

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

**George Anderson and
Middie Anderson,**

Debtors.

BK. NO. 89-20813

A.P. No. 91-2070

CHAPTER 7

Robert S. Cooper, as Trustee,

Plaintiff,

vs.

Margaret Jenkins,

Defendant.

DECISION

The Trustee in Bankruptcy commenced this Adversary Proceeding, pursuant to 11 U.S.C. §548, to set aside the transfer of debtors' residence to the defendant, their daughter Margaret Jenkins, within one year of the filing of debtors' Chapter 7 petition as a fraudulent conveyance. In her answer, the defendant denies that the transfer was a fraudulent conveyance alleging, among other things, that: (a) the transfer was made at the urging of the defendant at a time when the debtors were planning to enter a New York State sponsored nursing home within 36 months after the transfer; (b) there was consideration for the transfer in that the debtors retained a "*de facto*" life estate of considerable value; and (c) the transfer is not avoidable because the property transferred was fully exempt under New York State law. The case is before the Court on the Trustee's motion for summary judgment.

FINDINGS OF FACT

At oral argument on the motion for summary judgment, counsel for the parties confirmed,

and agreed on the record to, the following facts:

1. The debtors, husband and wife, filed their voluntary petition for relief under Chapter 7 of the Bankruptcy Code on May 4, 1989. On October 5, 1988, within one year prior to the filing of the petition, the debtors transferred to the defendant, Margaret Jenkins, their real property and residence, which was owned by them as tenants by the entirety.

2. Subsequent to the transfer, the debtors continued to and still reside at the property.

3. The debtors fully disclosed the transfer in the Statement of Affairs filed with the Bankruptcy Court in their Chapter 7 case.

4. When the property was transferred, it was free and clear of any liens or encumbrances and did, and still has, a value of \$16,000.

5. At the time of the transfer, the debtors were insolvent within the meaning of 11 U.S.C. §548.

6. The deed from the debtors to the defendant, recorded in the Livingston County Clerk's office on October 5, 1988, did not provide for the retention of any life estate in favor of the debtors, and neither the debtors nor the defendant have any other documentation evidencing a retention by the debtors of a life estate in the property transferred.

7. The debtors received less than a reasonably equivalent value in exchange for the transfer. In fact, the debtors received no consideration for the transfer.

DISCUSSION

The defendant's contention that the debtors retained a life estate in the transferred property is without merit. In fact, to have retained a legal interest in the property would have defeated the expressed purpose for which the property was transferred: for the debtors to be without assets for the required three-year period so that their anticipated nursing home expenses would be fully paid for by the government.

The defendant's contention that the transfer is not avoidable as a fraudulent conveyance, pursuant to 11 U.S.C. §548, because the property transferred was fully exempt under Section 5206 of the New York Civil Practice Law and Rules, is rejected by this Court.

The defendant's contention may be correct when a Trustee proceeds under 11 U.S.C. §544 and state law controls. The state of New York has adopted the Uniform Fraudulent Conveyances Act at Article 10 of the New York Debtor and Creditor Law §§270-280. Section 270 defines assets of a debtor as "property not exempt from liability for his debts." Therefore, property which is exempt cannot be fraudulently conveyed since the creditors cannot look to it for the satisfaction of their claims.

In this case, the transferred property was the debtors' residence, and under Section 5206 of the New York Civil Practice Law and Rules, each debtor may claim a \$10,000 homestead exemption for a combined \$20,000 exemption. Since the value of the property was \$16,000, the debtors' residence would be entirely exempt and not an asset under Section 270 of New York Debtor and Creditor Law. Therefore, the transfer of this exempt property could not be considered a fraudulent conveyance under state law.

This Court believes, however, that the result is different under Section 548 of the Bankruptcy Code where a trustee is not prohibited from avoiding a transfer by a debtor or exempt or exemptible property as a fraudulent conveyance. *Matter of Wickstrom*, 113 B.R. 339, 350 (Bankr. W.D.Mich. 1990).

Under the Bankruptcy Code, exemptions are determined as of the date of the filing of the petition. *Wickstrom*, 113 B.R. at 343; see *In re Doyle*, 42 B.R. 615 (Bankr. W.D.N.Y. 1984). When a debtor transfers otherwise exemptible property prepetition, the debtor waives the exemption. *Wickstrom*, 113 B.R. at 345. If prior to filing, the debtor transferred potentially exempt property to a third party, the debtor's interest in that property terminates and that property cannot be subsequently claimed as exempt based on some former interest held by the debtor. "Conveyances of property have

legal ramifications." *Wickstrom*, 113 B.R. at 346.

When the debtors transferred their residence to the defendant, they lost their ability to exempt that property when they filed bankruptcy. Therefore, under the Bankruptcy Code, it does not matter whether the transferred property was potentially exempt. Since the debtors transferred the property within one year of filing their petition, did not receive a reasonably equivalent value in exchange and were insolvent, the transfer was a fraudulent conveyance under Section 548(a).

This conclusion is consistent with 11 U.S.C. § 522(g) which prevents a debtor from claiming an exemption in otherwise exemptible property recovered by a Trustee pursuant to 11 U.S.C. § 548 when the property was voluntarily transferred by the debtor. *In re Gingery*, 48 B.R. 1000, 1003 (Bankr. D.Colo. 1985).

CONCLUSION OF LAW

The transfer by the debtors of their residence to their daughter on October 5, 1988, made within one year before the date of the filing of their Chapter 7 petition, for which they received no consideration, and at a time when they were insolvent, is avoidable by their Chapter 7 Trustee as a fraudulent conveyance in accordance with the provisions of 11 U.S.C. § 548(a)(2). In the alternative, pursuant to 11 U.S.C. § 550, the Trustee may have a judgment against the defendant in the amount of \$16,000.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: March 23, 1992