UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

JOHN ALEXANDER COCHRANE, Debtor.

ORDER RE: STATUS OF DEBTOR'S CLAIMS OF EXEMPTION, AND OBJECTIONS THERETO

BKY 3-93-2056

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At St. Paul, Minnesota, this 28th day of January, 1994.

This Chapter 11 case came on before the Court on November 18, 1993, for a hearing on the objections of various creditors to the Debtor's claims of exemption in various assets. The Debtor appeared personally and by his attorney, Michael J. Iannacone. S.B. McLaughlin & Company, Ltd. and Tudor Oaks Condominium Project appeared by their attorney, William J. Fisher. Midway National Bank appeared by its attorney, John E. Brandt. Liberty State Bank appeared by its attorney, Richard Glassman. Vaquero Investments, Inc. appeared by its attorney, Christopher A. Elliott. Carolyn Cochrane appeared by her attorney, Sheridan J. Buckley. During argument on the objections as framed by the creditors' written pleadings, counsel raised the issue of whether the Debtor was entitled to exclude or exempt certain assets from his bankruptcy estate under the theory that he held his interest in them as a tenant by the entireties under Florida law. The Court noted that, as a threshold issue, it had to be determined whether the Debtor had even made a claim of exclusion or exemption under that theory, and took that question under advisement. Upon a review of the Debtor's schedules and the extant caselaw, the Court makes the following order.

The Debtor filed a voluntary petition for reorganization under Chapter 11 in the United States Bankruptcy Court for the Southern District of Florida on December 21, 1992.(FN1) On January 4, 1993, the Debtor filed his statements, schedules, and lists, including his Schedules A, B, and C.

On his Schedules A and B, he listed numerous items of real and personal property. Each entry included blanks for, among other things, "Owner" and "Co-owner(s)." As to the following assets, he noted "Owner" as "joint," and "Co-owner(s)" as "spouse," "wife," or "Carolyn A Cochrane":

1. "homestead," described as being located at 3660 Haldeman Creek Drive, Naples, Florida;

2. checking account, described as being at Barnett Bank of Naples, Florida;

3. breakfast nook set;

4. dining room set;

5. living room set;

6. patio furniture; and

7. two televisions.

In the preamble to his Schedule C, the Debtor noted that he was electing the exemptions available to him under 11 U.S.C. 522(b)(2). The preamble had a summary of the provisions of that statute, including the following verbiage:

> . . . the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable non-bankruptcy law.

Immediately after this provision were the words "Debtor is married." In the text of the schedule, in response to the form's query "Specify law providing each exemption," the Debtor provided the very same citation for the entries for each and every asset, including those previously described as jointly owned with his spouse:

> Law: Florida Constitution Article X, 4; Florida Statute 222 [sic]

The legal estate of tenancy by the entirety is a creation of the common law of England. As such, it was adopted by the state of Florida through the enactment of Fla. Stat. 2.01(FN2) and its predecessors. First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d 777, 779 (Fla. 1971). See also In re Koehler, 6 B.R. 203, 205 (Bankr. M.D. Fla. 1980) (neither Florida state constitution nor Florida statutes expressly recognize tenancy by the entireties, as a source of exemption from claims of creditors). Florida recognizes the estate as to both real and personal property. First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d at 779-780; In re Shaland, 133 B.R. 166, 167 (Bankr. S.D. Fla. 1991); In re Peeples, 105 B.R. 90, 94 (Bankr. M.D. Fla. 1989). Husband and wife holding property as tenants by the entirety in Florida are to be considered as a unit, with both taking per tout et non per my and with neither taking as a separate individual. First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d at 780. In a proper tenancy by the entireties, the spouses do not take as joint tenants or as tenants in common. Id.; English v. English, 63 So. 822, 823 (Fla. 1913) (both quoting source identified as "15 Amer. & Eng. Ency. of Law (2nd ed.) 847"). The subject asset is considered to be held by a separate legal entity. In re Peeples, 105 B.R. at 94. See also Sheldon v. Waters, 168 F.2d 483, 484 (5th Cir. 1948) (applying Florida law). It is not subject to the individual debts of either spouse. In re Koehler, 6 B.R. at 205-206.(FN3)

