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ENTIRETIES PROPERTY IN MICHIGAN: DOES FISCHRE, et al. v UNITED STATES CORRECTLY STATE THE MICHIGAN LAW ON ENTIRETIES PROPERTY

By: Thomas King[1]

Since issuance of the opinion in Fischre, et al. v United States of America, Case No. 5:93-CV-11 on April 25, 1994 by the United States District Court for the Western District of Michigan, Southern Division, Bankruptcy practitioners in Michigan have had to re-analyze what they thought they knew about the law of entireties property in the State of Michigan. Prior to Fischre, federal cases held that, under Michigan law, ordinary creditors could not reach the interest of a husband or wife in entireties property, and as a result, entireties property was exempt from all but joint creditors of both spouses. See: In Re: Tricket, 13 B.R. 85 (Bkrtcy. W.D. Mich. 1981); In Re: Grosslight, 757 F.2d 773 (6th Cir. 1985); Matter of Wickstrom, 113 B.R. 339 (Bkrtcy. W.D. Mich. 1990). Assuming an absence of joint unsecured claims that a trustee in bankruptcy could seek to administer, a debtor could by claiming state exemptions, exempt any equity in entireties property from the claims of his or her creditors, and avoid the trustee's right to marshal and sell the entireties property.

Judge McKeague in Fischre begins by analyzing this well settled Michigan law and states as follows:

> Under Michigan law tenants by the entirety, who must be husband and wife, hold under a single title with right of

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survivorship. Certain Real Property at 2525 Leroy Lane, supra, 910 F.2d at 346. 'Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property.' Id. In fact, a lien based on the debt or obligation of one spouse only, does not even attach to the entireties property. Cole v Cardosa, 441 F.2d 1337, 1343 (6th Cir. 1971).

It is at this point in the Fischre opinion that Judge McKeague deviates from the well settled Michigan law that no individual creditor (and as a result no trustee) has any right to any interest in entireties property to satisfy a debt owed by one spouse alone. Citing the case of Certain Real Property at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990), a criminal forfeiture case, Judge McKeague attempts to analyze the exact nature of entireties property under Michigan law. Quoting from the 2525 Leroy Lane case, Judge McKeague states as follows:

> Under Michigan law, the individual interest of a tenant by the entirety is the functional equivalent of a life estate with a right of survivorship. The survivorship interest is in the nature of a remainder triggered by the death of either spouse, and, necessarily, the survivorship of the other spouse.

Based upon the foregoing cite from the 2525 Leroy Lane, Judge McKeague in Fischre, supra. goes on to state:

> This individual interest is not realized and remains inchoate until the entireties estate is terminated by the death of one spouse, divorce or joint conveyance. Id. As long as the entireties estate is intact, the property is not subject to levy and execution by creditors of one spouse. Yet, each spouse's survivorship interest is distinct, cognizable, and sufficient to support attachment of a creditors lien.

It is in the analysis of the nature of a tenancy by the entirety under Michigan law and specifically in the assertion that each tenant by the entirety has a survivorship interest in the nature of a remainder (citing 2525 Leroy Lane) that the Fischre opinion deviates from the clear statements of the Michigan Supreme Court regarding tenancy by the entireties.

A review of the case of The United States v Certain Real Property at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990), reveals that the 6th Circuit Court of Appeals cites no Michigan case for the proposition that under Michigan law the individual interests of a tenant by the entireties is the functional equivalent of a life estate with a right of survivorship in the nature of a remainder interest. The 6th Circuit Court of Appeals in 2525 Leroy Lane, at page 352, in analyzing the effect of the "remainder" interests on the government's interest in the property, states as follows:

> While we leave the determination of the precise scope of the Government's interest under Michigan law to the district court, we note

> some cases which may be instructive. As previously noted, the judgment creditors of one spouse may not levy against the entireties property through a forced sale. Matter of Grosslight, 757 F.2d at 773. The creditors of the husband alone cannot reach the husband's share of the proceeds from a foreclosure sale of the entireties real estate, Muskegon Lumber & Fuel Company v Johnson, 338 Mich. 665, 62 N.W. 2d 619 (1954), or rents from property held by the entireties, Peoples State Bank of Pontiac v Reckling, 252 Mich. 383, 233 N.W. 353 (1930); Battjes Fuel and Bldg. Material Co. v Milanowski, 236 Mich. 622, 211 N.W. 27 (1926). However, although Michigan law precludes the forced sale of property to enforce a judgment lien, we have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate. [emphasis added].

