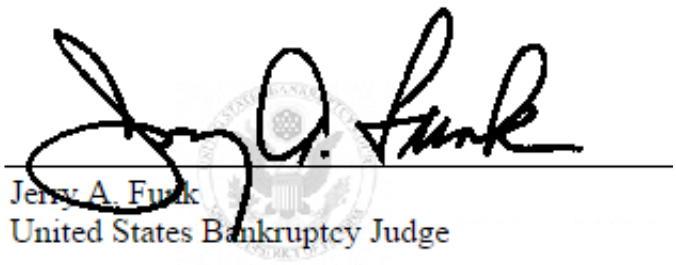
ORDERED.

Dated: April 10, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

ROBERT LYNN HOLLAND,
TERESA HANNON HOLLAND,

Case No. 3:15-bk-3084-JAF
Chapter 7

Debtors,
_____/

ORDER SUSTAINING TRUSTEE'S OBJECTION TO DEBTORS' AMENDED CLAIM OF EXEMPTION AND GRANTING MOTION FOR TURNOVER

This case is before the Court upon Trustee's Objection to Debtors Robert and Teresa Hollands' (the "Debtors") Amended Claim of Exemption (Doc. 76) and Trustee's Motion for Turnover of Property (Doc. 77). A trial was held on January 30, 2017, at which time the Court took evidence, heard argument, and directed the parties to submit briefs in support of their respective positions. The parties' briefs were submitted on March 2, 2017. (Docs. 108, 109). After reviewing the evidence, written submissions, and argument of counsel, the Court sustains the Trustee's Objection and grants the Trustee's Motion for Turnover of Property.

Background

On July 9, 2015 (the "Petition Date"), Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. (Doc. 1). Debtors filed an amendment to Schedule C Property Claimed as Exempt (the "Amendment") on May 9, 2016. (Doc. 75). In the Amendment, Debtors claim an exemption, pursuant to sections 222.11(2)(b) and 222.11(3), Florida Statutes, as to an account at Fifth Third Bank (the "Savings Wage Account"), in the amount of $15,069.19. Debtors claim these funds constitute Debtor Robert Holland's (the "Husband") wages for the six months prior to the Petition Date. Debtors assert the Husband is the "head of family" for purposes of this exemption, and that Debtor Teresa Holland (the "Wife") is the Husband's sole dependent.

The Trustee filed his Objection to the Amendment on May 23, 2016, arguing (among other things) that the Husband does not qualify as head of family because the Wife is not dependent on him for more than half of her support and would not become a charge on society if she was required to support herself. (Doc. 76).

Findings of Fact

Years prior to filing bankruptcy, the Husband owned and operated a real estate agency for the benefit of himself and his family. Financial problems ensued around 2008. The Husband first contemplated bankruptcy in late 2010, at which time he first consulted his current bankruptcy attorney. In 2011, the Husband sold his business and found employment elsewhere. Debtors filed their Chapter 7 petition in 2015.

According to the Debtors' Schedule I, as of the Petition Date, the Husband's take-home wages were $2,560.20 per month, while the Wife's take-home wages were $2,188.09 per month. (Doc. 1 at 48). The couple also received $200.00 per month from their adult daughter "to reimburse [them] for their payments of her car insurance and cell phone contract payments on the

family [auto insurance] policy and [cell phone] contract." (Doc. 1 at 49). Including the daughter's contribution, the total family income was $4,948.29 per month. (Doc. 1 at 48). Debtors' Schedule J lists their monthly expenses at $4,904.68. (Doc. 1 at 52).

Since at least 2010, the Debtors have not listed any dependents on their federal tax returns. As of the Petition Date, the Wife was covered under the Husband's health insurance policy, through the Husband's employer. The Wife testified that her employer does not provide her the option to obtain health insurance. Prior to the Petition Date, the Wife liquidated her personal retirement account in the amount of approximately $41,000.00 to pay toward the past-due federal taxes owed jointly by her and her Husband. The Husband, however, conceded the Wife did not have sufficient income to generate a $41,000.00 tax liability for herself, individually. In 2015, the Husband also took a distribution of approximately $111,000.00 from his retirement account to pay past-due federal tax liabilities. On the Petition Date, the Wife had no retirement savings; the Husband had over $207,000.00 in his retirement accounts.

