IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re:

RODNEY DIXON DORAND, Case No. 21-30205

Debtor.

PRELIMINARY ORDER ON OBJECTIONS TO EXEMPTIONS
AND ORDER SETTING STATUS CONFERENCE

The debtor Rodney Dixon Dorand is in chapter 7 bankruptcy. Creditors the Estates of Robert Moss and Brenda Moss by Danae Brown, Executrix, and the Estates of Charles Saunders and Peggy Saunders by Amanda Andrews, Administrator,[1] and the chapter 7 trustee have objected (docs. 35, 79) to the debtor's claim of exemptions as to several assets: (1) an Individual Retirement Account ("IRA"), the funds from which (about $814,000) are currently held by the trustee; (2) about $11,000 in social security funds; (3) real property located at 58 Dunetop Terrace, Santa Rosa Beach ("Dunetop"); and (4) a life insurance policy with a cash value of about $145,000.

Following a non-evidentiary hearing on the objections, Judge Karen Specie entered an order (doc. 116) in September 2021 stating, among other things, that "[b]ecause of the volume of materials submitted, the varied legal issues, and the parties' inability to agree on what issues need evidence (even after a 2.5-hour, non-evidentiary hearing), it remains unclear precisely what each party asserts as to each asset claimed exempt." (*See id.*, at pp. 2-3). Judge Specie ordered further briefing, including that the parties attach "copies of evidentiary documents they claim prove their version of the facts" and provide "copies of all exhibits of record on which they rely." (*See id.*, at pp. 3, 18). After Judge Specie reassigned the case in February 2022, the undersigned entered a supplemental

[1] The court will refer to the plaintiffs as either "plaintiffs" or "the Alabama creditors."

order (doc. 171) "that all of the pleading, briefing, and exhibits related to the exemption issues . . . be submitted to the court in binders so that the court has all written argument and evidence related to the exemption issues in one place."

The parties have now fully briefed the exemptions issues and submitted voluminous exhibits notebooks. Based on the court's careful review of the parties' submissions, the record here, and the relevant law, the court issues the following preliminary order and sets this case for a further status conference.

Background

The debtor and his then-wife Barbara Dorand established the "Rodney D. and Barbara H. Dorand Living Trust" ("the Living Trust") in 1997. (*See* trust agreement, doc. 180-10). The Living Trust is a self-settled trust which became irrevocable upon Barbara's death in 2016.

In January 2015, the Circuit Court of Tallapoosa County, Alabama entered a judgment (doc. 182-1) in favor of the Alabama creditors for $1.6 million against the debtor and seven others in a suit arising out of a failed condominium development. Four years later, the state court defendants filed a motion to set aside the state court judgment, which was denied on September 30, 2019. (*See* state court order and docket, docs. 182-3 and 182-10). The creditors domesticated the judgment in Florida in December 2020. (*See* doc. 182-9; creditors' amended claim no. 1).

A writ of garnishment was issued to Morgan Stanley, the custodian of the debtor's IRA, in the Alabama state court. The debtor filed a "Claim of Exemption" to the writ in October 2020 (docs. 67-1,[2] 182-6) and an "Amendment to Claim of Exemptions" in December 2020 (doc. 182-7). The Alabama creditors contested the exemption (doc. 67-2). The state court held a hearing on

[2] The creditors did not refile certain exhibits into the record, but included exhibits from previous filings with their exhibit notebooks.

December 21, 2020 and denied the claim of exemption on January 4, 2021. (*See* transcript, doc. 180-5; order, docs. 67-4, 182-8). In January 2021, the state court entered a judgment and then an amended judgment against garnishee Morgan Stanley, the custodian of the IRA, for $856,622.39. (*See* judgments, doc. 180-1). The debtor then filed for chapter 7 bankruptcy on April 1, 2021.

Legal Analysis

For different reasons, the debtor and creditors argue that assets of the Living Trust are not property of the bankruptcy estate. The court disagrees and will first set out its analysis on what constitutes property of the estate. The court will next address claim and issue preclusion. Finally, the court will discuss the exemptability of four assets of the estate: the IRA, the social security funds, Dunetop, and the life insurance policy.

