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## Dealing with Co-Owners of Bankruptcy Estate Property

**Chief Judge Phillip J. Shefferly**

*U.S. Bankruptcy Court (E.D. Mich.); Detroit*

**Charles D. Bullock**

*Stevenson & Bullock PLC; Southfield, Mich.*

**Kimberly R. Clayson**

*Clayson, Schneider Miller; Detroit*

**Tricia S. Terry**

*Marrs & Terry, PLLC; Ann Arbor, Mich.*

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**Hon. Phillip J. Shefferly  
Chief Bankruptcy Judge for the  
United States Bankruptcy Court,  
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**Charles D. Bullock  
Stevenson & Bullock, P.L.C.  
Southfield, Michigan**

**Kimberly R. Clayson  
Clayson, Schneider & Miller, P.C.  
Detroit, Michigan**

**Tricia S. Terry  
Marrs & Terry, PLLC  
Ann Arbor, Michigan**

**Recurring Issues Arising from Co-Owner Share of Different Types of Personal Property**

**Introduction**

These materials were prepared for use at a panel discussion at the ABI Veterans Day Detroit Consumer Bankruptcy Conference on Monday, November 11, 2019. The panel's topic is titled "Dealing With Co-Owners of Bankruptcy Estate Property." Materials submitted by other members of the panel focus on co-ownership of real property and co-ownership of interests in business entities. This portion of the materials focuses on co-ownership of different types of personal property and how they are administered in bankruptcy cases. This portion of the materials discusses vehicles, income tax refunds, joint bank accounts, and credit union accounts. In addition, this portion of the materials discusses in a more general way two other types of personal property where the case law regarding their administration in bankruptcy is just in its infancy: domain names for websites and bitcoin and other cryptocurrency. Because there are few cases dealing with co-ownership of these two types of property interests, the discussion of these items is not limited to co-ownership, although in the coming years bankruptcy courts will no doubt be called on to address the administration of these specific types of property interests where there are co-owners.

These materials were prepared by Barbara Bailey, Law Clerk for Phillip J. Shefferly, Chief Bankruptcy Judge for the Eastern District of Michigan, with minimal assistance from Judge Shefferly.

**I. Vehicles**

A. In re Young, 468 B.R. 818 (Bankr. E.D. Mich. 2012) (Judge Shefferly). Married debtors filed a joint Chapter 7 case. They listed a vehicle as being jointly owned, even though it was titled solely in the debtor husband's name. Both claimed an exemption. The Chapter 7 trustee

objected to the wife's exemption, arguing that title was dispositive and the wife could not claim property she did not own as exempt. The debtors argued that title was not conclusive evidence of ownership under Michigan law, and it was always their intention that she was the owner of the vehicle and they treated it as hers. Alternatively, the debtors argued that the husband held the vehicle in trust for his wife, and she was entitled to exempt that beneficial interest.

The court held an evidentiary hearing. In ruling for the trustee, the court found a statutory presumption that the husband, as the only person shown on the certificate of title, was the sole owner of the vehicle. However, citing Twichel v. MIC General Insurance Corp., 676 N.W.2d 616 (Mich. 2004), the court held that the certificate of title is not dispositive of ownership, and that, depending on the circumstances, one may be an owner of a vehicle despite not being shown as the owner on the title. However, the debtors failed to produce sufficient evidence of the wife's ownership interest. Likewise, the evidence did not support the debtors' trust argument.

B. In re Ambrose-Burbank, 563 B.R. 820 (Bankr. E.D. Mich. 2017 (Judge Tucker)). The debtor purchased a vehicle in 2010 for her cousin. She was listed as the sole owner on the application for title, and the sole owner on the certificate of title. However, the cousin made all payments, including for insurance and repairs, and maintained possession. In 2015, the vehicle was paid off. Later that year, the debtor filed bankruptcy. The trustee sued the cousin for turnover of the vehicle.

Judge Tucker granted summary judgment in favor of the trustee, disagreeing with In re Young and finding the ruling in Twichel inapplicable in determining ownership of a vehicle because it was decided in a different context. Instead, compliance with the Michigan Vehicle Code was mandatory and any transfer not in compliance is void.

**II. Income Tax Refunds From Jointly Filed Returns**

A. One line of cases looks to case law to determine respective ownership interests.

1. In re Linder, case no. 08-71386 (Judge Rhodes). A married debtor filed Chapter 7. She disclosed an interest in an income tax refund, describing it as “very small portion in relation to taxes she paid v non-debtor spouse,” and claimed no exemption. The trustee filed motion for turnover against the non-filing spouse, arguing that the debtor was entitled to have of a \$13,408 refund from their joint federal income tax return. Relying on case law, Judge Rhodes granted the motion, adopting a 50/50% bright line rule.

2. In re Nelson, case no. 08-47798 (Judge McIvor). Both spouses filed a joint case. The trustee objected to the debtor wife’s claim of exemption under § 522(d)(5) in a joint tax refund because she did not work outside the home. With no income, the trustee argued the debtor wife had no exemptible interest. Judge McIvor limited the exemption to 50% of the refund.

3. In re Connolly, case no. 08-42952 (Judge Tucker) (transcript of April 30, 2008 hearing at ECF No. 29). A married debtor filed Chapter 7 and claimed no exemption in an income tax refund. The trustee filed a motion for turnover, arguing that the debtor was entitled to 50% of over \$8,000 in total tax refunds. The debtor argued that she earned very little that year compared to her non-filing spouse. After describing various methods of apportioning interests in joint tax refunds, Judge Tucker adopted the one using a presumption of 50/50% interest but allowed limited rebuttal through a domestic relations order or an enforceable written pre-petition agreement.

4. In re Marble, case no. 09-40146 (Judge Shapero) (Dec. 28, 2009 opinion at ECF No. 36). Both spouses filed a joint case. One debtor claimed an entire income tax refund exempt under § 522(d)(5), as the entire withheld taxes were attributable to his wages. Judge Shapero started with a rebuttable presumption of 50/50 ownership but went on to look at other evidence

indicating an intention by the spouses to separately own or divide the refunds in other than equal shares.

B. Another line of cases involves an exemption under a Michigan statute.

Mich. Comp. Laws § 557.151, Evidence of indebtedness payable to husband and wife; ownership in joint tenancy, provides that

All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

1. Jahn v. Regan, 584 F. Supp. 399 (E.D. Mich. 1984). In this case, the court applied § 557.151 to an intercepted income tax refund. A husband and wife sued both the federal and state governments “challenging the validity of the Internal Revenue Service’s transmittal of plaintiffs’ 1981 joint tax refund to the State . . . to apply on the plaintiff husband’s debt to the State for child support.” Id. at 401. The plaintiffs had not actually received the refund check, so they alleged that their “joint tax overpayment constitut[ed] a chose in action owned by [them] jointly and as tenants by the entireties and exempt from attachment or taking to satisfy the debts of one of the owners.” Id. at 409. The district court recognized that § 557.151 created a tenancy by the entirety in certain personal property, including a joint indebtedness made payable to a husband and wife. However, it held that

a tax refund or overpayment for a jointly filed tax return cannot be reasonably characterized as an “evidence of indebtedness” in the same manner as a mortgage or bond. The refund plaintiffs [were] pursuing [was] not a document of indebtedness of the government. It [was] not even a negotiable instrument made payable to them. Therefore, plaintiffs’ joint tax overpayment [was] not within M.C.L.A. § 155.151 and not held by them as tenants by the entireties.

Id. at 410.

2. In re Bowles, case no. 11-35340 (Judge Opperman) (Aug. 28, 2012 opinion at ECF No. 40). The debtor claimed an exemption in only \$165 of a \$9,800 refund. The trustee argued that the debtor was entitled to half of the refund even though the non-filing spouse was the main income earner. Judge Opperman first determined that refunds are property of the estate, prorated per diem for the year. For the refund at issue, the pro rata amount was \$8,700.

Judge Opperman then reviewed the multiple approaches in determining how refunds should be divided between a husband and wife. He determined that all of the cases use methods that are consistent with that state's law governing property rights. Concluding that Michigan law governs in this case, Judge Opperman held that the refund was "evidence of indebtedness made payable to persons who are husband and wife" under M.C.L.A. § 557.151. As a result, half of the pro rated refund was attributable to the debtor, less his exemption, requiring turnover of the balance to the trustee.

3. In re Johnson, case no. 13-51584 (Judge Tucker) (transcript of Dec. 4, 2013 bench opinion at ECF No. 37). Married debtors filed for Chapter 7. They anticipated receiving over \$20,000 in income tax returns. The debtor wife claimed an exemption even though she had not worked during the relevant tax years. In response to the trustee's objection to the exemption, the debtors cited § 557.151 and In re Bowles. The trustee countered with the Jahn v. Regan opinion.

Judge Tucker agreed with Jahn and disagreed with Bowles. Because the wife had not contributed any wages from which taxes were withheld, the court ruled that she had no ownership interest in the refunds.

4. Lewis v. Spohr (In re Spohr), Adversary Proceeding No. 17-4605 (Judge Shefferly) (transcript of June 29, 2018 bench opinion at ECF No. 57). A married debtor filed Chapter 7. A

joint income tax refund was deposited into his bank account. From that, he withdrew half and transferred it to his non-filing spouse. A week later, he filed for bankruptcy. The Chapter 7 trustee filed an adversary complaint against the wife to avoid and recover the allegedly fraudulent transfer. The defendant argued that, because the refund was “other evidence of indebtedness” under § 557.151 and thus entirety property, the debtor did not transfer *his* property but instead simply gave his wife her half.

