UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION



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| In re:<br><br>Donald K. Gallimore,<br><br>Debtor. | Case No. 00-52225 |
| W. Joseph Burns, Trustee in Bankruptcy for Donald K. Gallimore,<br><br>Plaintiff,<br><br>vs.<br><br>D. Keith Gallimore, Jr.,<br><br>Defendant. | Adversary Proceeding No.:<br>01-6034<br>(Consolidated Proceeding) |
| W. Joseph Burns, Trustee in Bankruptcy for Donald K. Gallimore,<br><br>Plaintiff,<br><br>vs.<br><br>Donald K. Gallimore and Carolyn Breedlove,<br><br>Defendants. | Adversary Proceeding No.<br>02-6015<br>(Consolidated Proceeding) |

## MEMORANDUM OPINION

This matter came on for trial before the undersigned Bankruptcy Judge on July 23, 2003 and August 18 and 19, 2003 in Winston-Salem, North Carolina, after due and proper notice, upon the Complaint to Revoke Discharge, for Turnover and Monetary Damages filed by W. Joseph Burns, Trustee in Bankruptcy (the "Trustee") against Defendants Donald Gallimore and Carolyn Breedlove, as well as the Complaint filed against Defendant Keith Gallimore. Appearing before the Court was Robert E. Price, Jr., on behalf of the Trustee; Jerry Smith, on behalf of the Defendant Carolyn Breedlove; and Leslie Frye, on behalf of Defendants Keith and

Donald Gallimore. Having reviewed the file and considered the arguments of counsel and the testimony of witnesses, the Court makes the following findings of fact and conclusions of law:

**BACKGROUND**

Defendant Gallimore (the "Debtor") filed a petition for relief under Chapter 7 of the Bankruptcy Code on November 3, 2000 (the "Petition Date"). The present action arises as an adversary proceeding filed on October 12, 2001 by the Trustee against Defendant Keith Gallimore, the Debtor's son, and a second adversary proceeding filed on February 14, 2002 by the Trustee against the Debtor and Defendant Breedlove ("Breedlove"), the Debtor's daughter, to revoke the Debtor's discharge, to recover fraudulent conveyances pursuant to the Bankruptcy Code and North Carolina law, and to seek damages for civil conspiracy under North Carolina law.

The series of events leading up to these adversary proceedings was precipitated by the separation and divorce of the Debtor and his wife, Rebecca Fallin ("Fallin"). In early 1999, the Debtor and Fallin were having marital difficulties. When the couple separated on April 14, 1999, Fallin removed joint funds from the couple's checking account and kept those funds for herself. In response, on April 23, 1999, the Debtor liquidated his IRA accounts at First Citizens Bank in the amount of $35,393.74 in an effort to protect these funds from Fallin. No taxes were paid out of these IRA funds at the time of withdrawal.

On June 21, 2000, the Debtor and Fallin were divorced. An equitable distribution action was brought by both parties. In the equitable distribution proceeding, the Debtor claimed that he gave as a gift to his son Keith Gallimore the after-tax amount of the First Citizens IRAs, approximately $22,000.00. Keith Gallimore wrote a letter dated February 15, 2000 to corroborate this claim. On August 9, 2000, the equitable distribution judgment was entered. Despite the Debtor's contention regarding the gift, the judgment awarded to the Debtor a First

Citizens IRA valued at $35,300.00. The Debtor was ordered to pay $9,291.44 to Fallin in order to equitably distribute the marital estate.

On November 3, 2000, the Debtor, seeking to avoid paying this equitable distribution award, filed a Chapter 7 bankruptcy petition. In his petition and schedules, the Debtor listed cash in the amount of $470.82 in a checking account. He did not list the First Citizens IRAs or the proceeds therefrom as personal property, income, or as a gift to any third party. In his Statement of Financial Affairs, the Debtor listed income (from social security and pension as the only source) as follows: for 2000, $12,330.00 in income; for 1999, $16,128.00 in income; and for 1998, $15,984.00 in income. The Debtor listed no gifts made within the year preceding the bankruptcy. The only transfer listed within one year of the bankruptcy was the transfer of the title of the Debtor's mobile home to Breedlove, which was subsequently transferred back to the Debtor's name. The equitable distribution judgment was listed on the Debtor's schedules.

The § 341 Meeting of Creditors was held in the Debtor's bankruptcy case on December 8, 2000. At the meeting, the Debtor stated that he listed all of his assets on his petition. When questioned by Fallin's counsel, the Debtor stated that he gave about $22,000.00 in cash to Keith Gallimore from his First Citizens IRAs in either May of 1998 or 1999. The Trustee then investigated the issue, and on January 8, 2001 sent a demand letter to Keith Gallimore to turnover the amount of $35,393.74, the full amount of the IRAs allegedly given as a gift. Gallimore did not respond to the demand letter, and the Trustee subsequently filed the first adversary proceeding. Gallimore wrote a letter dated December 14, 2001 to the Trustee, requesting a meeting to tell "the real story". On December 19, 2001, the date of a scheduled pre-trial hearing in this matter, Gallimore appeared and spoke with the Trustee outside of the courtroom. There, he admitted that the $22,000.00 gift was a falsehood intended to prevent Fallin from recovering funds from the Debtor, and that Breedlove in fact had been given the IRA funds. Gallimore indicated to the Trustee that these funds had been placed in Breedlove's

lockbox and some funds had been spent on an apartment built onto Breedlove's home and for the purchase of a vehicle.