The Wife testified she paid for groceries, her credit card, her car payment and expenses, pet expenses, and personal travel expenses. She did not know whether she could support herself on $2,188.09 net pay per month, and she specifically testified she had not "looked" into whether she could survive on $2,188.09 per month.

Debtors did not put on evidence of the exact amount of mandatory withholdings required by law to be withheld from the Husband's wages. Nevertheless, based on the payroll deductions listed in Schedule I, the Court finds the Husband's "disposable earnings" were less than $750 per week for the entire six months preceding the Petition Date.[1]

[1] Debtors specifically cited only section 222.11(2)(b), Florida Statutes, as their basis for wage exemption in their Amended Schedule C. This was more than a mere typographical error because Debtor's post-trial brief block-quoted only subsection (2)(b), repeatedly referred to (2)(b), and did not mention or allude to subsection (2)(a). Since it is clear the Husband's "disposable earnings" are less than $750 per week, the Court concludes Debtors have failed to

The Husband testified his intent to form the Savings Wage Account arose after he first met with his bankruptcy attorney in 2010, and that the account was opened in 2011. On the stand, the Husband volunteered the fact that he had never heard of a "wage account" until discussing the matter with his attorney. He explained his intent in setting up the Savings Wage Account was borne of his fear of having to file bankruptcy and his desire to preserve money.

The Savings Wage Account statements were admitted into evidence without objection. (Doc. 102-1 at 20-25). The six-month period prior to the Petition Date is January 9 to July 9, 2015. On January 9, 2015, the Savings Wage Account's balance was $21,273.32. (Doc. 102-1 at 25). On the Petition Date, the account balance was $15,069.19, an amount equal to the wages deposited into the account during the six-month period prior to the Petition Date. (Doc. 102-1 at 19). The Husband testified he transferred funds from the Savings Wage Account to a separate checking account, and then paid bills from the separate checking account. The Wife had no access to the funds in this separate checking account or the Savings Wage Account.

Conclusions of Law

"Commencement of a bankruptcy case creates an estate consisting of all debtors' property pursuant to § 541. However, a debtor may exempt certain property from the estate pursuant to § 522. Section 522 provides for two exemption schemes. Florida has opted out of the federal exemptions and provides for exemptions under state law." In re Parker, 147 B.R. 810, 812 (Bankr. M.D. Fla. 1992) (Proctor, J.); § 222.20, Fla. Stat. (2015) (opting out of federal exemptions).

"[U]nder Rule 4003(c) of the Federal Rules of Bankruptcy Procedure, the burden is on the party objecting to exemptions to prove, by a preponderance of evidence, 'that the exemptions are

put on prima facie evidence to support an exemption under section 222.11(2)(b). See, e.g., In re Holmes, 414 B.R. 868, 869-70 (Bankr. S.D. Fla. 2009) (discussing burden shifting under Rule 4003(c)). However, the Court will address Debtors' claim of exemption under section 222.11(2)(a).

not properly claimed.'" In re McFarland, 790 F.3d 1182, 1186 (11th Cir. 2015); Fed. R. Bankr.P. 4003(c). "If the objecting party establishes prima facie evidence that the debtor's claimed exemptions should be denied, then the burden shifts to debtor to establish that the exemptions are legally valid." In re Holmes, 414 B.R. 868, 869-70 (Bankr. S.D. Fla. 2009). The burden to establish prima facie evidence is also known as the burden of production or burden of going forward with evidence. However, under Rule 4003(c), the objecting party maintains the ultimate burden of persuasion, which is the burden to convince the fact-finder of the facts on which there is conflicting evidence. See Microsoft Corp. v. I4I Ltd. P'ship, 564 U.S. 91, 107 (2011) ("[T]he same party who has the burden of persuasion also starts out with the burden of producing evidence.").

The relevant statute is section 222.11, Florida Statutes. "When interpreting a state statute, such as [section] 222.11, 'we look to the decisions of the state's courts.'" Tobkin v. Calderin (In re Tobkin), 638 F. App'x 822, 824 (11th Cir. 2015).

Section 222.11 provides, in part:

> (2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to $750 a week are exempt from attachment or garnishment.
>
> (b) Disposable earnings of a head of a family, which are greater than $750 a week, may not be attached or garnished unless such person has agreed otherwise in writing. . . .
>
> (3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

§ 222.11(2)-(3), Fla. Stat. (2015).

