In the United States Bankruptcy Court

for the Northern District of Iowa

WILLIAM B. WELDON *Debtor(s).*	Bankruptcy No. X88-01538F Chapter 7
JAMES H. COSSITT Trustee *Plaintiff(s)* vs. WILLIAM B. WELDON and BARBARA J. WELDON *Defendant(s)*	Adversary No. X88-0306F

MEMORANDUM OF DECISION

Trustee-plaintiff James H. Cossitt seeks the avoidance and recovery of transfers allegedly fraudulent under 11 U.S.C. § § 548 and 544(b). The trustee also objects to William B. Weldon's discharge. Trial was held on the trustee's complaint on October 18, 1989 in Fort Dodge, Iowa. The court now issues this memorandum of decision which includes findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S. C. § 157(b)(2)(H) and (J) .

FINDINGS OF FACT

William and Barbara Weldon were married on March 13, 1983. Barbara had two children by a prior marriage. The children, one in middle school and the other in high school, live with the Weldons. The day prior to their marriage, the Weldons completed the purchase of a home. They have lived there since the purchase. Barbara Weldon works in a convenience store. In recent years, William Weldon (WELDON) has been employed only sporadically. He has done work as a truck driver and as an investigator. When the couple was first married, Weldon worked for General Electric. From February, 1980 until March, 1987, Weldon operated his own business, a gun shop, from the basement of his home. At first, it was a part-time business, but beginning in approximately June, 1984, it became his full-time occupation.

Weldon was involved in an automobile accident on February 28, 1987. Because of the accident, the Weldons asserted claims against the Schroeder Oil Company and Charles Casey. Weldons settled these claims on or about May 27, 1988 when they executed a release in favor of Schroeder Oil Company and Casey in consideration of the sum of $72,091.00. This money was paid in two checks by Federated Insurance, one check in the amount of $70,091.00 and the second in the sum of $2,000.00. The checks were made payable to "William Weldon & Barbara Weldon, Individually and as Husband & Wife, and Greg Siemann, their Attorney." These checks were issued May 26, 1988 and on or about that date were endorsed by the payees and deposited in Siemann's trust account. The settlement monies were then distributed by Siemann to himself for legal fees and expenses, to a

medical subrogation claimant, and to the Weldons, who received $35,596.76. Siemann's check to the Weldons was dated and delivered May 27, 1988. Weldons endorsed the check and deposited it in their joint checking account at Commercial Savings Bank in Carroll, Iowa after 3:00 P.M. on that same date. The bank dated the transaction May 31, 1988 and credited it to Weldons' account on that date. Siemann's check to Weldons was drawn on the same bank.

Also on May 27, 1988, Weldons mailed to Associates National Mortgage Corporation (ASSOCIATES) a check for $35,543.53. This check, drawn on their checking account at Commercial Savings Bank, represented an interest payment and a substantial reduction of principal on their debt to Associates, which was secured by the mortgage on their home. Associates had held the mortgage on the couple's home since its purchase in 1983. Associates deposited the check at Texas Commerce Bank in Irving on May 31, 1988. It was paid by Commercial Savings Bank on June 2, 1988.

On May 31, 1988, Weldon went to Commercial Savings Bank in Carroll and requested that his name be removed as a joint owner of the couple's checking account. This request was noted on the account signature card and the signature card was altered by the bank to strike Weldon's name from the account and to delete his name as a signatory. Weldon had made the decision to have his name removed from the joint account to prevent his wife's earnings from being attached as joint property by his business creditors. Weldon had been receiving threats from certain of his business creditors that they would attempt to obtain judgments against him and attach his property. At the time his name was deleted from the account, Weldon was not employed and his wife was the sole support of the family. She, however, was not liable to his business creditors. She agreed to the decision to remove her husband's name from the account.

At the time Weldon's name was deleted from the account, he was contemplating bankruptcy as a solution to his financial problems. To that end, Weldon had met with attorney Ron Eich of Carroll on May 27, 1988 and had given him a $1,000.00 retainer for his legal help. After Weldon had written the check to Associates, he calculated that there was a balance in the couple's joint checking account of $996.58. On the date that he had his name removed from the joint account, although the check to Associates had not yet cleared, he believed that the balance in the account was $139.11.

After Weldon's name had been deleted from the account, Mrs. Weldon continued to deposit her pay checks in the account along with alimony, child support and social security payments all of which related to her former marriage. The couple's living expenses continued to be paid from this checking account after Weldon's name had been removed. Most of the time, Weldon wrote the checks which were then signed by Mrs. Weldon. He undertook to write the checks as part of his household responsibilities. Payments included such necessities as food and utilities plus contributions to the couple's church and other normal and nonextraordinary family expenses. The payment of these expenses included payment of bills for two phones located in the home, and although records introduced into evidence at trial indicated that one of these phone bills was labeled "business phone", the court finds that it was in fact used by the couple as a household phone at all times after the gun shop business had closed.