At her Rule 2004 examination on February 12, 2002, Breedlove admitted that she received $16,000.00 from the Debtor on April 27, 1999 to hold for him in her BB&T account. She stated that the money was spent on expenses for her father and an apartment addition on her home, and that she did not know where the remainder of the IRA funds were located. Breedlove further stated that she did not think Keith Gallimore had received $22,000.00 from the Debtor, but did not know if the Debtor had ever given Gallimore money. Breedlove could not recall how much of the Debtor's money she was holding on the petition date. After confirming the involvement of Breedlove, the Trustee filed a second adversary proceeding against both Carolyn Breedlove and the Debtor on February 14, 2002.

The Rule 2004 Examination of the Debtor took place on May 8, 2002. The Debtor was unrepresented by counsel. The Debtor confirmed Breedlove's testimony that, of the $35,393.74 that he withdrew from his First Citizens IRAs, he gave Breedlove $16,000.00 in the form of four $4,000.00 checks. He further testified that the remainder of the funds was withdrawn in cash. The Debtor claimed that he used $1,000.00 to purchase a vehicle, $600.00 to repay a debt to Breedlove, $600.00 to deposit into a new checking account, and the remaining $16,000.00 to travel and gamble. The Debtor denied that Keith Gallimore received any of the proceeds from the First Citizens IRAs, but that he had asked Gallimore to corroborate this falsehood for the purposes of the equitable distribution action, and Gallimore had agreed to do so.

Meanwhile, from the spring of 2000 to the summer of 2001, Breedlove was engaged in major renovations and the construction of an addition to her home. Davidson County tax records indicate that the tax value of Breedlove's home increased from $115,180.00 in 2000 to $138,100.00 in 2001. The addition to Breedlove's home was designed to serve as a separate apartment if needed. When the apartment was finished in the summer of 2001, the Debtor

moved in with Breedlove; however, relations between the Debtor and Breedlove soured and after fourteen months of residing in the apartment, the Debtor moved out.

Finally, at some point in the year preceding the trial, the Debtor disclosed to the Trustee that he had a opened a joint brokerage account with Breedlove at Legg Mason Wood Walker, Inc. ("Legg Mason") in 1999. He informed the Trustee that the account had been funded with his own money, but that the account had transferred to a sole brokerage account in the name of Carolyn Breedlove later that year to protect the funds from Fallin.

## FINDINGS OF FACT

As a preliminary matter, the court must note that the parties and counsel have made it unusually difficult to sort out the facts of this case. First, the parties disagree as to numerous events and occurrences. The Debtor has changed his sworn testimony on several occasions and Breedlove's testimony was vague and inconsistent. Gallimore and the Debtor admit to providing false evidence in the equitable distribution proceeding of the Debtor and Fallin. In general, the testimony by the Defendants is simply not credible. Furthermore, it has taken months for subpoenaed documents to be submitted to the court, despite representations by counsel for Breedlove that this supporting documentation would be provided within 24 hours.[1] These supporting documents are voluminous. Nevertheless, after careful scrutiny of the complete bank records, cancelled checks, credit card statements, and testimony, certain facts become evident, as set forth below. Once the facts have been established, it is not difficult to determine the legal ramifications of the parties' actions.

On February 12, 1999, roughly a year and a half prior to the Petition Date, Breedlove and

[1] The court admitted Defendant's Exhibit Number 32, which is a handwritten summary of Breedlove's bank records, upon the condition that corresponding copies of the original bank records be admitted into evidence as Exhibit 32-A. The records subsequently provided by Breedlove were incomplete, with many checks and several statements from key months missing. The Trustee ultimately subpoenaed the documents directly from the bank.

the Debtor opened a joint account with Legg Mason. On February 17, 1999, Breedlove deposited $16,500.00 into that new account. It is undisputed that the Legg Mason account was placed in the sole name of Breedlove on August 5, 1999. The Legg Mason account remains in the sole name of Breedlove to this date. Breedlove and the Debtor disagree as to the source of these funds. The Debtor contends that he gave Breedlove all of the funds in the Legg Mason account in cash to keep Fallin from reaching the funds. At the trial, Breedlove's sworn testimony was that $10,000.00 of the Legg Mason funds were given to her by the Debtor as a gift for her sons' college education and the remaining $6,500.00 was given to her by a friend, Ronnie Harrison, in repayment of a debt. Upon cross examination, Breedlove changed her testimony, stating that only a portion of the $6,500.00 came from Ronnie Harrison, but that she was not sure how much. Both of Breedlove's sons are in now in college, but Breedlove has not used any of these funds to pay for these expenses. Breedlove testified that she did, however, consider using the funds to compensate herself for the expenses she has incurred as a result of "all this mess."

