UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
WILLIAM S. DRAKE CAROLINE DRAKE	:	
Debtors	:	Bankruptcy No. 04-30315F

.....

MEMORANDUM

.....

Citibank South Dakota, N.A., an unsecured creditor, has filed an objection to the debtors' exemption claim. The debtors filed a response to this objection and a hearing was scheduled. At the hearing, the parties informed me that there were no facts in dispute and the contested issue is only a matter of law. Moreover, from their oral argument, it appears that the only question I am now asked to resolve concerns the debtors' exemption claim in their residence.[1]

The parties referred to the debtors' bankruptcy schedules for the relevant facts and so shall I.

I.

On July 29, 2004, the debtors filed a joint voluntary petition in bankruptcy under chapter 7, pursuant to 11 U.S.C. § 302. No party has requested and so I have not

[1]The objection challenged other exemptions, but either the parties have resolved them or the challenge to the exemption of the realty will in some manner dispose of these other issues.

entered any order consolidating their estates under section 302(b).[2] The debtors filed bankruptcy schedules disclosing their ownership in the real property located at 1713 Maple Avenue, Croydon, Pennsylvania.[3] They have valued this property as worth $115,000. Schedule A. They also disclosed that there is one mortgage lien on this real estate, held by National City Mortgage, with a payoff amount of $59,080. Schedule D. No other liens are scheduled. Accordingly, there is $55,920 of equity in this property.

By virtue of 11 U.S.C. § 522(b)(1), (d)(1) and (d)(5), if the debtors had elected to take the federal homestead and wildcard exemptions, they could exempt no more than $38,850 of this equity.[4] Therefore, a chapter 7 trustee would probably sell the real property, pay the mortgage lien and the debtors' federal exemptions, and distribute any remaining proceeds (after deducting costs of sale and the trustee's commission) to unsecured creditors. To avoid this result, the debtors have elected on Schedule C to claim the state law exemptions permitted under section 522(b)(2). Although perhaps less than absolutely clear from their bankruptcy schedule C, it is understood from both parties'

---

[2]On November 9, 2004, the debtors moved to convert their chapter 7 case to one under chapter 13. Such a conversion would not render the instant objection moot. By virtue of section 1325(a)(4), a chapter 13 plan should provide creditors not less than they would receive in a chapter 7 case. The amount distributed to creditors in a chapter 7 case includes all non-exempt property. Thus, if the debtors' exemption claim were disallowed, this ruling could affect the amount due unsecured creditors in their chapter 13 case. See In re Simmons, 308 B.R. 559 (Bankr. M.D. Ala. 2004); In re Booth, 309 B.R. 568, (Bankr. W.D. Mo. 2004).

[3]Some of their bankruptcy schedules list the address as 113 Maple Avenue. I assume that this is a mistake and they own only one property located at 1713 Maple Avenue.

[4]Section 522(d)(1) (after the latest inflation adjustment under section 104(b)(1)) currently provides an $18,450 homestead exemption, and section 522(d)(5) now permits a $975 "wildcard" exemption. Section 522(m) provides that each debtor may claim these exemptions in a joint case. See generally Augustine v. United States, 675 F.2d 582 (3d Cir. 1982); In re Cavenaugh, 1995 WL 602487, *1 (E.D. Pa. 1995).

memoranda that the debtors claim their residence as exempt because it is held by them as tenants by the entireties.

On Schedule F, the debtors list nine unsecured debts totaling $39,600. (Eight of the nine unsecured debts appear to be credit card balances.) All nine unsecured creditors have claims against either the husband/debtor or the wife/debtor, but not against both. Accordingly, while the mortgagee holds a joint secured claim, there are no joint unsecured claims. Citibank South Dakota, the objector in this dispute, is not listed as an unsecured creditor; but Schedule F lists a creditor named "Citicards." I assume that this creditor is in fact the instant objector.

II.

On September 27, 2004, Citibank filed its timely objection to the debtors' exemptions.[5] The memorandum filed by Citibank states the sole legal issue before me as follows: "Is property held by tenants by the entireties, when both husband and wife have filed, exempt under the exemptions granted by the Commonwealth of Pennsylvania when there are no joint creditors?" If the debtors' realty is so exempt in these circumstances,

[5]Although not raised by the debtors, I note that the recent amendment to Fed. R. Bankr. P. 4003(b) does not deprive creditors of standing to object to exemption claims.

