UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re

THOMAS S. UNDERWOOD,

Case No.: 08-411-PMG

Debtor.
_____/

ROBERT ALTMAN, as Chapter 7 Trustee,

Plaintiff,

vs. Adv. No.: 08-140

THOMAS S. UNDERWOOD,

Defendant.
_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND MEMORANDUM OPINION

This Proceeding is before the Court on the Complaint to Deny Discharge under 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4) filed by the Plaintiff, Robert Altman, the Chapter 7 Trustee. The Trustee asserts that the discharge of Defendant, Thomas Underwood, should be denied because he transferred property within one year of the bankruptcy filing with the intent to hinder, delay, or defraud creditors, and he knowingly and fraudulently made a false oath in connection with his bankruptcy case.

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 Thomas 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) was deposited into an account in Judith Underwood's individual name, and the other half ($129,587) was deposited into accounts in the names of both Thomas and Judith Underwood.

The net proceeds were comprised in part of refunds from the IRS ($66,089.00) and Georgia Department of Revenue ($35,700.00), mainly for taxes the Underwoods paid on gains from the sale of their property (for a total of $101,789). The Trustee acknowledges that Judith Underwood is entitled to the half of the proceeds from the tax refunds that was deposited into her individual account ($50,894.72). The Trustee contends, however, that the deposits of the other half of the proceeds from the tax refunds ($50,894.72) into the joint account constitute transfers of half that amount ($25,447.36) to Judith Underwood with the intent to hinder, delay, or defraud creditors. The Trustee also contends that Thomas Underwood knowingly made a false oath on his schedules by failing to disclose transfers he made to Judith Underwood in connection with the entire net proceeds from the sale of the Georgia Property.

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. p. 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 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), but they never resided in the house. (Pl.'s Ex. 5). 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.) Mr. Underwood had personally guaranteed approximately $12 million of promissory notes on which Volusia Construction was primarily obligated. 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. p. 29).

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 Underwoods' Florida homestead.

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 held with his wife as tenants by the entireties, that he understood that the bank no longer set up accounts in that manner, and that he penciled in tenants by the entireties on the signature card. (Tr. p. 81).[1] Thomas Underwood further testified that although he penciled in tenants by the entireties on the signature card, his wife's name was on the account "for survivorship

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

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). Further, Judith Underwood did not have checks or an ATM card for this account, and she did not write checks on the account. (Tr. pp. 157-58).

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 was entered in March, 2007, against Volusia Construction in the amount of approximately $170,000. (Pl.'s Ex. 13).

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 the 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 sales proceeds, $60,000 was sent to the Internal Revenue Service as a capital gains 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. p. 34, 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, Mrs. 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 in the amount of $27,979.28, and was one half of the net proceeds from the sale of the Georgia Property. (Tr. pp. 35-36, 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 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 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, funds 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).

Question Ten of Thomas Underwood's Statement of Financial Affairs, an inquiry about "Other transfers," provides as follows: "(a) List all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within two years immediately preceding the commencement of this case . . . ." Thomas Underwood's response includes the statement: "Debtor and his wife sold their second home in Sea Island, GA, for $1.6 M. The net sale proceeds of $55,958.56, were split 50/50 between debtor and his wife." (Pl.'s Ex. 2). Thomas Underwood did not reference the division of the proceeds from the refund of the Sea Island Club membership or tax refunds in his Statement of Financial Affairs.

Thomas Underwood's counsel sent letters to the Trustee on January 28, 2008, and February 19, 2008, that disclosed Thomas Underwood's financial records. (Pl.'s Ex. 7). The documentation attached to the January 28, 2008 letter includes bank statements on the Coastal Bank and Fifth Third Account, the 2006 federal income tax return, the HUD1 settlement statement on the sale of the Georgia Property, and a copy of the settlement statement with Colonial Bank. The February 19, 2008 letter provides detailed explanations regarding the Underwoods' division of the ultimate net proceeds of the sale of the Georgia Property.

