

(Cite as: 1989 WL 90535 (Bankr.D.Vt.))

In re Wade I. TREADWAY, Debtor.

Raymond OBUCHOWSKI, Trustee of the Bankruptcy Estate of Wade I. Treadway,

Plaintiff,

v.

UNITED BANK & TRUST COMPANY, [FN1] Trustee of the Morton C. and Faith I.

Treadway Trust, and Wade I. Treadway, Defendants.

FN1. United Bank and Trust Company is not involved in this part of the adversary proceeding.

Bankruptcy No. 88-00003.

Adv. No. 88-0034.

United States Bankruptcy Court, D. Vermont.

July 19, 1989.

Raymond J. Obuchowski, South Royalton, Vermont, Trustee pro se (Trustee).

Jerome I. Meyers, White River Junction, Vermont, for Wade I. Treadway (debtor).

**MEMORANDUM OF DECISION SUSTAINING TRUSTEE'S MOTION FOR DECLARATORY
JUDGMENT**

FRANCIS G. CONRAD, Bankruptcy Judge.

*1 This matter [FN2] is before us on the Trustee's Motion for Declaratory Judgment to allow liquidation of certain property held by the debtor and his non-debtor spouse as tenants by the entirety. We hold that the tenancy by the entirety property is property of the estate subject to sale by the Trustee and not exempt when a debtor elects exemptions under 11 USC § 522(b)(1).

FN2. We have jurisdiction to hear this adversary proceeding under 28 USC § 1334(b) and the General Order of reference to this Court. This is a core matter under 28 USC § 157(b)(2)(B). This memorandum decision constitutes findings of facts and conclusions of law under F.R.Civ.P. 52 as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

The Debtor, Wade I. Treadway, filed for relief in bankruptcy under Chapter 7, Title 11 of the United States Code, 11 USC §§ 101, et seq., and elected the use of federal exemptions pursuant to 11 USC § 522(b)(1) [FN3]. On August 17, 1988 the Trustee filed a Complaint to Compel Turnover of Property and for Declaratory Judgment. The fourth cause of action in the Complaint seeks a declaratory judgment that the joint property of the debtor and his nondebtor spouse may be liquidated by the Trustee to pay the joint obligations of the debtor and his spouse, and that property held as tenants by the entirety is subject to liquidation by the Trustee because it cannot be exempted by a debtor who elects the federal exemptions under § 522(b)(1). Debtor's Answer, filed on September 23, 1989, admits that Debtor jointly incurred obligations to creditors with his spouse, Susan E. Treadway.

FN3. 11 USC § 522(b)(1) provides in pertinent part:

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.... Such property is (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under Paragraph (2)(A) of this subsection specifically does not so authorize....

On November 21, 1988 the Trustee moved for summary judgment on the adversary proceeding. On December 16, 1988, Debtor filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and on December 22, 1988 the Trustee filed a Memorandum in Support of Motion for Summary Judgment. We ruled on the summary judgment motion concerning other counts in the Trustee's Complaint on May 31, 1989, but in that decision refused to rule on the tenants by the entirety issue because we could not determine if the debts were in fact joint debts.

At a later hearing and after oral argument and representation of counsel the record now establishes that the Debtor, with his spouse, jointly incurred obligations to two creditors-- Kenneth Biathrow, C.P.A. and Howard Bank, N.A. Debtor and his spouse are jointly indebted to Kenneth Biathrow, C.P.A. of St. Johnsbury, Vermont for accounting services rendered in connection with preparation of the Treadways' December 31, 1985 and December 31, 1986 income tax returns and summarization of the Treadways' 1986 books as billed in June 1987 in the total amount of \$538.00, and as listed in Debtor's Schedule A-3. An affidavit was filed by Biathrow that indicated the debt was mostly the Debtor's debt and not his spouse's. Bifurcation of this obligation has no effect, however, because in fact, the debt is a joint debt.