Rule 4003(b) now provides that any "party in interest" may file an objection to an exemption claim. Prior to its amendment in 2000, the rule stated that the "trustee or any creditor may file objections . . . ." The amendment to Rule 4003(b) was intended simply to conform the language of the rule to that found in section 522(l), and includes creditors within its scope. See, e.g., In re Booth, 259 B.R. 413, 415 (Bankr. M.D. Fla. 2001) ("the [2000] amendment [to Rule 4003(b)] also broadens the category of objecting parties from the 'trustee or any creditor' to a 'party in interest' . . ."); Advisory Committee Note (2000); see also 11 U.S.C. § 1109(a) (the phrase "party in interest" includes creditors).

then that right of exemption must flow from section 522(b)(2)(B) of the Bankruptcy Code. This section provides:

> b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. . . . Such property is–
>
> ***
>
> (2)(B) 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 nonbankruptcy law.

Under Pennsylvania common law, a married couple can own property as tenants by the entireties. Property that is owned by the entireties is not owned by either spouse; rather, it is owned by the marital unit. See, e.g., Lindenfelser v. Lindenfelser, 396 Pa. 530, 534 (1959); In re Estate of Bullotta, 798 A.2d 771, 774 (Pa. Super. 2002). Thus, in Pennsylvania, a creditor of only one spouse cannot execute on property owned by both spouses as tenants by the entireties, because the marital unit itself is not the obligor. See, e.g., Napotnik v. Equibank and Parkvale Sav. Ass'n, 679 F.2d 316, 319 (3d Cir. 1982); Klebach v. Mellon Bank, N.A., 388 Pa. Super. 203 (1989); Reliance Ins. Co. v. Schoolfield Constr. Co., 14 Pa. D. & C. 4th 490, 494 (Pa. Com. Pl. 1992).

This form of ownership has been detailed in the following manner:

> When property is held by parties in the entireties, the tenancy by the entireties can be severed by joint conveyance, express or implied agreement, or divorce. Clingerman v. Sadowski, 513 Pa. 179, 183-84 . . . (1986) (citations omitted). Historically, a tenancy by the entireties "is a form of co-ownership in real and personal property held by a husband and wife with right of survivorship." In re Gallagher's Estate, 352 Pa. 476, 478 . . . (1945). Moreover, "[i]ts essential characteristic is that each spouse is seized per tout et non per my, i.e., of the whole or the entirety and not of a share, moiety, or divisible part." Id. (citations omitted). Neither spouse may unilaterally sever an estate held in the entireties. Id. Further, when one spouse dies, the surviving spouse does not take a new estate; "the only change is in the properties of the legal entity holding the estate." Fazekas v. Fazekas, 737 A.2d 1262, 1264 (Pa. Super. 1999) (citation omitted). During the duration of the entireties estate, either spouse may act for both spouses as long as both spouses share in the proceeds, and neither spouse may appropriate property for the spouse's own use to the exclusion of the other spouse without first obtaining the consent of the other spouse. Id. (citations omitted).

In re Estate of Bullotta, 798 A.2d at 774 (parallel citations omitted).

As noted above, because entireties property is neither owned by either spouse, nor subject to individual conveyance or encumbrance by either spouse, it has long been held in Pennsylvania that a creditor of only one spouse cannot execute upon property held by the entireties:

> It is also settled principle a husband and wife do not own separate interests in entireties property which can be reached by their individual creditors. Stop 35, Inc. v. Haines, 374 Pa. Super. 604, 543 A.2d 1133 (1988). Execution upon the property in question would lead to a sheriff's sale, which would divide the entireties property. This division would conflict with the principle that one cannot execute upon a judgment as long as the entireties property is not destroyed.

Howard Sav. Bank v. Cohen, 414 Pa. Super. 555, 560 (1992). Thus, the Pennsylvania Supreme Court noted: "[P]roperty owned by tenants by the entireties is not subject to the

debts of either spouse, and they may alien[ate] it without infringing upon the rights of their individual creditors." Stauffer v. Stauffer, 465 Pa. 558, 576 (1976).

As also mentioned previously, section 522(b)(2)(B) permits a debtor in bankruptcy to claim as exempt an interest in entireties property to the extent that this interest is exempt from process under applicable nonbankruptcy law. In Napotnik v. Equibank and Parkvale Savings Ass'n, 679 F.2d 316, 318 (3d Cir. 1982), the Third Circuit Court of Appeals held, in construing section 522(b)(2)(B): "Since property law in general and the law of co-tenancies in particular are creatures of state law, the 'applicable nonbankruptcy law' is the applicable Pennsylvania law of tenancy by the entirety." Furthermore, after analyzing Pennsylvania's common law concerning entireties property, the Third Circuit concluded that, as joint creditors may execute upon entireties property, when one spouse files for bankruptcy, that spouse may not claim as exempt from any joint creditors his interest in entireties property. Id. at 321-22.