The Living Trust

Because both Rodney and Barbara Dorand had children from previous marriages, the Living Trust maintains Rodney and Barbara's separate interests in property: "Any separate property, including any individual interests in property, and the proceeds from such property, which is or becomes trust property, shall remain the separate property of a Trustmaker." (*See* trust agreement, doc. 180-10, at p.3-2). On Barbara's death, the trust property was divided into two separate trusts: the Marital Trust and the Family Trust (which is not at issue). (*See id.*, at p.8-1).

The Marital Trust consists of the debtor's "interest in the community portion of the trust property, if any, and his . . . separate portion of the trust property." (*See id.*). There is also a provision related to minimizing the estate tax on Barbara's estate. The debtor is and at all relative times has been both trustee and beneficiary of the Living Trust. (*See* debtor's resp. to trustee's obj. to exemptions, doc. 100, at p.2).

The Marital Trust is divided into two shares, with all of the debtor's portion going into Marital Share One:

> **a. Marital Share One**
>
> Our Trustee shall allocate all of the surviving Trustmaker's separate portion of the trust property and all of the surviving Trustmaker's community portion of the trust property, if any, to Marital Share One.
>
> **b. Marital Share Two**
>
> Marital Share Two shall consist of the balance, if any, of the property passing to the Marital Trust.
>
> If any allocation under this Article results only in the funding of Marital Share One, our Trustee shall administer this agreement as if Marital Share Two did not exist.

(Trust agreement, doc. 180-10, at p.9-1). The parties have not identified any assets which would be in Marital Share Two.

As both trustee and beneficiary, the debtor has the right to pay himself both income and principal from the Marital Trust:

> **a. The Surviving Trustmaker's Right to Income**
>
> Our Trustee shall pay to or apply for the surviving Trustmaker's benefit, at least monthly during the surviving Trustmaker's lifetime, all of the net income from Marital Share One.
>
> **b. The Surviving Trustmaker's Right to Withdraw Principal**
>
> Our Trustee shall pay to or apply for the surviving Trustmaker's benefit such amounts from the principal of Marital Share One as the surviving Trustmaker may at any time request in writing.
>
> No limitation shall be placed on the surviving Trustmaker as to either the amount of or reason for such invasion of principal.

(*Id.*, at p.9-2).

The trust agreement provides that the validity of the agreement is "determined by reference to the laws of the State of Alabama." (*See id.*, at p.18-7). But questions about "the construction or

administration of the various trusts contained in th[e] trust] agreement [are] determined by reference to the laws of the state in which the trust is then currently being administered." (*See id.*).

Bankruptcy Code § 541 "provides that, with some exceptions, 'all legal or equitable interests of the debtor in property as of the commencement of the case,' is property of the estate and subject to administration by a chapter 7 trustee." *See In re Romagnoli*, 631 B.R. 807, 814 (Bankr. S.D. Fla. 2021) (citation omitted). "A chapter 7 trustee 'stands in the shoes' of a debtor with respect to the debtor's interest in assets which become part of the estate." *Id.* (citation omitted). But "the trustee takes no greater rights than the debtor himself had." *Id.* (citation, quotation marks, and brackets omitted). "Where the debtor's interest is in a trust, the trustee acquires only those interests that the debtor had in the trust." *Id.* at 814-15. The parties do not dispute the validity of the trust agreement, so the court applies the law of Florida, the state in which the Living Trust is being administered.

Florida has adopted the Uniform Trust Code. *See In re Rensin*, 600 B.R. 870, 881 (Bankr. S.D. Fla. 2019). Under Florida Statutes § 736.0505, "[w]hether or not the terms of a trust contain a spendthrift provision, [w]ith respect to an irrevocable trust, a creditor . . . may reach the maximum amount that can be distributed to or for the settlor's benefit."[3] If the trustee of an irrevocable trust "'has discretion to distribute the entire income and principal to the settlor, the effect of this

