

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **12-03834-hb**

Order

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
12/20/2012**



Entered: 12/21/2012

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Donald E Franklin,

Debtor(s).

C/A No. 12-03834-HB

Chapter 7

ORDER

THIS MATTER came before the Court for hearing on the Objection to Exemption filed by Chapter 7 Trustee Randy Skinner (“Chapter 7 Trustee”).¹ Debtor Donald E. Franklin (“Franklin”) filed a response.²

FACTS

On June 20, 2012, Franklin filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Franklin’s bankruptcy schedules indicate that Franklin and his wife, Sharon A. Franklin (“Mrs. Franklin”),³ purchased real property located at 106 Swan River Court, Greer, South Carolina 29650 on January 15, 2008, for \$242,500.⁴ The real property is their residence and they took title jointly. The schedules list a mortgage encumbering the real property in favor of CitiCorp Bank in the amount of \$195,000.⁵ On March 10, 2012, the whole of the real property was appraised for \$293,000.⁶ On Schedule A, Franklin lists the value of his interest in his residence at \$146,500 – one half of the appraised value – and on Schedule C he claimed a \$25,000 homestead exemption in his interest pursuant to S.C. Code Ann. § 15-41-30(A)(1).⁷

¹ Doc. No. 32, filed September 26, 2012.

² Doc. No. 36, filed October 3, 2012.

³ Donald E. Franklin’s wife, Sharon A. Franklin, is not a debtor in this bankruptcy case.

⁴ Doc. No. 6, filed July 4, 2012.

⁵ *Id.*

⁶ *Id.*

⁷ Doc. No. 36, filed October 3, 2012. *See also* S.C. Code Ann. § 15-41-30(A)(1):

“(A) The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:

On January 18, 2008, shortly after the real property was purchased and years before this bankruptcy filing, both Franklins transferred title to their residence to the Franklin Living Trust (“Trust”) for consideration of \$5. The Trust was established by a document that defines it as a revocable trust and it names both Franklins as trustors.⁸ Mrs. Franklin is named as the sole Trustee.⁹ Three adult children are named as beneficiaries of the Trust.¹⁰ The Trust provides that each trustor/settlor of the Trust has the right to revoke the trust in whole or in part as to his or her contributive share and to receive income as well as principal from the Trust. Franklin has not exercised his revocation right and the real property remains in the Trust.¹¹ The Trust does not expressly provide Franklin the right to live in the residence; however, he and Mrs. Franklin have lived there since the date of purchase. The Trust owns other property in addition to the residence.¹² The Trust specifically states it was created “to avoid probate through the use of

(1) The debtor's aggregate interest, not to exceed fifty thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor, except that the aggregate value of multiple homestead exemptions allowable with respect to a single living unit may not exceed one hundred thousand dollars. If there are multiple owners of such a living unit exempt as a homestead, the value of the exemption of each individual owner may not exceed his fractional portion of one hundred thousand dollars . . .”

⁸ Doc. No. 36, Exhibit E, Article 1, Section 3, filed October 3, 2012. The pertinent section provides as follows: “While both of us are alive, *we may at any time or times amend any provision hereof or revoke our Trust in whole or in part*, provided, however, that each of us shall only hold the powers to amend or revoke as to each Trustor’s respective Contributive Share of our Trust Estate; and each Trustor shall have the power to partition our Trust into separate trusts consisting of each Trustor’s respective Contributive Share.” (emphasis added).

⁹ *Id.* at Article 1, Section 1.

¹⁰ *Id.* at Article 11, Section 1 (demonstrating that Franklin is not specifically listed as a beneficiary of the Trust).

¹¹ *Id.* at Article 4, Sections 1 and 3 (“During our joint lifetimes, our Trustee shall pay to, or apply for the benefit of, a Trustor, all or part of the income and principal of such Trustor’s respective Contributive Share as such Trustor may direct.”); *see also id.* at Article 8, Section 1; *see also id.* at Article 15, Section 15 defining contributive share to “refer to property transferred to our Trust Estate by a Trustor during life or at death.”

¹² *Id.* at Article 2, Section 5.

[a]... Trust.”¹³ Franklin concedes that under South Carolina law his creditors could reach any interest he has in the revocable Trust.¹⁴

DISCUSSION AND CONCLUSIONS OF LAW

The filing of a petition in bankruptcy creates an estate consisting of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541. Pursuant to § 522(b) of the Bankruptcy Code, debtors can choose to exempt property under the applicable state or federal law. South Carolina has opted out of the federal exemptions pursuant to § 522(b)(2). Franklin has claimed an exemption under South Carolina law, which specifically provides that a debtor may exempt, “[t]he debtor's aggregate interest, not to exceed fifty thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence” S.C. Code Ann. § 15–41–30(A)(1). The Court must construe the homestead exemption liberally in favor of Franklin. *See In re Shaffer*, 78 B.R. 783, 784 (Bankr. D.S.C. 1987) (finding that “bankruptcy exemptions are to be construed liberally in favor of the debtor”) (citations omitted); *see also In re Nguyen*, 211 F.3d 105, 110 (4th Cir. 2000) (“Generally, statutes creating debtors' exemptions must be construed liberally in favor of the debtor and the exemption.”); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989).¹⁵

¹³ *Id.* at Article 14, Section 1.