Breedlove's BB&T checking account statement reflects a deposit into her checking account in the amount of $9,000.00 on February 17, 1999, and another deposit on February 18, 1999 in the amount of $7,500.00. The statement also reflects a payment on check number 4147 in the amount of $16,500.00. A copy of check number 4147, as produced by Breedlove, shows that this check dated February 12, 1999 was made payable to Legg Mason in the amount of $16,500.00. A copy of this check was introduced individually into evidence as Exhibit Number 31 by Breedlove, and Breedlove specifically confirmed its authenticity on the stand. On the "memo" line, the words "from Daddy and me!" are written on the check. A copy of check number 4147, as produced by BB&T, also shows that this check dated February 12, 1999 was made payable to Legg Mason in the amount of $16,500.00. On the "memo" line, the words "from Daddy" are written on the check. It is apparent that Breedlove altered the check after it was tendered to Legg Mason and prior to providing it as evidence to this court. Based upon the

evidence presented, the court finds that the Debtor gave Breedlove cash in the amount of $16,500, which she deposited into her BB&T checking account, and then used to fund the Legg Mason account. Therefore, the funds placed in the Legg Mason account at the time the account was opened were funds that belonged to the Debtor.

On April 23, 1999, the Debtor withdrew the sum of $35,393.74 from two IRA accounts located at First Citizens Bank (the "First Citizens IRA Accounts). Statements issued from First Citizens Bank reflect a withdrawal in the amount of $19,996.01 from one account and $15,397.73 from another. The Debtor was issued four cashier's checks from the account holding $19,996.01 in the amount of $4,000.00 each, for a total of $16,000.00 in checks. One of the few facts upon which Breedlove and the Debtor agree is that these four checks were deposited into Breedlove's savings account to be held for the Debtor. Breedlove's bank records indicate that this $16,000.00 was deposited into her savings account on April 27, 1999. The sum of $16,000.00 currently remains in Breedlove's account; however, Breedlove contends that the full $16,000.00 was used, though not directly from that account, to cover her father's ongoing expenses.

After deducting $16,000.00 from the First Citizens account holding $19,996.01, the Debtor received the remaining $19,393.74 in cash (the court will round this figure to $19,000.00 and refer to it as such herein). At trial, the Debtor conceded that he had changed his story several times regarding the disposition of the $19,000.00 in cash; however, he insisted that, in truth, he had given the cash to Breedlove. Breedlove denies that she ever received any of the $19,000.00 in cash from her father.

While credibility is an issue for both the Debtor and Breedlove, the court finds that the documentary evidence supports the Debtor's testimony as given at trial regarding the disposition of the $19,000.00 in cash. This documentary evidence shows that large amounts of cash from an unaccounted source or sources flowed through Breedlove's checking account. Breedlove's tax

returns reflect income from employment in the amount of $27,109.00 in 1999. Breedlove was employed at that time by the preschool program at Centenary United Methodist Church. Breedlove testified that she also received approximately $1,250.00 per month in child support and payment of one half of her children's medical expenses from her ex-husband. She testified that she may have received a tax refund during that year, but other than that, she could account for no other source of income in the year 1999. Breedlove's checking account statements reflect deposits totaling $69,030.51 during the year 1999. Even after taking into account the $16,500.00 which she deposited into the Legg Mason Account, Breedlove deposited an extra $10,000.00 into her checking account.

For the year 2000, Breedlove's bank records indicate that she received her salary in the form of a direct deposit in the amount of $911.01 every other week, for a total of $23,686.26 in take home pay for the year. She also received $6,200.00 from the sale of a vehicle, $33,305.93 from a new mortgage on her home, and child support. She testified that she had no other sources of income during that year. In total, Breedlove received monies from known sources totaling approximately $80,000.00, even after adding a cushion for a tax refund. Breedlove deposited $99,476.73 into her checking account.

The partial records admitted into evidence for the year 2001, from January through May, reflect the continuing infusion of cash into Breedlove's account. Breedlove was unemployed in April and May 2001 and received no earned income during these months. Breedlove's bank statements from January through May indicate that she received $7,118.99 in direct payroll deposits and continued to receive $1,250.00 per month in child support for a total of $13,368.99. Breedlove actually deposited $18,799.62 into her checking account during this time period.