[3] Alabama Code § 19-3B-505 is the same. *See also generally In re Tait*, No. 08-01015, 2008 WL 4183341 (Bankr. S.D. Ala. Sept. 10, 2008). While the Living Trust contains a spendthrift provision (*see* doc. 180-10, at p.18-4), that provision states that trust property cannot be used to satisfy the claims of creditors "except for our interests in the various trusts or trust property subject to this agreement" and "other than our creditors to the extent of each of our respective interest in the trust or trust property." In other words, the exception swallows the rule and creditors of the debtor can reach the trust property. At any rate, under Florida law, a spendthrift provision in a self-settled trust has no effect. *See In re Brown*, 303 F.3d 1261, 1267-68 (11th Cir. 2002); *In re Rensin*, 600 B.R. at 880.

subsection is to place the settlor's creditors in the same position as if the trust had not been created.'" *See In re Rensin*, 600 B.R. at 881 (citation omitted).

The debtor (who is also trustee) has discretion to distribute the entire Martial Share One of the Marital Trust corpus to himself. Under Florida law, then, his creditors can "attach any and all assets of the trust. Put another way, the assets in the [Marital Trust] are not protected from execution under Florida law." *See In re Rensin*, 600 B.R. at 881. Thus, the assets of the Marital Trust are property of the estate under § 541 and "are subject to administration in this bankruptcy case." *See id.*; *see also In re Murphy*, No. 6:04-ap-154, 2007 WL 3054989, at *11 (Bankr. M.D. Fla. Oct. 16, 2007) (assets in an irrevocable trust for which the debtor was both settlor and beneficiary "would certainly constitute property of the bankruptcy estate, subject to administration for the benefit of [the debtor]'s creditors"). Of course, the trust assets are still subject to applicable Florida exemptions. *See In re Rensin*, 600 B.R. at 881-82.

Claim and issue preclusion

The debtor's claim of exemptions in this bankruptcy are based on Florida law. The Alabama creditors and trustee argue the Full Faith and Credit Doctrine and Alabama preclusion law bar the debtor's claim of exemptions related to the IRA, social security benefits, and life insurance.

After his IRA was garnished in the Alabama state court action, the debtor claimed the following exemptions under Alabama Rule of Civil Procedure 64A (*see* doc. 67-1) with no specific mention of Florida law:

- "Head of family wages." [The court notes that this exemption is available in Florida but not Alabama.]
- "I provide more than one-half of the support for a child or other depending, have net earnings of more than $750 per week, but have not agreed in writing to have my wages garnished."

- "Social Security benefits."
- "Retirement or profit-sharing benefits or pension money."
- "Life insurance benefits or cash surrender value of a life insurance policy or proceeds of annuity contract."

His "Amendment to Claim of Exemptions" (doc. 182-7) contains an inventory of assets, including addresses of the properties he owns and more information about his retirement benefits (the IRA at issue) and life insurance policy but, again, no specific mention of Florida law.

The Alabama creditors filed a contest to the claim of exemption under Alabama Rule of Civil Procedure 64B, enumerating the following objections (*see* doc. 67-2), and did not mention Florida law either:

> I. The claim of exemption filed by Rodney Dorand is defective. The claim of exemption does not include an inventory as required by Rule 64B of the Alabama Rules of Civil Procedure. Failure to include the inventory requires the Court to reject the claim of exemption.
>
> II. Rodney Dorand's claimed Individual Retirement Account funds are not exempt from garnishment because Rodney Dorand has engaged in prohibited transactions as defined by the IRS tax code and those funds have lost their exempt status.
>
> III. Any assets of the Rodney D. And Barbara H. Dorand Living Trust are not and have never been subject to any legal protection as retirement funds or subject to any other valid exemption.
>
> IV. There is a personal judgment against the Rodney D. Dorand And Barbara A. Dorand living [sic] Trust which makes all of the assets of the Trust subject to seizure without respect to the interests of any intended beneficiaries of the Trust.
>
> V. Rodney Dorand cannot claim a personal exemption over any assets owned by the Rodney D. And Barbara H. Dorand Living Trust since those funds are not "personal" but are the corpus of a trust, this is true even if Rodney Dorand is the intended beneficiary of the Trust.
>
> VI. The Plaintiffs reserve the right to argue additional grounds for the Court to find the funds are not subject to any valid exemption as the Plaintiffs are still gathering discovery related to these issues.