Debtor and his spouse are also jointly indebted to the Howard Bank, N.A. for credit card charges on a joint credit account bearing number 4143-110-023-342 in the amount of \$2,827.43. The Howard Bank filed a proof of claim in this amount dated February 26, 1988. The record also evidences by admission that Debtor and his nondebtor spouse own property as tenants by the entirety.

*2 11 USC § 541(a) provides, with exceptions not relevant here, that the debtor's estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case." Courts, including this Court, have consistently interpreted this definition of property of the estate to include an individual debtor's interest in property held as a tenant by the entirety. In *Re Pauquette*, 38 BR 170 (Bkrtcy.D.Vt.1984); *Napotnik v. Equibank & Parkvale Sav. Ass'n*, 679 F.2d 316, 29 BCD 250 (3d. Cir.1982); In *Re Oberlies*, 94 BR 916 (E. D.Mich.1988); In *Re Townsend*, 72 BR 960, 964 (Bkrtcy.W.D.Mo.1987). Moreover, to the extent that Congress made express provision for the possibility of exempting certain interests as a tenant by the entirety under 11 USC § 522(b)(2)(B), it is clear that the debtor's interest in property as a tenant by the entirety must be included initially as property of the estate if Congress intended that such interests be exempt in the first place. *Napotnik*, supra, at 679 F.2d 318. See, *Oberlies*, 94 BR 916 (There is no policy conflicting with a holding that entireties property is reachable to the extent of unsecured joint obligations).

Treadway, under 11 USC § 522(b)(1), elected to utilize the Federal exemptions set forth in § 522(d) rather than the State exemptions afforded him by 11 USC §§ 522(b)(2)(A) and (B). Debtor also seeks to exempt property held with his spouse as tenants by the entirety. In so doing, he seeks to simultaneously exempt property pursuant to § 522(b)(1) and § 522(b)(2). This he may not do. As we've previously noted, § 522(b)(1) and § 522(b)(2) create "mutually exclusive exemption regimens ... [A]n individual debtor may exempt property under Code section 522(d) as authorized by Code section 522(b)(1), or, alternatively, may exempt property as authorized under subsections 522(b)(2)(A) and 522(b)(2)(B)." In *re Lawson*, 45 BR 686, 687, 12 BCD 818 (Bkrtcy.D.Vt.1985). The relevant legislative history unreservedly manifests the intent of Congress that the debtor must adopt either the exemptions authorized by the Federal scheme, or those exemptions provided by other Federal law and the state of his domicile. See, House Report No. 595, 95th Cong., 1st Sess. (1977) 360-362, U.S.Code Cong. & Admin.News 1978, 5787. If, as here, a debtor elects the Federal exemptions pursuant to § 522(b)(1), it matters not that he may be qualified for different exemptions under some other Federal law. Other Federal exemptions are available to a debtor only if he espouses the exemptions provided by the state of his domicile. In *re Kochell*, 732 F.2d 564, 566, 11 BCD 1174 (7th Cir.1984). Moreover, a debtor may exempt from the estate property held as a tenant by the entirety only if he elects to take state exemptions. In *re Lawson*, 45 BR at 687, citing *John T. Mather Memorial Hosp. v. Pearl*, 723 F.2d 193, 194, 11 BCD 414, 9 CBC.2d 670 (2d Cir.1983).

Even if Debtor had elected the exemption scheme authorized under to 11 USC § 522(b)(2), property held by the Debtor and his nondebtor spouse would not be exempt from property of

the estate. 11 USC § 522(b)(2)(B) provides, in pertinent part, that:

***3** Notwithstanding section 541 of this title, an individual debtor may exempt from this property of the estate ... 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.

Because both real property law and, more specifically, the law regarding tenants by the entireties are products of state law, the "applicable nonbankruptcy law" for purposes of the instant case is Vermont law of tenancy by the entirety. As the Supreme Court explained, "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 US 48, 55 99 S.Ct. 914, 59 L.Ed.2d 136, 4 BCD 1259, 19 CBC 481 (1979). This Court must, therefore, apply Vermont law to determine what interest, if any, the bankruptcy estate has in property held by Debtor and his nondebtor spouse as tenants by the entirety.