Weldon obtained some employment beginning in June, 1988 and beginning on June 30, 1988, he began depositing money in what was then Mrs. Weldon's checking account. His deposits were as follows:

DATE	AMOUNT
June 30, 1988	$274.20

July 14, 1988	368.16
July 27, 1988	33.07
August 20, 1988	379.60
August 31, 1988	200.00
September 30, 1988	383.28
October 1, 1988	168.36
October 4, 1988	185.02
October 10, 1988	434.94
Total	$2,426.63

William Weldon filed his voluntary petition under chapter 7 of the Code on October 11, 1988. On October 14, 1988, Weldon's name was added as an owner of the checking account. This was authorized by Mrs. Weldon and a new signature card was filled out. During the period that Barbara Weldon's name alone was on the account, she continued to use checks and deposit tickets bearing both names. New checks bearing both names were ordered, obtained and used which bore both names. However, the testimony was inconclusive on whether those checks were ordered prior to the removal of Weldon's name. On the date his name was added to the account as a joint owner, the account showed balances on the Weldons' check register ranging between $261.52 and $236.43. The bank's record showed a balance as of October 14, 1988 of $1,159.99.

As previously stated, Weldon had his name removed from the account to protect his wife's earnings from his business creditors. He said that he did not receive "anything" from his wife in return for the removal of his name. When his name was added to the account, he did not pay her "anything." His name was returned to the account because the threat to the account from his creditors had been eliminated. Weldon believed that it was best for his wife if his name were off the account. No judgments were ever obtained by his creditors prior to his bankruptcy and no effort to levy on the checking account was ever made.

On May 31, 1988, Weldons' assets were as follows:

Asset	**Fair Market Value**
House	$ 42,000.00
Household goods	1,000.00
Automobile	5,000.00
Business inventory	2,500.00

Weldon's debts on that date included a mortgage against the house of approximately $42,000.00, a lien against the automobile of approximately $4,980.00, and his business debt to a bank in the amount of $10,000.00 secured by a lien on the business inventory. On May 31, 1988, Weldon had no other significant assets, and had an additional number of unsecured debts totaling $15,842.00. On the date Weldon's name was removed from the account, it contained $37,554.04 of which at least $17,798.38 (half of the settlement) was Weldon's. The house, equity in the car, and the household goods were claimed by Weldon as exempt.

DISCUSSION

On May 31, 1988 when Weldon removed his name from the joint checking account, his check to Associates had yet to be negotiated or paid. Consequently, on May 31, the balance of that account still included Weldon's share of the tort claim settlement. The trustee argues that Barbara Weldon became the sole owner of the account on May 31 and that William Weldon had fraudulently conveyed his share of the settlement to his wife.

Initially, it must be noted that both William and Barbara Weldon had an interest in the proceeds resulting from their tort settlement. This settlement was in consideration for each of the Weldons releasing claims against Schroeder Oil Company and Casey, and both checks with regard to the settlement were made payable to "William Weldon and Barbara Weldon, individually and as husband and wife" as well as to their attorney. Therefore, it is apparent that William Weldon did not possess a sole interest in the settlement proceeds. The extent of Weldon's interest in these proceeds was not addressed by either party. The money was deposited in the Weldons' joint checking account.

In Iowa, a joint tenancy with right of survivorship may be created in personal property, including bank deposits. In re Stamet's Estate, 260 Iowa 93, 148 N.W.2d 468, 471 (1967). "Each joint tenant is presumed to own an equal share in the joint bank account; however, this presumption is rebuttable." Anderson v. Iowa Depart. of Human Services, 368 N.W.2d 104, 109 (Iowa 1985).

No party to this proceeding has rebutted this presumption. The court concludes that at the time Weldon's name was removed from the account, each spouse owned an equal share in it, including an equal share in the settlement monies deposited in the account.

The removal of William Weldon's name from the account effected a "transfer" of property within the broad meaning given to that term in the Code. 11 U.S.C. S 101(5-0). It was also a transfer within the meaning of 11 U.S.C. § 548. The extent of the transfer will be discussed infra.

(a) Actual Fraud

The trustee argues that by removing his name from the joint account, William Weldon intended to hinder, delay, or defraud his creditors, and therefore the trustee can avoid this transfer of interest under 11 U.S.C. § 548(a)(1) and the court should deny the Weldons' discharge under 11 U.S.C. § 727 (a)(2)(A).1

1 The trustee does not argue that the payment to Associates was fraudulent.

Both § 548(a)(1) and § 727(a)(2) entail an element of culpability; the trustee must demonstrate that the debtor actually intended to hinder, delay, or defraud his creditors. This proof must be by clear and convincing evidence under § 548(a)(1). Central Trust Company v. Barchett (Matter of Willson Dairy Company), 30 B.R. 67, 71 (Bankr. S.D. Ohio 1983) and under § 727(a)(2)(A); New World Marketing Corp. v. Garcia (In re Garcia), 88 B.R. 695, 702 (Bankr. E.D. Pa. 1988).

Having considered the evidence, the court finds that the trustee has failed to carry his burden of showing actual fraud on the part of William Weldon either under § 727(a)(2)(A) or § 548(a)(1). It was not Weldon's intent to transfer his share of the settlement to his wife. Weldon had already mailed the check to Associates the same day he and his wife deposited the settlement check in the joint account. When he removed his name from the account four days later, he was not aware that the money intended to pay off his mortgage still remained in the account. No transfer of his share of the settlement monies to his wife was contemplated or intended. Weldon's stated intent in removing his name from the joint account was not to hinder, delay or defraud his creditors by transferring his

property; rather, he intended to prevent his creditors from garnishing money deposited in the account by his wife--her wages. The court does not find this to be a fraudulent motive.

(b) Constructive Fraud

The trustee also argues that because William Weldon removed his name from the joint account before Associates National Mortgage Corporation received payment on Weldon's check for $35,543.53, the money remaining in the account was transferred to his wife. Because Weldon was insolvent at the time and because he received no reasonably equivalent value in exchange for the cash transfer, the trustee contends that this transfer is avoidable under 11 U.S.C. § § 548(a)(2)(A) and (B)(I). The trustee further argues that because under Iowa state law a transfer of property without consideration may be set aside by the transferor's creditors unless the transferor remains solvent after the transaction, this transaction may also be avoided under 11 U.S.C. § 544(b). See First Nat. Bank in Fairfield v. Frescoln Farms, Ltd., 430 N.W.2d 432, 435 (Iowa 1988).

The Iowa Supreme Court, in Frescoln Farms, adopted a definition of insolvency similar to that of the Bankruptcy Code. An individual debtor is insolvent if the sum of his debts exceeds all of his assets at fair value. See Frescoln Farms, 430 N.W.2d at 436 and 11 U.S.C. § 101(31).

The Iowa Supreme Court did not include in the term "asset" property to the extent that it is encumbered or if it is exempt property. Other than exempt assets, William Weldon had only inventory which was overencumbered and his share of the settlement proceeds. At the time he issued and mailed the check to Associates, he had only $17,798.38. He had, however, $23,342.00 in unsecured business debts ($15,842.00 in unsecured business debts and a $10,000.00 debt to a bank secured by $2,500.00 worth of inventory). William Weldon's use of the bank deposits to pay Associates left him with only business debts, as payment to the mortgagee served only to create equity in a previously fully encumbered exempt asset.

Under Iowa law or bankruptcy law, William Weldon was insolvent both before and after the payment to Associates. To the extent the removal of his name from the account represented a transfer of any funds to his wife, Weldon was insolvent both before and after that transfer. As argued by the trustee, just prior to the removal of his name, Weldon had $23,342.00 in unsecured debt ($7,500.00 in unsecured debt to Carroll County State Bank and $15,842.00 in other unsecured debt). His unencumbered, non-exempt assets were limited to his one-half interest in the joint bank account--$18,772.02.

Trustee contends that the removal of Weldon's name from the account effected a transfer of Weldon's share of the account including the settlement monies. Certainly by the removal of his name from the account, a transfer was made. But it does not necessarily follow that Weldon made an unfettered transfer of one-half of the dollars in that account to his wife.

A bank deposit may be made in the name of a person other than the depositor and still remain the property of the depositor. Andrew v. Helmer & Gortner State Bank of Mechanicsville, 249 N.W. 276, 216 Iowa 777 (1933). If this so, the money in an account might be shown to be that of a depositor whose name has been removed from the account. The fact that an account is in a particular name does not conclusively answer the question of who owns the money in the account. Andrew v. Helmer and Kortner State Bank of Mechanicsville, id. at 276.

The ability to write checks on an account may not make money available to the signator. "Generally, a party on a joint bank account may only withdraw funds without liability to his codepositor when in

fact he is the real owner of the money." Anderson v. Iowa Department of Human Services, 368 N.W.2d 104, 109 (1985). The right to withdraw funds from a joint account depends on the agreement of the parties. Id. at 110.

