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-STATE OF SOUTH CAROLINA )  
COUNTY OF KERSHAW )

BEFORE THE MASTER-IN-EQUITY  
FIFTH JUDICIAL CIRCUIT NOV 12 2014

**SC Court of Appeals**

Palmetto Residential Builder, LLC, )  
Petitioner, )  
vs. )  
Michael Cox and Elizabeth Cox, )  
Respondents. )

**ORDER ON MOTION TO SET  
ASIDE CONVEYANCES**

Case No.: 06-CP-28-0433

FILED FOR RECORD  
2014 SEP 15 PM 3:55  
JOYCE McDONALD  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

This matter came before me on June 25, 2014, 9:00 a.m. in the Office of the Kershaw County Mast-In-Equity pursuant to a Motion for Order Setting Aside Fraudulent Conveyances and Executing on Certain Property. This Order concerns only the issue of whether Respondent Michael Cox's voluntary contributions to his employee retirement plan are fraudulent conveyances under the Employee Retirement Income Security Act and applicable state law.

Present at the hearing were Plaintiff's counsel, the Defendants Michael and Elizabeth Cox and their counsel. This Court heard extensive argument from both lawyers who also submitted detailed briefs on the relevant case and statutory law applicable to the issue.

**BACKGROUND**

Respondent Michael Cox has been making voluntary contributions into his ERISA covered 401K plan since 1985. Mr. Cox is employed by International Paper Company and has been for thirty (30) years. His plan is an individual retirement account under 408(a) of the Internal Revenue Code and it provides the required contractual "anti-alienation" provision (See 29 U.S.C. § 1057(d)(1)). The retirement plan to which Mr. Cox contributes 16.5% of his salary is known as The International Paper Salaried Savings Plan. This plan was established for employees of the

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*Joyce McDonald*  
Clerk of Court Kershaw County

Company effective July 1, 1992 and is covered by ERISA (Employee Retirement Income Security Act of 1974) and is a "Qualified Employer Plan" under 26 U.S.C. § 401 (a). His plan is afforded the highest protection legally allowed under existing law, Federal or State.

In 2008, this Court rendered judgment against Mr. Cox and his wife in the amount of \$119,430.93. The Petitioner now wants this Court to rule that the contributions into his Employee Retirement Income Security Act (ERISA) covered 401(k) retirement plan made since judgment was rendered are fraudulent conveyance under the "Statute of Elizabeth" S.C. Code Ann. § 27-23-10.

Based on the record before me, arguments by the lawyers and their submitted written materials, I make the following findings of fact and conclusions of law.

1. This Court has proper continuing jurisdiction over the issues before me and parties hereto.
2. Under current law, Mr. Cox is allowed to contribute up to \$23,000.00 to his employee retirement account. All who contribute to 401(k) accounts are allowed to contribute up to \$17,500.00, pre-tax money into their retirement account. Mr. Cox, age 59, is allowed an additional \$5,500.00 pre-tax contribution pursuant to 26 U.S. Code § 219 (5)(B) which is called the "catch up" contribution and only those who are age 50 and over may take advantage of this provision.
3. Mr. Cox is currently and has been contributing less than \$17,500.00 to his retirement plan since judgment was rendered against he and his wife. The contributions are taken directly from his paycheck, deposited into his 401(k) trust account and are not counted as income to him for tax purposes.

4. Mr. Cox has been making contributions to his ERISA covered retirement plan for twenty-nine (29) years, since 1985. The Petitioners in this case were awarded judgment in 2008. Thus, Mr. Cox has been contributing to his ERISA covered 401(k) retirement plan for twenty-one (21) years prior to the Petitioner's judgment against him.

5. Mr. Cox has been making contributions into the 401(k) plan long before the Petitioner's judgment and since the judgment, Mr. Cox has not increased the amount of his contributions into the 401(k) account which he is entitled to do.

6. It follows then, that these transfers and continuing transfers of money from Mr. Cox's paycheck to his 401(k) were not made to delay, hinder, or defraud creditors under South Carolina's Statute of Elizabeth. Instead, they were made to provide for him and his wife's retirement.

7. The applicable exemption, S.C. Code Ann. § 15-30(A)(13) references Section 408(a) of the Internal Revenue Code and Section 408(a) references contributions to the plan. Thus, the contributions are allowed the same protection as the funds in 401K trust account. The contributions are pre-tax and not included in gross income.

8. Title I of ERISA requires that benefits under the plan may not be assigned or alienated. For the anti-alienation clause to be effective, the underlying plan must constitute a "pension plan" under ERISA which is defined as any plan, fund or program. . . which provides retirement income to employees. See ERISA § 3(2)(A). In the case at bar, Mr. Cox's plan is clearly an employee a pension plan under ERISA.