Breedlove's testimony regarding the source of the deposits into her checking account was inconsistent and vague. She simply could not account for the huge amounts of monies that flowed through her checking account. She failed to provide direct answers to pertinent

questions at trial and repeatedly answered questions by stating that she could not remember, even in regard to unusual occurrences, such as the receipt of a large sum of money. Breedlove's bank records reflect that she made numerous counter deposits in even dollar increments. For example, on August 21, 2000, Breedlove made eleven separate deposits ranging from $80.00 to $300.00 for a total of $2,240.00. In May 2001, at a time when she was not employed, Breedlove made the following deposits: $3,625.00 on May 9, $1,555.00 on May 14, $500.00 also on May 14, $400.00 on May 22. In response to questions about these repeated counter deposits into her checking account, Breedlove replied, "I don't know. You want me to reconstruct my life way back then?" The court finds Breedlove's inability to recall the source of numerous and very large deposits disingenuous. Based upon the evidence presented, the court concludes that the Debtor gave Breedlove approximately $19,000.00 in cash from his First Citizens Accounts.[2]

Based upon this same evidence, the court finds that Breedlove's contention that the $16,000.00 deposited into her checking account was used, though not directly from that account, to cover her father's ongoing expenses is without merit. In support of her position that she spent the $16,000.00 on behalf of the Debtor, Breedlove submitted Exhibit 18 into evidence. Exhibit 18 is a handwritten list of expenses incurred between April 1999 and February 2000 totaling $12,556.86 that was prepared by Breedlove for use in the Debtor's equitable distribution proceeding. This exhibit was prepared to assist the Debtor in his attempt to keep the IRA money from his ex-wife. The court finds Exhibit 18 misleading and inaccurate. Furthermore, Breedlove's contention that she funded her father's expenses out of pocket is impracticable. Given Breedlove's limited income, she could not have paid over $12,000.00 out of her own funds towards her father's expenses within a one year period.

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[2] In fact, even taking into account Breedlove's receipt of the Debtor's IRA proceeds does not completely explain the large amounts of cash that flowed through Breedlove's account, but the court can only speculate as to what other monies she received from the Debtor or from other undisclosed sources.

Breedlove also testified that she incurred additional expenses on behalf of the Debtor after February 2000 that were not included on Exhibit 31. To support her position, Breedlove submitted Exhibit C, which includes copies of checks for various expenses that she claims she paid on behalf of her father and for the construction of the apartment addition to her home. These checks total approximately $16,000.00. It is certainly puzzling to the court that Breedlove claims that she spent over $12,000.00 by February 2000 on behalf of her father, and at the same time, claims that Exhibit C represents the $16,000.00 that she received from the Debtor. This inconsistency only underscores the court's conclusion that Breedlove received an additional $19,000.00 from her father that she used to fund improvements to her home. Be that as it may, the court also finds that Exhibit C is false and misleading to the court. As confirmed by Breedlove during her sworn testimony, a number of these checks bear the notation "Dad" or "daddy." Yet, none of the copies of these same checks, as produced to the court directly by her bank, bear such notations. [3] Clearly, Breedlove modified the checks prior to submitting them as evidence to this court. Altering original documents prior to submitting them as evidence is a serious matter and Breedlove has discredited her own testimony by doing so.

While Breedlove did not spend the $16,000.00 held in her savings account on her father, the court concludes that she did use $19,000.00 that she received in cash from the Debtor to make improvements to her home. The remodeling to Breedlove's home began in the winter of 2000, Breedlove contends that she used the money she received from refinancing to remodel her home. Breedlove's bank records indicate that she received $33,305.93 on June 13, 2000. A careful review of Breedlove's checks (as provided by her bank) reveals that Breedlove expended over $32,000.00 in the year 2000 alone on labor and materials to remodel her home.

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[3] For example, Check No. 5374 in the amount of $325.00, as produced by Breedlove, bears the notation "elec dad." That same check as produced by the bank states simply "elec." Check Nos. 5489 and 5494 as produced by Breedlove each bear the notation "daddy." The memo portion for each of these checks as produced by the bank is blank.

In early 2001, Breedlove began construction on the apartment addition to her home. The Debtor testified that Breedlove used approximately $19,000.00 that he gave her in cash to make improvements to her home. The addition was finally completed in June 2001, when the Debtor moved into Breedlove's home. A careful review of Breedlove's checks and Discover Card statements (on which she charged materials purchased) Breedlove spent over $11,000.00 from January 2001 to June 2001 on materials for the addition. There are few checks for labor costs in 2001 and both Breedlove and the Debtor agree that the bills for the labor on the apartment addition were paid in cash. A handwritten ledger maintained by both the Debtor and Breedlove at the time of the construction (Exhibit 34) indicates that a total of $8,907.00 was paid in cash to Don Bramlett and David Barefoot for labor. Accordingly, the court finds that the apartment addition actually cost approximately $19,000.00.