Judge Shefferly found that Jahn v. Regan, while persuasive, was not binding and went on to disagree with its holding that a joint tax return was not “other evidence of indebtedness.” Instead, it was evidence of joint ownership, but not dispositive. The case was eventually resolved by a consent judgment.

### **III. Joint Bank Accounts**

#### A. Generally

“[A]s a matter of property law, there is a rebuttable presumption that funds deposited in a bank account belong to the owner of the account.” AFSCME Int’l Union v. Bank One, NA, 705 N.W.2d 355, 361 (Mich. Ct. App. 2005) (citing Muskegon Lumber & Fuel Co. v. Johnson, 62 N.W.2d 619 (Mich. 1954)). “[T]he burden of proof rest[s] upon the third party claimant to show clear title to the fund[s].” Burch v. Barendsen, 158 N.W. 839, 839 (Mich. 1916).

Gold v. Ziolo (In re Demeter), 539 B.R. 760 (Bankr. E.D. Mich. 2015) (Judge Tucker). At first blush, the facts sound pretty damning. Three weeks before the debtor filed her Chapter 7 petition, her mother removed her name from two joint bank accounts holding in total over \$178,000. The result was that new accounts were created in the mother’s name only. The Chapter 7 trustee filed an adversary complaint against the mother, seeking to recover half of the funds.

The legal standard applied was based on Michigan case law. “There is a presumption under Michigan law that funds held in a joint bank account are owned equally by both account holders.” Id. at 765 (citing Danielson v. Lizoski, 531 N.W.2d 799, 801-02 (Mich. Ct. App. 1995)). “That presumption of equal ownership may be rebutted, however, by evidence showing that one of the two joint account holders owns more than non-half of the funds in the account.” Id.

At a bench trial, both the debtor and her mother testified credibly. The mother’s intent in putting debtor’s name on the accounts was in case she became ill and needed help paying bills. The source of funds was from the mother, and none from the debtor. Even though both the debtor and her mother had the ability to withdraw funds unilaterally, the court held the debtor did not own any of the funds in either account and dismissed the trustee’s complaint.

B. Joint Accounts With Rights of Survivorship

Mich. Comp. Laws § 487.703 governs rights in bank accounts in the name of joint beneficiaries with rights of survivorship. Deposits made in the name of the depositor or any other person, or multiple persons, payable to either or the survivor, “shall become the property of such persons as joint tenants.”

The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

In Chemical Bank v. Yaker, 28 F.3d 1213 (6<sup>th</sup> Cir. 1994), the Sixth Circuit explained that § 487.703 provides

a rebuttable presumption that funds deposited in a joint account are held by the account holders as joint tenants unless a contrary intention is shown. In the absence of proof establishing their contributions toward the deposits, the presumption prevails that [joint account holders] were equal contributors thereto, and therefore equal owners. However, if rebuttal evidence is introduced, the statute provides a

permissible (rather than mandatory) inference that the funds are held as joint tenants.

Id. at \*2 (internal quotation marks and citations omitted) (vacating and remanding because the evidence raised a question of fact about the allocation of deposits between the two account holders).

As joint owners, the depositor and beneficiary have a right to all the funds in the account. Wright v. White, 424 N.W.2d 268, 271 n.7 (Mich. 1988) (the petitioner “was able to withdraw the funds from the accounts because of his status as a joint owner”); Esling v. City Nat’l Bank & Trust, 270 N.W. 791, 793 (Mich. 1936) (“either joint owner could have withdrawn the entire amount during the lifetime of the other”).

#### **IV. Multiple-Party Credit Union Accounts**

A. In re Racine, case no. 09-58228 (Judge Shapero) (Dec. 31, 2009 opinion at ECF No. 26). The debtor’s two sons were listed as joint owners on two credit union accounts. The credit union moved to lift the stay to set off funds in the accounts against the debtor’s credit card debt. The debtor argued that the accounts were opened 20 years before when her sons were very young, and she was unaware that she remained a co-owner.

The debtor argued that none of the funds were attributable to her, and thus they were not subject to set off by the credit union for her debt. She relied on Mich. Comp. Laws Ann. § 490.53, which states that, “[d]uring the lifetime of all parties, a multiple-party account which provides that sums on deposit or in shares may be paid on the demand of either of 2 or more parties is presumed to belong to the parties in proportion to the net contributions by each to the sums on deposit.” However, Judge Shapero noted that § 490.52 limits the presumption under § 490.53 to “controversies between these persons or their creditors and other successors.” Even though there was a dispute between the debtor and her sons, there was no controversy with the credit union.

Given the credit union's statutory right to set off, as well as its lien by statute and agreement, the court granted the motion for relief from the stay.

B. In re Hess, 456 B.R. 309 (Bankr. E.D. Mich. 2011) (Judge Shapero). Here, a credit union sought relief from the stay to set off the debtor's credit card debt against an account that the debtor argued was solely owned by his mother. The debtor believed that his mother added his name to her account solely for survivorship purposes, and to allow him to assist her in paying bills from the account. Instead, the court found that the application signed by the mother created a multi-party account, giving the credit union the statutory right to set off against the entire balance of the account.

C. In re Houston, 463 B.R. 452 (Bankr. E.D. Mich. 2011) (Judge McIvor). This case has similar facts to Hess. The debtor's mother opened a "Survivorship Account," intending that her son receive any remaining funds upon her death. Instead of being limited to survivorship rights, the account was a multi-party account where the debtor had access to any and all sums on deposit. After the son filed for bankruptcy, the credit union sought relief from the stay to set off his credit card debts against the account. Judge McIvor held that the credit union held a right to set off. However, under § 490.53, that right was subject to the ownership presumptions and only enforceable against the net contributions of the debtor (disagreeing with Crawford and Hess). Based on an uncontroverted affidavit from the debtor's mother swearing that she was the sole depositor into the account, the court denied the credit union's motion.

D. In re Houston, 2012 WL 4490890 (E.D. Mich. Sept. 26, 2012). The credit union appealed and the district court reversed. First, the court ruled that the credit union held a lien under § 490.361(4), irrespective of the net contributions of account co-owners. Second, the credit union also held a right to set off under § 490.64, and that right likewise was not limited to contributions

made by the respective co-owners. The bankruptcy court's use of the presumptions under § 490.53 was error because § 490.52 expressly limits its use to establishing beneficial ownership and controversies between parties and their beneficiaries or parties and their creditors. In so ruling, the court found that the credit union was not a "creditor" as used in § 490.52.

**V. Domain Names for Websites**

Internet hosts have unique numerical Internet protocol (IP) addresses, as well as a unique corresponding domain name. Intermatic Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996). Instead of entering the string of numbers representing the IP address, users gain access to a website by entering the domain name that corresponds to that address.

"To protect its interest in a domain name, the holder must register the name with an authorized company (a registrar). Thus, each domain name is unique and can only be registered to one entity." Panda Herbal Int'l, Inc. v. Luby (In re Luby), 438 B.R. 817, 829 (Bankr. E.D. Pa. 2010) (citations omitted). "In most cases, a domain name registration is valueless apart from the way it is used by the entity with rights to it . . . ." Dorer v. Arel, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999). There is clear value in a domain name that consists of a protected trademark or tradename. Id. (analogizing domain name value to a private telephone number versus one used as a "commercial tool").

Domain names can have significant value. In Jubber v. Search Market Direct, Inc. (In re Paige), 2009 WL 3418156 (D. Utah Oct. 16, 2009), the debtor was the "beneficial and legal owner" of the domain name "Freecreditscore.com." The trustee sought to avoid an unauthorized post-petition transfer of the domain name, but lacked funds to pursue the adversary proceeding. A third party stepped forward agreeing to fund the litigation in addition to paying the estate approximately \$2 million. "Cybersquatters" are enterprising individuals who register and later

attempt to resell or license “domain names back to companies that spent millions of dollars developing the goodwill of the trademark.” Intermatic v. Toeppen, 947 F. Supp. at 1233.

There is no consensus among courts as to whether an interest in a domain name entails contractual or property rights. On the one hand, “a domain name that is not a trademark arguably entails only contract, not property rights. Thus, a domain name registration is the product of a contract for services between the registrar and registrant.” Dorer v. Arel, 60 F. Supp. 2d at 561. See also In re Luby, 438 B.R. at 830 (holding that the uniqueness of a domain name “makes it a species of property”). On the other hand, the Ninth Circuit held that a domain name is a form of intangible property. Kremen v. Cohen, 337 F.3d 1024, 1029-30 (9th Cir. 2003) (finding that the evidence supported a claim for conversion when the defendant fraudulently induced the registrar to transfer registration of the plaintiff’s domain name to him). Even if a “domain name itself cannot be owned, nevertheless both a domain name and the contractual right to use that name are property rights under Louisiana law.” In re Larry Koenig & Assoc., LLC, 2004 WL 3244582, at \*7 (Bankr. N.D. La. Mar. 31, 2004).

Regardless of the way a court might interpret the right to a domain name, they must be disclosed by debtors on their schedules as property of the estate. In re Luby, 438 B.R. at 830 (finding that the debtors failed to disclose over 300 domain names). Failure to do so has been found to be grounds to deny a discharge. Id. See also Decker v. Doolittle (In re Doolittle), 2007 WL 4328804, at \*2 (Bankr. N.D. Cal. Dec. 10, 2007) (denying the debtor’s discharge where, in addition to other undisclosed property, the debtor “failed to identify as assets his partial interest in hundreds of domain names,” and “sold approximately five” of them post-petition without authorization). In addition cybersquatting was found to be grounds for a judgment of nondischargeability for a willful and malicious debt based on collateral estoppel, where the debtors

had been found to have violated the Anti-Cybersquatting Protection Act. In re Luby, 438 B.R. at 840.