11 U.S.C. 522(b)(2)(B) allows a debtor in a bankruptcy case to claim as exempt "an interest as a tenant by the entirety . . . to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law." Construing this provision in light of Florida law, Bankruptcy Courts in several of the federal judicial districts in Florida have held that the debtor claiming an exemption in such property bears the burden of proving the entitlement to the exemption, and cannot meet the burden solely by adducing the testimony of the debtor's spouse. In re Shaland, 131 B.R. at 167; In re Stanley, 122 B.R.

599, 604 (Bankr. M.D. Fla. 1990); In re Spatola, 65 B.R. 49, 50-51 (Bankr. S.D. Fla. 1986); In re Marchini, 45 B.R. 187, 189 (Bankr. S.D. Fla. 1984). Under current Florida law, the existence of the estate is "based upon the intention of the parties" to place theownership of the asset into the "unit" of the marriage. First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d at 780.

> A viable tenancy by the entirety . . . must possess always and the same time the following characteristics of form: unity of possession (joint ownership in control); unity of interest (the interests must be the same); unity of title (the interests must originate in the same instrument); unity of time (the interests must commence simultaneously); and, the unity of marriage.

Id. at 781. See also Great Southwest Five Ins. Co. v. DeWitt, 458 So.2d 398, 400 (Fla. Dist. Ct. App. 1984).

> In the case of real estate, where property is acquired specifically in the name of the husband and wife, . . . [as] a rule of construction . . . a tenancy by the entireties is created, although fraud may be proven.

First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d at 780 (citations omitted). In the case of personalty there is no such presumption, and the debtor's proof of intention must be more exacting. This is for

> . . . the reason . . . that the application of entireties concepts to personalty becomes exceedingly complex as the nature of the personalty increases in sophistication, and the judicial mind seeks to require greater safeguards lest the tenancy be abused.

Id. See also Great Southwest Fire Ins. Co. v. DeWitt, 458 So.2d at 400. The debtor must show

> that the parties' intention to create a tenancy by the entireties existed at the time of the acquisition of the assets in question, and that the tenancy by the entireties was not a hurried, after-the-fact creation used for the purpose of insulating funds from the legitimate claims of creditors of one of the spouses.

First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d at 782 (Dekle, J., concurring specially). See also In re Shaland, 133 B.R. at 168; In re Stanley, 122 B.R. at 604.

It is quite clear, then, that a debtor in bankruptcy who asserts the protection of a Florida tenancy by the entireties must expressly claim it against the bankruptcy estate in a Schedule C, and, if challenged, must defend it by adducing extrinsic evidence of the specific intent to create the tenancy; of its creation via an appropriate instrument, conveyance, or some other objective manifestation; and of its five elements. In this case, the Debtor has not even taken the first step. The law he sweepingly invokes for his claims of exemption--a specific section of the FloridaConstitution and, apparently, a whole chapter of the Florida

statutes--are not the legal sources for the protection that he now claims. He makes no reference to claiming the common-law exemption or "immunity." The passing reference to his marital status in his Schedule C, standing alone, says nothing conclusive about even the specific estate he claims to hold; nor does the assertion of his wife's various interests as co-owner in his A and B Schedules.(FN4) It cannot be said that the Debtor has even claimed this protection, as against his bankruptcy estate and his creditors; thus, the issue of his entitlement to it is not even before the Court.