It is interesting to note that nowhere in the 6th Circuit Court of Appeals opinion in 2525 Leroy Lane is there any Michigan citation which would lead one to conclude that the 6th Circuit Court of Appeals has found any case indicating that entireties property interests are divisible into a present life estate with contingent remainders, let alone any case indicating whether a creditor's lien may be attached to the "contingent remainder." Any attachment of a creditor's lien to a contingent remainder in entireties property necessarily relies upon the premise that under Michigan law a tenancy by the entireties is the functional equivalent of a life estate with a right of survivorship in the nature of a remainder.

Unfortunately for both the 6th Circuit Court of Appeals and the United States District Court for the Western District of Michigan that is not the law in the State of Michigan. In fact, the Michigan Supreme Court in the case of Sanford v Bertrau, 204 Mich. 244 (1918), had occasion to explicitly deal with the issue of whether or not the interest held by one spouse in entireties property is in the nature of a life estate with a remainder interest. The Michigan Supreme Court in analyzing the issue states as follows:

> It is well settled in this State that land held by husband and wife as tenants by the entirety is not subject to levy under execution on judgment rendered by either husband or wife alone. The subject of estates by the entireties has been considered in many aspects by this court, as will appear by reference to the following cases, where the earlier decisions have been referred to. Vinton v Beamer, 55 Mich. 559. In speaking of the estate, this court said that it was an entirety.
>
> They both took the same estate, the same interest and could not be separated. The right of one was the right of the other. Neither could by separate transfer affect the

rights of the other, or his own. What would defeat the interest of one would also defeat that of the other.

In Re: Appeal of Nellie Lewis, 85 Mich. 340 (24 Am. St. Rep. 94), this court said:

The estate created by this deed was not an estate in joint tenancy, but an estate in entirety. A joint tenancy implies a *seisin per my et per tout*, while an estate in entirety implies only a *seisin per tout*. 4 Kent. Comm. p 362.

* * *

It is urged by counsel for plaintiffs and appellants, that before the death of either of the parties, each holds an estate similar in some respects to that of a contingent remainder, and that is has been held that a contingent remainder is not subject to execution. We think the better doctrine is that the right of survivorship is merely an incident of an estate by entirety, and does not constitute a remainder, either vested or contingent. (citations omitted)

204 Mich. at 247-8.

The Michigan Supreme Court in the above cited case goes on to hold that while no execution or levy on property will be allowed for debts of the single spouse, debts held jointly against husband and wife are subject to execution and levy, even as to property held as tenants by the entireties. The language regarding the right of survivorship being neither a vested or contingent remainder is again cited with approval by the Michigan Supreme Court in the case of Budwitt v Herr 339 Mich. 265 at 272-273 (1954). As a result, the Michigan Supreme Court has clearly determined that an entireties property right of survivorship is not a remainder interest and as a result, the holding in Fischre that the "survivorship interest" is in the nature of a remainder and is "sufficient to support attachment of a creditor's lien" is an incorrect statement of Michigan law.

By contrast, a review of Michigan law regarding joint tenancies with full rights of survivorship discloses that joint tenancies, even those with full rights of survivorship, are vastly different than interests in property held as tenants by the entireties. In the case of Albro v Allen, 434 Mich. 271 (1990), the Michigan Supreme Court upheld a decision of the Michigan Court of Appeals determining that a joint tenancy with full rights of survivorship is comprised of a joint life estate with dual contingent remainders. The court in Albro held that while a contingent remainder in a joint tenancy with full rights of survivorship could not be defeated by the transfer of the joint life estate, it did not mean that the life estate could not be alienated. The Albro Court went on to hold that either co-tenant in a joint tenancy with full rights of survivorship may transfer his life estate without effecting the contingent remainders.

The difference between a tenancy by the entirety and a joint tenancy with full rights of survivorship is based upon the fact that property may be held in tenancy by the entirety only by a husband and wife. The law in the State of Michigan recognizes the fictional union of husband and wife as one person. As

a result, both husband and wife take the same estate, the same interest and the right of one is the right of the other. Neither spouse, by separate transfer, can effect the rights of the other spouse, or his own right in the property. It is this fictional unity of person that creates the distinction in treatment between property held as tenancy by the entirety and property held as joint tenants with full rights of survivorship under Michigan law.

It is also this fictional unity of person that the 6th Circuit Court of Appeals in the 2525 Leroy Lane case and the United States District Court for the Western District of Michigan in the Fischre case failed to consider. The analysis of the 6th Circuit Court of Appeals and the United States District Court for the Western District of Michigan would be correct if the property being analyzed were held in joint tenancy with full rights of survivorship. However, the statements in Fischre and 2525 Leroy Lane indicating that the interest held by one spouse in entireties property is the functional equivalent of a life estate with a full right of survivorship akin to a contingent remainder is wholly unsupported by Michigan law, and directly contrary to the above cited holdings of the Michigan Supreme Court.

Tenancy by the entirety under Michigan law is *sui generis* and relies upon the fictional unity of person between a husband and wife. The right of survivorship is merely an incident of an estate by entirety, and does not constitute a remainder, either vested or contingent. It is simply part of the same unity of interest held by the husband and wife which cannot be separated. As a result, under a proper reading of Michigan law, no creditor of either spouse may encumber any interest in entireties property, including a spouse's right of survivorship, with a creditors lien.

Even though Fischre and the 2525 Leroy Lane cases misstate the Michigan law on tenancy by the entireties, they are federal court precedent which must either be distinguished or followed by the United States Bankruptcy Court of the Western District of Michigan. As a result, bankruptcy practitioners in the Western District of Michigan may be faced with the precedential effect of these cases for some time to come.

RECENT BANKRUPTCY COURT DECISIONS

Sixth Circuit and Supreme Court decisions are summarized by John Potter and Eastern District cases by Jaye Bergamini. There were no Western District cases this month.

In Re: Production Steel, Inc.,: United States, Intervenor-Appelle v Keith M. Lundin, et al., Intervenors-Appellants, 1995 FED. App. 0178P (6th Cir.); File Name 95a0178p.06, Case No.: 94-5285 (June 8, 1995). In July of 1984, Plaintiffs, six United States Bankruptcy Judges filed suit in the District of Columbia against the Director of the United States Courts, challenging the Directors declaration that the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "Act") was unconstitutional because it was in violation of the appointments clause of the Constitution. Meanwhile, a Debtor in California challenged the authority of the Bankruptcy Judge in her case. *In Re Benny,* 44 B.R. 581 (N.D. Cal.

1984).

Plaintiffs and the United States sought to intervene in *Benny*, and filed a Motion to stay the District of Columbia proceeding. Later other parties in other Bankruptcy proceeds challenged the constitutionality of the Act. Plaintiffs and the United States intervened in all of these proceedings, including the *Production Steel* matter for which they are now seeking an award of attorney fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412. In 1988, the District of Columbia action was dismissed as moot. Plaintiffs filed a fee petition pursuant to the EAJA in the District of Columbia, seeking to recoup legal costs for each Bankruptcy proceeding they appeared in. The District Court denied their application. The District of Columbia Circuit reversed, holding that Plaintiffs were prevailing parties in the District of Columbia action, and the government's position was not substantially justified. However, the Court denied Plaintiff's claim for fees in other jurisdictions, since the EAJA forbids awarding fees in actions over which the Court lacks jurisdiction.

In 1993, Plaintiffs subsequently petitioned the Bankruptcy Court for the Middle District of Tennessee for the fees they incurred by intervening in the *Production Steel* matter. The EAJA provides for attorney fees to a prevailing party in litigation against the United States. A party must submit an application within 30 days of final judgment in the action. Final judgment means a judgment that is final and not appealable, and includes an order of settlement. The Bankruptcy Court granted their petition.

The District Court reversed the Bankruptcy Court. The Circuit Court affirmed. It stated that while the *Production Steel* case was ongoing when they made their fee petition, the Bankruptcy Court order disposed of the issue Plaintiffs intervened in on December 12, 1985. This order was a final judgment for purposes of the EAJA. Consequently, their petition was not timely, since it was filed more than seven years after the final judgment.

* * * * *

Florence Tanners v Vidosch, (Bankr. ED Mich) 94-52306-R, A/P 95-4247. Plaintiffs brought an adversary proceeding to determine the dischargeability of a debt owed by the Chapter 11 Debtor, as a result of a settlement of a sex discrimination case. The Debtor had made two pre-petition installment payments on the settlement within 90 days prior to filing. The Debtor countersued to recover the pre-petition payments pursuant to 11 U.S.C. §547(b).

Judge Rhodes dismissed the Complaint to Determine Dischargeability and granted the Debtor's Motion for Summary Disposition of it's claim to recover the pre-petition payments. The Plaintiffs claimed that the payments were made in the ordinary course of business under §547(c)(2). Pursuant to *In Re: Fred Hawes,* 957 F2d 239 (6th Cir. 1992) a creditor must prove all three elements of §547(c)(2) in order to defend against recovery. Those elements are, that the transfer was made:

> A. In payment of a debt incurred by the Debtor in the ordinary course of business or financial affairs of the Debtor and the transferee;
>
> B. Made in the ordinary course of business or financial affairs of the Debtor and the transferee; and
>
> C. Made according to ordinary business terms.

The Court held that the payments made pursuant to an agreement to settle a sex discrimination suit were not in furtherance of the ordinary business of the Debtor.

* * * * *

DRMC, Inc. V McCord, (Bankr. ED Mich), 94-50358-R, A/P 95-4155 R. Judge Rhodes holds that where a Trustee moves for an extension of the time to file objections to discharge, and the order is granted, the right to file within the extended time applied to the Trustee only, and is not for the general benefit of all creditors.

The Debtors filed a Chapter 7 petition on October 7, 1994. The bar date for filing objections to discharge was January 22, 1995. On December 20, 1994 the Trustee filed a Motion to Extend Time to File Objections, which was granted, and a new bar date of March 23, 1995 was set. On February 23, 1995 the Plaintiff creditor DRMC filed an adversary proceeding objecting to discharge. The Debtor moved to dismiss, arguing that the extension only applied to the Trustee, the movant, and not to the general creditors, vicariously. The Plaintiff defended against dismissal, saying that at the time that the Motion to extend the bar date was filed, the Trustee was in the process of conducting a 2004 exam, in which the Plaintiff participated. Further, the Trustee stated that he filed the Motion intending the extension to be for the benefit of all interested creditors. The language of the order did not specifically limit the extension to the Trustee.

The Court held that the general rule stated under Rule 4004(b) is, that an extension ordinarily applies only to the movant, unless there are circumstances which would warrant a different holding. The Court made note of the Advisory Committee note to Rule 4004(b) which states "[a]n extension granted pursuant to subsection (b) would ordinarily benefit only the movant, but it's scope and effect would depend on the terms of the extension."

The Court observed that in his Motion, the Trustee requested the extension on his own behalf, without any mention of other creditors. The Court went on to note that other Courts have held that were the Motion for an extension of time did not mention other creditors, those creditors could not piggyback on the extension of time granted to the moving party.

The Debtor's Motion to dismiss the adversary proceeding as untimely filed was granted.

STEERING COMMITTEE MINUTES

There was no July Steering Committee due to the Bankruptcy Seminar. The next scheduled meeting will be August 18, 1995, at noon, at the Peninsular Club in Grand Rapids.

LOCAL BANKRUPTCY NOTICE

Enclosed from Mark Van Allsburg is a memo from the Bankruptcy Court regarding the effective date of the Chapter 7 filing fees.

EDITOR'S NOTEBOOK

The 1995 Bankruptcy Seminar was held July 27-29 on Mackinaw Island and it certainly appeared as if it was enjoyed by all. I would like to thank the speakers for a job well done without whom the seminar would not have been a success. Every year the seminar is better than the last. I encourage everyone to attend next year's seminar.

LOCAL BANKRUPTCY STATICS

The following is a summary of the number of bankruptcy cases commenced in the United states Bankruptcy Court for the Western District of Michigan (Lower Peninsula) during the months of July of 1995. These figures are compared to those made during the same period one year ago and two years ago.

Bankruptcy Chapter	July of 1995	July of 1994	July of 1993
Chapter 7	375	308	341
Chapter 11	7	6	7
Chapter 12	1	1	4
Chapter 13	144	116	119
Totals	527	431	471

Bankruptcy Chapter	January - July of 1995	January - July of 1994	January - July of 1993
Chapter 7	2368	2104	2271
Chapter 11	40	45	58
Chapter 12	10	8	18
Chapter 13	855	781	709
§304	1	0	0
Totals	3274	2938	3056

STEERING COMMITTEE MEMBERS

Dan Casamatta (1996)	(616) 456-2002
John Grant (1997)	(616) 774-0641
Tim Hillegonds (1995)	(616) 459-6121
Mary Hamlin, Editor (1996)	(616) 345-5156
Jeff Hughes (1996)	(616) 336-6000
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Steven Rayman, Chair-elect (1995)	(616) 345-5156
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Bob Sawdey (1996)	(616) 459-8311
Tom Schouten (1997)	(616) 774-8121
Peter Teholiz (1995)	(517) 886-7176
Janet Thomas (1996)	(616) 726-4823
Rob Wardrop (1997)	(616) 459-1225
Bob Wright, Chair (1995)	(616) 454-8656

FROM THE BANKRUPTCY COURT:

The new $15.00 fee for increased compensation for chapter 7 trustees (which was described in detail in the last issue of the Bankruptcy Law Newsletter) will become effective on October 22, 1995. On that date, the filing fee for a chapter 7 case will become $175.00, and there will be a new motion fee of $15.00 which will be required upon the filing of a motion to convert a case to a chapter 7 or upon a notice of conversion to chapter 7 filed by a debtor.

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