## **VI. Bitcoin and Other Cryptocurrency**

“Bitcoin is a digital payment system, and bitcoins are the system’s unit of account. Bitcoins can be bought and sold on exchanges.” Greene v. Mizuho Bank, Ltd., 206 F. Supp. 3d 1362, 1368 (N.D. Ill. 2016) (citations omitted) (addressing motion to dismiss putative class action lawsuit against Mark Karpeles, president, CEO and majority shareholder of bankrupt Mt. Gox bitcoin exchange, and Mizuho Bank, which accepted fiat currency deposits for Mt. Gox customers).

Bitcoin is the most widely known of over 1,000 cryptocurrencies, which are “digital asset[s] [ ] designed to work as a medium of exchange, just like the dollar, yen or euro. Unlike the dollar, yen and euro, however, cryptocurrencies are generally not backed by any government, fiat currency or commodity.” Jack G. Haake, The Bankruptcy Estate and Cryptocurrency, 15 Westlaw J. Bankr. 01 (2018).

Bitcoin is a decentralized virtual “currency” that was created in 2009. Bitcoin is decentralized because it is not monitored, controlled, or administered by any legal or governmental entity. Although each bitcoin has no inherent value, each is unique and held by a single entity at a time. Bitcoin operates on a public ledger called the “blockchain,” which keeps track of every bitcoin created and who owns it. Each user’s bitcoins are stored in his or her “digital wallet,” which is only accessible by entering a sixth-four character alphanumeric “private key.” This interface is functionally similar to accessing bank funds through a customer’s banking portal. However, unlike a banking password, if a user were to lose his or her private key, those bitcoins would be forever inaccessible because there is no way to recover a lost key.

Chelsea Deppert, Bitcoin and Bankruptcy: Putting the Bits Together, 32 Emory Bankr. Dev. J. 123, 128 (2015) (footnotes omitted).

What is it – currency or commodity? No court has ruled on this issue, but the ramifications are broad. See Erin Jane Illman and Robert A. Cox, Jr., Bitcoin and Bankruptcy: Why Creditors

and Bankruptcy Practitioners need to Understand Cryptocurrencies, 14 No. 16 Westlaw J. Bankr. 2 (Dec. 14, 2017); Ryan W. Beall, Cryptocurrency in the Law: An Analysis of the Treatment of Cryptocurrency in Bankruptcy, 35 Cal. Bankr. J. 43 (2019).

Regardless of its classification, “there is little debate that a debtor’s bitcoins would qualify as property of the debtor’s bankruptcy estate and thus be subject to creditors’ claims.” Chelsea Deppert, Bitcoin and Bankruptcy at 130. See Schultz v. Keyword Rockstar, Inc. (In re Schultz), 2019 WL 2385186 (B.A.P. 9th Cir. June 4, 2019) (the debtor’s failure to schedule his \$30,000 Bitcoin account was one of several alleged failures to disclose that formed the basis for an ultimately unsuccessful adversary proceeding to deny discharge under § 727(a)(4)).

“Bitcoin’s anonymity is one of its most prized features.” Chelsea Deppert, Bitcoin and Bankruptcy at 128. “Despite the fact that bitcoin transactions are tracked on a public ledger that is accessible to anyone, bitcoin ownership and use is substantially anonymous because the only identifying information associated with a transaction is the user’s private key.” Id. “Because cryptocurrency can be held and traded under a pseudonym, [ ] it may require extra diligence by insolvency professionals to identify whether a debtor holds cryptocurrency.” Jack G. Haake, The Bankruptcy Estate and Cryptocurrency, 15 Westlaw J. Bankr. 01.

“With a cooperative debtor (or adverse party), the private key will simply be turned over to the trustee at the § 341 meeting in order to access the virtual wallet and liquidate the cryptocurrency through the exchange platform. In cases where the debtor attempts to conceal the existence of a virtual wallet, a trustee might be able to discover evidence from the debtor’s “traditional” financial records (account or credit card statements) of the debtor “cashing in” or “cashing out” on that platform.

Eric S. Rein and John Guzzardo, The Trustee and the Bitcoin, 37 Am. Bankr. Inst. J. 34 (Aug. 2018).

An additional cryptocurrency problem for trustees and creditors is the “drastic price fluctuations because no governmental entity issues or insures it, and its value is dependent on

public trust and perception.” Chelsea Deppert, Bitcoin and Bankruptcy at 128. For example, “[i]n 2013, the price of bitcoins saw a sixth-one percent drop in a single day, and in 2014, there was a single-day price drop of eighty percent.” Id. “The instability of bitcoins’ value is also influenced by the activity of hackers because most bitcoin exchanges are simply websites that convert deposited bitcoins into numbers in a database. These websites are just as vulnerable to hackers as any other website.” Id. at 128-29 (footnotes omitted).

## DEALING WITH CO-OWNERS OF BANKRUPTCY ESTATE PROPERTY

### Co-Ownership Interests in Businesses in Bankruptcy

#### Dzierzawski opinion

In the case of *In re Dzierzawski*, 528 B.R. 397 (Bankr. E.D. Mich. 2015), Judge Tucker considered a debtor's right to dismiss his voluntary Chapter 7 case. In so doing, Judge Tucker took careful consideration regarding the impact of dismissal on creditors and the interplay between a debtor's membership interest in a Michigan limited liability company and a Chapter 7 Trustee's administration of the same.

Specifically, after much litigation in his case, the debtor, Randy K. Dzierzawski sought to waive his discharge, pay the Trustee a sum of money for payment of administrative expenses, and dismiss his bankruptcy case "with prejudice." The debtor's largest creditor, who had been granted derivative standing to pursue a fraudulent conveyance claim against the debtor's wife related to the debtor's transfer of his membership interest in a Michigan limited liability company to her. That lawsuit asserted that the debtor transferred 99% of his then-existing 100% membership interest in the LLC and that, in the event the bankruptcy estate's claims were successful, the bankruptcy estate would possess 100% of the membership interests in the LLC.

When considering the application of the debtor's requested dismissal to the creditor's objections, Judge Tucker took very important consideration of the prejudice that dismissal would impose on the creditor if the debtor were permitted to dismiss his bankruptcy case. In so doing, Judge Tucker found that outside of bankruptcy, a creditor's ability to realize any value from the debtor's membership interest in the limited liability company would be greatly limited by Michigan's charging-order statute. Indeed, the Court stated:

Under MCL § 450.4507, a judgment creditor of a member of an LLC is limited to obtaining a charging order and lien against the membership interest of the judgment debtor. The judgment creditor cannot foreclose on that lien, and the only thing the charging order gives the creditor is the right to receive any distributions that the member is entitled to or becomes entitled to in the future.

*Id.* at 409.

On the other hand, inside the debtor's Chapter 7 bankruptcy case, if the avoidance action was successful, Judge Tucker noted that the Chapter 7 Trustee would possess 100% of the membership interests of the Michigan limited liability company, which "would give the Chapter 7 Trustee the ability to cause a liquidation of the assets of that LLC for the benefit of the creditors." *Id.* at 410. Judge Tucker also cited to numerous cases that support this position. See, e.g. *Fowler v. Shadel*, 400 F.3d 1016, 1018 (7th Cir. 2005) (where the Chapter 7 debtor was the sole

shareholder of a corporation, upon the debtor's filing his Chapter 7 petition, the debtor's shares of stock in the corporation became property of the bankruptcy estate and the Chapter 7 trustee, “[a]s the owner of the shares in bankruptcy, . . . could liquidate the corporation and obtain legal ownership of the corporate [property]”); *In re B & M Land & Livestock, LLC*, 498 B.R. 262, 267 (Bank. D. Nev. 2013)(holding that “where a debtor has a membership interest in a single-member LLC and files a petition for bankruptcy under Chapter 7, the Chapter 7 trustee’s rights automatically include the right to manage that entity”); *Fursman v. Ulrich (In re First Protection, Inc.)*, 440 B.R. 821, 830 (B.A.P. 9th Cir. 2010); *In re A–Z Electronics, LLC*, 350 B.R. 886, 891 (Bankr. D. Idaho 2006)(holding that, where one of the joint Chapter 7 debtors owned 100% of the membership interests in a limited liability company, the Chapter 7 trustee “was the only one entitled to manage [such limited liability company] and decide, *inter alia*, whether the LLC would or would not file bankruptcy”); *In re Albright*, 291 B.R. 538, 541 (Bankr. D. Colo. 2003)(explaining that “[b]ecause the Trustee became the sole member of Western Blue Sky LLC upon the [d]ebtor’s bankruptcy filing, the Trustee now controls, directly or indirectly, all governance of that entity, including decisions regarding liquidation of the entity's assets”); *In re Modanlo*, 412 B.R. 715, 731 (Bankr. D. Md. 2006), *aff’d*, 266 Fed. Appx. 272 (4th Cir. 2008)(holding that the appointed Chapter 11 trustee of a limited liability company’s sole member “had the power to place [the

limited liability company] into bankruptcy . . . and, standing in the shoes of the [d]ebtor . . . possess[ed] both the economic and governance rights to participate in the management of [the limited liability company] that the [d]ebtor himself enjoyed prior to his bankruptcy filing”); *Movitz v. Fiesta Invs., LLC (In re Ehmman)*, 319 B.R. 200, 206 (Bankr. D. Ariz. 2005) (holding that upon the debtor’s filing of his Chapter 7 petition, the Chapter 7 trustee had “all of the rights and powers with respect to the multi-member LLC of which he was a member including “redemption of the [d]ebtor's interest, appointment of a receiver to operate the partnership in accordance with its purposes and the members' rights, or dissolution, wind up and liquidation”); and *Samson v. Prokopf (In re Smith)*, 185 B.R. 285, 290-92 (Bankr. S.D. Ill. 1995). *Id.* at 410-411.