Thus, when one spouse only files for bankruptcy and there are joint creditors, entireties property cannot be claimed as exempt. See Napotnik. Conversely, when only one spouse files a bankruptcy petition and there are no joint creditors, the debtor's interest in entireties property has been held as exempt under section 522(b)(2)(B). See, e.g., In re Knapp, 285 B.R. 176 (Bankr. M.D.N.C. 2002); In re Koesling, 210 B.R. 487 (Bankr. N.D. Fla. 1997); In re Pernus, 143 B.R. 856, 858-59 (Bankr. N.D. Ohio 1992).

When one spouse files a voluntary petition in bankruptcy and owns property by the entireties, and when there are both joint and individual debts, the

entireties property is not exempt and may be administered, but for the benefit of joint creditors only. As explained by the Fourth Circuit Court of Appeals:

> The entireties property would only be exempt in bankruptcy if it is immune from process under state law, but we have already held that joint creditors may have the stay lifted and proceed against the property in state court. The fact that joint creditors can reach the property in state court flatly contradicts the immediately preceding premise that the property is immune from process under state law. The proper interpretation of § 522(b)(2)(B) as it applies in Maryland is that "to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law" means "to the extent that there are only individual claims," because entireties property is not exempt from process to satisfy joint claims in Maryland. A debtor does not lose all benefit of § 522(b)(2)(B) when joint creditors are present, but he does not benefit from it to the extent of joint claims.

Sumy v. Schlossberg, 777 F.2d 921, 928 (4th Cir. 1985) (footnotes omitted) (emphasis added). This position has been accepted by numerous courts. See, e.g., In re Pepenella, 103 B.R. 299, 302 (M.D. Fla. 1988):

> Although there is a split between courts as to whether the presence of a joint creditor eliminates the exemption entirely, the Court finds the most appropriate rule, and seemingly the majority rule, to be that the equity in the property may be used to satisfy the joint creditors, but the remainder of the equity is exempt as to the sole creditors of one of the tenants. . . . The Court concludes that the bankruptcy judge erred in finding that the equity in the property held by tenants by the entireties could be used to satisfy creditors of Appellant only. The debtor does not lose all benefit of exemption under 11 U.S.C. § 522(b)(2)(B) when joint creditors are present; he loses the exemption as to the extent of the joint creditors and their claims.

(citations omitted); In re Balber, 112 B.R. 6, 8 (Bankr. W.D. Pa. 1990); Matter of Cipa, 11 B.R. 968, 973 (Bankr. W.D. Pa. 1981) ("The practical significance of this 'immunity from process' is to render the entireties property without value to the unsecured creditors

of Mrs. Cipa's estate. Upon sale of the property, an amount equal to the value of the judicial lien would go to [the joint creditor]; the balance to the tenants by the entireties."); see also In re Edmonston, 107 F.3d 74, 76 (1st Cir. 1997). Moreover, this position is supported by a treatise on bankruptcy law:

> Most courts have held that the nonexempt portion of the sale proceeds may be distributed only to pay claims of joint creditors, reasoning that non-joint creditors should not gain the advantage unavailable to them outside of bankruptcy.

4 Collier on Bankruptcy, ¶ 522.10[3], at 522-74 (15th ed. rev. 2004). But see In re Wenande, 107 B.R. 770, 774-75 (Bankr. D. Wyo. 1989) (holding that if there were no joint creditors entireties property would be exempt, but if there are joint creditors the entireties property is administered for the benefit of all creditors, even individual creditors).

The decisions just cited, which make clear that entireties property may only be administered in a bankruptcy case for the benefit of joint creditors and is exempt from the claims of individual creditors, involved the bankruptcy filing of one spouse only. Does a joint filing by both spouses alter this result?

Without much analysis, the court in In re Leretsis, 100 B.R. 757 (W.D. Pa. 1989), did not believe so. It held that a judgment claim against the husband/debtor could not defeat an entireties exemption claim raised by the joint debtors in personal property.

More recently, the Fourth Circuit Court of Appeals considered this very issue in depth in In re Bunker, 312 F.3d 145 (4th Cir. 2002). In considering appeals from two different joint bankruptcy cases—one in which the joint estates had been consolidated—the Fourth Circuit held:

> We hold that when a husband and wife in Virginia file a joint Chapter 7 bankruptcy petition, and they have–apart from their mortgage lender–only individual creditors, the two spouses may exempt a home they own as tenants by the entirety to the extent of their equity. See 11 U.S.C. § 522(b)(2)(B). The spouses may take the exemption notwithstanding the joint administration or substantive consolidation of their individual bankruptcy estates.

Id. at 148-49.