The state court held a hearing (*see* transcript, doc. 180-5) and Florida exemption law was not raised or argued by either side. The only discussion of any Florida law is in the state court brief in opposition to the debtor's state court claim of exemption in which the Alabama creditors cite three Florida cases. (*See* doc. 67-2, at pp. 11-12). The creditors cited two Florida cases for the proposition that a court may take judicial notice of the contents of its own court file and related to alleged procedural defects in the debtor's claim of exemption pursuant to Alabama Rule of Civil Procedure 64B and the Alabama Code. The creditors cited a third case for what constitutes a prohibited transaction under federal law with respect to an IRA.

The Alabama state court order denying the exemptions states in its entirety:

> This matter is before the Court on a Claim of Exemption filed by Rodney Dorand, who is a judgment debtor herein. The claim was relative to garnishments filed by the Plaintiffs. The Plaintiffs filed a proper contest to the claim of exemption, making both procedural and substantive challenges to the same. After consideration of all pleadings, exhibits, submissions, and oral argument, the Claim of Exemption filed by Defendant is hereby DENIED.

(Docs. 67-4, 182-8).

"The Full Faith and Credit Doctrine requires a court to accord the same preclusive effect to a judgment as would the rendering court." *In re Cody*, 297 B.R. 906, 909 (Bankr. M.D. Fla. 2003). The practical effect of this doctrine is that this court applies Alabama preclusion law to the state court's exemption order. *See In re Harris*, 2021 WL 2946295, at *2 (11th Cir. July 14, 2021); *Beem v. Ferguson*, 713 F. App'x 974, 983 (11th Cir. 2018).

Both issue and claim preclusion require identity of parties, a point on which there is no dispute. In addition, claim preclusion (sometimes called res judicata) under Alabama law requires:

(1) A prior judgment on the merits;

(2) rendered by a court of competent jurisdiction;

(3) with the same cause of action presented in both actions.

See Chapman Nursing Home, Inc. v. McDonald, 985 So. 2d 914, 919 (Ala. 2007). If these elements are met, "'then any claim that was, or that could have been, adjudicated in the prior action is barred from further litigation.'" *See Bond v. McLaughlin*, 229 So. 3d 760, 767 (Ala. 2017) (citation omitted). Claim preclusion does not apply "to bar a claim that could not have been brought in a prior action." *See id.* at 767-68.

For issue preclusion (also known as collateral estoppel) to apply under Alabama law:

(1) the issue must be identical to the one involved in the previous suit;

(2) the issue must have been actually litigated in the prior action; and

(3) the resolution of the issue must have been necessary to the prior judgment.

See McCulley v. Bank of Am., N.A., 605 F. App'x 875, 878 (11th Cir. 2015); *Lee L. Saad Constr. Co. v. DPF Architects, P.C.*, 851 So. 2d 507, 520 (Ala. 2002). "'Only issues *actually decided* in a former action are subject to" issue preclusion. *See Lee L. Saad Constr. v. DPF*, 851 So. 2d at 520 (citation omitted) (emphasis in original).

This court does not believe that claim preclusion applies. At the outset, the court doubts that an Alabama court would find a defendant's claim of exemptions is a "cause of action" that will support a "judgment" for purposes of claim preclusion or that such court would allow the creditors' offensive use of claim preclusion (*i.e.*, as a sword not a shield) in this context. *See Austill v. Prescott*, 293 So. 3d 333, 354-56 (Ala. 2019) (Mitchell, J., concurring).

Even so, the debtor's entitlement to an exemption is determined as of the date the debtor filed for bankruptcy. *See In re Yerian*, 927 F.3d 1223, 1229 (11th Cir. 2019). The debtor's entitlement to exemptions as of the bankruptcy was not and thus could not have been presented as a defense in the state court action.[4] *See generally In re States*, 237 B.R. 847 (Bankr. M.D. Fla. 1999) (applying

[4] The trustee mentions *Rooker-Feldman* in her brief, but that doctrine is inapplicable for the same reason.