Accordingly, it appears that in those instances in which a bankruptcy estate possesses 100% of the membership interests in a Michigan limited liability company, the Chapter 7 Trustee can, at a minimum, liquidate the assets of the LLC, pay LLC debts, and make a distribution to the bankruptcy estate as the sole member of the company.

Other cases

In the instances in which a bankruptcy estate possesses less than 100% of the membership interests of an LLC or closely held corporation, the question remains, how may a Chapter 7 Trustee administer such interests?

- *In re Knowles*, case no. 6:11-bk-11717, 2013 WL 152434 (Bankr. M.D. Fla. Jan. 15, 2013) —

The husband and wife debtors were each 1/6 members in an LLC with other family members. The trustee sought to reject the operating agreement as an executory contract and sell the membership interests at an auction rather than in accordance with the operating agreement's right of first refusal to the remaining members. The operating agreement required ongoing management and supervision by all 6 co-members, capital contributions when required, and quarterly and annual member meetings. However, only one of the members performed any management functions, which were minimal, and that member was the only signer on the LLC's bank account; in the 7 years of the LLC's existence, there had been 1 capital call of \$2,000.00 in addition to the initial contribution of \$10.00; and the LLC had never had a meeting.

The court found that the debtors had no real obligations as members of the LLC and thus the operating agreement was not an executory contract. A sale had to be held in accordance with the operating agreement's right of first refusal.

- *Miller v. Bill & Carolyn Limited Partnership (In re Baldwin)*, 463 B.R. 142 (10th Cir. BAP, 2006) —

In this case, the debtors filed a voluntary petition for relief under Chapter 7 in the United States Bankruptcy Court for the Eastern District of Oklahoma. Mrs. Baldwin was the sole limited partner in a limited partnership created by her parents pursuant to the Oklahoma United Limited Partnership Act. As of the petition date, Mrs. Baldwin owned a 99% interest in the partnership; however, the partnership's general partner (and the holder of the remaining 1% interest) was a trust of which the debtor's parents were the sole trustees. Under the partnership agreement, the trust, as the general partner of the limited partnership, had the exclusive managerial and controlling interest of the partnership and its assets. Moreover, the partnership agreement provided that the limited partner "shall not take any part in or interfere in any manner with the conduct or control of the business of the partnership or have any right or authority to act for or on behalf of the partnership." The partnership's assets consisted of approximately 200 acres of undeveloped land and a house in which the debtors resided.

The Chapter 7 Trustee filed an adversary proceeding against the partnership and the general partner seeking a declaration that the debtor's interest in the limited partnership belonged to the bankruptcy estate and, further, that continuation of the partnership was impracticable due to the general partner's refusal to recognize the bankruptcy estate's interest. The 10th Circuit BAP found that the debtor's 99% interest in the limited partnership became property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1) and therefore, the Chapter 7 Trustee was not limited to pursuing a charging order against the partnership interest.

However, the Court also held that the bankruptcy estate takes such a partnership interest subject to restrictions under the provisions of the partnership agreement or operating agreement, and thus would be prohibited from dissolving the limited partnership even if such were otherwise allowed under applicable Oklahoma law. As was the case with the limited liability company in *Ehmann*, the limited partnership here was set up to allow the debtor's father to retain complete control of the partnership assets during his lifetime, while at the same time removing them from his estate for tax purposes. The Chapter 7 Trustee was left with only the partnership interest and no real ability to monetize the same. As the Court noted, "Since the partnership is operating as allowed under the partnership agreement and Oklahoma law, we are constrained to say that the trustee has no present right to force either dissolution of the partnership or liquidation of its assets." *Id.*

- *Sullivan v. Matthew*, case no. 14 C 6877, 2015 WL 1509794 (N.D. Ill. March 30, 2015) —

In this case, the court essentially bifurcated a partnership agreement into management rights and property rights. At the time the debtor filed his Chapter 7 case, he held a 25% interest in a partnership. The partnership agreement provided that if a partner filed a bankruptcy case, the other partners had the right to purchase the debtor's interest within a specified time frame. If the debtor's interest was not purchased, the partners were required to dissolve the partnership. The trustee filed a complaint seeking to dissolve the partnership, wind-up the partnership business, and inspect the books and records to confirm that the partnership was appropriately wound-up.

The court determined that the management rights were an executory contract: partners owed a continuing fiduciary duty to the partnership and each other, partners were responsible for future capital calls, other than the day-to-day decisions, all of the other partnership decisions required written consent of a majority of the partners, and partners were prohibited from taking certain actions (such as incurring debt on behalf of the partnership without approval). Partners also had responsibilities in the event of a dissolution and wind-up of the partnership. Because the trustee did not expressly assume or reject the contract, it was deemed rejected and the trustee could not enforce the management rights terms of the rejected executory contract.

The property rights in the partnership profits and surplus were not affected by the rejection of the executory contract terms of the partnership agreement. Thus, the partnership profits and surplus were property of the bankruptcy estate which the trustee could liquidate. Under the Illinois Uniform Partnership Act, a partner's personal bankruptcy case results in dissociation from the partnership and the purchase of the debtor/partner's interest for a specified price. The trustee argued that because those sections of the Partnership Act were unenforceable *ipso facto* clauses, the entire partnership interest--both the management and property rights were property of the estate. The court disagreed.

[The debtor's] property interest in the partnership became part of the bankruptcy estate under § 541, and that interest cannot be modified as a result of his bankruptcy. 11 U.S.C. § 541(c)(1). But [the debtor's] management rights and obligations under the partnership agreement were executory when he filed his petition. By failing to assume the partnership agreement, [the trustee] rejected the contract and cannot now enforce it. 11 U.S.C. § 365(d). The relief he seeks in his complaint—dissolution pursuant to the partnership agreement, judicial supervision of winding up, and an accounting to ensure that the partnership was properly dissolved and wound-up—are based on the management rights included in the agreement that he rejected. Even if the dissociation provisions cannot be enforced against the *property* rights of the estate, the Trustee cannot enforce the *management* rights that he rejected.

*Id.* at \*8 (footnotes omitted).

- *Matter of H&W Food Mart, LLC*, 461 BR 904 (Bankr. E.D. Ga. 2011)

—

Hunt, who was the managing member of a 2-member LLC, filed a personal bankruptcy case. Before his personal bankruptcy was closed, and without an abandonment of his membership interest, he filed a bankruptcy case for the LLC with perceived authority.

In accordance with the operating agreement, the LLC was managed by a manager. The operating agreement required majority approval to authorize the manager to file a bankruptcy case for the LLC and both Hunt and the other original member approved the LLC's bankruptcy filing. However, the operating agreement provided that upon a "Bankruptcy Event" the manager would cease to be the manager. Hunt's personal bankruptcy case was a "Bankruptcy Event" by the terms of the operating agreement. Hunt believed that the trustee of his personal bankruptcy case was entitled to the economic rights of his membership interest, but that he (Hunt) retained voting and management rights. The court disagreed and found that Hunt ceased to be the manager upon the filing of his personal bankruptcy case, and did not find that he was reappointed. Although the court remarked that the termination of Hunt as manager of the LLC was sufficient to dismiss the LLC's bankruptcy case as being filed without authority, it continued.

[I]f the operating agreement is an executory contract, it could be argued that a trustee could not assume the operating agreement without modification because applicable state law allows the remaining members to refuse to admit the trustee as a voting member. If the operating agreement is not an executory contract, the *ipso facto* provision of section 541(c)(1) would apply to bring the membership interest, without modification, into the estate and the trustee would have the full rights of a member, notwithstanding state law and the provisions in the operating agreement that limit such participation.

*Id.* at 909. Based on the lack of “outstanding, continuing obligations on the part of the members”, the court found that the operating agreement was not an executory contract, and thus the trustee of Hunt’s personal bankruptcy case became a full member of the LLC, entitled to economic and voting rights. *Id.* at 910.

- *Bensusan v Prebul (In re Prebul)*, adv. pro. no. 09-1139, 2011 WL 2947045 (Bankr. E.D. Tenn. July 19, 2011) —

The debtor was a member of a 3-member LLC with another individual and DBS International, LLC. DBS was the managing member. The trustee filed a complaint alleging that DBS (and 2 non-members) engaged in “minority oppression”, which was a breach of fiduciary duty. The defendants took the position that the LLC’s operating agreement was an executory contract which the trustee did not assume and thus the trustee could not maintain an action against the LLC.

The first matter was to determine whether the operating agreement was an executory contract.

An executory contract has been defined as “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” *Rieser v. Dayton Country Club Co. (In re Magness)*, 972 F.2d 689, 694 (6th Cir. 1992) (quoting Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 Minn. L.Rev. 439, 460 (1973)). In the Sixth Circuit, however, this traditional “Countryman” definition, while it may be helpful, is not controlling. Instead, courts are also instructed to apply a functional test by “work[ing] backward from an examination of the purposes to be accomplished by rejection and, if they have already been accomplished, then the contract cannot be said to be executory.” *Id.*

*Bensusan v. Prebul* at \*7.