Section 222.11(1) provides the following definitions pertinent to this case:

> (b) "Disposable earnings" means that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld.
>
> (c) "Head of family" includes any natural person who is providing **more than one-half of the support for** a child or other dependent.

§ 222.11(1)(b)-(c), Fla. Stat. (2015) (emphasis added).

Based on the arguments in this case, the chief dichotomy presented by the parties is whether a showing of *support* or a showing of *dependency* is the key factor in proving head-of-family status. This Court concludes, as the case law demonstrates, that showing actual dependency is the more important factor, rather than the mere existence of some financial support. This conclusion is supported by the plain language of the statute, which requires the head of family to provide "more than one half of the support for" the dependent. § 222.11(1)(c), Fla. Stat. (2015)

In the case of In re Beckmann, the debtor-husband sought the benefits of section 222.11 "by claiming his wife as a dependent." 2000 WL 33722204, at *3 (Bankr. M.D. Fla. June 30, 2000) (citing Florida case law). In support of his argument, the husband "maintain[ed] that, regardless of [the wife]'s ability to financially support herself, his consistent payment of household expenses during the marriage qualifi[ed] him as the 'head of family.'" Id. The court acknowledged the husband "was the functional head of the family unit throughout the marriage." Id. The court also agreed the husband "made the decisions [on] which bills to pay and when to pay them," and "was the primary financial source for the majority of the marriage." Id.

Yet, despite these findings, the Beckmann court ultimately held:

> The Debtor received $58,000.00 in salary, and Mrs. Beckmann received $53,000.00 in salary and $130,000.00 in capital gains in 1998. Mrs. Beckmann's income and assets preclude her becoming a public charge or an object of charity. She is not a dependent of the Debtor for purposes of § 222.11. Therefore, the Debtor was not the head of family as defined by § 222.11 of the Florida Statutes on the

> petition date, and he did not qualify for the claimed exemptions as provided pursuant to § 222.11.

Id. The court explained that allowing the exemption "would permit Debtor to use the exemption as a sword merely to defeat the claims of creditors" and "undermine the purpose of the statute." Id. In other words, the court's decision hinged on the notion that the wife could support herself. The key takeaway from Beckmann is that "[a] person qualifies as a dependent under [section] 222.11 if that person's income is insufficient to sustain him or her without the support of the person claiming him or her as a dependent." Id. (citing Parker, 147 B.R. 810 (Bankr. M.D. Fla. 1992)).

In the case of In re Parker, the debtor-husband also claimed a "head of family" exemption, contending his wife was his dependent. 147 B.R. 810, 811 (Bankr. M.D. Fla. 1992). The "Schedule I listed [the husband]'s net monthly income as $3,644.00 and [the wife]'s net monthly income as $150.00." Id. at 811. The Parker court found those "schedules indicate that [the husband] is the primary source of support for [himself] and his wife." Id. at 812. The wife's income was "nominal and insufficient to sustain the family." Id. Based on these facts, the court held the husband "qualifies as the head of a family residing in Florida." Id. at 812.

The Florida Supreme Court addressed this same core principle in Killian v. Lawson, 387 So. 2d 960 (Fla. 1980). In Killian, the question presented was whether the head of family must reside with the dependent for the exemption to apply. In answering that question, the supreme court held: "A wage earner need not reside in the same house with his wife and/or children to remain the head of a family. Instead, it is the obligation to support, and **dependency** on that obligation, which should control." Killian, 387 So. 2d at 962 (emphasis added). The former-husband was ordered to pay alimony, and the alimony was the former-wife's sole source of income. As a result, the court held the husband qualified under the exemption.

It is important to note that "head of family" was not statutorily defined in the 1975 version of the statute applicable in Killian.[2] The court explained that, at that time, "courts of this state ha[d] adopted two alternatives by which a person claiming exemption must show either: (1) a legal duty to maintain arising out of the family relationship at law; and/or (2) continuing communal living by at least two persons with one person recognized as being in charge." Id.

However, following Killian, "the [L]egislature dispensed with the requirement that the support be obligatory or court-ordered as it was in Killian." Steven Scott Stephens, 23 Fla. Prac., *Florida Family Law* § 2:5 (2016 ed.). The current statute, as stated, requires simply that the head of family provide more than half of the dependent's support. The core principle identified in Killian, which is *dependency* on the support, still remains in the plain language of section 222.11(1)(c), Florida Statutes (defining head of family).