Florida claim preclusion law, which also requires the same cause of action); *see also Bond*, 229 So. 2d at 767-68. The United States Supreme Court in *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S. Ct. 1589 (2020), has questioned so-called "defense preclusion" when the defense necessarily could not have been raised below. Nor has this court located any law that the state court even could or should have considered another state's exemption law rather than Alabama or federal exemptions.[5] In any case, the evidence before the court is ambiguous at best as to whether the state court considered Florida exemption law; Florida law was barely mentioned except for the three cases discussed above, none of which were cited for any Florida exemption. While the creditors argue that the state court applied Florida law, nothing in the state court record – including the state court order denying the debtor's claim of exemptions – sheds much light on that issue.[6]

Issue preclusion does not apply, either. As with claim preclusion, the issue of the debtor's exemption at the time of the bankruptcy filing was not and could not have been litigated in the state court case, nor was resolution of that issue necessary to the state court's order. Again, the evidence does not show that identical issues were involved because it is unclear whether the Florida exemptions were actually litigated. *See, e.g.*, *In re Allen*, 203 B.R. 786, 794 (Bankr. M.D. Fla. 1996) (discussing "actually litigated" requirement). Even if they were, there is no evidence that resolution of those exemptions was necessary to the state court's order. The state court pointed out that both procedural and substantive grounds were raised; it did not state whether it was denying the exemptions on procedural grounds, substantive grounds, or both.

[5] The trustee states in her brief (doc. 182, at p.7) that "Alabama does not allow Debtors to claim extraterritorial exemptions."

[6] Judicial estoppel does not prohibit the debtor from arguing that the state court did not consider Florida law, as nothing in that record shows that Florida law was specifically raised in that court. And the court has already pointed out that the state court could not have decided the issue of the applicability of Florida exemptions at the time the debtor filed for bankruptcy.

Therefore, the court preliminarily rejects the creditors' and trustee's argument that the exemptions related to the IRA, social security funds, and life insurance should be overruled based on preclusion principles.

The IRA

Over 20 years ago, the debtor created an IRA account with Morgan Stanley. In June 2016, the Living Trust made two transfers totaling $16,500 (one for $6,500 and one for $10,000) to the IRA. The debtor has claimed the total cash value of the IRA as exempt. In general, an IRA is exempt under Florida Statutes § 222.21(2)(a). The Alabama creditors argue that (1) the debtor testified in the state court action that the Living Trust owned the IRA, and thus the IRA is no longer exempt because 26 U.S.C. § 408 limits IRA ownership to an individual;[7] (2) transfers into the IRA of $6,500 and $10,000 forfeited the IRA's exempt status; and (3) the Alabama state court judgment against Morgan Stanley for $856,622.39 created a right of setoff in favor of Morgan Stanley under Bankruptcy Code § 553 and those funds never became property of the estate.

The debtor's deposition testimony – without the benefit of any account documents – that he believed the Living Trust owned the IRA is not dispositive and does not warrant the application of judicial estoppel argued by the creditors. *See Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1181 (11th Cir. 2017) ("Judicial estoppel should not be applied when the inconsistent positions were the result of inadvertence or mistake because judicial estoppel looks towards cold manipulation and not an unthinking or confused blunder.") (citation, quotation marks, and brackets omitted); *see also Belkova v. PNC Bank, N.A.*, No. 3:18-ap-0180-JAF, 2020 WL 5745969, at *2 (Bankr. M.D. Fla. Mar. 25,

[7] The trustee contends on page 5 of her brief (doc. 182) that the IRA was never transferred into the Living Trust, "there was merely a change of address."

2020) (judicial estoppel is "'invoked at a court's discretion'") (citation omitted).[8] While that mistaken testimony created confusion at the outset, the documentary evidence and deposition testimony of Morgan Stanley's corporate representative Staci Corley have since established that the IRA was always in the debtor's individual name. That same evidence also shows that the $10,000 transfer was a qualified rollover from his deceased wife's IRA and that the $6,500 transfer was an allowable "catchup" contribution by the debtor. (*See, e.g.*, Corley dep., doc. 180-3, at 23:4-24:5, 33:16-22, 43:18-46:2, and ex. 8).