After examining the operating agreement, the court found that the only obligation of the LLC’s members was to contribute capital when and if needed as determined by the managing member. There were no allegations that capital contributions were regularly required or expected to be necessary. The court thus found the capital contribution requirement to be a “remote and hypothetical” obligation. Examining the requirement under the *Magness* functional test, there was no purpose to be served by rejection “if there are no present obligations to breach and the only future obligation to be avoided is arguable a remote contingency.” *Id.* at \*8.

- *In re Denman*, 513 BR 720 (Bankr. W.D. Tenn. 2014) —

A debtor who held 70% of the membership interest in an LLC filed a Chapter 13 case. The LLC’s operating agreement provided that any other member of the LLC could purchase the interest of a member who filed a bankruptcy case for an agreed value. The member who wanted to purchase the debtor’s membership interest filed a motion for relief from stay to exercise his right as provided by the operating agreement. The court first set out to determine whether the purchase provision was invalidated by either 11 U.S.C. §§ 365(e)(1) or 541(c)(1)(B).

What constitutes an executory contract is not statutorily defined by § 365 or any other provision of the Bankruptcy Code. *See, for example, In re Terrell*, 892 F.2d 469, 471 (6th Cir.1989). The Sixth Circuit Court of Appeals has held that an executory contract as contemplated under § 365 must have “material obligations left to be performed by both parties to [a] contract.” *Id.* at 472. Also, “the obligation of both the bankrupt [debtor] and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” *Id.* at 471, n. 2 (quoting the Countryman standard, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L.Rev. 439, 460 (1973)). Fundamentally, an executory contract must be a “contract” and not some other legal instrument.

*Id.* at 723.

After comparing contract law with Tennessee’s LLC act, the court determined that Tennessee operating agreements can never be executory contracts. “[E]xecutory obligations can arise under numerous types of legal instruments and not just ordinary contracts.” *Id.* at 725-726.

Ultimately, the court found that §541(c)(1)(B) invalidated the purchase provision and denied the motion for relief.

# Co-Debtors, Co-Owners and Tenants by the Entirety

## **DETERMINING THAT THEY EXIST**

The first step in addressing issues with non debtor co-owners interest in estate property is determining that they exist. While this may seem like it is an easy task, it really is not. Even assuming that you have a Debtor who is attempting to be as honest and straight forward as possible in disclosing all assets and property interests, the lack of understanding for the lay person in exactly what a "property interest" is can require an intense and varied discussion. Likewise the question "are you married" can be a minefield. Belief in common law marriage and likewise non-formal divorces is still alive and well.

The question "Do you have any interest in real property?" is often met with

"No, I don't own any real property. Well I have a house, but it has a mortgage on it."

"My name is on my parent's house but it is their house"

"I think my name might be on my parents' house who have passed but my sister lives there now and it is her house"

"There is a family cabin up north but it's not worth anything"

Bank accounts

"I'm on my (daughter's, son's, mother's, father's etc) account but just for convenience"

“I’m on my minor child’s bank account because I have to be”

Titled Property

“My names on the title but it’s not my car, boat, trailer etc”

The individual scenario can then be examined for options, but again, you have to know that there is an issue in order to address it.

### **CO-DEBTORS**

Once you have determined that there is a co-debtor, then begins the analysis of what your client wants to do and what can be done. Most of the time it seems that a Debtor’s interest in protecting a co-debtor is pretty extreme, they either want them protected at all costs or could care less, there doesn’t seem to be much middle ground.

#### **11 U.S. Code § 1301. Stay of action against codebtor**

**(a)** Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

**(1)** such individual became liable on or secured such debt in the ordinary course of such individual’s business; or

**(2)** the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

**(b)** A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

**(c)** On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2645; Pub. L. 98-353, title III, §§ 313, 524, July 10, 1984, 98 Stat. 355, 388.)

As a general rule, the main area of controversy revolves around whether or not a debt is consumer debt. In analyzing whether a debt is a consumer debt for purposes of the co-debtor stay, there is a plethora of case law to use as a guide. Judge Opperman in *In Re Andrew Case No 18-31345-dof, Adversary Proceeding Case No. 18-3070-dof*, decided July 23, 2019 in the Eastern District of Michigan, provides a detailed overview of case law.

## C. Consumer Debts

The term "consumer debt" is defined by the Bankruptcy Code as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). "Consumer debt" is:

used throughout the Bankruptcy Code. See *generally* 11 U.S.C. § 524(c)(6)(B) (excepting consumer debts secured by real estate from reaffirmation requirements); 11 U.S.C. § 707(b)(1) (providing for dismissal of cases filed by individual debtors under Chapter 7 "whose debts are primarily consumer debts" for substantial abuse); 11 U.S.C. § 1301(a) (staying actions against a co-debtor to collect consumer debt). "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." [\*Atl. Cleaners & Dyers, Inc. v. United States\*, 286 U.S. 427, 433, 52 S. Ct. 607, 76 L. Ed. 1204 \(1932\)](#). It is therefore appropriate to consider cases construing other sections of the Code in which the term "consumer debt" is used. [\*Cypher Chiropractic Ctr. v. Runski \(In re Runski\)\*, 102 F.3d 744, 746-47 \(4th Cir. 1996\)](#).

[Swartz v. Strausbaugh \(In re Strausbaugh\)](#), 376 B.R. 631, 636 (Bankr. S.D. Ohio 2007); see also [In re Stovall](#), 209 B.R. 849, 852 (Bankr. E.D. Va. 1997) (in analyzing what constitutes "consumer debt" for purposes of the co-debtor stay provided by 11 U.S.C. § 1301, it is appropriate to consider cases construing "consumer debt" in other Bankruptcy Code sections). In addition, a non-business debt is not automatically a consumer debt; rather, there is an "interstitial" category of debts for those that are neither consumer debt nor business debt. See, e.g., [IRS v. Westberry \(In re Westberry\)](#), 215 F.3d 589 (6th Cir. 2000) (a tax debt is an interstitial debt); [Stovall](#) (same); [In re Peterson](#), 524 B.R. 808 (Bankr. S.D. Ind. 2015) (an intentional tort judgment based on improperly accessing medical information is not a consumer debt as defined in 11 U.S.C. § 101(8), noting that such a debt fell into the "interstitial" area of debts that are not consumer debt, yet are also not business debt).

## 1. Tax Debts

"Consumer debt" as used in the Bankruptcy Code does not include tax debts. [Westberry](#), 215 F.3d at 591. In so holding, the Sixth Circuit Court of Appeals noted "[a]lmost without exception, the bankruptcy courts that have addressed this question have determined that tax debt should not be considered consumer debt for purposes of the codebtor stay." *Id.* (citations omitted). The Sixth Circuit Court of Appeals relied on the following four bases to support its conclusion: (1) a tax debt is "incurred" differently than consumer debt in that the incurrence is not voluntary on behalf of the taxpayer, (2) consumer debt is incurred for personal or household purposes, while taxes are incurred for a public purpose, (3) taxes derive from earning money, while consumer debt derives from its consumption, and (4) unlike taxes, consumer debt usually involves the extension of credit. *Id.* The *Westberry* Court's analysis was based on the plain language and meaning of 11 U.S.C. § 101(8). [Westberry](#), 215 F.3d at 592-93 (citations omitted).

## 2. Sanctions

"Courts historically have awarded punitive damages to punish the defendant and to deter the defendant and others from committing similar conduct in the future." [In re Durant](#), 586 B.R. 212, 222 (Bankr. D. Md. 2018) (citations omitted). "The punishment and deterrence objectives of a punitive damages award are often necessary and very appropriate under applicable law, but differ in significant ways from a `personal, family, or household purpose.'" *Id.* Thus, punitive damages do not meet the definition of consumer debt in 11 U.S.C. § 101(8). *Id.* See also [Peterson](#), 524 B.R. at 813 (an intentional tort judgment is an interstitial debt, not a consumer debt or a business debt).

Thus tax debt and intentional torts are clearly non consumer debts. Joint tax debt is often the most commonly seen area where an issue is created. A Chapter 13 Debtor who has joint tax debt with a non-filing spouse will potentially face the conflict of paying the IRS through the plan while still having the spouse actively pursued, or at the very least still liable for accruing interest and penalties.

At least the co-debtor has some protection under the bankruptcy code, not so for the poor co-owner.

### **Co-Owners**

For the co-owner of property that is now part of a bankruptcy estate, the first inkling that there is an issue is usually a letter or phone call from a Chapter 7 Trustee. The earlier an issue is recognized and addressed, generally the more successful the outcome.

Filing a Chapter 13 is usually one way to address protecting co-owners of property from the dreaded Chapter 7 trustee as it allow for a framework of repayment to satisfy the creditor. Credit Unions are a particularly nasty creditor due to the multitude of cross collateralization clauses within their membership agreements. How often a practitioner runs into credit union issues can be particularly geographical. For a debtor living in Jackson or Lenawee Counties in Michigan, it is almost a sure bet that they are a credit union member due to the large number of those institutions in that area. Debtors are often very loyal to their credit unions and it is extra important for them to verify what accounts they are on with other family members, including children. In In RE: Kunkel, 582 BR 184 Bankr Court, WD Michigan 2018, the Debtors had a certificate of deposit that had their children on it as it had been opened for the children. The Debtors were indebted to the credit union for a credit card. The credit union filed a motion for relief to pursue offset against the CD. Judge Dales ultimately did lift the stay to allow the creditor to pursue state law remedies.