Breedlove cannot clearly explain how she obtained the $19,000.00 to pay for this addition to her home. At times during her testimony, she seemed to be contending that she used the $16,000.00 held in her savings account that her father gave her, yet, she never actually withdrew any of this money. At other times, she contended that she had to fund the construction herself. She claims that rather than using all of the money from her refinance to finish remodeling, she contributed money to the addition. Her own records indicate that the money from refinancing her home was completely spent prior to the time that construction began on the addition. When asked where she obtained the cash to pay Don Bramlett and David Barefoot, she stated that she would deduct cash when making a deposit, or would simply take cash out. Breedlove was unemployed during April and May of 2001, the months when the bulk of the construction took place. Breedlove has never used an ATM card, and there are no checks written for cash from her checking account. The cash used to pay for labor clearly did not come from Breedlove's checking account.

Therefore, the court concludes that Breedlove funded the improvements to her home by

using approximately $19,000.00 that she received in cash from the Debtor. The Debtor testified that Breedlove kept the money in cash in a lockbox, from which she withdrew funds as needed. All in all, the undisputed documentary evidence supports the Debtor's testimony. Breedlove used cash to pay the wages of Don Bramlett and David Barefoot, and she funneled the remainder of the cash into her checking account to cover the remainder of the expenses.

In sum, based upon the evidence presented at trial, the court finds that Breedlove received $16,500.00 from the Debtor on February 12, 1999. This money was deposited into the Legg Mason account. On April 27, 1999, Breedlove received $16,000 from the Debtor. This money was deposited into Breedlove's savings account. Lastly, the court finds that also on April 27, 1999, Breedlove received approximately $19,000.00 in cash from the Debtor. Further findings of fact are incorporated into the Discussion below as needed.

## DISCUSSION

The Trustee has asserted several claims, including fraudulent conveyance avoidance causes of action pursuant to both 11 U.S.C. § 548 and N.C. Gen. Stat. § 39-23.4, a claim civil conspiracy and an action to revoke the Debtor's discharge under § 727(d).

### A. Fraudulent Conveyances under Section 548 of the Bankruptcy Code

The Trustee contends that several transfers between the Debtor and Breedlove constitute fraudulent conveyances under both section 548 of the Bankruptcy Code and North Carolina law. Under section 548, "the trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred within one year before the date of the filing of the petition..." 11 U.S.C. § 548(a)(1). In this case, the date of the filing of the petition is November 3, 2000. No transfers at issue between the parties occurred after November 3, 1999. The Trustee argues that he can reach these transfers under § 548 pursuant to the doctrine of continuous concealment. See e.g., In re Rosen, 996 F.2d 1527, 1532 (3d Cir.1993);

In re Olivier, 819 F.2d 550, 553 (5th Cir.1987); In re Kauffman, 675 F.2d 127, 128 (7th Cir.1981); In re Ogalin, 303 B.R. 552, 557-58 (Bankr. D. Conn. 2004); In re Hooper, 274 B.R. 210 (Bankr. D.S.C. 2001). This line of cases, however, involves the applicability of the doctrine to § 727(a)(2). The language of § 727(a)(2) differs from § 548(a)(1); in the former, discharge shall not be granted if the debtor transfers *or* conceals property within one year of the filing of the petition. See 11 U.S.C. § 727(a)(2). The court has not found, nor has the Trustee cited, any cases that apply the doctrine of continuous concealment to an action under § 548(a)(1). Because § 548(a)(1) is limited to a transfer, the continuous concealment doctrine is not applicable, and the Trustee cannot reach the transfers under 548(a)(1) due to the one-year time limit.

**B. Fraudulent Conveyances under N.C. Gen. Stat. § 39-23.4**

Section 544(b) of the Bankruptcy Code allows a trustee to avoid transfers pursuant to applicable state law if such transfer is voidable by an unsecured creditor. 11 U.S.C. § 544(b)(1). The applicable fraudulent conveyance law in North Carolina is the North Carolina Fraudulent Conveyances Act, or N.C. Gen. Stat. § 39-23.4. This act provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
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> (1) With intent to hinder, delay, or defraud any creditor of the debtor; or
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> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

N.C. Gen. Stat. § 39-23.4(a). Pursuant to N.C. Gen. Stat. § 39-23.4, a fraudulent conveyance has

occurred if the debtor made a transfer within the proscribed period "with the intent to hinder, delay, or defraud any creditor of the debtor." N.C. Gen. Stat. § 39-23.4. Further, the leading North Carolina fraudulent conveyance case states that "if the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void..." Aman v. Walker, 165 N.C. 224, 227, 81 S.E. 162, 164 (1914). A conveyance is considered voluntary when it is not for value, "i.e., the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 128, 252 S.E.2d 826, 832 (1979). It is important to note that transfers between related parties, "if made without adequate consideration, create a presumption of actual fraudulent intent." Tavenner v. Smoot, 257 F.3d 401, 408 (4th Cir. 2001) (citations omitted).

