

## CONSUMER BANKRUPTCY

# Life Estates and Remainder Interests Are Exempt

*U.S.D.C. in first impression case permits homestead exemption*

By Craig D. Robins

Many senior citizens, as part of an elder-law planning strategy, transfer title of their homes to their children while retaining a life estate. Doing so, and waiting a requisite period of time, enables the seniors to qualify for certain Medicaid benefits, and further permits the house to pass without probate.

However, up until recently, there was a degree of uncertainty by some bankruptcy trustees as to whether the remainder interests were protected in bankruptcy.

In 2009, I was retained by the Rasmussens – a husband and wife – to represent them in what appeared to be a typical Chapter 7 filing involving typical consumer debt.

The only fact that was out of the ordinary was that they lived with the husband's mother, a widow, who had previously deeded a life estate in her house to herself, while granting the remainder interest to her son and daughter-in-law.

I assumed that the debtors would be able to protect their remainder interest by asserting the homestead exemption which permits debtors who own their homes and reside in them to protect a certain amount of equity. After all, the debtors owned the remainder interest, which is an interest in real estate, and they resided in the house. They also contributed to the household expenses by paying rent to the husband's mother pursuant to an oral lease.

I filed the Chapter 7 bankruptcy petition in March 2009 and Kenneth Silverman

was appointed trustee. The trustee disagreed with our contention that the remainder interest was exempt as a homestead. The trustee then brought a proceeding challenging the debtors' claimed exemption, arguing that since the debtors did not have a present right to possession, they did not sufficiently "own" the property as required by the homestead statute.

Judge Alan S. Trust, in a decision in July 2010, ruled in favor of the debtors stating that they could exempt their remainder interest as a homestead. In re *Rasmussen*, No. 09-72069-ast, (Bankr. E.D.N.Y., Jul. 20, 2010).

The judge commented that this was a case of first impression in the Second Circuit, and that there was no federal or New York case law in this jurisdiction addressing whether holders of either a life estate or a remainder interest can claim a homestead exemption under the New York homestead exemption statute, C.P.L.R. § 5206.

The court determined that the debtors' remainder interest qualified for the exemption because New York's homestead exemption statute does not specify which types of ownership interests are exemptible, and hence does not preclude it.

The court further concluded that since a future interest in real property is descendible, devisable, and alienable to the same degree as estates in possession,



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the debtors' interest is therefore an ownership interest and thus exemptible.

Judge Trust further found this outcome was particularly apt in light of the Bankruptcy Court's duty to construe the homestead exemption in the debtors' favor to effectuate its purpose of protecting homeowners from seizure of their homes and to protect a debtor's home in the event of bankruptcy.

Although the debtors and I were elated by this decision, within days the trustee appealed to the United States District Court for the Eastern District of New York.

In September 2011, Judge Joanna Seybert affirmed the Bankruptcy Court's decision, commenting that Judge Trust's decision was thoughtful and well-reasoned. In re *Rasmussen*, No. 10-CV-4173-js (E.D.N.Y., Sept. 14, 2011).

Judge Seybert focused on the wording of the homestead statute which permits homeowners to exempt their home when it is "owned and occupied as a principal residence." There was no dispute that the debtors occupied the premises as principal residence. The only issue was therefore whether the debtors "own" the premises within the meaning of the homestead statute.

The District Court held, as did the court below, that a future interest is an ownership interest.

The trustee had claimed that the

Bankruptcy Court was incorrect in concluding that "neither exclusive possession nor exclusive ownership are, on the face of CPLR § 5206(a), required to establish an exemptible interest." To that, the District Court stated, "The trustee is plainly wrong. Section 5206(a), by its terms, does not specify the circumstances of ownership or occupation required to claim a homestead exemption."

Although Judge Seybert applied her reasoning to the actual set of facts, which included the fact that the debtors paid rent to the husband's mother pursuant to an oral lease, the decision is pretty clear that the debtors would have received the same result, even if they did not pay rent.

The judge did not address this distinction at all.

Thus, there should be no doubt in this jurisdiction, absent a higher appellate court case down the road, that future interests and remainder interests are exempt as homesteads in bankruptcy proceedings, as long as the debtor resides in the premises.

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