



**IT IS ORDERED** as set forth below:

**Date: November 26, 2007**

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake**  
**U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBER</b>
	:	
GABRIELE ERICA SUMNER,	:	BANKRUPTCY CASE
	:	NO. 05-14243-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Objection to Exemption filed by Griffin E. Howell, III, the Chapter 7 Trustee in the above-captioned bankruptcy proceeding. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction.

*See* 28 U.S.C. § 1334; § 157(b)(2)(A).

## BACKGROUND AND PROCEDURAL HISTORY

Gabriele Sumner (hereinafter the "Debtor") filed a voluntary petition under Chapter 7 of the Code on October 15, 2005. Griffin Howell, III (hereinafter the "Trustee") was appointed as the Chapter 7 Trustee. At some time, the Debtor's husband passed away, and the Debtor became entitled to \$250,000 of life insurance proceeds. The Debtor claims that she turned the proceeds<sup>1</sup> over to Antoinette Hyde, her sister-in-law, who is the executrix of her late husband's estate, because she claimed that the insurance proceeds were part of the Debtor's husband's estate.

Upon the filing of her petition, the Debtor did not list the insurance proceeds as an asset or list the transfer of the proceeds in her Statement of Financial Affairs. The Trustee learned of the transfer at the first meeting of creditors in December 2005. In July 2006, the Debtor amended her Schedules B and C to list \$10,000 of the transferred funds as an asset and to exempt those funds pursuant to Section 44-13-100(a)(11)(C) of the Official Code of Georgia (hereinafter Section 44-13-100(a)(11)(C)). The Debtor also listed as an asset the "Debtor's right to inherit estate property" with a value of \$5,600 and exempted that amount pursuant to Section 44-13-100(a)(6).

---

<sup>1</sup> The Debtor's brief states that the amount transferred was \$250,000, while the Trustee's brief states that the amount was \$200,000.

On August 3, 2006, the Debtor filed a motion for an order authorizing the Trustee to pay the \$5,600 exemption to the Debtor. In the motion, the Debtor claimed that she was unable to meet her basic living expenses and was in dire need of immediate payment of these funds. On August 17, 2006, the Court entered a consent order submitted by the Trustee and the Debtor's counsel approving the immediate distribution of the \$5,600 exemption. In the consent order, the Trustee agreed that the Debtor was entitled to the funds and had a right to an exemption in at least that amount pursuant to Section 44-13-100(a)(6).

On August 31, 2006, the Debtor filed second amended Schedules B and C. The amended schedules increased the amount of the insurance proceeds listed as an asset of the estate to \$250,000 and claimed that amount as fully exempt under Section 44-13-100(a)(11)(C). The same day, the Debtor filed a second motion seeking immediate distribution of her exemption. This motion was resolved by the entry of a consent order in which the Debtor's counsel and the Trustee agreed that the Trustee would be permitted to pay \$5,000 of the Debtor's exemption and that the Trustee would have sixty days from the date the Court approved a settlement between the Trustee and Ms. Hyde within which to "object to the Debtor's exemption."

Apparently, the Trustee did not reach a settlement with Ms. Hyde, as no

motion to approve settlement was ever filed. The Trustee does state that he recovered \$30,123.96 of the proceeds in August 2006. The record is unclear as to whether the proceeds were turned over by Ms. Hyde, but the Court assumes that this is the case. The Trustee also states that, after receiving the recovered funds, he determined that no additional funds could be obtained from Ms. Hyde. The Trustee has abandoned any additional claim to the remainder of the funds.

The Trustee filed the instant objection to the Debtor's exemption on August 28, 2007. The Motion came for hearing before the Court on October 19, 2007. Following the hearing, the Court requested that the parties submit briefs and took the matter under advisement.