9. In addition to ERISA, the U.S. Code provides "that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." § 401 (a)(13)(A). Neither ERISA or

code protections apply to individual retirement plans (I.R.A.'s), simplified pension plans, government plans or most church plans. ERISA §§ 4(b) and 201; Code § 401(a); DOL Treas. Reg. §2510.3-2(d).

10. ERISA § 514 (a) provides that ERISA supersedes state laws to the extent that they state laws relate to employee benefit plans, also known as the "preemption" provision". The anti-alienation and preemption provisions both make state attachment and garnishment laws inapplicable or without force or effect with relation to ERISA covered plans.

11. There are exceptions to the anti-alienation and preemption provisions but the case before me is not one of them. Qualified Domestic Relations Orders (QDRO's) for child support may be exempt. Code § 401 (a)(13)(B); ERISA § 206(d)(3). In a marriage and subsequent divorce, the retirement plan is a marital asset subject to a Family Court's equitable division authority. Federal tax judgments and levies are also exempt. Treas. Reg. §1.401(a)-13(e). Criminal judgments may also be exempt. See U.S. v. Novak, 476 F.3d 1041 (9<sup>th</sup> Cir. 2007).

12. If Mr. Cox would have contributed more than \$23,000.00 for any tax year since he turned 50 years old, or otherwise contributed more than is allowed as a pre-tax contribution to his retirement plan, those funds would not be protected by ERISA and may be recovered by the Petitioner's in this case as a fraudulent conveyance..

13. None of the exceptions to the anti-alienation or preemption provisions are applicable in this case.

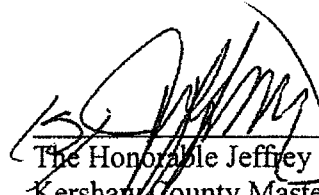
14. With respect to whether these contributions are fraudulent conveyances under South Carolina law, this Court finds that, "... conveyances shall be set aside under two conditions; First, where there was valuable consideration and the transfer is made by the grantor with the actual

intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration. Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 459 (S.C. 2012).

14. This Court finds that the voluntary contributions made by Mr. Cox to his retirement account are made with and for valuable consideration and were not made with any intent to defraud the judgment creditors at bar.

15. Therefore, under ERISA and our state's law, the contributions Mr. Cox has made into his 401(k) since judgment was rendered against him are not fraudulent conveyances, they were not made with the intent to defraud the creditor and are protected from attachment, levy or garnishment by the Employee Retirement Income Security Act.

**ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Petitioner's Motion to set aside Mr. Cox's voluntary contributions to his employee retirement plan is denied.

  
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The Honorable Jeffrey M. Tzerman  
Kershaw County Master-In-Equity  
Fifth Judicial Circuit

Camden, South Carolina

~~2013~~ 2014  
September 13

STATE OF SOUTH CAROLINA )  
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 COUNTY OF KERSHAW )  
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 Palmetto Residential Builder, LLC, )  
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 Petitioner, )  
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 vs. )  
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 Michael Cox and Elizabeth Cox, )  
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 Respondents. )  
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BEFORE THE MASTER-IN-EQUITY  
 FIFTH JUDICIAL CIRCUIT

**ORDER DENYING MOTION TO  
 ALTER OR AMEND**

Case No.: 06-CP-28-0433

FILED FOR RECORD  
 2014 OCT 13 PM 4:45  
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 KERSHAW COUNTY, S.C.

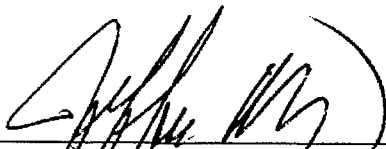
This matter came before me on pursuant to a Motion to Reconsider, Alter or Amend submitted by Petitioner on September 29, 2014. After having thoroughly reviewed the motion, Petitioner's Motion is denied for the following reasons: Prior Orders in this case are clearly distinguishable from the current Order in that the previous Orders did not concerns wages that were regularly deducted in order to make a legally allowable contribution to an ERISA covered 401-K plan. Previously, the Respondents liquidated assets that were used to repay a loan to the 401-K. This Court held that that transaction was fraudulent and that the monies must be turned over to the judgment creditor. Adopting the Petitioner's argument would require what is in essence, a wage garnishment, which is prohibited under our State law. Further, once the wages are deposited in the 401-K account, they have the protection of federal law.

**ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Petitioner's Motion to Reconsider, Alter or Amend this Court's Order signed on September 13, 2014 and filed on September 15, 2014, is denied.



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 Court

*Joyce McDonald*  
 Clerk of Court Kershaw County



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The Honorable Jeffrey M. Tzerman  
Kershaw County Master-in-Equity  
Fifth Judicial Circuit

Camden, South Carolina  
October 13, 2014