M.C.L. § 490.64. The last prepetition account statement for the VISA account<sup>[4]</sup> shows that Ms. Kunkel is "past due," suggesting a default triggering MSUFCU's prepetition setoff rights. With good reasons, therefore, MSUFCU argues that there is cause to grant relief from the stay.

In response to this showing, the Trustee and the Debtors contend that the CDs belong to the Children, and therefore the court should not grant relief from the automatic stay or the co-debtor stay of § 1301(a).<sup>[5]</sup> If so, the argument continues, there is no mutuality of obligation (as § 553(a) requires) because the Children are not indebted to MSUFCU. Therefore,

according to the Trustee's and the Debtors' arguments, § 553 does not authorize the post-petition setoff.

These arguments, however, prove too much. It is certainly true that § 553(a) requires mutuality of obligation before authorizing a post-petition setoff, but it is equally true that § 553 does not address setoff rights between non-debtors and their non-debtor depository institutions. Instead, applicable non-bankruptcy law generally controls when federal law is silent. See 28 U.S.C. § 1652.

Indeed, in enacting the Bankruptcy Code Congress has generally refrained from affecting the rights and obligations under non-bankruptcy law in controversies between two non-debtors. For this reason, and as a matter of comity, courts generally hold that the automatic stay under § 362(a) does not protect property that does not belong to either the debtor or her bankruptcy estate, and they hesitate to extend any such protections to non-debtors. See, e.g., [Saleh v. Bank of America \(In 188\\*188 re Saleh\)](#), 427 B.R. 415, 420 (Bankr. S.D. Ohio 2010) (declining to extend chapter 13 co-debtor stay to non-debtor entity).

Therefore, crediting the Debtors' and Trustee's assertion that the CDs belong to the Children, and ignoring any presumption to the contrary,<sup>61</sup> it follows that Ms. Kunkel has no equity in the CDs. Moreover, during the hearing the Debtors did not contend that the CDs are necessary to their reorganization, only that they belonged to the Children. 11 U.S.C. § 362(g) (burden of proof). Their argument against granting relief from stay actually points in favor of lifting it. See 11 U.S.C. § 362(d)(2).<sup>71</sup>

In a similar way, the Trustee and the Debtors argue against lifting the co-debtor stay of § 1301(a) by contending, plausibly, that the Children are not co-debtors because they owe nothing to MSUFCU. Although this is quite likely true, the co-debtor stay does not just apply when a co-debtor is obligated on the debt, but also in non-recourse settings where co-debtors have "secured" a consumer debt by pledging their interests in property as collateral. See 11 U.S.C. § 1301(a) (referring in the disjunctive to an individual that is "liable on such debt" or that "secured such debt").

**In re Kunkel, 582 BR 184, 187-188**

TENANTS BY THE ENTIRETY

For an incredibly in depth examination, I highly recommend the following law review article.

David Gray Carlson, *The Federal Law of Property: The Case of Inheritance Disclaimers and Tenancy by the Entireties*, 75 Wash. & Lee L. Rev. 3 (2018), <https://scholarlycommons.law.wlu.edu/wlulr/vol75/iss1/2>

Professor Carlson sums it up best on Page 116; “The tenancy by the entirety is absolutely exempt from the claims of individual creditors. Simultaneously, if joint creditors exist, the tenancy by the entirety is a limited exemption”.

Tenants by the entirety exemptions are available in just a handful of states that still recognize it. Michigan especially, has had a rough go with the issue. Judge Hughes in *In re Spears*, 308 B.R. 793, 829 (Bankr. W.D. Mich. 2004), rev’d sub nom. *Spears v. Boyd (In re Spears)*, 313 B.R. 212 (W.D. Mich. 2004) examined the structure of tenancy by the entirety and originally ruled that tenancy by the entirety was destroyed by the creation of a bankruptcy estate by one debtor. Ultimately overruled, the district court relied upon *In re Grosslight* 757 F.2d 773 (6<sup>th</sup> Cir 1985) which held that only joint creditors can make claim to bankruptcy estate property held as tenants by the entirety.

Appellant's position is best explained by the Sixth Circuit's decision of *In re Grosslight*, 757 F.2d 773, 775-77 (6th Cir.1985), which held that joint creditors *alone* could make a claim to bankruptcy estate property which was held by the entireties and which, by virtue of the election of state exemptions, had been exempted by the debtor. It explained its decision as follows:

Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property. See *Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880 (1918).

...  
Under the Bankruptcy Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 (codified as amended in 11 U.S.C. and scattered 215\*215 sections of 28 U.S.C.), all the debtor's property is brought into the bankruptcy estate by 11 U.S.C. § 541(a).... . . .

It is now established law that this provision brings entireties property into the bankruptcy estate. See *Chippenham Hospital v. Bondurant*, 716 F.2d 1057, 1058 (4th Cir.1983); *Napotnik v. Equibank & Parkvale Savings Association*, 679 F.2d 316, 318 (3d Cir.1982); *In re Trickett*, 14 B.R. 85, 88-89 (Bankr.W.D.Mich.1981); *In re Ford*, 3 B.R. 559, 564-71 (Bankr.D.Md.1980) (*en banc*), *aff'd* on the opinion of the bankruptcy court *sub nom. Greenblatt v. Ford*, 638 F.2d 14 (4th Cir.1981).

The debtor may [nevertheless] . . . exempt the entireties property under 11 U.S.C. § 522(b). . . .

Under Michigan law, ordinary creditors cannot reach interests in entireties property, and the entire interest will therefore be exempt if there are no joint creditors. Joint creditors, however, can reach entireties interests, subject only to the \$3,500 homestead exemption in Mich. Const. art. 10, § 3.

The circuits have split on the question whether entireties property is exempt from joint creditors under 11 U.S.C. § 522(b)(2)(B). The Third Circuit has held that a creditor with a judgment on a joint debt may levy upon the property itself and thus on the interests of both spouses. The debtor's interest in that portion of entireties property reachable by joint creditors therefore is not exempt. *Napotnik v. Equibank & Parkvale Savings Association*, 679 F.2d 316, 320-22 (3d Cir.1982); *accord In re Traurig*, 34 B.R. 325 (Bankr.S.D.Fla.1983); *In re Trickett*, 14 B.R. 85, 89-90 (Bankr.W.D.Mich.1981).

The Fourth Circuit, on the other hand, has reasoned that a joint creditor cannot levy on a debtor's interest in entireties property, but only on the property itself, and therefore the whole interest is exempt under section 522(b)(2)(B). *In re Ford*, 3 B.R. 559, 576 (Bankr.D.Md.1980) (*en banc*), *aff'd* on the opinion of the bankruptcy court *sub nom. Greenblatt v. Ford*, 638 F.2d 14 (4th Cir.1981). To prevent injustice, the Fourth Circuit continues the prior practice of lifting the automatic stay and deferring discharge while joint creditors seek their remedy in state court. *Sovran Bank v. Anderson*, 743 F.2d 223, 224 (4th Cir.1984); *Chippenham Hospital v. Bondurant*, 716 F.2d 1057, 1059 (4th Cir.1983); *accord D'Avignon v. Palmisano*, 34 B.R. 796, 800 (D.Vt.1982).

The distinction between the two views is of theoretical and procedural rather than substantive significance. From that perspective, however, we

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believe that the better view is that expressed by the Third Circuit in *Napotnik*. . . .

. . . The procedure we now approve, spelled out in more detail below, allows the creditor to protect his rights with a single filing in bankruptcy court. There is no question that the statute in effect at the time this case was filed, Bankruptcy Act of 1978, Pub.L. No. 95-598, sec. 241(a), § 1471, 92 Stat. 2549, 2668-69 (codified at 28 U.S.C. § 1471) (repealed 1984), gave the bankruptcy court jurisdiction over such claims by creditors.

In this case the debtor filed for bankruptcy on March 1, 1983, and presumably filed a schedule of exempted property listing his interest in entireties property with the petition. See Bankruptcy Rules 108(b), 403(a) (superseded 1983). The joint creditor, Liberty State Bank & Trust, filed this adversary proceeding in bankruptcy court twenty-four days later, on March 25, 1983. Liberty [216\\*216](#) asked that the automatic stay be lifted to allow it to proceed with its case against the parties' joint assets in state court, as under prior law, or alternatively that the entireties property be sold for the benefit of joint creditors, as in *In re Trickett*, 14 B.R. 85 (Bankr.W.D.Mich.1981).

The proper procedure, of course, is to file an objection to the claim of exemptions. See Bankruptcy Rule 4003(b). This objection may be combined with a proof of claim under Bankruptcy Rule 3002. Although Liberty did not comply with the letter of that procedure, we are satisfied that its failure to do so resulted from an excusable uncertainty as to the proper procedure and that its filing did meet procedural concerns. We therefore treat this adversary proceeding as an objection to the claim of exemptions. Taken as such, it was not untimely. See *In re Dembs*, 757 F.2d 777 (6th Cir.1985).

It follows that Liberty is entitled to file a proof of claim on remand and attempt to show the validity of its claim. In appropriate cases, the court may lift the automatic stay to allow the creditor to proceed against the entireties property in state court. 11 U.S.C. § 362(d). We see no reason for such a procedure here, when judicial economy would be better served by a single proceeding in bankruptcy court.

*Grosslight*, 757 F.2d at 775-77.