The state court judgment against garnishee Morgan Stanley does not affect the IRA's exempt status, either. That order (*see* doc. 180-1) states in pertinent part:

> The Judgment amount represents moneys Morgan Stanley . . . has admitted holding in accounts owned by either Rodney Dorand individually or the Rodney D. and Barbara H. Dorand Living Trust including an account designated as an Individual Retirement Account by Rodney Dorand. Morgan Stanley . . . is authorized to set-off this payment from any funds in its possession and held for the benefit of either Rodney Dorand individually or the Rodney D. Dorand and Barbara H. Dorand Living Trust. This specifically includes the right of Morgan Stanley to set-off funds held in an account designated as an Individual Retirement Account. Rodney Dorand's claim of exemption as to retirements funds was denied by the Court at Document 450. Upon remittance of these funds to the Circuit Clerk of Tallapoosa County, Alabama the judgment against Morgan Stanley . . . will be satisfied.

Under the order, Morgan Stanley may set off only if and when it pays the state court judgment – which has not happened. The debtor owes no debt to Morgan Stanley and there is no mutuality under Bankruptcy Code § 553. *See In re McKay*, 420 B.R. 871, 877 (Bankr. M.D. Fla. 2009) ("The elements of setoff are not present. The parties do not owe mutual prepetition debts to each other."). Similarly, Bankruptcy Code § 544 does not apply because the debtor owes no debt to Morgan Stanley.

[8] Judicial estoppel may not apply at all since the debtor's statement was made in a deposition in this proceeding, not a separate proceeding. *See Radenhausen v. U.S. Coast Guard*, No. 3:13-cv-268-J-39JRK, 2015 WL 12861136, at *6-7 (M.D. Fla. Jan. 30, 2015).

The court will hold an evidentiary hearing on the IRA exemption if the trustee and creditors request one. The court does not propose for the parties to rehash arguments already made. But based on the evidence currently before it, the court will find that the creditors and trustee have not met their burden under Federal Rule of Bankruptcy Procedure 4003(c) to show that the IRA exemption is improper.

The social security funds

In his schedules (doc. 24), the debtor claims as exempt "[f]our months of Social Security payments" in a Morgan Stanley account in the amount of $11,176.00 under Florida Statutes § 222.201 and Bankruptcy Code § 522(d)(10)(A).[9] The Morgan Stanley account is held by the Living Trust and, for the reasons set forth above, is property of the bankruptcy estate unless otherwise exempt. The court agrees with the debtor that the funds are traceable and retain their exempt status because the Morgan Stanley Account Records (*see* doc. 67-3) identify when funds from social security were transferred into the account. *See In re Belmont*, No. 6:15-bk-03714-CCJ, 2015 WL 7717203, at *1 (Bankr. M.D. Fla. Nov. 23, 2015).

The court has been unable to identify which four months are at issue. Each deposit appears to be in the amount of $2,585.70, in which case four months would be $10,342.80, not $11,176.00. While the court agrees that the funds are traceable, there are different methods for determining

[9] Although Florida has opted out of the exemption schedule of the Bankruptcy Code, Florida Statutes § 222.201 allow an individual debtor to also exempt "any property listed in" Bankruptcy Code § 522(d)(10). *See In re Ladd*, 258 B.R. 824, 826 (Bankr. N.D. Fla. 2001). The debtor chose to take the exemption in § 522(d)(10)(A), which means "he may exempt, among other things, his right to receive a future social security benefit, but not an accumulated benefit that has already been distributed." *See Matter of Treadwell*, 699 F.2d 1050, 1052 (11th Cir. 1983) (citation, quotation marks, and brackets omitted); *see also In re Pomar*, 234 B.R. 135, 137 (Bankr. M.D. Fla. 1993). No party raised this issue, though, and the debtor can amend his schedules to claim the federal statutory exemption under 42 U.S.C. § 407. *See Matter of Treadwell*, 699 F.2d at 1052-53.

whether the traceable exempt funds ever left the account. *See, e.g.*, *In re Tydings*, No. 19-20889-drd-7, 2020 WL 1510025, at *2-3 (Bankr. W.D. Mo. Mar. 27, 2020) (setting forth "a simplified explanation of each of the most common tracing methods"); *see also generally In re Wharton-Price*, No. 9:15-bk-03126-FMD, 2015 WL 4230856 (Bankr. M.D. Fla. July 6, 2015). This court intends to apply the pro rata or percentage method.