#### **CONCLUSIONS OF LAW**

Before the Court is the question of whether the Debtor is entitled to exempt approximately \$30,000 of insurance proceeds pursuant to Section 44-13-100(a)(11)(C). The Trustee argues that, pursuant to either section 522(g) or (h), the Debtor is not entitled to exempt the funds because she voluntarily transferred the funds to her sister-in-law. The Debtor does not address the Trustee's reliance on sections 522(g) and (h) and simply argues that the Debtor is entitled to an exemption pursuant to Georgia law.

Under section 522(b), an individual debtor may exempt from property of the estate property that is exempt under applicable state law. 11 U.S.C. § 522(b)(2)(A). In this case, the applicable state law is Section 44-13-100(a)(11)(C), which permits the exemption of property traceable to insurance proceed. As a limitation on this entitlement, section 522(g) provides that:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

- (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
- (B) the debtor did not conceal such property; or
- (2) the debtor could have avoided such transfer under subsection (f)(2) of this section.

11 U.S.C. § 522(g).

Section 522(g) permits the exemption of recovered property only to the extent that the debtor could have exempted the funds if the funds had not been transferred and only if: 1) the transfer was not a voluntary transfer and the debtor did not conceal the property; or 2) the debtor could have avoided the transfer of the funds under section 522(f)(1)(B).<sup>2</sup> Section 522(g) is applicable to property that is

---

<sup>2</sup> The version of section 522(g) in effect at the time the Debtor filed her case contained a cross-reference to section 522(f)(2), which the Court reads as a reference to section 522(f)(1)(B). As explained in COLLIER'S, "[i]n the 1994 amendments to the

"recovered" by the trustee. A "trustee may 'recover' property in a number of ways, including by merely using the threat of avoidance powers to induce a debtor or transferee to return the property to the estate." *In re Hicks*, 342 B.R. 596 (Bankr. W.D. Mo. 2006) (citing *In re Glass*, 60 F.3d 565 (9th Cir. 1995)). Accordingly, property may be considered "recovered" by a trustee even in the absence of a formal action by the trustee. *See id.*; *see also In re Kuhnel*, 495 F.3d 1177 (10th Cir. 2007) ("[A] trustee need not initiate formal adversary proceedings to recover property under § 522(g), so long as the trustee has taken some action resulting in the reconveyance of the property to the estate.").

The Trustee objects to the Debtor's exemption on the basis that the Trustee recovered the funds under either section 542 or 550,<sup>3</sup> and, accordingly, the Debtor may not exempt the funds because the Debtor voluntarily transferred the funds to

---

Bankruptcy Code, Congress revised section 522(f) such that former section 522(f)(2) became section 522(f)(1)(B)," and "the amendment did not include a corresponding correction to section 522(g)(2). COLLIER'S ON BANKRUPTCY, ¶ 522.12[1] (2006). COLLIER'S concludes, and this Court agrees, that "[t]he sensible reading of the section would be to consider the cross-reference in section 522(g)(2) to relate back to section 522(f)(1)(B)." *Id.* Indeed, through the BAPCPA, Congress amended section 522(g)(2) to change the cross-reference from section 522(f)(2) to section 522(f)(1)(B).

<sup>3</sup> Under the facts of this case, it is not entirely clear whether the Debtor transferred the funds to Ms. Hyde as the executrix of her late husband's estate, or whether the Debtor gave the funds to Ms. Hyde to hold in trust for her benefit. If the former is true, the Trustee could have sought to avoid the transfer pursuant to section 548 of the Code and to recover the funds pursuant to section 550. If the latter is true, the Trustee would have been entitled to seek turnover of the property under section 542.

Ms. Hyde. As the Trustee points out, assuming the Debtor transferred the funds voluntarily, the Debtor is not permitted to exempt these funds pursuant to section 522(g)(1). Further, the Debtor is not permitted to exempt the funds under section 522(g)(2) because the Debtor could not have avoided the transfer pursuant to section 522(f)(1)(B).<sup>4</sup>

Accordingly, if the Court finds that the Debtor's transfer of the funds to Ms. Hyde was voluntary within the meaning of section 522(g), the Debtor is not entitled to any exemption in the recovered funds. The Code does not define the word "voluntary." A transfer may be considered involuntary notwithstanding the fact that the transfer was "not beyond the debtor's control" if the transfer involved "fraud, material misrepresentation or coercion." *In re Davis*, 169 B.R. 285, 296 (E.D.N.Y. 1994). In this regard, a voluntary transfer is one in which the transfer resulted from the debtor's free will and the debtor acted "with knowledge of all essential facts and free from the persuasive influence of another." *Id.* Such does not include a transfer resulting from concealment or a failure to "inform a debtor of the essential facts necessary for the debtor to make an intelligent decision on whether to transfer the

---

<sup>4</sup> Section 522(f)(1)(B) provides that the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that the lien impairs an exemption to which the debtor would have been entitled if such lien is a nonpossessory, nonpurchase-money security interest in certain personal property, such as household goods. 11 U.S.C. § 522(f)(1)(B).

property." *Id.* "This is especially true where a debtor can show that she would not have made the transfer had she been informed of all the essential facts." *Id.*; *see also In re Reeves*, 8 B.R. 177, 181 (Bankr. D.S.D. 1981)) (emphasis in original). The Debtor bears the burden of proving that the transfer was not voluntary. *See In re Rodriguez*, 361 B.R. 887 (Bankr. D. Ariz. 2007); *Davis*, 169 B.R. at 295; *In re Corwin*, 135 B.R. 922 (Bankr. S.D. Fla. 1992).

The Debtor has not asserted in her brief that she did not voluntarily transfer the funds to Ms. Hyde. The Debtor does state in her brief that she signed over the insurance check to Ms. Hyde because of her assertion that the law required turnover of the check and that the funds belonged to the Debtor's late husband's estate. However, this fact, in and of itself, is insufficient evidence to carry the Debtor's burden of proving that the transfer was not voluntary. The Court cannot conclude from the record before it that the Debtor was subject to any great pressure to transfer the funds, that Ms. Hyde harassed or threatened the Debtor, or even that the Debtor would not have turned the funds over if she had known that the funds were not property of her late husband's estate. Accordingly, the Court finds that the Trustee's objection to the Debtor's exemption of the recovered funds should be sustained.

## CONCLUSION

For the reasons stated above, the Trustee's Objection to the Debtor's Exemption is **SUSTAINED**. The Debtor is entitled to no exemption in the liquidated insurance proceeds. The Debtor shall immediately turnover to the Trustee the \$5,000 exemption previously disbursed by the Trustee.<sup>5</sup> The Court will also enter a judgment against the Debtor in favor of the Trustee for the full amount of the nonexempt property disbursed to the Debtor, and the Trustee shall credit towards the satisfaction of the judgment any amount turned over by the Debtor.

**END OF DOCUMENT**

---

<sup>5</sup> The Court assumes from statements made in the Debtor's brief that she has already spent the \$5,000 disbursed to her by the Trustee on basic living expenses. In the event the Trustee believes that the Debtor is in possession of property traceable to the \$5,000, the Trustee may file a supplemental motion for turnover of that property. In the absence of possession by the Debtor of property of the estate, its proceeds, or any funds with which to pay the Trustee for the value of estate property, entry of an order directing turnover is inappropriate. *See In re Cook*, 2007 WL 2238397 (Bankr. E.D. Va. Jul. 31, 2007). However, because the Court is not privy to whether the Debtor has any funds available to pay the Trustee the value of the nonexempt property, the Court will enter an order directing the turnover of any such funds that may exist.

**Distribution List**

**Michael Gorove**

Harmon & Gorove  
1 Jefferson Street  
Newnan, GA 30263

**Gabriele Erica Sumner**

145 Hidden Brook Trail  
Newnan, GA 30265

**Griffin E. Howell, III**

127 1/2 East Solomon Street  
PO Box 551  
Griffin, GA 30224

**Office of the US Trustee**

Suite 362  
75 Spring Street, SW  
Atlanta, GA 30303