

THE STATE OF SOUTH CAROLINA  
OFFICE OF THE ATTORNEY GENERAL  
COLUMBIA

OPINION NO. *88-15-4452* February 11, 1988

SUBJECT: Taxation & Revenue - Homestead Exemption When  
Legal Title Held By Trustee.

SYLLABUS: Where legal title to a person's legal  
residence is held by a trustee, the person  
must possess, under the trust instrument, the  
right to use the dwelling for life before the  
homestead exemption can be granted.

TO: Honorable Mary Ann Gray  
Beaufort County Auditor

FROM: Joe L. Allen, Jr. *JLA*  
Chief Deputy Attorney General

QUESTION: A settlor conveys his legal residence in fee to  
a trustee. The settlor is the trustee and the immediate  
beneficiary of the trust. The question is whether the legal  
residence qualifies for the homestead exemption?

APPLICABLE LAW: Sections 12-37-250 and 12-37-266, Code of  
Laws of South Carolina, 1976, as amended.

DISCUSSION:

For purposes of this opinion, we assume that there has been  
a valid transfer of the title to the legal residence from  
the settlor to the trustee<sup>1</sup>. Section 12-37-250 provides  
for a homestead exemption for persons over sixty-five years  
of age or persons classified as totally and permanently  
disabled or blind. Such persons must own the homestead in  
fee simple or for life. Section 12-37-266 provides an  
exception for such persons when legal title to the homestead  
is held by a trustee and the person:

" . . . possesses the use of the dwelling  
for life . . . "

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<sup>1</sup> The application for the homestead exemption was made by  
the settlor in his individual capacity and not as the  
trustee. Section 12-37-610 subjects the trustee to the  
liability for payment of the ad valorem property taxes on  
the property. Section 12-37-266 requires that the trustee  
make the application.

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Whether the person possesses such a use is to be ascertained from the trust instrument itself.

"Resort is first to be had to its [instrument's] language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Extrinsic facts cannot, in such cases, give the instrument a different construction from that imported by its terms." Chiles v. Chiles, 270 S.C. 379, 242 S.E.2d 426. Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385.

The trust provides in Item I that the trustee shall:

". . . after paying the necessary expenses of management and preservation of the trust property, pay the net income of the trust in such amounts to or for the benefit of Grantor during the Grantor's lifetime, together with such amounts of the trust principal, as Grantor may so direct Trustee to do from time to time."

The next paragraph provides that if the grantor is adjudicated incompetent or by reason of illness or mental or physical disability becomes unable to administer the grantor's own affairs, the income is to be paid to the grantor's spouse.

These two provisions establish that the person is entitled to the income from the trust and to the trust principal as the trustee may be directed to return. The provisions do not confer the use of the residence for the person's life. Additionally, the language referred to above is subject to an interpretation that the distribution of the trust income is conditional and could end upon a judicial declaration of incompetency or by reason of "illness or mental or physical disability" that renders the person incapable of administering the person's own affairs.

Under Item VIII of the instrument, the trustee is:

"To take title to and possession of property, real, personal or mixed, and

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to collect and receive the moneys,  
interests, profits and income arising  
therefrom, with full power in the  
Trustee to manage, sell, invest and  
reinvest the same . . . "

This again reflects that the person does not have a right to possess "the use of the dwelling for life". Such vests in the discretion of the trustee. The trustee has the power to manage or sell the property.

In Item XI of the instrument, the settlor has the right to:

"modify, alter, amend or revoke this  
Agreement, in whole or in part . . . "

The grantor may additionally "withdraw any part or all of the property, real personal or mixed, from this trust estate".

This is further evidence that the use of the residence is conditional and may be affected by acts outside the instrument. There is no right granted under the instrument for the person to possess the use of the residence for the person's life.

The fact that the grantor or settlor and the trustee and the present beneficiary are the same person does change the results above stated. A trust is variously defined, however, the general definition is that it is:

". . . the legal relationship between  
one person having an equitable ownership  
in property and another person owning  
the legal title to such property . . ."  
76 Am.Jur. 2d, Trusts, section 3.

The settlor (grantor) may direct himself to be the trustee of the estate, however, the property of the estate is held by the trustee in a fiduciary capacity and not in the settlor's individual capacity. 76 Am.Jur. 2d 114. Here the person does not under the trust instrument possess the right to use the dwelling for life and hence the exemption cannot be granted under Section 12-37-266.

CONCLUSION:

Where legal title to a person's legal residence is held by a trustee, the person must possess under the trust instrument, the right to use the dwelling for life before the homestead exemption can be granted.

JLAJr/jws