If the parties intend to go forward with this issue, the court will hold an evidentiary hearing and will require the debtor to (1) state which four months are at issue and how the debtor arrived at the amount of $11,176.00; (2) identify what documents support that contention; (3) disclose whether funds ever left the account after each deposit and up to the petition date, and include documents evidencing all deposits and withdrawals from the date of the disputed deposits up to the petition date; and (4) if funds did leave the account, state whether he agrees with the court's application of the pro rata approach and, if not, why the court should not apply that approach in determining the exemption if funds did leave the account. The court expects the parties to attempt to agree on an exempt amount before any hearing, as this is a relatively low-dollar amount which does not justify extensive litigation.

Dunetop

Dorand has lived at Dunetop since 2013. In October 2016, Dorand established the Rodney D. Dorand Revocable Trust ("Dorand Revocable Trust"). Around the same time, Dorand's daughter and son-in-law conveyed Dunetop by warranty deed to "RODNEY D. DORAND (and successors thereto), Trustee of the Rodney D. Dorand Revocable Trust . . . ." (*See* doc. 180-6; *see also* Dorand dep., doc. 67-3, at 22:13-25). The funds (in the amounts of $150,000, $275,000, $5,000, and $12,470.95) to purchase Dunetop came from the Living Trust. (*See* debtor br., doc. 180, at p.17; *see also* Dorand dep., doc. 67-3, at 38:10-39:6).

The debtor contends that Dunetop is exempt in its entirety under Florida's homestead exemption. The trustee argues that the Dorand Revocable Trust's ownership of Dunetop "has a substantial effect on the exempt status of the property" (*see* trustee br., doc. 182, at p.10) and that all the debtor has is a life estate interest. The Alabama creditors argue, based on *First National Bank of Chipley v. Peel*, 145 So. 177 (Fla. 1933), that Dunetop is not exempt because the Alabama state court judgment was entered before Dorand acquired Dunetop. They also argue that any exemption is lost under Bankruptcy Code § 522(o).

The court will first address the trustee's arguments. Revocable trusts "are widely used will-substitute devices that provide flexibility in managing the settlor's assets during his or her lifetime. In other contexts, revocable trusts are treated similarly to wills." *See Engelke v. Estate of Engelke*, 921 So. 2d 693, 697 (Fla. Dist. Ct. App. 2006). Under Florida Statute § 736.0505, part of the Florida Trust Code, "[t]he property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor." In other words, as recognized by another Florida bankruptcy court, the chapter 7 trustee's ability to reach the debtor's interest in property in a trust is limited by applicable Florida exemptions such as the homestead exemption. *See In re Romagnoli*, 631 B.R. 807, 813-17 (Bankr. S.D. Fla. 2021). Indeed, the homestead exemption is sacrosanct under Florida law. *See, e.g.*, *In re Edwards*, 356 B.R. 807, 810-11 (Bankr. M.D. Fla. 2006); *In re Potter*, 320 B.R. 753, 759 (Bankr. M.D. Fla. 2006). The Dorand Revocable Trust's ownership of Dunetop does not affect the exemption. *See In re Romagnoli*, 631 B.R. at 813-17; *see also generally In re Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006). Further, even if all the debtor has is a life estate, the Dorand Revocable Trust is the owner of the remainder interest and the homestead exemption would still apply under the analysis of *In re Romagnoli*, 631 B.R. 807, and *In re Alexander*, 346 B.R. 546.

Turning to the creditors' arguments, in *Peel* and cases applying it (*see* creditors' br. on homestead exemption, doc. 184, at pp. 10-15), the debtors owned non-exempt real property at the time a judgment was entered against them, so the lien attached to the property at that time. The debtors then converted or tried to convert the property (which they already owned) into their homestead to avoid the judgment lien, even though the property had not been their homestead and was not exempt at the time the judgment lien was perfected. That is not the case here, where Dunetop has been the debtor's homestead the entire time he has owned it.