Thomas Underwood has been unemployed since Volusia Construction ceased doing business in February, 2006. (Tr. p. 56). In October, 2008, Judith Underwood obtained modest employment, but does not make enough to cover all of the Underwood's 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 balance of 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

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			17,850.22
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).

Included in the net proceeds were the tax refunds totaling $101,789.44 from the sale of the Georgia Property, that were divided equally between Thomas and Judith Underwood. One-half, $50,894.72, was deposited into the individual account of Judith Underwood (the Individual Georgia Account), and one-half, $50,894.72, was deposited into the Fifth Third Account of Judith or Thomas Underwood.

II. The Trustee's contentions

The Trustee does not contest that Thomas and Judith Underwood were each entitled to an equal division of the tax refunds. The Trustee contends that Thomas Underwood's discharge should be denied because: (1) the deposit and retention by Thomas Underwood of his half of the tax refunds ($50,894.72) in a joint account with Judith Underwood within one year before the date of the

filing of the petition was a transfer of half of that amount ($25,447.36) to Judith Underwood with the intent to hinder, delay, or defraud his creditors; and (2) by failing to disclose the 75%-25%[2] division of the proceeds of the sale of the Georgia Property and club refund on his schedules, Thomas Underwood knowingly and fraudulently made a false oath or account.

III. The applicable statute

Section § 727(a) of the Bankruptcy Code provides:

> **11 U.S.C. § 727 Discharge**
>
> (a) The court shall grant the debtor a discharge, unless-
>
> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-
>
> (A) property of the debtor, within one year before the date of the filing of the petition;
>
> . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case-
>
> (A) made a false oath or account;
>
> . . .

11 U.S.C. § 727(a).

IV. Transfers of funds

For the Court to deny a discharge based on transfers made with the intent to hinder, delay, or defraud creditors, the Trustee must show that transfers were made. The Trustee contends that when Thomas Underwood placed his half of the proceeds from the tax refunds ($50,894.72) into the joint

[2] The Trustee contends that the deposit of 50% of the sales proceeds into Judith's individual account and 50% into their joint accounts results in a 75%-25% division between Judith and Thomas.

Fifth Third Account, he fraudulently transferred $25,447.36 to Judith Underwood since she was a joint holder of that account.

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).

V. 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 Judith deposited these checks into her Individual Georgia Account. (Tr. pp. 46-47).

The Trustee contends that the deposit of the tax refunds and the retention of Thomas Underwood's share of the tax 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 set up as a joint account, it was his original intent to set it up 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, SSB v. Almand and Associates, etc, et al., 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. (Tr. p. 81). 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 Thomas wrote Judith a check for exactly one-half of the balance in the account (Pl.'s Ex. 10), 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 the refunds 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. The funds deposited into the account belonged to Thomas Underwood, and the present ownership of half of those funds was not transferred to Judith Underwood.

Additionally, since Thomas Underwood retained present ownership of the funds deposited and retained in the joint account, the funds were accessible by his individual creditors. 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.).

Although the present ownership of half of the funds was not transferred to Judith, because Judith was a joint holder of the joint account, she had the ability to withdraw funds from the account. (See § 659.79 Florida Statutes). Additionally, since Judith was a joint holder of the account for survivorship purposes, she had a conditional remainder interest in the funds. The definition of transfer is to be interpreted broadly (Levine, infra), and since it includes each mode, including the conditional disposition of an interest in property (see § 101(54)), the Court continues with the § 727 analysis.

VI. Fraudulent transfers

Section § 727(a)(2)(A) of the Bankruptcy Code provides:

> (a) The court shall grant the debtor a discharge, unless-
>
> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-
>
> (A) property of the debtor, within one year before the date of the filing of the petition;

11 U.S.C. § 727(a)(2)(A).

---

[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 bankruptcy estate.

Section 727 of the Bankruptcy Code "may be used to deny a discharge to dishonest debtors, however unfortunate." In re Moeritz, 317 B.R. 177, 182 (Bankr. M.D. Fla. 2004)(quoting In re Matus, 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004)). Objections to discharge under 11 U.S. C. § 727, however, should be "liberally construed in favor of debtors and strictly against objectors in order to grant debtors a fresh start." In re Zwirn, 2005 WL 1978510, at *2 (Bankr. S.D. Fla. Aug. 15, 2005).

Rule 4005 of the Federal Rules of Bankruptcy Procedure provides "[a]t the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." Fed. R. Bankr. P. 4005. "The objector must establish all required elements of the objection by a preponderance of the evidence." In re Zwirn, 2005 WL 1978510, at *2.

"A creditor alleging intent to defraud under § 727(a)(2)(A) bears the considerable burden of demonstrating *actual fraudulent intent*; constructive fraud is insufficient." In re Miller, 39 F.3d 301, 306 (11th Cir. 1994)(Emphasis in original). "Under § 727(a)(2)(A), the objecting party must prove by a preponderance of the evidence that: (1) a transfer occurred; (2) debtor transferred his property; (3) the transfer was within one year of the petition, and (4) the transfer was done with the intent to hinder, delay, or defraud a creditor or the trustee." In re Greene, 340 B.R. 93, 98 (Bankr. M.D. Fla. 2006); see also Williamson Const., Inc. v. Ross (In re Ross), 217 B.R. 319, 323 (Bankr. M.D. Fla. 1998). "Concealment under this section occurs when a debtor's interest in the property is not obvious, but the debtor continues to reap the benefits the property has to offer." Greene, 340 B.R. at 98; see also IRS v. Petersen, 312 B.R. 385, 392 (Bankr. N.D. Iowa 2004)).

The analysis of the ownership of the funds in the Fifth Third Account under applicable Florida law shows that Thomas Underwood retained present ownership of the funds, that he treated the account as his account, wrote all checks on the account, and was liable on all debts paid from the

account. Clearly, Thomas Underwood viewed and treated the Fifth Third Account as his account.

Since Thomas Underwood retained present ownership of the funds deposited into the joint account, the funds were accessible by his individual creditors. 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, 2009 WL 586010 at *5.

Accordingly, the retention of control of the account in not indicative of fraud in this case, since there was no concealment of the account, Thomas Underwood did not transfer the present ownership of the account, and the account was accessible by his creditors.

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. 470-472. The court in Jennings based its finding upon the fact that although the debtor had never previously set aside any money for retirement, he purchased a single premium $500,000 annuity, after he had been sued, but before judgment was entered. Id. 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 tax refunds, 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, the evidence does not support a finding that Thomas Underwood acted with the intent to hinder, delay, or defraud his creditors.

VII. False Oath

Section 727(a)(4)(A) of the Bankruptcy Code provides:

(a) The court shall grant the debtor a discharge, unless--

. . .

(4) the debtor knowingly and fraudulently, in or in connection with the case-

(A) made a false oath or account.

11 U.S.C. § 727(a)(4).

"To prevail under § 727(a)(4)(A), the Trustee must show that (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case." In re Forness, 334 B.R. 724, 730 (Bankr. M.D. Fla., 2005). This subsection relates to both affirmative false statements and omissions. In re Montgomery, 2007 WL 625196, at *3 (Bankr. E.D. Tenn. Feb. 27, 2007).

"The purpose of § 727(a)(4)(A) is to ensure that debtors disclose adequate information regarding their assets and financial affairs." In re Forness, 334 B.R. at 730; see also In re Offer, 2007 WL 1560131, at *4 (Bankr. S.D. Fla. May, 25 2007) (reasoning that the purpose of § 727(a)(4)(A) is "to ensure that adequate information is available to those interested in administration of the estate without need of examinations or investigations to determine whether the information is true in the bankruptcy petition.").

The Trustee alleges Thomas Underwood failed to disclose information with the intent to hinder his investigation. Question Ten of Thomas Underwood's Statement of Financial Affairs inquires about "Other transfers" and provides as follows:

> (a) List all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within two years immediately preceding the commencement of this case. . . .

Thomas Underwood's response to this question states: "Debtor and his wife sold their second home in Sea Island, GA, for $1.6 M. The net sale proceeds of $55,958.56, were split 50/50 between debtor and his wife." (Pl.'s Ex. 2). The Trustee contends that the proceeds were not split equally because Judith Underwood's half was deposited into her Individual Georgia Account, while the half of the sales proceeds allocable to Thomas Underwood were deposited into the Joint Georgia Account.[4]

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

[4] Thomas Underwood's share of the proceeds refunded from the Sea Island Club membership was also deposited in the Joint Georgia Account, while Judith Underwood's share was deposited in her Individual Georgia Account. Therefore, the analysis that applies to the proceeds from the sale of the Underwood's home also applies to the proceeds refunded from the Sea Island Club membership.

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.).[5]

"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 account does not intend to make a gift of the funds deposited into the account to the joint account holder." In re McLain, 2004 WL 5309101, at *7 (Bankr. N.D. Ga. Sept. 30, 2004). 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.

Additionally, 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). Accordingly, the funds in the Joint Georgia Account were accessible by the creditors of Thomas Underwood.

---

[5] "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.

Because the sums 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 Underwood's, to Thomas Underwood, pursuant to Ga. Code § 7-1-812(a), and that the deposit by Thomas Underwood of his half of these amounts into the Joint Georgia Account did not constitute a gift of the present ownership of half of that amount to Judith Underwood.

This presumption was not rebutted. Thomas Underwood testified that Judith Underwood was on the account for survivorship purposes, that she did not have checks or an ATM card for the account, and that she did not write checks on the account. (Tr. p. 85). Further, Thomas Underwood wrote checks on this account for his obligations and for family expenses for which he was liable. Additionally, the funds were accessible by his creditors. Thomas Underwood viewed and treated the Joint Georgia Account as his account. Accordingly, Thomas Underwood did not willfully make a false statement with the intent to defraud his creditors by stating that he and Judith Underwood split the proceeds from the sale of their Georgia Property equally.

The Trustee also asserts that Thomas Underwood failed to list transfers he made to Judith Underwood of his one half interest in proceeds refunded from the IRS, Georgia Department of Revenue, and Sea Island club membership on his Statement of Financial Affairs. Thomas Underwood contends there were no transfers to report because he did not transfer half of his share of the proceeds to Judith Underwood. Further, Thomas Underwood asserts that he openly disclosed his financial records, which is evidenced by the following letters his counsel sent to the Trustee: (1) a January 28, 2008, letter with attached documentation of bank statements on the Joint Georgia and Fifth Third Bank accounts, the 2006 Federal income tax return, the HUD1 settlement statement on

the sale of the Georgia property, and a copy of the settlement agreement with Colonial Bank; and (2) a February 19, 2008, letter that provides detailed explanations along with attached documentation in regards to how the Underwoods divided the ultimate net proceeds of the Georgia Property. (Pl.'s Ex. 7).

As discussed, there was no transfer of present ownership in the funds to Judith Underwood. Further, the evidence shows that Thomas Underwood openly disclosed to the Trustee how the net proceeds of the sale of the Georgia Property, the club refund, and the tax refunds were divided between him and Judith Underwood.

Accordingly, the discharge of Thomas Underwood should not be denied on the basis of § 727(a)(4)(A) of the Bankruptcy Code.

Conclusion

For the reasons expressed above, the Trustee has not established by a preponderance of the evidence that Thomas Underwood's discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(2)(A) or 727(a)(4). 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

/s/Paul M. Glenn
Paul M. Glenn
Chief United States Bankruptcy Judge