The time limit specified for the bringing of an action under § 39-23.4(a) is within four years from the date of the transfer and/or, for transfers under § 39-23.4(a)(1), within one year after reasonable or actual discovery of the transfer by the claimant. N.C. Gen. Stat. § 39-23.9. Therefore, a trustee in bankruptcy, pursuant to § 544 of the Code, has the authority to attack fraudulent transfers under § 39-23.4(a) that occurred four years prior to the petition date.

Under section 550 of the Bankruptcy Code, once a transfer is avoided under section 544, the trustee "may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from the initial transferee..." 11 U.S.C. § 550(a). An initial transferee must have dominion and control over the transferred funds in order for a trustee to recover from her under § 550. See Hurtado v. Hurtado, 342 F.3d 528 (6th Cir. 2003) (mother of debtors was an initial transferee when transferred funds were put in her savings account and spent by her at the debtors' direction).

The transfers from the Debtor to Breedlove that require evaluation under N.C. Gen. Stat. §39-23.4(a) are as follows: (1) the transfer of $16,500.00 to the Legg Mason account; (2) the transfer of the $16,000.00 from the Debtor's First Citizens' IRA to Breedlove's savings account;

and (3) the transfer of the remainder of the First Citizens' IRA proceeds in the amount of $19,393.74.

First, the court finds that the transfer of the $16,500.00 currently held in the Legg Mason Account was a fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.4. The Debtor has admitted that he transferred these funds to Breedlove with the intent to hinder, delay, or defraud Fallin, a creditor. The Debtor did not receive a reasonably equivalent value in exchange for the transfer. While Breedlove contends that some of the money was given to pay for her sons' college education, her testimony regarding these funds has been entirely discredited by her tampering with the copy of the check used to fund the Legg Mason Account prior to submitting it into evidence. This transfer left the Debtor unable to pay his debts as they became due. Because this transfer was made with actual intent to defraud a creditor, and was made for no value, the Court finds this was a fraudulent transfer under North Carolina law and the Trustee is entitled to avoid this transfer pursuant to 11 U.S.C. § 544.

The Debtor's transfer of the funds from his First Citizens IRA Accounts in the form of four $4,000.00 checks and $19,393.74 in cash to Breedlove was also a fraudulent transfer. In her defense, Breedlove argues that under North Carolina law, it is impossible to fraudulently transfer exempt property or property otherwise protected from creditors. Under North Carolina law, funds held in qualified retirement accounts are exempt from the reach of most creditors. See N.C. Gen. Stat. § 1C-1601(a)(9).[4] Breedlove cites L&M Gas Co. v. Leggett, 273 N.C. 547 (1968), a case in which the transfer at issue was the conveyance of a husband's interest in entireties property to his wife. This argument is inapplicable to the case at hand. First, the Debtor liquidated his potentially exemptible IRA into cash before he transferred it to Breedlove. Therefore, this transfer was in fact $16,000 in cash, a non-exemptible asset. Also, the Fourth

[4] This exemption does not apply within the context of an equitable distribution proceeding. Fallin, as the Debtor's former wife, is entitled to her share of any retirement accounts as awarded in the equitable distribution proceeding. See N.C. Gen. Stat. § 50-20.1.

Circuit has held that "transfers of potentially exempt property are amenable to avoidance and recovery actions by bankruptcy trustees." Tavenner v. Smoot, 257 F.3d 401, 407 (4th Cir. 2001).

Both the Debtor and Breedlove have stated that the $16,000.00 transfer was conducted solely to remove the funds from the reach of the Debtor's ex-wife, a creditor in the equitable distribution and this bankruptcy case. The Debtor made this transfer to his daughter without receiving consideration of any kind and left the Debtor with funds insufficient to pay his debts when due. The court finds that the $16,000.00 transfer was made with actual intent to defraud the ex-wife, was transferred for no value, and is therefore a fraudulent conveyance under North Carolina law and can be avoided pursuant to § 544 of the Bankruptcy Code.

The Debtor also testified that the remaining $19,000.00 was also transferred to Breedlove with the intent to defraud Fallin. Breedlove does not contest the Debtor's intent, however, as addressed previously, she contends that she was not the recipient of this transfer. The court has already found that Breedlove did in fact receive these funds. While it may be argued that the Debtor received the consideration of the apartment as a home, the Debtor resided there only a short period of time and Breedlove testified that she now uses it as part of her home. As a result, this transfer is avoidable as a fraudulent conveyance pursuant to North Carolina law and § 544 of the Bankruptcy Code.

Because these transfers were fraudulent, they may be avoided pursuant to § 544 and the Trustee can recover the funds under 11 U.S.C. § 550. There is no doubt that Breedlove had the requisite dominion and control over the transferred funds. Therefore, the Court finds that the Trustee is entitled recover the full amount of the monies withdrawn from the First Citizens IRA Accounts in the amount of $35,000.00 and the amount of $16,500.00 from the Legg Mason account. Out of the $35,000.00 from the First Citizens IRA Accounts, Breedlove still has $16,000.00 held in cash in her savings account. Because Breedlove invested the balance of the fraudulently transferred funds into her home, the Trustee is entitled to a lien in his favor in the

amount of $19,000.00. See U.S. v. Mazzeo, 306 F.Supp.2d 294 (E.D.N.Y. 2004).