However – and this is a big however – Bankruptcy Code § 522(o) requires the court to reduce the debtor's homestead exemption to the extent such value is attributable to any portion of any non-exempt property that the debtor disposed of within 10 years of the bankruptcy filing with the intent to hinder, delay, or defraud a creditor. *See In re Roberts*, 527 B.R. 461, 473 (Bankr. N.D. Fla. 2015). The debtor argues that § 522(o) does not apply because the funds used to purchase Dunetop came from the Living Trust, not the debtor. (*See* debtor br., doc. 180, at p.19). As discussed above, the court disagrees and finds that the debtor's portion of the Living Trust assets were under the debtor's control and were subject to the claims of the debtor's creditors under Florida law, such that they constitute "property that the debtor disposed of" under § 522(o). If the creditors and trustee prove fraudulent intent, *see generally In re Roberts*, 527 B.R. 461, the debtor's exemption in Dunetop will be lost to the extent of any value attributable to non-exempt funds used to purchase it. The court will set this issue – whether the debtor's homestead exemption may be lost under § 522(o) and to what extent – for an evidentiary hearing.

Life insurance

Florida Statutes § 222.14 exempts "the cash surrender value of life insurance policies issued upon the lives of citizens or residents" of Florida, with an exception that does not apply here.

However, "[t]his provision . . . has been interpreted to only protect policies in which the owner is also the insured." *See Clampitt v. Wick*, 320 So. 3d 826, 831 (Fla. Ct. App. 2021) (emphasis in original). Other courts disagree. *See In re Rensin*, 600 B.R. 870, 882 (Bankr. S.D. Fla. 2019) (ownership of annuity by trust did not affect exemption).

The debtor here does not personally own the policy. The life insurance annual report dated February 2020 (doc. 180-9) shows the Living Trust as the policy owner and the debtor as the insured. There is no evidence that the ownership of the policy changed between the date of the report and the petition date in April 2021. Although the trust assets (as discussed above) are subject to the claims of creditors and part of the debtor's estate, the trust is a separate legal entity. The court has not been able to find any Florida case law directly on point regarding insurance policies owned by living trusts, possibly because it does not often occur.

Even if it is exempt, there is another potential issue with the life insurance policy. The evidence currently before the court is that the debtor repaid a loan on the policy in the amount of $137,609.85 from the Living Trust account shortly after losing a motion in state court (*see* Morgan Stanley Account Details, docs. 182-4 and 182-5; Dorand dep., doc. 67-3, at 45:11-23) – thus converting a non-exempt asset into an exempt asset (assuming that the policy is exempt). Although this situation does not fall within Bankruptcy Code § 522(o) because it does not involve a homestead, the conversion of nonexempt assets into exempts assets can constitute a voidable fraudulent transfer. *See* Florida Statutes § 222.29 and 222.30(2) ("Any conversion by a debtor of any asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor's claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor."); *In re Allen*, 203 B.R. 786, 791-92 (Bankr. M.D. Fla. 1996); *Clampitt*, 320 So. 3d at 830 n.1.

Given the unclear status of the law on the issues of whether ownership is an exemption requirement and whether ownership by a living trust would suffice, plus the potential necessity of an evidentiary hearing on the fraudulent transfer issue, the court reserves ruling on the life insurance policy pending further proceedings and discussion with the parties.

Conclusion

This is a preliminary ruling, not a final order. The court intends to issue a final order ruling on all the exemption issues after it has completed the evidentiary hearings discussed in this order. The court sets this case for a telephonic status hearing on July 11, 2022 at 9:00 a.m. to discuss how to proceed further with this case, including a potential global mediation of all issues and dates for evidentiary hearings in fall 2022. The conference call dial-in number is 1-877-336-1831, access code 1356129, security code 1886.

Dated: June 10, 2022

HENRY A. CALLAWAY
U.S. BANKRUPTCY JUDGE