the sale of the Georgia Property. Thomas Underwood did not have a clear intent to transfer a present interest to Judith Underwood, he did not surrender dominion and control to Judith, and Judith did not exercise control over the account and thereby did not accept the deposits as a gift. Accordingly, the tax refunds retained in the account belonged to Thomas Underwood, and the present ownership of half of those funds was not transferred to Judith Underwood.

3. Both the Joint Georgia Account and the Fifth Third Account

Since Thomas Underwood retained the present ownership of the funds deposited into the joint accounts, under both Georgia and Florida law the funds were accessible by his individual creditors. In Georgia, ". . . OCGA § 7-1-812(a) [the Georgia statute regarding the ownership of funds deposited into a joint bank account] should be applied to determine the extent to which appellees [creditors] are entitled to garnish the funds in the joint account" Lamb v. Thalimer Enterprises, Inc., 193 Ga. App. 70, 72, 386 S.E. 2d 912, 914 (Ga. 1989). In Florida, "funds held in a joint account can be garnished by the creditor of one of the joint account owners to the extent of the debtor's ownership of the funds." Bernal v. All American Investment Realty, Inc., 2009 WL 586010 at *5 (S.D. Fla.).

4. Transfers of interests

Although Thomas Underwood retained the present ownership interest of the funds in the joint accounts, because Judith was a joint holder of the joint accounts she had the ability to withdraw funds from those accounts. (See § 7-1-811 Georgia Code, and § 659.79 Florida Statutes).

³ In Kellman, the debtor's name was on a joint account with her husband, but the court concluded that the debtor had no ownership interest in the funds in the account, and that none of the funds in the account were assets of the debtor's

Additionally, since Judith was a joint holder of the accounts she had a contingent survivorship interest, and accordingly she had a conditional remainder interest in the funds deposited into the accounts.⁴

The definition of transfer is to be interpreted broadly (In re Levine, 134 F.3d at 1049), and since it includes each mode of parting with property, including the conditional disposition of an interest in property (see § 101(54)), the Court continues with the § 548 analysis.

B. Fraudulent transfers

1. Section 548(a)(1)(B)

Section 548(a)(1)(B) of the Bankruptcy Code provides:

11 U.S.C. § 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

...

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

...

11 USC § 548(a)(1)(B) (Emphasis supplied).

bankruptcy estate.

⁴ In Georgia, when considering the proceeds of the sale of real property in which one party held a survivorship interest, "the existence of the power to dispose of the fee did not enlarge the life estate into a fee." Caldwell v. Walraven, 490 S.E.2d at 446. "[W]here an estate is expressly given for life with an added power of disposal, that power, although it may be absolute, does not enlarge the life estate to a fee." Id. at 447.

To avoid a transfer pursuant to § 548(a)(1)(B), the Trustee must show that (i) the debtor received less than reasonably equivalent value, and (ii) the debtor was insolvent on the date that such transfer was made.

It is clear that Thomas Underwood was insolvent on the dates that the deposits at issue were made. Volusia Construction had ceased doing business and its assets had been liquidated, the company was being sued and judgments were entered against the company that it could not and did not pay, and Thomas Underwood was the guarantor of \$12 million of the company's debts. Clearly, the sum of his debts was greater than all of his property. (See 11 U.S.C. §101(32)(A)).

However, Thomas Underwood did not receive less than reasonably equivalent value for the deposits that he retained in the joint accounts. Under § 548(a)(1)(B), "the plaintiff must prove that the debtors did not receive 'reasonably equivalent value' in exchange for the transferred property." In re Seaway International Transport, Inc., 341 B.R. 333, 334 (Bankr. S.D. Fla. 2006). The statutes do not specifically define the term "reasonably equivalent value." In determining the issue, however, courts generally consider many factors, including the "the disparity between the fair value of the property and what the debtor actually received" In re Vilsack, 356 B.R. 546, 553 (Bankr. S.D. Fla. 2006). The "essential examination is a comparison of 'what went out' with 'what was received.'" In re Leneve, 341 B.R. 53, 57 (Bankr. S.D. Fla. 2006)(citing In re Grabill Corp., 121 B.R. 983, 994 (Bankr. N.D. Ill. 1990)).

The analysis of the ownership of the funds in the joint accounts under both applicable Georgia and Florida laws shows that Thomas Underwood was the owner of the funds at issue that were deposited and retained in the accounts, and that these funds were subject to the claims of his creditors. Thomas Underwood retained the present ownership of the funds after they were deposited, he had the authority to spend the funds, and he spent the funds on debts for which he was

responsible. Thomas Underwood received the full value of the funds that are at issue. The transfers of any contingent interests in the accounts had no value.

The Trustee cannot recover under § 548(a)(1)(B).

2. Section 548(a)(1)(A)

The Trustee contends that the transfer was made with the actual intent to hinder, delay, or defraud creditors under § 548(a)(1)(A). 11 U.S. C. Section 548(a)(1)(A) provides:

11 U.S.C. § 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; . . .

11 U.S.C. § 548 (a)(1)(A) (Emphasis supplied).

Although Judith Underwood's share of the ultimate sales proceeds was deposited into her individual account, Thomas Underwood's share was deposited into two joint accounts, one in Georgia and one in Florida. Volusia Construction had ceased doing business, its assets had been liquidated, and lawsuits were being filed. Thomas Underwood was insolvent and was consulting with his bankruptcy attorney. He established a joint account in Georgia and tried to establish a tenancy by the entireties account in Florida. With these facts as a basis, the Trustee understandably argues that Thomas Underwood's deposits of the funds into the joint accounts were made with the intent to defraud his creditors.