It is also true that money in a bank account may be in the nature of a trust fund to which another may have legal or equitable title. Packer v. Crary (Marshalltown State Bank), 96 N.W. 870, 121 Iowa 388 (1903). William Weldon's settlement funds were in the account at the time his name was removed, but he had ordered them to be paid to his creditor--Associates. Mrs. Weldon agreed, at the same time, to the payment of her half to the same creditor. It seems to this court that while the name removal effectuated a transfer of legal rights in the account, it did not give Mrs. Weldon the right to the funds Mr. Weldon had ordered paid to Associates.

Her ability to stop payment of the check to Associates was not enlarged or diminished by William Weldon's name removal. (Exhibit 29, page 2.) Had she stopped payment, it is not certain she could have done so without liability to Mr. Weldon. It was intended that the couple's settlement money would go to Associates to reduce the home mortgage. William Weldon drew the check. Half of such funds were his. Had the check been dishonored, William Weldon could have been liable to Associates under contract law. Iowa Code § 554.3-413(2) and § 554.3-122(3). Mrs. Weldon might have been liable to Weldon for breach of contract.

When William Weldon's name was removed from the account, whatever rights Mrs. Weldon attained in William Weldon's share of the settlement were attained subject to her agreement with her husband to reduce the home mortgage indebtedness by $35,543.53.

Thus, although by the removal of Weldon's name Mrs. Weldon received new or expanded legal rights in the account, Weldon retained an equitable right in the account to the extent of $17,771.765. This right was not extinguished until the check to Associates had been honored. It can also be said that upon the removal of Weldon's name, Mrs. Weldon held $17,771.765 of the deposits in trust pending clearance of the Associates check.

The court concludes that while a transfer of an interest in the joint account was effectuated by William Weldon's name removal, it did not affect the transfer of an unfettered right to his share of the settlement proceeds which were to be used to pay Associates. Furthermore, the court concludes that Mrs. Weldon's agreement that the money be used for the reduction of the home mortgage was reasonably equivalent value for the removal of Weldon's name from the account under either 11 U.S.C. § 548(a)(2)(A) or under state fraudulent transfer law. In viewing Weldon's transfer to his wife and the payment of the mortgage as two independent events, Weldon received a reasonably equivalent, value in return for the transfer. Any transfer of his settlement interest was made with the understanding that both his and her interest in the settlement would be used to pay down the mortgage on their homestead. Consequently, even if Weldon transferred his interest in the settlement to his wife, in return, Mrs. Weldon agreed to the use of those funds to reduce the mortgage debt on which he was obligated. His transfer was offset two days later by an equivalent increase in his home equity; his transfer was for consideration and he received reasonably equivalent value in exchange.

However, this analysis does not apply to all funds in the account at the time of the transfer. The account balance on the date of the name removal was $37,554.04. The check to Associates was for $35,543.53; in addition, there were other outstanding checks which had been issued by the couple. The transfer by Weldon was also subject to these obligations. The check register indicates a balance on May 31 of $139.11. One-half of this sum was transferred to Mrs. Weldon unimpressed by any obligation, trust or agreement. Therefore, the transfer of $69.55 which was effected by the name

removal was fraudulent within the meaning of 11 U.S.C. § 548(a)(2) and such transfer may be avoided by the trustee. The transfer was also fraudulent under Iowa law[2] and thus may be avoided by the trustee under 11 U.S.C. § 544(b).

2 A transfer of property without consideration is presumed to be fraudulent unless the transferee can prove that the transferor remained solvent after the transfer. Regal Ins. Co. v. Summit Guar. Corp., 324 N.W.2d 697, 703 (Iowa 1982).

CONCLUSIONS OF LAW

The removal of William Weldon's name from the joint checking account was an avoidable transfer to the extent of $69.55 under 11 U.S.C. § 548 and under Iowa law as incorporated by 11 U.S.C. S 544 (b).

The removal of Weldon's name from the joint account was not a fraudulent transfer within the meaning of 11 U.S.C. § 727(a)(2)(A).

ORDER

IT IS ORDERED that the transfer of $69.55 from William Weldon to Barbara Weldon is avoided and that James Cossitt, trustee of the bankruptcy estate of William Weldon, shall recover judgment against Barbara Weldon in the sum of $69.55.

IT IS FURTHER ORDERED that the trustee's complaint against William Weldon under 11 U.S.C. § 727 is dismissed. Judgment shall enter accordingly.

SO ORDERED ON THIS 8th DAY OF JANUARY 1990.

William L. Edmonds
Chief Bankruptcy Judge