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"Fresh Start" or "Head Start": Missouri Courts Rethink the Role of Tenancies by the Entirety in Bankruptcy

*Landmark Bank v. Charles (In re Charles)*¹

Few issues have caused as much consternation² in determining the extent of a debtor's estate in bankruptcy³ as the treatment to be given property held by the debtor as a tenant by the entirety.⁴ The Bankruptcy Court for the

1. 123 Bankr. 52 (Bankr. E.D. Mo. 1991).

2. See, e.g., Ackerly, *Tenants by the Entirety Property and the Bankruptcy Reform Act*, 21 WM. & MARY L. REV. 701 (1980); Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255 (1974); Kalevitch, *Some Thoughts on Entireties in Bankruptcy*, 60 AM. BANKR. L.J. 141 (1986); Note, *Administration of Entireties Property in Bankruptcy*, 60 IND. L.J. 305 (1985) [hereinafter Note, *Administration of Entireties*]; Note, *The Bankruptcy Code of 1978 and Its Effect Upon Tenancies by the Entireties*, 13 IND. L.REV. 761 (1980) [hereinafter Note, *Bankruptcy Code*]; Note, *Estates By the Entireties in Bankruptcy*, 15 J. L. REF. 399 (1982); Comment, *Entireties Property: The Effects of Bankruptcy on Creditors' Rights*, 28 U. PITT. L. REV. 267 (1966) [hereinafter Comment, *Entireties Property*].

3. The debtor's estate in bankruptcy is the device used "to bring all of the debtor's nonexempt property together and, through an orderly administration of the assets, to pay as much as possible ratably among the creditors of the same class." Craig, *supra* note 2, at 262.

4. The term "tenancy by the entirety" describes a peculiar kind of co-ownership between a husband and a wife. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 229 (1962). As with a joint tenancy, the estate is created through the four unities of time, title, interest, and possession. *Id.* When these unities exist in a husband and wife, absent a clearly expressed contrary intention, a tenancy by the entirety is created. *Ronollo v. Jacobs*, 775 S.W.2d 121, 123 (Mo. 1989). In Missouri, personal property, as well as real property, may be held in tenancy by the entirety. *In re Estate of King*, 572 S.W.2d 200 (Mo. Ct. App. 1978). This entirety estate is founded on the common law concept of legal unity of the spouses. R. CUNNINGHAM, W. STOEBUCK, D. WHITMAN, *THE LAW OF PROPERTY* 210-11 (1987) [hereinafter CUNNINGHAM]. Thus, it adds a "fifth unity": unity of person. 4 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* 64 (repl. ed. 1981) Although changing attitudes, exemplified by the Married Women's Property Acts, have nearly abandoned this hoary old concept, its spin-off fiction, tenancy by the entirety, is "alive and well in Missouri" and in many other states. CUNNINGHAM, *supra* note 4, at 211; *Townsend v. Townsend*, 708 S.W.2d 646, 647-50 (Mo. 1986) (abolishing interspousal tort immunity flowing from archaic "unity fiction . . . [which] our General Assembly attempted to abrogate"); *Skinner v. Checkett*, No. 88-5144-CV-SW-8 (W.D. Mo. Jan. 10, 1991) (LEXIS, Genfed library, Dist file).

Eastern District of Missouri, in *Landmark Bank v. Charles (In re Charles)*,⁵ held that where a debtor owns property as a tenant by the entirety, and that debtor files bankruptcy singly while seeking relief from debts owed jointly with the non-filing spouse, that property becomes a part of that debtor's bankruptcy estate.⁶ The trustee must administer this property only for the benefit of the joint creditors, and the debtor may exempt the remainder from distribution to his sole creditors.⁷

A comprehensive study of all the facets of tenancies by the entirety is beyond the scope of this Note. In addition to the authorities cited above, good overviews are provided in H. Grilliot & T. Yocum, *Tenancy by the Entirety: An Ancient Fiction Frustrates Modern Creditors*, 17 AM. BUS. L.J. 341, 341-46 (1979), and Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 24-43 (1952).

For the purposes of this Note, there are three unique characteristics to a tenancy by the entirety which lie at the core of this bankruptcy controversy. First, the two spouses are said to hold the estate *per tout et non per my*, i.e. by the whole and not by the part. C. MOYNIHAN, *supra* note 4, at 229. A Missouri court stated that "neither spouse owns an undivided half interest in entirety property; the whole entirety estate is vested and held in each spouse and the whole continues in the survivor." *Ronollo*, 775 S.W.2d at 123. The second critical characteristic is that neither spouse, acting alone, may transfer any portion of the estate during the joint lives of the spouses. *Kennedy v. Miles*, 773 S.W.2d 519, 520 (Mo. Ct. App. 1989). The final relevant aspect of tenancies by the entirety is that neither spouse, acting alone, may encumber the entirety property, *Manissi v. Manissi*, 672 S.W.2d 738, 739-40 (Mo. Ct. App. 1984), nor may any individual creditor of one spouse lien, levy, execute or in any way affect the entirety property without the express or implied acquiescence of the other spouse. *United States v. Hutcherson*, 188 F.2d 326, 330 (8th Cir. 1951) (construing this characteristic as "an essential element" of Missouri law). A joint creditor of both spouses, however, may execute on entirety property. *Dickey v. Thompson*, 323 Mo. 107, 120, 18 S.W.2d 388, 393 (Mo. 1929).

Tenancies by the entirety are recognized, in some form, in at least twenty jurisdictions, CUNNINGHAM, *supra* note 4, at 211; Note, *Administration of Entireties*, *supra* note 2, at 309-10 n.24, with one author placing the number as high as twenty-six. Note, *Estates by the Entireties in Bankruptcy*, *supra* note 2, at 402. This Note, concerns only those jurisdictions who have, like Missouri, retained all three of the strict common law characteristics of tenancies by the entirety set out above. These jurisdictions number approximately twelve, Craig, *supra* note 2, at 295-302, to fourteen. Note, *Administration of Entireties*, *supra* note 2, at 331-32, 336-37. In the other jurisdictions, at least one spouse has a conveyable, leviable interest. Craig, *supra* note 2, at 295-302.