**C. Revocation of Discharge under Section 727(d)**

The Trustee asserts that the Debtor's discharge should be revoked in this case pursuant to § 727(d)(1) of the Bankruptcy Code, which provides that a discharge shall be revoked if "such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge." 11 U.S.C. § 727(d)(1). "To revoke a discharge under § 727(d), the debtor must have committed a fraud in fact which would have barred the discharge had the fraud been known." In re Edmonds, 924 F.2d 176, 180 (10th Cir. 1991). Fraud under § 727(d) may be shown by the same grounds that would prevent discharge under § 727(a). See In re George, 179 B.R. 17, 22 (Bankr. W.D.N.Y. 1995) (citation omitted).

In this case, the Trustee argues that the Debtor's discharge should be revoked on the grounds that he made a false oath or account pursuant to § 727(a)(4) of the Bankruptcy Code. To prevail on a § 727(a)(4) action, the court must find, by a preponderance of the evidence, that (1) the debtor made a statement under oath that he knew to be false; (2) about a material matter; and (3) that the debtor made the statement willfully and with the intent to defraud. See Hooper v. Hooper, 274 B.R. 210, 218 (Bankr. D.S.C. 2001) (citing Williamson v. Fireman's Fund Ins. Co., 828 F.2d 249, 251 (4th Cir. 1987).

Here, the Debtor made several statements under oath that he knew to be false. First, the Debtor misstated his income on his Statement of Financial Affairs by neglecting to include income he had received from the liquidation of IRA funds. Second, the Debtor falsely testified at his § 341 Meeting of Creditors that he had given a gift of the IRA funds to his son Keith, when in fact he had not done so and knew those funds were in Breedlove's possession. He reiterated this false testimony at his 2004 Examination conducted by the attorney for the Trustee. False statements or omissions in a debtor's schedules and statement of financial affairs and false

statements made by a debtor "during the course of the proceedings" constitute false oaths under § 727(a)(4). In re Colburn, 145 B.R. 851 (Bankr. E.D. Va. 1992). Therefore, the statements made by the Debtor satisfy the first requirement.

These false statements were made about a material matter. "A statement relates to a material matter when it bears a relationship to the existence and disposition of a debtor's property." Hooper, 274 B.R. at 219. Clearly, these statements involve the existence of the Debtor's IRA proceeds and their disposition. The Debtor sought to keep the whereabouts of the IRA proceeds from the Trustee and the bankruptcy court, and this issue is material to the Debtor's case.

The Debtor's statements in this case also satisfy the third prong: the debtor made the statement willfully and with the intent to defraud. The Debtor has testified directly about his intent to defraud, stating that the false statements about Keith Gallimore receiving the IRA proceeds were made purposefully in order to prevent the use of those funds from being used to satisfy his ex-wife's equitable distribution judgment. The Debtor intended to defraud the bankruptcy court, the trustee, and his ex-wife (a creditor in the bankruptcy case) and keep property out of the bankruptcy estate and away from creditors. As a result, the Debtor has committed fraud pursuant to § 727(a)(4).

Finally, in order for the Debtor's discharge to be revoked, the court must find that the Trustee did not know about the fraud until after the granting of the discharge. In this case, the Debtor's discharge was entered on February 14, 2001. The Trustee could not discover the truth about the whereabouts of the IRA proceeds until Keith Gallimore came forward, first through letter dated December 14, 2001 and then in a meeting with the Trustee on December 19, 2001. The Court finds that the Trustee did not know of the fraud committed by the Debtor until after the discharge was entered. Therefore, the Debtor's discharge will be revoked pursuant to § 727(d).

**D. Civil Conspiracy**

The Trustee additionally argues that the Debtor and Defendants Breedlove and Gallimore are liable to the Trustee for civil conspiracy under North Carolina law. In North Carolina, there is no recognized action for civil conspiracy, but the law "nevertheless permits one defrauded to recover from anyone who facilitated the fraud by agreeing for it to be accomplished." Nye v. Oates, 385 S.E.2d 529, 531 (N.C. App. 1989) (citation omitted). To prevail on such an action, a claimant must show that (1) an agreement existed (2) between two or more persons (3) to do an unlawful act or to do a lawful act in an unlawful way (4) that results in damages to the claimant, and (5) an overt act was committed by at least one conspirator in furtherance of the agreement. Dickens v. Puryear, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981); Dalton v. Camp, 531 S.E.2d 258, 266 (N.C. App. 2000), rev'd on other grounds, 353 N.C. 647, 548 S.E.2d 704 (2001). If a party makes a showing of an "overt act" committed by at least one conspirator in furtherance of the conspiracy, all of the conspirators are jointly and severally liable for the act of any one of them done in furtherance of the agreement. Fox v. Wilson, 85 N.C.App. 292, 301, 354 S.E.2d 737, 743 (1987).