Here, the Court must determine whether the Husband provides more than half of the Wife's support. This is a very close call, given the facts of this case. Much of the testimony offered by the Debtors showed the Husband, rather than the Wife, controlled the family's finances. In fact, the Wife was quite clear in demonstrating that she played little, if any, role in the financial affairs of the household. That inquiry, however, is not relevant. Beckmann, at *3. Regardless of which spouse controls the financial affairs of the family, the Court cannot conclude the Husband provides more than half of the Wife's support given: a) that the ratio of net income between the two spouses is $2,560.20 per month versus $2,188.09 per month; b) that the Husband brings in only $372.11 more per month than the Wife; and c) that the Wife's income precludes her from becoming a public charge.

[2] The 1975 version of the statute applicable in Killian, provided as follows: "No writ of attachment or garnishment or other process shall issue from any of the courts of this state to attach or delay the payment of any money or other thing due to any person who is the head of a family residing in this state, when the money or other thing is due for the personal labor or services of such person." § 222.11, Fla. Stat. (1975).

Put differently, while it is clear the Husband provides slightly more than half of the total family income, it is equally evident that he does not provide the Wife with more than half of her own support. While the Husband provides the Wife with health insurance through his employer and the Wife's employer does not offer her health insurance, there was no testimony demonstrating the Wife would be unable to obtain other health insurance or how much other health insurance would cost. More importantly, Debtors put on no evidence demonstrating the Wife would be incapable of supporting herself or would become a charge upon society without her Husband's income. While the ultimate burden does not lay with the Debtors, the totality of the circumstances nevertheless demonstrates a lack of dependency by the Wife.

Debtors argue that providing more than half of a dependent's support is only one of three ways to qualify as a head of family. (Doc. 109 at 5). Debtors contend a person may also qualify as head of family by: 1) showing "there is a legal duty to maintain, such as by alimony or child support order;" and 2) "show[ing] a communal living arrangement with evidence that he/she is in charge," citing to Killian in support of both arguments. (Doc. 109 at 5).

As to the duty "to maintain," there is no court-ordered support obligation and, moreover, this argument ignores the Legislature's post-Killian amendment defining "head of family" and omitting any requirement of a support obligation. As to showing the head of family "is in charge," this argument was squarely rejected in Beckmann, at *3. Further, both of these arguments ignore the core principle that remains in the statute today, which is that the dependent actually depend on the head of family for more than half of his/her own support. In other words, these two arguments rely on case law applying an outdated version of the statute. By doing so, these arguments implicitly seek to rewrite the statute which neither the Debtors nor this Court has authority to do.

Debtors also point to the Husband's 2015 distribution of approximately $111,000.00 from his retirement account to pay a portion of past-due federal taxes as evidence that he provides more than half of the Wife's support. This argument ignores the Husband's testimony, on cross exam, that the federal tax liability arose primarily due to income he received from his former real estate business, rather than from the Wife's income. This also ignores the Husband's concession that the Wife was not responsible for the $41,000.00 portion of the tax liability for which she liquidated her own retirement accounts. The Husband's distribution to pay past-due taxes does not demonstrate he provided more than half of the Wife's support as of the Petition Date.

Finally, Debtors argue Beckmann is distinguishable because the Beckmann wife received $130,000 in capital gains, whereas the instant Wife did not. However, the Beckmann court did not base its decision solely on the wife's capital gains but, instead, based its decision on the fact the wife would not be an "object of charity" absent her husband's support. The same is true here. The instant Husband is not a head of family under section 222.11 because, even though he brings in marginally more net income, the Wife would not become an object of charity without the Husband. Again, providing more than half of the family's total support is not what the statute requires. The statute requires the Husband to provide more than half of the Wife's support. The facts of this case demonstrate the Husband does not provide more than half of the Wife's support.

Therefore, the Court concludes the Husband does not qualify as head of family for purposes of section 222.11, Florida Statutes. The Debtors are not entitled to claim the $15,069.19 deposited into the Savings Wage Account as exempt property. As a result, it is ORDERED that the Trustee's objection to Debtors' claim of exemption is SUSTAINED. It is further ORDERED that the Trustee's motion for turnover of property is GRANTED. Debtors shall turnover the $15,069.19 to the Trustee within thirty (30) days of the entry of this Order.