Vermont acknowledges the tenancy by the entirety in its traditional form. *Pauquette*, 38 BR at 173. "Tenants by the entirety have but one title and each owns the whole, and neither, without the concurrence of the other, has power to convey to any third person and thus to sever the tenancy." *Kennedy v. Rutter*, 110 Vt. 332, 340, 6 A.2d 17 (1939). While Vermont law makes clear that the undivided interest of one tenant by the entirety may not be reached by the sole creditors of that tenant, the entirety property is never immune from the claims of joint creditors. *D'Avignon v. Palmisano*, 34 BR 796, 798-800 (Bkrtcy.D.Vt.1982); *Townsend*, *supra*, 72 BR at 965. Although the Circuits were at one time split on whether entireties property is exempt from the claims of joint creditors under § 522(b)(2)(B), it is now generally accepted that joint creditors are entitled to reach entireties property to satisfy their claims. *Townsend*, 72 BR at 965-66.

The facts of *In Re Oberlies*, *supra*, present a situation similar to that of the instant case. There the Court held that property owned by a Chapter 11 debtor and a nondebtor spouse as tenants by the entirety was not exempt from property of the estate under the Bankruptcy Code to the extent that joint claims existed against the debtor and the spouse at the commencement of the case, despite the fact that the debtor had allegedly negotiated a post-petition settlement with all joint creditors resulting in a release of all claims against the nondebtor spouse (emphasis ours). The *Oberlies* Court further reasoned that bankruptcy administration ought not effect any change in substantive property rights and concluded that joint assets may be administered only for the benefit of joint creditors. "[T]he proceeds of the sale of entireties properties must be distributed to joint creditors ... [and] non- joint creditors must be paid, if at all, out of the general estate funds." *In Re Oberlies*, 94 BR at 920.

***4** Having established that the property held by Debtor and his nondebtor spouse as tenants by the entirety is property of the estate which is not exempt, the Trustee has the capacity, under 11 USC § 363(b)(1), "after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate". The Trustee's power to sell the nondebtor spouse's interest in entireties property along with the interest of the bankruptcy estate is contingent only upon the conditions set forth in § 363(h): (1) partition in kind of such property among the estate and any co-owners is impracticable; (2) 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 the co-owners; (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; and, (4) such property is not used in the production, transmission, or distributions, for sale, of electric energy or of natural or synthetic gas for heat, light or power. There is no condition other than those outlined in subsection (h) that must be shown prior to sale of the entireties property.

In instant case, it is of no assistance to Debtor or his spouse that the joint debt of the parties is being paid by the nondebtor spouse outside of bankruptcy. To the extent that a claim has been filed against the bankruptcy estate and to the extent that the claim represents a debt owed jointly by Debtor and his nondebtor spouse, property held as tenants by the entirety is available to satisfy this joint debt obligation. The Trustee is empowered by § 363(b)(1) to sell the entireties property and the conditions precedent to such a sale outlined in § 363(h) can be met. There will be no detriment to the nondebtor spouse which outweighs the benefit to the estate from the sale because § 363(i) grants the nondebtor spouse the right of first refusal. Even if the nondebtor spouse is unable to exercise the right of first refusal, her interests are protected by § 363(j) which requires the Trustee to pay over to the spouse the value of the spouse's interest in the property if the Trustee sells the property to someone other than the spouse.

For the foregoing reasons, declaratory judgment will be granted in favor of the Trustee. The property of Debtor and his nondebtor spouse held as tenants by the entirety is subject to liquidation by the Trustee having not been exempted by the Debtor.

An appropriate Order will be entered.

1989 WL 90535 (Bankr.D.Vt.)

[Back to Opinions by Citation](#)

[Back to Opinions by Date](#)

OR

[Or Search for Keywords](#)