In this case, the evidence presented does not show that the first element of the claim is met, that there was an agreement to defraud the Trustee. The evidence does show that the Debtor and Keith Gallimore had an agreement in the equitable distribution proceeding to state that Keith received approximately $20,000. However, there is no evidence that the agreement extended into the bankruptcy proceeding. Moreover, when Keith Gallimore realized that the story had made its way into the bankruptcy, he went to the Trustee to inform him that he had no part in any misdoing as it related to the bankruptcy. Therefore, the court will not find that there was an agreement between Keith Gallimore and the Debtor to defraud the Trustee.

As to the Debtor and Breedlove, the court finds that there is evidence of an agreement to defraud the Trustee. At her 2004 examination on February 12, 2002, Breedlove testified that she

only she received $16,000.00 from her father out of his First Citizens' IRA Accounts and that she believed her father had spent the rest of the money on gambling and other various expenses. On May 8, 2002, the Debtor confirmed Breedlove's story at his 2004 examination. A few months later, Breedlove had the Debtor evicted from her home. While the Debtor did not immediately change his story, by the time of the trial, the Debtor admitted that he had lied, and that, in fact, he had given Breedlove approximately $19,000.00 to build the apartment addition to her home. The court has already found that Breedlove's bank records confirm the Debtor's testimony as given at trial. Therefore, the court finds that prior to Breedlove's 2004 examination, she and the Debtor reached an agreement to conceal assets from the Trustee. In furtherance of this agreement, Breedlove and the Debtor did in fact commit perjury under oath during their 2004 examinations with the Trustee. Nevertheless, the Trustee has not alleged any damages other than requesting turnover of concealed assets. The Trustee may recover these assets under N.C. Gen. Stat. § 39-23.4(a), therefore there will be no additional recovery under this claim.

For the foregoing reasons, the Court will grant judgment in favor of the Trustee against the Debtor and Carolyn Breedlove. The court holds that the transfers made by the Debtor to Breedlove in the amount of $16,500.00 on February 17, 1999 and $35,000.00 on April 27, 1999 were fraudulent pursuant to N.C. Gen. Stat. § 39-23.4(a). The Trustee, pursuant to §544(b), may recover those transfers for the benefit of the estate. The Court finds that improvements to Breedlove's residence with a value of $19,000.00 were fraudulent and result in an equitable lien in favor of the Trustee in the amount of $19,000.00 on Breedlove's residence. Finally, the Debtor's discharge is revoked pursuant to § 727(d).

A separate judgment will be entered contemporaneously with this Memorandum Opinion pursuant to Rule 9021.

This the 8 day of June 2004.

Catharine R. Carruthers
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION



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| In re:<br><br>Donald K. Gallimore,<br><br>Debtor. | Case No. 00-52225-7 |
| W. Joseph Burns, Trustee in Bankruptcy for Donald K. Gallimore,<br><br>Plaintiff,<br><br>vs.<br><br>D. Keith Gallimore, Jr.,<br><br>Defendant. | Adversary Proceeding No.: 01-6034<br>(Consolidated Proceeding) |
| W. Joseph Burns, Trustee in Bankruptcy for Donald K. Gallimore,<br><br>Plaintiff,<br><br>vs.<br><br>Donald K. Gallimore and Carolyn Breedlove,<br><br>Defendants. | Adversary Proceeding No. 02-6015<br>(Consolidated Proceeding) |

**JUDGMENT**

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is therefore ORDERED, ADJUDGED and DECREED that the transfers made by the Debtor to Carolyn G. Breedlove in the amount of (1) $16,500.00 on February 17, 1999, and (2) $35,000.00 on April 27, 1999 were fraudulent pursuant to N.C. Gen. Stat. § 39-23.4(a).

It is further ORDERED that the Trustee shall avoid pursuant to § 544 of the Bankruptcy Code and N.C. Gen. Stat. § 39-23.4(a), and recover under § 550 of the Bankruptcy Code, those transfers for the benefit of the estate as follows: (1) $16,500.00 currently held in Legg Mason

account number 332-03474 under the name of Carolyn G. Breedlove; and (2) $16,000.00 currently held in the name of Carolyn G. Breedlove in her BB&T personal savings account number 5144008349.

It is further ORDERED that the Trustee is entitled to a Judgment in the amount of $19,000.00 against Carolyn Breedlove to be secured by an equitable lien in favor of the Trustee in the amount of $19,000.00 on Breedlove's residence located at 160 Foltz Dr., Winston-Salem in Forsyth County, North Carolina. Said Judgment is to bear interest at the federal rate from the date of the Judgment.

IT IS FURTHER ORDERED that the Debtor's discharge is revoked pursuant to § 727(d).

This the 8 day of June 2004.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge