

United States Bankruptcy Court
District of Delaware



JUDGE BRENDAN LINEHAN SHANNON

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Via First Class Mail and E-Mail

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Re: In re: James A. Kauker and Patricia L. Kauker
Case No. 18-11171 (BLS)

Dear Counsel:

This letter follows upon a hearing held in the above matter on October 23, 2018. The issue here is whether the Debtors hold certain real property located at 729 Foxtail Court, Bethany Beach, Delaware (the “Property”) as tenants by the entirety (a specific form of ownership reserved to spouses). If so, Debtors may exempt the Property from the bankruptcy estate. This exemption would be based on 11 U.S.C. § 522(b)(3)(B), which permits debtors to exempt property that is immune from process under state law. 11 U.S.C. § 522(b)(3)(B); *see also* 5 Collier on Bankruptcy P 541.04 (16th 2018). In Delaware, exempt property includes property held by a tenancy in the entireties. *See Mitchell v. Wilmington Tr. Co.*, 449 A.2d 1055, 1058 (Del. Ch. 1982), *aff’d sub nom. Wilmington Tr. Co. v. Mitchell*, 461 A.2d 696 (Del. 1983) (holding that in Delaware, property held by a tenancy in the entireties is not subject to a judgment lien pursuant to a debt incurred by only one spouse.)

Therefore, if the Debtor’s home is held as a tenancy by the entireties, it may be exempted from satisfying debts that are owed by only one of the two Debtors. It is undisputed that the Debtors owned their home by a tenancy by the entireties at some point. The question is whether that tenancy was terminated before the current bankruptcy proceeding, which would make the 11 U.S.C. § 522(b)(3)(B) exemption for tenancies by the entireties unavailable to the Debtors. In Delaware, a tenancy by the entireties can be terminated by an action showing that both spouses intend to terminate such an estate. Delaware’s requirement of mutual intent protects each spouse from the unilateral alienation of property by the other spouse. *See William M. Young Co. v. Tri-Mar Assocs., Inc.*, 362 A.2d 214, 215 (Del. Super. Ct. 1976) (holding that a tenancy by the entireties “prevents severance by the independent acts of one spouse”).

Here, the Kaukers mutually agreed in 2007 to transfer their ownership interest in their home into \$10 cash and a beneficial interest in the Kauker Family Trust (“the Trust”). In Delaware, a tenancy by the entireties will be terminated by a transfer of property from one form to another (from real property to personal property, for example) *if, and only if*, such a transfer demonstrates the spouses’ mutual intent to terminate the entireties tenancy. *See William M. Young Co. v. Tri-Mar*

Assocs., Inc., 362 A.2d 214, 216 (Del. Super. Ct. 1976) (determining that an automobile was held by the entirety and was not available to individual creditors because “[t]he primary evidence to be considered remains the intent of the spouses as to form of ownership” and “the clear intent of the spouses as evidenced by the purchase and use of the automobiles [was] ownership by the entirety.”).

The record is undisputed that the husband and wife agreed to the transfer of the Property into the Trust. The main question is whether they demonstrated a mutual intent to terminate the tenancy in the entirety by doing so. The fact that the Kaukers transferred their property into a revocable trust does not necessarily indicate an intent to terminate the estate by the entirety. Instead, determining their intent is a fact-specific inquiry that depends on the circumstances of this particular transfer. Other bankruptcy courts have made similar inquiries and come to conclusions depending on the particular nature of the trust in question. *Compare In re Bellingroehr*, 403 B.R. 818, 822 (Bankr. W.D. Mo. 2009) (stating that property held in a revocable trust is held as a tenancy by the entirety when the marital interest in the trust “possesses the essential restrictions against severability and transferability as entirety property possesses”) with *In re Stanke*, 234 B.R. 439, 444 (Bankr. W.D. Mo. 1999) (holding that a trust was not compatible with a tenancy by the entirety because it “contain[ed] provisions that would be inconsistent with the characteristics of a tenancy by the entirety” and allowed the property to be “encumbered [or] sold...by the unilateral act of one of the owners.”) and *In re Reuter*, 427 B.R. 727, 777 (Bankr. W.D. Mo. 2010), *aff'd*, 443 B.R. 427 (B.A.P. 8th Cir. 2011), *aff'd*, 686 F.3d 511 (8th Cir. 2012) (similar).

Upon consideration of the trust instruments provided by the Kaukers and the undisputed facts surrounding the timing of the Kaukers’ transfer of the Property into the Kauker Revocable Trust, the Court determines that the transfer did not terminate the tenancy by the entirety. The Trust instrument does not contain any provisions that would demonstrate that the Kaukers mutually intended to terminate the entirety tenancy. The Court is satisfied that there is no indication that the Kaukers’ movement of the Property into the Kauker Revocable Trust was made in bad faith, or in an effort to hinder or evade creditors. Examining the Trust makes it clear that is not the kind of trust that would typically limit creditor recourse to trust *res* (as, for example, a spendthrift trust might). Nor is there any indication that the movement of the Property into the Trust was an intentional attempt to gain protection against creditors in a subsequent bankruptcy. Because the Property was already held by the entirety before it was placed in the Trust, the 11 U.S.C. § 522(b)(3)(B) exemption would have already been available to the Kaukers. Furthermore, the movement into the Trust was accomplished in 2007, more than a decade before the Kaukers filed their petition.

Accordingly, the Court will overrule the objection. Counsel are requested to confer and submit an order consistent with the foregoing within ten days.

Very truly yours,



Brendan Linehan Shannon
United States Bankruptcy Judge

BLS/klg

cc: Michael B. Joseph, Esquire
Chapter 13 Trustee