5. 123 Bankr. 52 (Bankr. E.D. Mo. 1991).

6. *Id.* at 55.

7. *Id.*

This result puts the Eastern District of Missouri in accord with the majority of jurisdictions,⁸ and represents a significant change from previous practice in Missouri.⁹ The decision (i) dramatically alters the rights of debtors and creditors in this very common situation,¹⁰ (ii) abandons a strained interpretation perpetuated by other Missouri courts,¹¹ and (iii) raises several new and complex questions.¹²

To place *In re Charles* in its proper perspective, this Note traces the Missouri and national treatment of tenancies by the entirety under bankruptcy law. This history began with the Bankruptcy Act of 1898.¹³ A settled procedure under the 1898 Act was reconsidered when Congress adopted the 1978 Code.¹⁴ A consensus on the treatment of tenancies by the entirety under the 1978 Code has only now emerged.¹⁵ As the courts apply this new uniform approach, focus has shifted to the inconsistencies created by this procedure.¹⁶ This Note will illustrate that *In re Charles* is but one step along this road for Missouri courts.

8. See *infra* notes 54-68 and accompanying text.

9. See *infra* notes 69-95 and accompanying text.

10. The facts in *In re Charles* were presented to the court by stipulation of the parties. *Charles*, 123 Bankr. at 53. The debtor, Mr. Cecil Charles, held funds in a Landmark Bank account as a tenant by the entirety with his wife, Julie Charles. *Id.* at 52. Control of these funds was given to the trustee by Landmark Bank after Mr. Charles filed bankruptcy. *Id.* Mr. and Mrs. Charles demanded the funds be returned, contending that as entirety property, they constituted no part of the bankruptcy estate. *Id.* Although not specifically stated, it can be reasonably inferred from the opinion that at the time Mr. Charles filed his Chapter 7 bankruptcy, he and his wife had joint and unsecured debts. *Id.* at 55.

These key facts: (1) the joint, unsecured, debts of a husband and wife, (2) the property held by the husband and wife as tenants by the entirety, and (3) the one spouse filing bankruptcy while the other does not, produce the most difficult issues for a bankruptcy court in determining the extent of a bankrupt's estate. These fact situations also form the scope of this Note. Unless otherwise stated, it may be assumed that each of these elements was present in each of the cases cited herein.

11. See *infra* notes 69-95 and accompanying text.

12. See *infra* notes 136-160 and accompanying text.

13. 11 U.S.C. § 101 to -1130 (1976) (repealed 1978) [hereinafter 1898 Act]. See *infra* notes 17-31 and accompanying text.

14. 11 U.S.C. § 101 to -1130 (1988) [hereinafter 1978 Code]. See *infra* notes 37-53 and accompanying text.

15. See *infra* notes 60-62 and accompanying text.

16. See *infra* notes 136-160 and accompanying text.

I. TENANCIES BY THE ENTIRETY UNDER THE 1898 ACT

Section 70a(5) of the 1898 Act provided that upon the debtor's filing of a petition in bankruptcy, the trustee in bankruptcy would take title to all "property, including any rights of action, which prior to the filing of the petition [the debtor] could by any means have transferred or which might have been levied upon and sold under judicial process."¹⁷ To determine which property satisfied these requirements, bankruptcy courts looked to the state law where the property was located.¹⁸

In virtually all cases where one spouse filed for bankruptcy and the other spouse did not, no part of the tenancy by the entirety property passed to the trustee or was subject to the bankruptcy proceeding.¹⁹ This resulted because the debtor held no interest in the property that could be transferred or levied upon by creditors by the debtor acting individually.²⁰

Even though the entirety property was not brought into the estate, the debtor could still be discharged from all debts, including joint debts.²¹ This led virtually all courts to acknowledge the resulting inequitable position of

17. 11 U.S.C. § 110(a)(5) (1970) (repealed 1978).

18. *In re Wetteroff*, 453 F.2d 544, 546 (8th Cir. 1972), *cert. denied sub nom. Wetteroff v. Grand*, 409 U.S. 934 (1972).

19. *Blodgett v. United States*, 161 F.2d 47, 50 (8th Cir. 1947).

20. *See supra* note 4. Where both spouses filed bankruptcy at the same time, courts have consolidated the two proceedings to satisfy joint creditors, reasoning that if both spouses have filed, then the whole of the entirety property must be vested in the trustee. *Wetteroff*, 453 F.2d at 546; *contra Shipman v. Fitzpatrick*, 350 Mo. 118, 120-21, 164 S.W.2d 912, 913 (Mo. 1942). Although it appears that since neither spouse had a transferable/leviable interest, neither spouse passed any part of the entirety property to the trustee. Thus the trustee's aggregate title would be two times nothing. Courts have not discussed this anomaly. *Cf. Kalevitch, supra* note 2, at 146 (noting that the same anomaly continues under the 1978 Bankruptcy Code).

Courts were split as to whether, once brought into the estate by virtue of both spouses having filed bankruptcy, the entirety property could be sold for the benefit of all creditors or only the couple's joint creditors. *See Craig, supra* note 2, at 267-72; *Ackerly, supra* note 2, at 706. This split arises from the following catch-22: if an individual creditor is allowed to benefit from the entirety property now within the estate, that creditor is in a better position with respect to the debtor than would be the case outside of bankruptcy; if an individual creditor is not allowed to benefit, this would violate "an avowed aim of the Bankruptcy Act: to equalize distribution among creditors." Comment, *Entireties Property, supra* note 2, at 283-84. For a discussion of the reoccurrence of this dilemma under the new Code, *see infra* notes 79-84 and accompanying text.