The excludability or exemptibility of these assets is of significant consequence to the administration of the Debtor's bankruptcy estate.(FN5) Though the Debtor's right to amend his claim of exemptions is nearly unfettered in time, Fed. R. Bankr. P. 1009(a),(FN6) it is entirely appropriate to circumscribe that right by requiring him to raise the issue discussed in this order under pain of the loss of the right to do so(FN7)

IT IS THEREFORE DETERMINED AND ORDERED:

1. That the Schedule C filed by the Debtor on January 4, 1993, does not contain any claim that any of the Debtor's assets are excluded or exempt from his bankruptcy estate by the provisions of Florida state law that protect an interest in property held in a tenancy by the entireties from the claims of creditors.

2. That, if the Debtor intends to claim that his interest in any property owned by him and his wife is excluded or exempt from his bankruptcy estate by the law noted in Term 1 of this order, he shall do so by filing and serving an amended Schedule C (and, if appropriate, amended Schedules A and B), in accordance with Loc. R. Bankr. P. (D. Minn.) 304(b) - (c), no later than February 18, 1994.

3. That, if the Debtor fails to timely serve and file an amended Schedule C in accordance with Term 2 of this order, none of his assets shall be excluded or exempted from his bankruptcy estate under the theory that his interest in them is that of a tenant by the entireties.

4. That, if the Debtor does timely serve and file an amended Schedule C in accordance with Term 2 of this order, objections to any claims of exclusion or exemption first made via amendments therein shall be governed by Fed. R. Bankr. P. 4003(b) and Loc. R. Bankr. P. (D. Minn.) 702.

BY THE COURT:

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GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE

(FN1)Pursuant to a change of venue ordered by that court on motion of S.B. McLaughlin & Company, Ltd., the case is presently before this Court.

(FN2)This statute provides, in pertinent part:

> The common and statute laws of England which are of a general and not a local nature, . . . down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

(FN3)The federal courts in Florida have differed as to the words with which they have identified this protection. At least one has opined that property held in tenancy by the entireties never passes into the bankruptcy estate. Mesa Petroleum Co. v. Conigilio, 16 B.R. 1015, 1020 (M.D. Fla. 1982). Though this case was decided under the Bankruptcy Act of 1898, which had a definition of the bankruptcy estate narrower than that under current law, it has been cited for the same proposition by Bankruptcy Courts in Florida. E.g., In re Peeples, 105 B.R. at 94-95. This characterization is probably in error; it does not acknowledge the very broad sweep of the bankruptcy estate under 11 U.S.C. Section 541(a), which includes a debtor's interest in certain sorts of community property--another form of estate in marital property that rests on the existence of a legal "community" separate from the two individuals involved. See 11 U.S.C. Section 541(a)(2). Nor does it recognize that 11 U.S.C. Section 522(b)(2)(B), as discussed supra, expressly characterizes the protection given by state law to tenancy-by-the-entireties property as an exemption. Using yet another tag, the Koehler court termed this protection an "immunity." 6 B.R. at 205-206. At least insofar as the present case is concerned, the question of nomenclature seems to be immaterial.

(FN4)In Florida a husband and wife can hold joint ownership of assets in at least three different estates: tenancy in common, Great Southwest Fire Ins. Co. v. DeWitt, 458 So.2d at 400; joint tenancy; and tenancy by the entireties.

(FN5)The Court has entered an order disallowing the claim of exemption to the Naples, Florida real estate that the Debtor made under Fla. Const. Art. X, Section 4. Under the same provision, his exemption in personal property, other than his interest in an Individual Retirement Account, is limited to a value of $1,000.00.

(FN6)The first sentence of this rule provides:

> A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.

(FN7)The last sentence in Fed. R. Bankr. P. 1009(a) provides:

> On motion of a party in interest, after notice and hearing, the court may order any voluntary

petition, list, schedule, or statement to be amended . . .

Strictly speaking, there is no such motion at bar. The current posture of this case, however, fully merits action under the Bankruptcy Code's "All Writs Act":

No provision of [the Bankruptcy Code] providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforceor implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. Section 105(a).
End Footnote