In reaching this conclusion, the appellate court examined Virginia's law of entireties (which is similar to Pennsylvania's common law) and explained that:

> [U]nder Virginia law an individual creditor of either spouse cannot reach property held in a tenancy by the entirety. Insofar as individual creditors are concerned, entireties property is, in the words of § 522(b)(2)(B), "exempt from process" under Virginia law. . . . Thus, the presence of individual claims against either or both of the spouses in a joint case does not prevent the debtor spouses from exempting their interests in entireties property under § 522(b)(2)(B).
>
> ***
>
> The Bunker-Bonanno case boils down to a simple proposition: none of the unsecured creditors is a joint creditor of the husband and wife; each of these creditors is an individual creditor with a claim against either the husband or the wife. The governing exemption provision, § 522(b)(2)(B), points us to Virginia law, which shields entireties property from the claims of the individual creditors of either spouse. Mr. Bunker and Ms. Bonanno may therefore exempt their entireties property (their home) under § 522(b)(2)(B) to the extent of their equity.

Id. at 152-53; accord 4 Collier on Bankruptcy, ¶ 522.10[3] at 522-73 n.23a (15th ed. rev. 2004) ("The tenancy by the entirety exemption remains effective in protecting entireties property from the claims of individual creditors of a husband and wife in a joint filing or in separate cases that have been consolidated pursuant to section 302(b).") (citing In re Bunker).

In this instance, Citibank elected to issue a credit card to an individual only. It knew or should have known that, under Pennsylvania law, it could not reach marital property held by the entireties, such as the debtors' residence. When a bankruptcy petition is filed, debtors are permitted to claim the same exemptions as granted them under state law. In enacting section 522(b)(2)(B), Congress intended to "protect[] the debtor's entireties interest if a creditor of only the debtor could not have levied upon that interest outside of bankruptcy, by making such an interest exempt." 4 Collier on Bankruptcy, ¶ 522.10[3] at 522-72 (15th ed. rev. 2004).

Citibank seems to accept that if only one of these debtors filed an individual bankruptcy petition, the entireties property would be exempt under section 522(b)(2)(B). It offers no persuasive basis to support its contention that Congress intended that the very same exemption would be lost if both spouses filed a joint petition.[6] For the reasons

---

[6]Citibank refers only to a footnote in Napotnik, 679 F.2d at 321 n.12, wherein the Third Circuit stated:

> We need not decide at this time how the language of Section 522(b)(2)(B) would apply in a case where the debtor had no actual creditors on a joint debt–i.e., whether a court should consider immunity from hypothetical as well as actual creditors on joint debts.

This very issue, however, has been considered by other courts in later decisions, especially in light of United States v. Craft, 535 U.S. 274 (2002).

In Craft, the Supreme Court held that 26 U.S.C. § 6321 allows the IRS to place a lien against entireties property in order to collect the federal tax obligation owed by one spouse only. Section 544(a)(2) of the Bankruptcy Code grants the bankruptcy trustee the rights and powers of a hypothetical creditor that extends credit to the debtor at the time of commencement of the case. After Craft, some bankruptcy trustees have attempted to defeat the entireties exemption by asserting the rights of a hypothetical federal tax creditor, or a joint creditor, under section 544(a)(2).

If I overlook the standing of Citibank—who has never sought court approval—to assert the trustee's powers under section 544, see, e.g., Nebraska State Bank v. Jones, 846 F.2d

(continued...)

articulated in Bunker, and given that it is generally accepted that entireties property is not administered for the benefit of individual creditors, even when there are joint creditors, I conclude that the debtors here may exempt their interest in entireties property when there are no joint unsecured creditors.

An appropriate order shall be entered.

---

[6](...continued)
477, 478 (8th Cir.1988), I note that attempts to use section 544(a)(2) to defeat a debtor's section 522(b)(2)(B) exemption claim have been unsuccessful, as to do so would "eviscerate" that exemption. See, e.g., Schlossberg v. Barney, 380 F.3d 174, 181-82 (4th Cir. 2004); In re Greathouse, 295 B.R. 562, 567-68 (Bankr. D. Md. 2003); see also In re Eads, 307 B.R. 219, 223 n. 4 (Bankr. W.D. Mo. 2004). Indeed, the application of the trustee's powers under section 544(a)(2) would make sense in these circumstances if one overturned the principle that entireties property may be administered only for the benefit of joint creditors. One could not distribute property to a hypothetical creditor.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
WILLIAM S. DRAKE CAROLINE DRAKE	:	
Debtors	:	Bankruptcy No. 04-30315F

.....

ORDER

.....

AND NOW, this 29th day of November 2004, for the reasons stated in the accompanying memorandum, it is hereby ordered that the objection filed by Citibank South Dakota, N.A. to the debtors' real property exemption claim under 11 U.S.C. § 522(b)(2)(B) is denied.

BRUCE FOX
United States Bankruptcy Judge

copies to:

Kenneth F. Carobus, Esquire
Morris & Adelman, P.C.
1920 Chestnut Street, Suite 300
P.O. Box 30477
Philadelphia, PA 19103

Michael P. Kelly, Esquire
Suite 202–Penn's Square
402 Middletown Blvd.
Langhorne, PA 19047