21. *Wharton v. Citizen's Bank of Bosworth*, 223 Mo. App. 236, 240-41, 15 S.W.2d 860, 862 (Mo. Ct. App. 1929); *see also* Comment, *Entireties Property, supra*

joint creditors in this situation. One author summarized the problem as follows: (1) the debtor is discharged from his joint debts in bankruptcy, (2) the joint creditor must gain a judgment over both spouses before the tenancy by the entirety property is available for execution, (3) the debtor's discharge prevents the joint creditors from ever achieving this status, and thus, ever executing on the tenancy by the entirety property, and (4) therefore, the creditor is left only able to gain an individual judgment against, and execute on the individual assets of, the spouse who was not discharged in bankruptcy; a substantially worse position than the creditor initially bargained for.²²

Renshouse Electrical Supply Co. v. Magee (In re Magee),²³ a Missouri bankruptcy court decision under the 1898 act, typifies the majority approach when faced with this potential for "legal fraud."²⁴ To deny the creditors an equitable remedy, "would not merely give a bankrupt spouse, owning property by the entirety with a non-bankrupt spouse, a 'fresh start', it would give him a 'head start' which the Act does not contemplate."²⁵ Therefore, the court stayed the debtor's discharge and gave the joint creditor leave to pursue the claim against the debtor in state court. In the state court, the creditor would seek a joint judgment for execution against the tenancy by the entirety property to which the creditor had been denied access in bankruptcy court.²⁶

This remedy of lifting the automatic stay from a joint creditor resulted in large part from the United States Court of Appeals for the Fourth Circuit's decision in *Phillips v. Krakower*.²⁷ In *Krakower*, the court stated the following:

It is elementary that a bankrupt is not entitled to a discharge unless and until he surrendered his assets for the benefit of creditors; and he certainly is not in position to ask a court of bankruptcy, which is a court of equity, to grant him a discharge under the statute, when the effect of the discharge

22. Craig, *supra* note 2, at 284 (citing *Shipman v. Fitzpatrick*, 350 Mo. 118, 164 S.W.2d 912 (Mo. 1942)), *see also* Comment, *Entireties Property*, *supra* note 2, at 285-90.

23. 415 F. Supp. 521 (W.D. Mo. 1976) (affirming the bankruptcy court, whose opinion is attached to the district court's opinion as an appendix).

24. *Id.* at 527 (quoting *Phillips v. Krakower*, 46 F.2d 764, 765-66 (4th Cir. 1931)). The legal fraud in such cases is "the effectual withholding of the property from the reach of those entitled to subject it to their claims, for the beneficial ownership and possession of those who created the claims against it. We cannot conceive that any court would lend its aid to the accomplishment of a result so shocking to the conscience." *Krakower*, 46 F.2d at 765-66.

25. *Magee*, 415 F. Supp. at 528.

26. *Id.* at 530.

27. *Krakower*, 46 F.2d at 765-66.

will be to withdraw from the reach of creditors property properly applicable to the satisfaction of the their claims.²⁸

The *Krakower* court found support for its decision in *Lockwood v. Exchange Bank*.²⁹ In that case the United States Supreme Court noted that in a case where a creditor held waivers executed by the debtor, "certainly, there would exist in favor of a creditor . . . an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor."³⁰

Thus, in states recognizing the common law formulation of tenancies by the entirety,³¹ courts found one hand bound in the treatment of these properties by the language of the statute, but were free with the other hand to fashion a remedy at equity to protect the rights of the joint creditors.

II. TENANCIES BY THE ENTIRETY UNDER THE 1978 CODE

Most courts addressing the issue of tenancies by the entirety under the 1978 Code approach the question in two parts: (1) Are tenancy by the entirety properties now part of the debtor's estate under section 541(a),³² and (2) If made a part of the estate, can these interests be exempted from administration under section 522(b)(2)(B)?³³ Because each of these questions has proved dispositive to at least one court, this Note will deal with them separately.

28. *Id.*

29. 190 U.S. 294 (1903).

30. *Id.* at 300.

31. *See supra* note 4.

32. Section 541(A) of the 1978 Code reads, in pertinent part: "The commencement of a case under . . . this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a) (1988).

33. Section 522(b) of the 1978 Code reads, in pertinent part:

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

(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.

A minority of courts has concluded that tenancy by the entirety properties still are not included in the bankruptcy estate under section 541(a).³⁴ Other minority decisions concluded that a debtor's interest is part of the estate, but is exempt from the reach of all creditors.³⁵ The majority of courts, however, have determined that the debtor's interest in the entirety property passes to the trustee and can satisfy the claims of joint creditors.³⁶

A. Does a debtor's interest in tenancy by the entirety property become part of the bankruptcy estate?

The initial determination of the extent of the debtor's estate is made under section 541(a) of the 1978 Code.³⁷ Section 541 calls for the creation of an estate, administered by the trustee, encompassing "all legal or equitable interests of the debtor in property."³⁸ The legislative history reveals that this section should be interpreted broadly, bringing all of the debtor's assets into the estate, and leaving any questions of exemption for a later decision under section 522.³⁹ Congress, however, did not expressly state how tenancies by the entirety should be treated.⁴⁰ The House Judiciary Committee stated that

34. See *infra* notes 89-95 and accompanying text.

35. See *infra* notes 109-112 and accompanying text.

36. See *infra* notes 113-118 and accompanying text.

37. 11 U.S.C. § 541(a) (1988).

38. *Id.*

39. S. REP. NO. 95-989, 95th Cong., 2d Sess. 82-84, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868; H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 367-68 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6322-24. The Judiciary Committee of the House of Representatives stated that the bankrupt's estate consists of:

[A]ll interests, such as interests in real or personal property that the debtor has . . . whether or not transferable by the debtor Certain restrictions on the transferability of property will prevent the trustee from realizing on some items of property . . . [B]ut on the whole, the trustee will be able to bring all property together for a coherent evaluation of its value and transferability, and then to dispose of it for the benefit of the debtor's creditors.

H.R. REP. NO. 595, 95th Cong., 2d Sess. 176-77, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6136-37.

40. A clear expression was made, however, by the Commission on the Bankruptcy Laws of the United States, which was created by Congress in 1970 to study the current laws and recommend changes. The Commission reported to the Congress:

Under the proposed Act, the undivided interest of a spouse who is a debtor in a case under the Act is property of the estate. This is contrary to the present Act which looks to state law to determine what happens with

"[w]ith respect to . . . tenancies by the entirety . . . the bill does not invalidate the rights, but provides a method by which the estate may realize on the value of the debtor's interest in the property while protecting the [non-filing spouse's] rights."⁴¹

Commentators have reasoned that this language, and the Code sections dealing specifically with the exemption⁴² or sale⁴³ of tenancy by the entirety property, indicate congressional intent to make this property part of the bankrupt's estate and, hence, subject to the trustee's administration.⁴⁴

Another argument showing that section 541 should include tenancies by the entirety property is the significant departur the section represents from the practice under section 70(a) of the 1898 Act, the predecessor of code section 541.⁴⁵ The 1898 Act defined the estate as interests that the debtor could transfer or subject to liens of individual creditors.⁴⁶ The United States Supreme Court⁴⁷ said that "the title to the property of a bankrupt, generally exempted by state laws, should remain in the bankrupt, and not pass to [the trustee]."⁴⁸ When Congress repealed the 1898 Act, it expressly stated that the new section 541 overruled this case.⁴⁹

Congress intended section 541 to have a broad reach.⁵⁰ The method used by Congress to effectuate this broad scope was to change the "transfer-

respect to property jointly owned by a husband and wife.

H.R. DOC. NO. 137, 93d Cong., 1st Sess. pt. L.C. 1, at 194 (1973).

41. H.R. REP. NO. 595, 95th Cong., 2d Sess. 177, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6137.

42. 11 U.S.C. § 522(b)(2)(B) (1988).

43. 11 U.S.C. § 363(h) (1988).

44. Note, *Administration of Entireties*, *supra* note 2, at 313; Note, *Bankruptcy Code*, *supra* note 2, at 765-66. This analysis has been criticized on the grounds that it is "bootstrapping;" in essence, basing the existence of an interest of the debtor in the entirety property, which is required under section 541, on Code sections that do not apply until after the property is deemed in the estate under section 541. Note, *Bankruptcy Code*, *supra* note 2, at 766.

45. 11 U.S.C. § 110(a) (1974) (repealed 1978).

46. *Id.*

47. *Lockwood v. Exchange Bank of Fort Valley*, 190 U.S. 294 (1903) (bankruptcy court had no jurisdiction over homestead property subject to state law exemption regardless of whether debtor had waived his homestead rights). Section 70a of the 1898 Act stated that the Trustee would not take title to property determined to be exempt. 11 U.S.C. § 110(a) (1974) (repealed 1978).

48. *Id.* at 299.

49. H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 368, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6324 (overruling *Lockwood* because the estate includes "all property of the debtor, even that needed for a fresh start").

50. See *supra* notes 37-44 and accompanying text.

ability/leviability" test under the 1898 Act⁵¹ to the "interest" test in Section 541.⁵² As a result, it is reasonable to infer that Congress expected that property owned in a tenancy by the entirety, while not transferable by either spouse acting individually, is nonetheless an interest and will be made part of the estate.⁵³

In 1981, the Fourth Circuit Court of Appeals in *Greenblatt v. Ford* became the first court of appeals to unravel the status of tenancies by the entirety in bankruptcy under the 1978 Code.⁵⁴ Adopting the bankruptcy court's *en banc* opinion, the court of appeals declared that under Maryland law, a debtor's undivided interest in entirety property is part of the bankruptcy estate pursuant to section 541.⁵⁵ The bankruptcy court began its examination of section 541 by stating that the determination of whether a debtor's interest in entirety property is a "legal or equitable interest" (and therefore within the bankruptcy estate) is a federal question.⁵⁶ Because neither the code nor any other federal law defines "property" or "an interest in property," the court then turned to state law to resolve the issue.⁵⁷ The court found that, under Maryland law, the debtor has "an *in futuro* expectancy" and "an undivided, indivisible present right to the use, possession and income from his tenants by the entireties property."⁵⁸ The court concluded that "[t]hese [rights are] *in esse* legal and equitable interests of the debtor."⁵⁹ The court then held that, based on legislative history, the "clear congressional intent [was] . . . that the

51. See *supra* note 46 and accompanying text.

52. See *infra* notes 69-95 and accompanying text.

53. One commentator attempts to rebut this argument by stating that, under the 1898 Act, entirety properties were not exempt, but rather immune. Note, *The Bankruptcy Code, supra* note 2, at 773-75. This was because the protection afforded entirety came, not from explicit state statutory exemptions, but "from the peculiar nature of the estate." *Id.* at 773-74 (quoting *Shaw v. United States*, 94 F. Supp. 245, 246 (W.D. Mich. 1939)). Therefore, the author argues, unless states were now to specifically exempt entirety properties, their status would continue as immune, rather than exempt, rendering section 522(b)(2)(B) a nullity. *Id.*

It is, however, not certain that Congress had this particular subtlety of state property law in mind when it drafted section 522(b)(2)(B). In contrast to the argument above, it is equally possible that Congress' use of the word "exempt" in section 522(b)(2)(B) indicates a misunderstanding of the classification of entireties under the 1898 Act.

54. 638 F.2d 14 (4th Cir. 1981), *aff'g on the opinion, In re Ford*, 3 Bankr. 559 (Bankr. D. Md. 1980) (applying Maryland law).

55. *Greenblatt*, 638 F.2d at 14.

56. *Ford*, 3 Bankr. at 564-65.

57. *Id.* at 565.

58. *Id.* at 566.