¹⁴ *See* Doc. No. 36, filed October 3, 2012 (stating that “insertion of a spendthrift provision in a trust agreement is not sufficient to prevent the transfer of a beneficial interest of a debtor in a trust to a creditor”). *See also*, Doc. No. 6, Schedule A, filed July 4, 2012.

¹⁵ One purpose behind the homestead exemption in South Carolina is to keep individuals that have filed bankruptcy in their homes. The South Carolina Home Security Act clearly states that it was enacted “*because of*” the Bankruptcy Abuse and Consumer Protection Act (“BAPCPA”) “to offer to the citizens of South Carolina protection for their homes in the event that financial difficulties, such as military deployment or extreme medical emergencies, occur for which bankruptcy filing may be the only available remedy.” S.C. Code Ann. § 15–41–30(1) (Supp.2006) (significantly increasing the amount of the homestead exemption); *see also In re Evans*, 362 B.R. 275, 280-81 (Bankr. D.S.C. 2006).

At issue here is whether Franklin owns an interest in *real property* that he uses as a residence,¹⁶ since the real property in question was transferred to the revocable Trust in 2008. In South Carolina, a revocable trust provides little protection from creditor claims. Pursuant to S.C. Code Ann. § 62-7-505(a)(1) “[d]uring the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.” Here, Franklin admits that creditors and the Chapter 7 Trustee can reach his interest and rights in the Trust, including the right to revoke and return to his estate his contributive share of the real property where he lives. However, Franklin owns only rights and interests in the Trust, not an interest in the *real property* itself as the plain language of the statute requires.¹⁷ Although that statute does not require fee simple title to real property, it requires something more than a possessory, future or potential ownership interest. *See e.g. Gibbs v. Hunter*, 99 S.C. 410, 83 S.E. 606 (1914) (finding a vested remainder in real property debtor used as a residence to be a sufficient interest in land to allow the homestead exemption); *see also In re Scotti*, 456 B.R. 760, 764 (stating that “a mere possessory or potential equitable distribution interest is not [a] sufficient” ownership interest to allow a debtor to claim the homestead exemption for real property titled in his wife’s name only); *see also In re Asghar*, 1997 WL 34816024, at *2 (Bankr. E.D.Va. Feb. 11, 1997) (finding an expected distribution from husband’s life insurance policy if the couple were to divorce to be an insufficient ownership interest to support an exemption in bankruptcy).

Courts interpreting homestead exemptions have disallowed exemptions on similar facts and pursuant to similar laws, reasoning that a debtor residing in property held in trust owns only

¹⁶ Although the exemption statute also provides an exemption for “personal property ...that the debtor uses as a residence...” this Court understands that the term “personal property” in this context would mean a mobile home, camper, or similar shelter.

¹⁷ S.C. Code Ann. § 15-41-30(A)(1) (stating “[t]he debtor's aggregate interest, not to exceed fifty thousand dollars in value, in *real property* or personal property that the debtor or a dependent of the debtor uses as a residence”) (emphasis added).

an interest in the trust, not an interest in the real property held in trust.¹⁸ However, other Courts have held that if the *res* of the trust (including real property) could be reached by a debtor's creditors, or if the debtor has some current equitable interest in the real property, then the debtor owns a sufficient interest in real property to claim an exemption.¹⁹ After considering the reasoning set forth in these authorities, after a review of cases interpreting the South Carolina exemption, related law, and following a painstaking review of the Trust terms and facts of this case, the Court finds that Franklin currently owns only rights and interests in a Trust that owns his residence, and that this is not an interest in real property as the plain language of S.C. Code Ann. § 15-41-30(A)(1) requires. Even interpreting the exemption statute liberally in favor of Franklin, the Court cannot find a sufficient, current ownership interest in real property to which the exemption can be applied.

IT IS THEREFORE, ORDERED:

That the Chapter 7 Trustee's Objection to Exemption is **SUSTAINED**.

¹⁸ See *In re Estarellas*, 338 B.R. 538 (Bankr. D. Conn. 2006) (finding that a Chapter 7 debtor, acting as both trustee and beneficiary of a self-settled revocable trust, could not claim to be the owner of a residence for which she executed a quitclaim deed thereby transferring all ownership interest to the trust); see also *In re Zmijewski*, 390 B.R. 24, 25 (Bankr. D. Mass. 2008) (disallowing a homestead exemption claimed by a Chapter 7 debtor based on the fact that the "[d]ebtor does not live in the trust, she lives in the *res* of the Trust" meaning debtor did not own an interest in real estate.)

¹⁹ See *In re Kester*, 339 B.R. 749, 755-56 (B.A.P. 10th Cir. 2006) (finding Chapter 7 debtor, as grantor and beneficiary, retained equitable title to residential property held in a self-settled living revocable trust which was sufficient to support the claimed homestead exemption); see also *In re Edwards*, 356 B.R. 807, 810 (Bankr. M.D. Fla. 2006) (finding Chapter 7 debtor, acting as grantor of a revocable trust, retained an ownership interest in the property and lived in the residence with the intent that it be her homestead thereby allowing the homestead exemption).