In determining actual intent under § 548(a)(1)(A), consideration may be given, among other factors, to whether:

(a) The transfer was to an insider;

- (b) The debtor retained possession or control of the property transferred after the transfer;
- (c) The transfer or obligation was disclosed or concealed;
- (d) Before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
- (e) The transfer was of substantially all of the debtor's assets;
- (f) The debtor absconded;
- (g) The debtor removed or concealed assets;
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the asset to an insider of the debtor.

In re XYZ Options, Inc., 154 F.3d 1262, 1271 (11th Cir. 1984).

This list of "badges of fraud" is nonexclusive, and courts may consider factors other than those listed in determining a debtor's intent. In re Jennings, 332 B.R. 465, 469 (Bankr. M.D. Fla. 2005). Generally, courts look to the circumstances surrounding a particular conveyance, and "avoid determining in a vacuum the presence or absence of a debtor's actual intent to hinder or delay a creditor." General Trading Incorporated v. Yale Materials Handling Corporation, 119 F.3d 1485, 1498-99 (11th Cir. 1997).

The Trustee maintains that several badges of fraud are present. Establishing joint accounts gave Judith Underwood the ability to withdraw funds from the accounts. Thomas Underwood had been sued or threatened with suit, Thomas Underwood was insolvent, and Thomas Underwood retained possession and control of the accounts.

Although some of the badges of fraud are present, the evidence does not support a finding that Thomas Underwood transferred funds to Judith Underwood with the actual intent to hinder, delay, or defraud creditors.

The facts show that the transfers were made to an insider, that Thomas Underwood was sued or threatened with suit prior to the transfers, and that Thomas Underwood was insolvent on the dates of the transfers.

However, there is no evidence that the accounts were concealed, or that Thomas Underwood absconded with the assets or removed the assets. Although the accounts were joint accounts, and one of the accounts was in Georgia, information about the accounts was as available to creditors as information about any bank accounts.

Additionally, Thomas Underwood testified that the accounts were intended to be his accounts, that Judith's name was on the accounts for survivorship purposes, and that Judith Underwood did not exercise any control over the accounts. Thomas Underwood paid his debts and the family's expenses from these accounts. In fact, he utilized all of the funds in the accounts for these debts and expenses. The facts show that Thomas Underwood received the full value of the funds deposited into the joint accounts.

Thomas Underwood retained possession and control of the accounts. The retention of possession or control is often considered as a factor that indicates a fraudulent transfer. However, in this instance, with the accounts in joint names, possession and control are factors indicating that Thomas Underwood retained the present ownership of the funds deposited into the joint accounts.

Since Thomas Underwood retained the present ownership of the funds deposited into the joint accounts, under both Georgia and Florida law the funds were accessible by his individual creditors. In Georgia, ". . . OCGA § 7-1-812(a) [the Georgia statute regarding the ownership of funds deposited into a joint bank account] should be applied to determine the extent to which appellees [creditors] are entitled to garnish the funds in the joint account" Lamb v. Thalimer Enterprises, Inc., 193 Ga. App. 70, 72, 386 S.E. 2d 912, 914 (Ga. 1989). In Florida, "funds held in a

joint account can be garnished by the creditor of one of the joint account owners to the extent of the debtor's ownership of the funds." Bernal v. All American Investment Realty, Inc., 2009 WL 586010, at *5.

There is a "close line between pre-bankruptcy planning and the intent to hinder, delay or defraud creditors." In re Siervo, 2006 WL 3068841, *3 (Bankr. S.D. Fla. April 3, 2006); see also In re Barrett, 156 B.R. 529, 536-37 (N.D. Tex. 1993); In re Carey, 938 F.2d 1073, 1077 (10th Cir. 1991). As a bankruptcy court in South Florida reasoned, there is a distinction between a debtor who "makes a transfer with a particular creditor in mind and has attempted to remove assets from the reach of the creditor," and a debtor who "is merely looking to his future well-being." In re Covino, 187 B.R. 773, 779 (Bankr. S.D. Fla. 1995). The facts before the Court do not show that Thomas Underwood acted with the intent to remove assets from any particular creditor.

The facts of this case are distinguishable from a Middle District of Florida case cited by the Trustee, in which the court found that the debtor engaged in bankruptcy planning with the specific purpose of trying to hinder, delay, or defraud a specific creditor. In re Jennings, 332 B.R. at 470-472. The court in Jennings based its finding on the fact that the debtor purchased an annuity after he had been sued, but before judgment was entered. Id. Specifically, the court in Jennings found that, "[t]he timing of and the chronology of events leading up to Jennings' purchase of the annuity leads to but one conclusion; Jennings purchased the annuity to keep the money beyond the reach of Maxfield." Id. at 471. Also in Jennings, the transfer was of non-exempt assets into an exempt asset.

In this case, however, while Thomas and Judith Underwood acted to maintain their separate interests in the proceeds of the sale of the Georgia Property, Thomas Underwood did not remove his assets from the claims of a particular creditor, or for that matter from the claims of his creditors in general.

Accordingly, while several of the "badges of fraud" are present from which an intent to defraud initially may be inferred, the evidence does not support a finding that Thomas Underwood acted with the intent to hinder, delay, or defraud his creditors.

Conclusion

For the reasons expressed above, the Trustee is not entitled to avoid the transfers of funds under 11 U.S.C. §§ 548(a)(1)(A) or 548(a)(1)(B). The Court will enter a separate judgment that is consistent with these Findings of Fact and Conclusions of Law.

Dated this 29th day of September, 2009, in Jacksonville, Florida.

BY THE COURT

Paul M. Glenn

Paul M. Glenn

Chief United States Bankruptcy Judge