Judge Hughes again closely examined tenants by the entireties and its effect on creditors in *In re Raynard*, 327 B.R. 623, 641 (Bankr. W.D. Mich. 2005). Judge Hughes ruled that a plan could not be confirmed where a tenants by the entirety exemption was used on real property but the proposed plan treated the joint unsecured creditors differently than the

individual unsecured creditors. On appeal, *Raynard v. Rogers (In re Raynard)*, 354 B.R. 834 (B.A.P. 6th Cir. 2006), the Debtors again argued that the tenants by the entirety property was exempt from individual creditor and ultimately prevailed.

Pursuant to section 522(b) of the Bankruptcy Code, debtors are permitted to exempt certain property from the claims of creditors. In those states, such as Michigan, that have not opted out of the federal bankruptcy exemptions, debtors are free to choose between two sets of exemptions provided by the Bankruptcy Code, provided that both spouses in a joint case make the same election. The Debtors elected to claim the exemptions provided by section 522(b)(2), generally those exemptions provided by state law. Regarding their real property, the Debtors claimed an exemption of \$17,126 with respect to their home and \$110,285 with respect to their farm, in both cases citing 11 U.S.C. § 522(b)(2)(B). These amounts represent the estimated equity in each of the parcels of real property after satisfaction of outstanding mortgages. Section 522(b)(2)(B) provides an exemption for:

any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable non-bankruptcy law.

11 U.S.C. § 522(b)(2)(B).

The Debtors assert that under Michigan law, the full value of their interests as tenants by the entireties is exempt from the claims of the individual creditors of either one of them, and therefore that this same value is exempt from the claims of individual creditors in their bankruptcy [839\\*839](#) case. The Debtors are correct. The court of appeals has made this clear:

Michigan is one of a minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property.

*Liberty State Bank and Trust v. Grosslight (In re Grosslight)*, 757 F.2d 773, 775 (6th Cir.1985) (citing *Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880 (1918)). Nothing in the Bankruptcy Code changes this result. The bankruptcy court erred when it limited the language "to the extent that" in section 522(b)(2)(B) to a dollar amount. In effect, the bankruptcy court read section 522(b)(2)(B) to provide an exemption only to the extent of the amount not needed to satisfy joint claims. It then reasoned that because

the amount needed to satisfy joint claims was not exempt under bankruptcy law, that amount should be available to satisfy all claims, whether joint or individual. The bankruptcy court failed to realize that entireties property is fully exempt from the claims of individual creditors under all circumstances. That is the *extent to which* it is exempt. Individual creditors are not entitled to a windfall as the result of the filing of a bankruptcy case. Whether outside of a bankruptcy estate or inside it, a debtor's interest in property held as a tenant by the entireties is exempt from the claims of his or her individual creditors pursuant to the common law of Michigan. The court of appeals could not have been more clear on this point: "Under Michigan law, ordinary creditors cannot reach interests in entireties property, and the entire interest will therefore be exempt if there are no joint creditors." *Id.*

In practice, joint creditors can reach joint property. It is therefore necessary to perform a more intricate review of the basis for debts when seeking to use the tenants by entireties exemption. With online credit applications becoming more and more the norm, whether a debt is actually individual or joint can be difficult for the Debtor to remember and for the Debtor attorney to figure out short of actual discovery efforts. Clues can be had, for example, does the statement come in the name of both spouses or just one? Does the credit report list both spouses as being on the account or just one? A call from the client to the creditor to ask how the account is listed as to ownership can also sometime be successful.

Real property is perhaps the easiest to determine whether it is held by the entireties, just go to the deed. Vehicles and bank accounts require a further investigation. Vehicle titles will often designate the ownership interest, but examination is crucial. Bank accounts almost never say on the statement exactly how the account is held, and clients should be advised to contact their financial institutions regarding exactly how accounts are held.

## Co-Owned Real Estate and Real Estate Partition Sales under §363(h)

Kimberly Ross Clayson  
Clayson, Schneider & Miller, PC  
kim@detlegal.com

Pre-bankruptcy legal services require practitioners to do a lot of detective work to advise debtors how their bankruptcy case will unfold. Co-ownership of property and in particular real estate interests can create a lot of headaches for debtors' attorneys and heartache for debtors and/or related parties. Debtors often present themselves in our offices with little knowledge of their property interests and how they will be impacted in bankruptcy and it is up to us to decipher all that a debtor owns and owes and to advise our clients of how their interests will be affected in the bankruptcy proceeding. The client interview and our own due diligence will often reveal everything we know about a debtor's assets but in some cases investigation of real property interests can be hampered inconsistent search options that vary county by county and in some cases state by state.

### **Real property interests according to state law**

To determine property interests, the first place the Bankruptcy Code sends us is to state law where property rights are determined. Butner v. United States, 440 U.S. 48 (1979). In Michigan there are 4 types of co-ownership interests in real estate that are specified in the deed or by default a tenant in common interest if the deed is silent on the type of conveyance (if property is conveyed to a married couple after their marriage and to each of the names of the couple it will result in an entireties interest) So the four tenancies include (1) tenants in common

(2) joint tenancy (3) joint tenancy with rights of survivorship and (4) tenancy by the the entireties. See Albro v. Allen, 434 Mich. 271, 275 (1990) which provides a thorough discussion of the distinction between tenants in common and joint tenants and Beaton v. La Ford, 79 Mich. App. 373, 375 (1977) regarding requirement of marriage as an additional element to establish an entireties interest in real property. Tenancy by the entireties interests can be partitioned under §363(h) provided that the debtor has not elected an allowable entireties exemption under applicable state law. In order to elect an entireties exemption, the property must be granted to the debtor and debtor's spouse as a married couple and the entireties exemption will only protect to the property to the extent that the married couple's debts are not joint.

### **Circumstances where co-owners exist**

Shared ownership in real estate often arises between a debtor and his or her spouse or an ex-spouse, relatives who are using co-ownership as a means of informal estate planning or as a result of shared inheritance together with many other nuanced reasons a debtors' name might be titled on real estate that may or may not be used directly by the debtor. Ideally, careful bankruptcy planning can allow a debtor to seek bankruptcy relief with a plan to resolve co-ownership interests in real property that meets the client's goals and comports with the Bankruptcy Code. This will require frank and open discussions about the potential consequences of shared ownership in property.

### **The power of a partition sale under the Code**

One of the bankruptcy trustee's super powers involves 11 U.S.C. §363(h) the partition sale provisions that allow the sale of co-owned property if it meets certain criteria that warrants a

sale. This subsection allows trustees to sell co-owned real estate that “the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety” if it meets the four-part test set out in subsections (1) through (4) of subsection (h). Unless a debtor and trustee can negotiate terms for the debtor to retain a co-ownership interest or co-owners succeed in obtaining a buy-out of the debtor’s interest from the bankruptcy trustee, the trustee will pursue a listing and sale of debtors’ co-owned real estate under §363(h).

### **Procedure for partition sale and application of proceeds**

The trustee’s sale powers of a co-ownership interest are decided through an adversary proceeding as specifically delineated at Fed. R. Bankr. P. 7001(3). If a trustee prevails in a partition lawsuit the trustee may sell a co-ownership interest together with a debtor’s interest in real estate and divide the proceeds of the sale net of sale costs. Whether a trustee can pursue a partition sale is a fact-based inquiry that also incorporates analysis of a debtor’s equitable versus legal interest pursuant to §363(j) and §541(d). There is a presumption of equal division of ownership interests when it comes to co-ownership of real estate.

In accordance with §363(j) the trustee is required to disburse net proceeds of a partition sale “to the debtor’s spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.” Hence the expenses attending to the sale of real estate will be charged to the total of

proceeds and then the balance of proceeds will be disbursed to the estate and co-owners and generally the net proceeds will be divided evenly among the interests.

Co-owners of real estate may raise a fact-based defense to the four-part inquiry of §363(h) and analysis of those factors are discussed below. In addition co-owners may argue that they have a larger equitable interest than the debtor in co-owned real real estate according to §541(d) which says “Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.” (See In re Schultzer, 585 B.R. 670, 678 (Bankr. E.D.N.Y. 2018)).

Deciphering the value of equitable versus legal interests in real estate may include determining who utilizes a property, who pays the expenses of the property including mortgage payments and property taxes, who bears the maintenance costs and so on. At the same time the trustee can argue that the equitable interest of the non-debtor co-owner who resides in or has regular use of the property can be offset by the fair market rent for the non-debtor co-owner’s occupancy.

In re Corse, 486 B.R. 241, 244–45 (Bankr. D.R.I. 2013), aff’d, No. CA 13-282 S, 2014 WL 652268 (D.R.I. Feb. 19, 2014) interpreted §541(d) to provide “that if a debtor holds only bare legal title to property and not an equitable interest in such property, the bankruptcy estate interest in the property is limited to such bare legal title.” The parties in Corse made this defense under Kansas law citing to In re Crouch C Stores, Inc., 120 B.R. 178 (Bankr.D.Kan.1990) “the debtor held only bare legal title to the real property and not an equitable interest in the real

property.” As noted in Corse however the Crouch ruling was erroneous and reversed by the Tenth Circuit Bankruptcy Appellate Panel “concluding in part that the bankruptcy court's reliance on Crouch was erroneous because the Crouch ruling was itself based on a misreading of applicable state law.

Other than the Crouch ruling which was ultimately found to be erroneous, case law readily identifies the distinction of legal versus equitable title in personal property but has few references to real property interests, for example In re Schuller cites to In re Marcos Antonio Campuzano 11-CV-22929-KAM (S.D. Fla. 2012) where the court ruled that a debtor merely held legal title to a boat that demonstrated that the debtor did not hold any of the privileges or responsibilities attending to his title interest in a boat. “[T]he debtor did not make any payments towards the purchase price of the boat, did not have control of the boat, did not have access privileges at the marina, did not use the boat, and did not have any interest in using the boat. Further testimony was that the debtor agreed to put the title to the boat in his name as at the time of the purchase, the actual owner was not a permanent resident of the United States and had concerns about his ability to be on the title to the boat.”

### **The four factors for partition**

Under 11 U.S.C. §363(h) “the burden of proving each of the four statutory conditions . . . is on the Trustee.” In re Schuller, (Citing Durand v. Ackerman, No. 09-CV-3372 (JFB), 2010 WL 3834587, at \*12 (E.D.N.Y. Sept. 27, 2010); Sapir v. Sartorius, 230 B.R. 650, 655 (S.D.N.Y. 1999); In re Prakope, 317 B.R. 593, 602 (Bankr. E.D.N.Y. 2004)).

#### **(1) Partition is impracticable**

The impracticable factor is a practical inquiry. First, the court must determine if it is even feasible for the estate to only sell a debtor's interest in property while leaving the other co-ownership interests intact. Where this comes into play is likely in the context of real estate containing a home or other structure. A home or building cannot be sliced in half or divided in any practical manner nor does it seem likely that a prospective third-party buyer wants to purchase and share ownership of a residence with a non-debtor co-owner.

**(2) A sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners.**

Another practical inquiry -- does it make financial sense to sell only the debtor's interest? The parts may be worth less than the whole in the context of real estate. Therefore, even if the estate can justify selling the estate's interest in the real estate, the value of the estate's interest may net far less for the estate than dividing sale proceeds of the whole parcel among each of the co-owners. See In re DeRee, 403 B.R. 514, 523 (Bankr. S.D. Ohio 2009) which quoted from In re Ziegler, 396 B.R. 1, 4 (Bankr. N.D. Ohio 2008) that "Other courts ... have found that '[i]t is generally accepted that the sale of a bankruptcy estate's undivided interest will generate substantially less than the sale of the property free of each owner's interest because of the chilling effect that the sale of the undivided interest usually has on prospective purchasers of the property.'" Ziegler quoting (quoting Maxwell v. Barounis (In re Swiontek), 376 B.R. 851, 866 (Bankr.N.D.Ill.2007)).

**(3) The benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners.**

The next inquiry weighs benefit of the sale of co-owned property to the detriment caused to the non-debtor co-owners. Likewise, in In re Oswald, 90 B.R. 218 (Bankr.N.D.W.Va.1988),

the court found that the benefit to the estate of approximately \$12,500.00 from the sale of jointly owned property outweighed the detriment to the co-owner, wife, where the co-owner had the right of first refusal to purchase the property at the proposed sales price and there was a substantial amount of equity in the property that would enable the co-owner to obtain new financing to purchase the debtor's one-half interest in the property.

In re Griffin, 123 B.R. 933, 936 (Bankr. S.D. Fla. 1991) looked at the trustee's proposed partition of real estate worth \$25,000 with a \$20,000 encumbrance and based on the costs of a sale and net benefit the court determined that the benefit of a proposed sale was outweighed by the co-owner's detriment. The court also factored into the analysis the reason the debtor was named on the real property in the first place -- the debtor was merely a title owner of the property for the purpose of the co-owner's ability to qualify for financing.

Courts may also consider whether the estate has presented the court with a willing and able buyer before relief can be determined under this factor. In the matter of In re Beery, 295 B.R. 385, 396 (Bankr. D.N.M. 2003) the court ruled that absent information about the value of the property or identification of an actual buyer the trustee did not meet the burden of proof with respect to factor (2) and (3). This basis for denying partition may be relevant in the short term however if a debtor is co-owner to valuable property with significant equity, it is highly likely a bankruptcy trustee will eventually obtain a purchase offer from a willing and able buyer to demonstrate the benefit to estate will outweigh the detriment to the co-owner.

**(4) And such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.**

A footnote in In re Levenhar 24 B.R. 331, 332 (ED NY, 1982) tells us that this last provision was included for public utilities to protect against the loss of a power source as a result of a co-owner bankruptcy.

### **Caution in entireties interest protections**

As identified earlier in this paper, joint debts may upset an entireties exemption at least to the extent of the shared liabilities between a husband and wife. However, to ensure that the entireties exemption will afford the protections your client may seek, practitioners should carefully study the underlying conveyance document. Without a careful review, debtors risk unknown exposure should the property not have been conveyed to debtor and spouse as they initially thought. For instance, a debtor may not recall the exact timing of conveyance or purchase of a residence in relation to the date of marriage. If property was conveyed to the debtor and spouse prior to the marriage, even immediately prior, the property is not held in an entireties estate. In other cases and for varied reasons including financing requirements, estate planning or other measures, property a debtor and spouse thought they owned jointly may only be titled to debtor which in turn eliminates the co-ownership issues to begin with. Prior to filing a petition, practitioners should take care to look at a prospective debtor's deeds, the express terms of the deeds and date of recording.

Property recently transferred from spouses together to the non-filing spouse alone or property transferred from a debtor to entireties property or both spouses from a pre-marital deed to a post-marital deed will wreak havoc on carefully laid bankruptcy advice and planning post-petition. These efforts likely will not assure the protections of an entireties interest. This

will open a new can of fraudulent transfer worms under the Code and even under the Michigan Uniform Voidable Transfer Act which has a six-year statute of limitations that will be afforded to the bankruptcy trustee. Michigan law also leaves open the door to an avoidance claim where a trustee can establish the wrongful enhancement of an entireties interest that the debtor has exempted under Michigan's entireties bankruptcy exemption, this is a Michigan law-specific remedy to judgment creditors and trustees. A transfer of real estate a debtor purchased with a spouse prior to the marriage into an entireties asset likely will not wash away the co-ownership rights and will only open the door to a fraudulent transfer claim.

### **Marital Property Interests and Divorce**

Property settlements in divorce can come into play in a debtor's bankruptcy case particularly where quit claim deeds or other property divisions fail to take effect before a debtor files for bankruptcy. A former spouse may have rights to the property by a judgment of divorce but what happens if the deed was not recorded timely and pre-petition? The Automatic Stay now stops the non-debtor ex-spouse from effectuating the terms of the judgment that otherwise authorized the conveyance of the property. Now weeks, months and sometimes even years later, a bankruptcy trustee can assert property rights in the subject real estate.

Meeks v. Nalley (In re Nalley), 507 B.R. 411, 418 (SD Georgia 2014) discusses the interplay of bankruptcy with a judgment of divorce that has not yet taken effect. With respect to property divisions through 11 U.S.C. §362. This case discusses the effect of a pending divorce and proposed property division and confirms other court holdings that distinguish aspects of a divorce judgment that are excepted from the automatic stay and quotes *In re Briglevich*, 147 B.R.

1015, 1019 (Bankr. N.D. Ga. 1992) which held “to the extent that [the divorce] proceeding seeks to determine the division of property that is property of the estate’ it is not excepted from the automatic stay,” and ruled that the bankruptcy court retains jurisdiction over the division of property of the estate.

A 2016 Vermont Law Review<sup>1</sup> article provides some useful case cites and explanation for the risks of bankruptcy to effectuating a judgment of divorce and division of co-owned property interests. Generally speaking bankruptcy courts are likely to uphold the division of marital property but there are some potential pitfalls to Chapter 5 avoidance claims. With respect to fraudulent transfer claims “[c]ourts have found that a disproportionate division of assets—coupled either with intent to keep assets from a judgment creditor, or indicators of duress—is sufficient to allow the avoidance of a transfer of an interest of the debtor in property. These exceptions are rare, however. Bankruptcy courts generally acknowledge that.” Id.

Nathan v. Libra (In re Libra), 584 B.R. 550, 553 (ED Mich 2018) is a trial opinion that thoroughly discusses marital property rights under Michigan law and the interplay of a trustee’s avoidance powers with respect to property divisions. The court looked at two pre-petition transfers of property that were completed in compliance with the debtor’s judgment of divorce. The court determined that based on the facts of that case a transfer of the marital home was not avoidable however a \$30,000 transfer of cash pursuant to the judgment of divorce was avoidable. The court recognized the complexities of analyzing property divisions for the purpose of divorce

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<sup>1</sup> Vermont Law Review Vol. 40:939 “Bringing A Lamb To Slaughter: How Family Law Attorneys Unknowingly Lead Clients To Financial Disaster In The Negotiation Of A Divorce Stipulation” Jennifer L. Bjurling Link: <https://bit.ly/2ksq0rY>

and the purpose of the bankruptcy code avoidance powers. This case is a very helpful resource to understanding Michigan marital law in contrast to the Bankruptcy Code.

### **Conclusion**

During the bankruptcy planning process, debtor attorneys should carefully analyze a debtor's property interests to identify any potential co-ownership interests a debtor may have. In practical application, many debtors lose track of arrangements they may have made with an elderly parent to be named on a deed for "estate planning purposes." Other times a debtor's co-ownership interests in family property owned by one or several siblings or relatives may be at issue. Pre-filing bankruptcy planning may include formulating a plan with a debtor or relatives of a debtor to buy out the estate's interest in property to allow the debtor or other co-owners to retain the property or prepare for a potential listing of the property.