59. *Id.*

debtor's undivided interest in tenants by the entirety property is property of the estate.⁶⁰ The same result was reached by the Third Circuit Court of Appeals without reference to state law.⁶¹ Every other court of appeals facing the issue has held that section 541 brings a debtor's interest in property as a tenant by the entirety into the bankruptcy estate.⁶²

The majority of lower court decisions also hold that section 541 brings the debtor's interests in entirety property into the bankruptcy estate.⁶³ The courts' decisions, however, are not unanimous. In *In re Jeffers*,⁶⁴ the court finds the legislative history inconclusive.⁶⁵ Concentrating on the language of the House Committee Report indicating that section 541 did not invalidate

60. *Id.* at 570. The *Ford* opinion by Judge Goldburn and Judge Lebowitz is an exhaustive look at the wealth of legislative history that surrounds the Bankruptcy Reform Act of 1978. *Id.* at 566-70. This section of the opinion will be of great use to anyone engaged in the task of analyzing the intent of Congress, regardless of the particular statute under study. This opinion forms the basis of section I of this Note.

61. *Napotnik v. Equibank and Parkvale Sav. Ass'n*, 679 F.2d 316, 318 (3d Cir. 1982).

62. *Community Nat'l Bank and Trust Co. of New York v. Persky (In re Persky)*, 893 F.2d 15 (2d Cir. 1989) (by necessary implication because the case turned on whether the trustee could order a sale of the property under section 363(h)); *Liberty State Bank and Trust v. Grosslight (In re Grosslight)*, 757 F.2d 773, 775 (6th Cir. 1985) (without reference to state law); *Chippenham Hosp., Inc. v. Bondurant (In re Bondurant)*, 716 F.2d 1057, 1058 (4th Cir. 1983) (although the case concerned Virginia property, the court determines the property to be within the estate without reference to state law).

63. *See, e.g., Virginia Nat'l Bank v. Martin (In re Martin)*, 20 Bankr. 374, 376 (Bankr. E.D. Va. 1982); *Michigan Nat'l Bank v. Chrysler (In re Trickett)*, 14 Bankr. 85, 89 (Bankr. W.D. Mich. 1981); *In re Barsotti*, 7 Bankr. 205, 210 (Bankr. W.D. Pa. 1980).

Interestingly, the court in *Barsotti* stated the following:

even if it were argued that entirety property was not includable under § 541(a)(1), § 541(a)(2) includes in the debtor's estate all interests of the debtor and the debtor's spouse in community property . . . (A) under the sole, equal or joint management and control of the debtor." Since husband and wife manage and control tenancy by the entirety property as a "sole" natural person, it is clear that entirety property is included as property of the debtor's estate.

Barsotti, 705 Bankr. at 210 (citations omitted).

Section 541(a)(2) was also considered by the court in *Ford* as a grounds for including the debtor's entirety interest. The *Ford* court dismissed this section as an independent provision for including entirety property, saying that it "is merely a further clarification of the broad scope of § 541(a)(1)." *Ford*, 3 Bankr. at 569.

64. 3 Bankr. 49 (Bankr. N.D. Ind. 1980).

65. *Id.* at 56.

tenancy by the entirety rights,⁶⁶ the court held that, while Congress certainly had the constitutional power to alter state property rights in pursuit of "uniform laws on the subject of Bankruptcies throughout the United States,"⁶⁷ the language and history of section 541 are insufficient to warrant a change in state entirety law.⁶⁸

In Missouri, before the instant case, bankruptcy courts had consistently held that a debtor's interest in entirety property was not included in the bankruptcy estate. The first case to do so was *Miner v. Anderson (In re Anderson)*.⁶⁹ Noting that another court looked to state law to determine whether section 541 included a debtor's interests in entirety property,⁷⁰ the *Anderson* court looked to Missouri entirety law to determine whether the debtor had a legal or equitable interest in the property.⁷¹ The *Anderson* court distinguished other decisions by determining that "[u]nlike the Maryland version of tenancy by the entirety, the Missouri version has no right of survivorship as such."⁷² Therefore, the court found that the debtor, as an individual, had no right to the use, enjoyment, or income from the property. These rights vest in the "entiretyship;" in essence, the "legal unity of husband and wife."⁷³ Because the estate is "not held by the moieties or halves, but both tenants hold and own the entire estate *as a single person*," the court found it "signally clear" that the debtor had no legal or equitable interest, and thus no part of the tenancy by the entirety property could become part of the estate.⁷⁴ The *Anderson* court disregarded the legislative history discussed in other opinions, and focused on the permissive language found in the House

66. See *supra* note 41 and accompanying text.

67. U.S. CONST. art. I, § 8, cl. 4.

68. *Jeffers*, 3 Bankr. at 57.

69. 12 Bankr. 483, 490 (Bankr. W.D. Mo. 1981).

70. *In re Koehler*, 6 Bankr. 203 (Bankr. M.D. Fla. 1980) (holding that Florida law permits including debtor's entirety interests in the bankruptcy estate). The court in *Anderson* does not refer to the striking similarities between Florida and Missouri entirety law. See, e.g., *Sharp v. Hamilton*, 520 So.2d 9 (Fla. 1988) (entirety properties are immune from process of either spouse, but not creditors of both spouses); *United States Fidelity and Guar. Co. v. Hiles*, 670 S.W.2d 134 (Mo. Ct. App. 1984) (same); see also Note, *Administration of Entireties*, *supra* note 2, at 331-32, 337 (characterizing Florida and Missouri law as substantially identical in all relevant respects). The Court in *Anderson* also does not offer any explanation as to why they reached exactly the opposite conclusion as the court in *Koehler*.

71. *Anderson*, 12 Bankr. at 488-91.

72. *Id.* at 489.

73. *Id.*

74. *Id.* (citing *Leuzinger v. Merrill Lynch, Pierce, Fenner & Smith*, 396 S.W.2d 570, 580 (Mo. 1965) (en banc) (court's emphasis)).

Committee Report⁷⁵ to support its finding that section 541 does not change the treatment of tenancies by the entirety in bankruptcy in Missouri.⁷⁶ The court noted that its conclusion perpetuated "the unsatisfactory situation which existed under the old Bankruptcy Act,"⁷⁷ but that the result reached was "exactly compelled."⁷⁸

Bankruptcy courts in Missouri continued the approach adopted in *Anderson* until 1987 when the Bankruptcy Court for the Western District of Missouri decided the case of *In re Townsend*.⁷⁹ Finding that "Missouri had demonstrated its willingness to abandon the aged and outmoded fiction that husband and wife are under all circumstances, one person in the law," the court concluded that it would no longer "trap the joint creditors of such a union in an ancient time warp for bankruptcy purposes in bankruptcy

75. Section 541 "provides a method by which the estate *may* realize on the value of the debtor's interest in the property while protecting the [non-filing spouse's] rights." H.R. REP. NO. 595, 95th Cong., 2d Sess. 177, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6137.

The *Anderson* court believed that the use of the word "may," "necessarily mean[t] that, in states like Missouri, where the entiretyship gives the debtor, standing alone, no legal or equitable right, the entirety property cannot be deemed to have passed into the estate in bankruptcy." *Anderson*, 12 Bankr. at 490. One commentator labeled the *Anderson* court's construction of the permissive language in the legislative history as "unnecessary." Note, *Administration of Entireties*, *supra* note 2, at 312 n.34. Given the context of the statement and the phrases following it, a more natural interpretation is for "may" to refer to the possibility of a sale by the trustee in those cases where the criteria of Section 363(h) can be satisfied. *Id.*

76. *Anderson*, 12 Bankr. at 490.

77. The court was aware that by forcing the joint creditors to pursue the type of remedy described in *In re Magee*, see *supra* notes 23-26 and accompanying text, a race would ensue. *Anderson*, 12 Bankr. at 490. The creditor who was able to get the stay lifted first would likely be the first to obtain judgment and writ of execution in the state court and "thus, in all likelihood, . . . obtain the property held in the tenancy by the entirety to the exclusion of the other [joint] creditors." *Id.* The court held that, while a *pro rata* distribution under the rules of bankruptcy administration was a more desirable outcome, it was not possible under the current statute. *Id.* at 490-91. The court reconciled itself to the less than desirable outcome saying, "[T]he court cannot be wiser than the law." *Id.* at 491.

78. *Anderson*, 12 Bankr. at 490-91.

79. 72 Bankr. 960 (Bankr. W.D. Mo. 1987).

estates."⁸⁰ Thus, *Townsend* states that section 541 requires a Missouri debtor's interest in entirety property to be included in the bankruptcy estate.⁸¹

By reaching this conclusion, the court in *In re Townsend* avoided the recurrence of the "unsatisfactory situation" from which the *Anderson* court had not been able to extricate itself.⁸² *In re Townsend* stated that a more logically consistent and procedurally efficient position is advanced if the bankruptcy estate administers entirety properties.⁸³ The *Townsend* court also noted, as did the *Anderson* court, that the stay-lifting procedure often results in a race among joint creditors to gain an unfair advantage while "each joint creditor . . . incur[s] duplicative expenses in its separate motions and state court actions."⁸⁴

In addition, the court in *In re Townsend* raised three arguments that call into question the continued validity of the stay-lifting procedure under the 1978 Code.⁸⁵ First, the court found that if the debtor's interest is subsequently exempted under section 522, "then most pre-petition judicial liens on that property would impair that exemption and are thus avoidable under Section 522(f)(1)."⁸⁶ Additionally, the court warned that a debtor might

80. *Id.* at 963. The "willingness" to which the court referred was illustrated solely by the Missouri Supreme Court's decision in *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (en banc). The *Townsend* bankruptcy court noted the following:

In the *Townsend* case, the Supreme Court of Missouri, sitting en banc, did away with the doctrine of unity of husband and wife insofar as that doctrine would prevent a wife from suing her husband in tort for an allegedly intentional gunshot wound. In so doing, it did not purport to detract from any element of tenancy by the entirety under the law of Missouri.

Townsend, 72 Bankr. at 963. Then, in a burst of judicial honesty, the court continued: "What is stated in [our opinion] which follow[s] is stated by way of *prognostication* of what the law of Missouri may be in this respect in the future, based upon the dictum contained in the *Townsend* case." *Id.* (emphasis added). No appeal from this decision was taken and the district court was denied a chance to comment until 1990.

81. *Id.* at 964-65.

82. See *supra* notes 69-78 and accompanying text.

83. *Townsend*, 72 Bankr. at 965. "[T]he delay injected into the bankruptcy case by the lift-of-stay procedure works to the detriment of both the debtor, who is awaiting a fresh start, and the other creditors of the estate, who await distribution of the assets." *Id.* at 968. See also *Rensenhause Elec. Supply Co. v. Magee (In re Magee)*, 415 F.Supp. 521 (W.D. Mo. 1976).

84. *Townsend*, 72 Bankr. at 968.

85. *Id.*

86. *Id.* Section 522(f) provides, in pertinent part:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been

avoid post-petition liens under Section 522(f)(1).⁸⁷ Finally, the court cautioned those who would use the stay-lifting procedure that Section 522(c) requires property exempted under Section 522 will not be subject, either during or after any bankruptcy case, to any pre-petition lien.⁸⁸

The law of *In re Townsend* stood until the one-two punch of *Garner v. Strauss*⁸⁹ and *Skinner v. Checkett*.⁹⁰ In these two opinions, written within eight weeks of each other, the United States District Court for the Western District of Missouri overruled *In re Townsend*, describing it as erroneously decided,⁹¹ an aberration,⁹² and contrary to the result mandated by applicable bankruptcy and state law.⁹³ After reviewing Missouri law, the court in *Garner* stated that "the inevitable conclusion . . . [is] that the bankrupt-debtor, without [the non-filing spouse] has no legal or equitable interest in the property by the entirety, and thus the property cannot be included in the bankruptcy estate."⁹⁴ Thus, both *Garner* and *Skinner* returned to the rule of *Anderson*, holding that the debtor's interest in entirety property does not pass to the bankruptcy estate.⁹⁵

The Missouri courts, therefore, after the *Garner* and *Skinner* cases, but prior to *In re Charles*, were a distinct minority, holding that a debtor had no interest in an entirety estate that passes to the trustee in bankruptcy.

entitled under subsection (b) of this section, if such lien is -

(1) a judicial lien;

11 U.S.C. § 522(f) (1988).

87. *Townsend*, 72 Bankr. at 968. (citing *Sumy v. Schlossberg (In re Sumy)*, 777 F.2d at 930 n.22 (4th Cir. 1985)).

88. *Id.*

89. 121 Bankr. 356 (Bankr. W.D. Mo. 1990).

90. No. 88-5144-CV-SW-8 (W.D. Mo. Jan. 10, 1991) (LEXIS, Genfed library, Dist. file).

91. *Id.*

92. *Garner*, 121 Bankr. at 359.

93. *Id.*

94. *Id.* at 360. Interestingly, this exact language re-appears in *Skinner* without citation to *Garner* or any other source.

95. *Id.*; *Skinner*, No. 88-5144-CV-SW-8, slip op. at 5. Both courts noted that the shift from the "legal unity" theory of entirety properties, which the *In re Townsend* court believed *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (en banc) foreshadowed, had not materialized. *Garner*, 121 Bankr. at 360 (citing *Strout Realty, Inc. v. Henry*, 758 S.W.2d 197 (Mo. Ct. App. 1988) (holding that *Townsend v. Townsend* did not extinguish unity in entireties law)); *Skinner*, No. 88-5144-CV-SW-8, Slip op. at 4 (citing *Ronollo v. Jacobs*, 775 S.W.2d 149, 151-52 (Mo. 1989) (in Missouri entirety property "[e]ach spouse is seized of the whole or entirety and not a share, moiety or divisible part"))

B. If a part of the estate, may a debtor exempt his interest in tenancy by the entirety property under section 522(b)(2)(B)?

The Bankruptcy Code provides a federal scheme of exemptions available to a debtor in bankruptcy.⁹⁶ Section 522(b) states that this list of exemptions is available to the debtor "unless the State law that is applicable to the debtor . . . does not so authorize."⁹⁷ Missouri has, along with a majority of other states,⁹⁸ chosen to "opt-out" of this federal exemption scheme.⁹⁹ Thus, a debtor in Missouri must rely on the provisions of section 522(b)(2)(A)-(B) to protect those assets needed for a "fresh start." As alluded to in Section I of this Note, Congress has specifically provided for the treatment of property owned as a tenant by the entirety in section 522(b)(2)(B).¹⁰⁰

The legislative history of section 522(b)(2)(B) is inconclusive and provides no clear guidance for the correct application or interpretation of this statute.¹⁰¹ A proposed amendment, stating that tenancy by the entirety property could be exempted "to the extent that such property or interest in property is exempt or not subject to process or levy under [nonbankruptcy] law . . . or is exempt or not subject to levy by a creditor, of only the debtor, . . . under State or local law"¹⁰² would have shed light on the question. This

96. 11 U.S.C. § 522(d) (1988).

97. *Id.* § 522(b).

98. 7 COLLIER ON BANKRUPTCY 1 n.6 (15th ed. 1985).

99. MO. REV. STAT. § 513.427 (1986).

100. Section 522(b) reads, in part, as follows:

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

(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.

11 U.S.C. § 522(b) (1988).

101. Note, *Administration of Entireties*, *supra* note 2, at 315, n.57.

102. 126 CONG. REC. S15,163; 126 Cong. Rec. H9,293. In *Napotnik*, both the debtor and the trustee sought to use this thwarted amendment to advance their cases. *Napotnik v. Equibank & Parkvale Sav. Ass'n*, 679 F.2d 316, 321 (3d Cir. 1982). The debtor argued that this meant that the section, as it stood unamended, must be substantively different than that proposed. Conversely, the trustee posited that the proposed amendment was merely a clarification of an unarticulated congressional intent. *Id.* The court neglected to hypothesize congressional intent based on the negative implication of unenacted language. *Id.* However, the court did state that "[i]f congress has mistakenly disguised its actual intent by incorporating language pointing in a different direction, it is not up to us to rewrite the statute . . ." *Id.*

amendment, however, was defeated for reasons unrelated to these provisions.¹⁰³

The majority of courts that have reached this issue have decided that the debtor's interest in tenancies by the entirety is not exempt from the trustee's administration when the debtor is liable on joint debts with the other spouse. Proceeds from the property that are beyond what is necessary to satisfy the joint obligations are exempt from the bankruptcy estate under section 522(b)(2)(B).

A Florida bankruptcy court was one of the earliest courts to formulate this rule. In *In re Koehler*,¹⁰⁴ the court stated that because joint creditors could levy against the entirety property absent the automatic stay of bankruptcy, this property is not "exempt from process" and is therefore not exempt under section 522(b)(2)(B).¹⁰⁵

In 1982, the Court of Appeals for the Third Circuit addressed these issues in *Napotnik v. Equibank and Parkvale Savings Association (In re Napotnik)*.¹⁰⁶ The *Napotnik* court determined that joint creditors have always been able to levy on tenancy by the entirety property in Pennsylvania.¹⁰⁷ "Because the interests of both are available to the creditors of both, the debtor's interest is *not unavailable* and thus is not 'exempt from process' under the law of Pennsylvania."¹⁰⁸ But, because section 522(b)(2)(B) allows an exemption only "to the extent" that Pennsylvania exempts the property, the court held that the debtor could not claim as exempt that portion of his entirety property needed to satisfy joint creditors.¹⁰⁹

Until 1985, the Fourth Circuit stood alone in holding that the entire interest of the debtor in entirety property could be exempted under section 522(b)(2)(B).¹¹⁰ The unique reasoning employed by the Fourth Circuit was that because only the interests of the debtor in the entirety property are brought into the estate,¹¹¹ and because joint creditors cannot levy solely on the interests of one spouse when the property is held in tenancy by the entirety,¹¹² the interests of the debtor are "exempt from process" in Mary-

103. *Id.*

104. 6 Bankr. 203, 206 (Bankr. M.D. Fla. 1980).

105. *Id.*

106. 679 F.2d 316, 318 (3d Cir. 1982).

107. *Id.* at 320.

108. *Id.* at 321 (emphasis added).

109. *Id.* at 321-22. In 1985 the Court of Appeals for the Sixth Circuit adopted the reasoning of the *Napotnik* decision in *Liberty State Bank & Trust v. Grosslight (In re Grosslight)*, 757 F.2d 773, 776-77 (6th Cir. 1985).

110. *Ford*, 3 Bankr. at 576.

111. *See supra* note 33 and accompanying text.

112. *Ford*, 3 Bankr. at 576. "In order for the joint creditors to execute upon <https://scholarship.law.missouri.edu/mlr/vol56/iss3/11>

land, and thus exempt from the estate under section 522(b)(2)(B).¹¹³ This reasoning prevailed in the Fourth Circuit until *Sumy v. Schlossberg (In re Sumy)*¹¹⁴ was decided. The *Sumy* court first held that *Ford* did not control the case because the language dealing with the presence of joint creditors was dicta.¹¹⁵ The court wrote that "because each spouse owns the whole estate and each spouse is liable for the whole debt, it is a false distinction to declare that a joint creditor cannot reach a spouse's individual undivided interest in entireties property."¹¹⁶ The *Sumy* court also noted that the *Ford* reasoning had been rejected by *Napotnik*, *Grosslight*, and a majority of bankruptcy courts in other states with similar tenancy by the entirety law.¹¹⁷ The court then brought the Fourth Circuit in line with these courts, holding that, to the extent there are joint creditors, the debtor's interest in the tenancy by the entirety may not be exempted and must remain in the bankruptcy estate to satisfy the joint creditors.¹¹⁸ "[T]he guiding principle of all of our relevant cases [is] that joint creditors are entitled, and should in some manner be allowed, to reach entireties property to satisfy their claims."¹¹⁹

The Missouri cases, holding that the debtor's interest in tenancy by the entirety property does not become subject to the trustee's administration,¹²⁰ seldom reach the question of exemption. The overruled *Townsend* court, because of its unique construction of Missouri law, reached this issue and was persuaded by the majority approach as represented by *Grosslight* and *Napotnik*.¹²¹

entireties property, the husband's interests must be joined with the interests of the co-tenant wife. As a result, the debtor's interest in entireties property, standing alone, is unavailable to the joint creditor." *Id.*

113. *Id.*

114. 777 F.2d 921 (4th Cir. 1985).

115. *Id.* at 926. Neither the facts as stated, nor the relief ultimately granted, indicate the actual presence of joint creditors in the case. *Id.*

116. *Id.* at 928 n.13 (citing *Liberty State Bank v. Grosslight (In re Grosslight)*, 757 F.2d 773, 776 (6th Cir. 1985)).

117. *Id.* at 929. The court cites extensive authority from Pennsylvania, Maryland, Vermont, Delaware, Virginia, Michigan and Florida. *Id.* at 929 n.16. These states are all considered to have tenancy by the entirety property laws that are substantially similar to Missouri law. Note, *Administration of Entireties*, *supra* note 2, at 337.

118. *Sumy*, 777 F.2d at 932.

119. *Id.* at 926.

120. See *supra* note 42-59 and accompanying text.

121. *Townsend*, 72 Bankr. at 965.

III. THE LANDMARK BANK V. CHARLES (IN RE CHARLES) DECISION

In January of 1991, after both *Garner*¹²² and *Skinner*¹²³ had been decided, the Bankruptcy Court for the Eastern District of Missouri addressed for the first time¹²⁴ the issue of bankruptcy entirety property in *Landmark Bank v. Charles (In re Charles)*.¹²⁵ *In re Charles* is squarely in line with the majority of jurisdictions. The court held that funds in a bank account that are owned as tenants by the entirety are part of the bankruptcy estate,¹²⁶ and expressly declined to follow the reasoning of *Anderson* or *Garner*.¹²⁷ Relying on an analysis of the legislative history, the court in *In re Charles*

122. See *supra* note 89.

123. See *supra* note 90.

124. This statement is not altogether accurate. There have been at least two prior cases on point in the eastern district. In *Kodner v. Raack (In re Kodner)*, 1 BAMSLS 841 (1982) (Bar Association of Metropolitan St. Louis, Bankruptcy Reporter, Vol. I.), the court held that under section 541 there is no requirement that the debtor have a transferable interest, or even a "separate and distinct" interest. *Id.* at 848. Therefore, even though a debtor in Missouri has no separate interest in tenancy by the entirety property, "he does have certain rights and incidents of ownership which, however small, are sufficient to include his interest in the entirety property as part of the bankruptcy estate." *Id.* The question presented by the case was whether to lift the automatic stay. As a result, the court did not reach the question of exemptibility under section 522.

In *Mann v. Carter (In re Carter)*, 2 BAMSLS 700 (1983) (Bar Association of Metropolitan St. Louis, Bankruptcy Reporter, Vol. II.), the court held that where only one spouse has petitioned for bankruptcy, the entirety property escapes bankruptcy administration either because it never comes into the estate or because, once in, it is exempt under Section 522(b)(2)(B). *Id.* at 705. It should be noted that the court relied heavily on *Chippenham Hosp., Inc. v. Bondurant*, 716 F.2d 1057 (4th Cir. 1983), a 1973 case which upheld the continued vitality of the pre-Code practice of lifting the automatic stay as a device to protect joint creditors. The *Bondurant* case was followed, in 1985, by *Sumy v. Schlossberg (In re Sumy)*, 777 F.2d 921 (4th Cir. 1985), which held that the preferred remedy is to administer such estates in bankruptcy rather than through non-bankruptcy means. *Id.* at 931-32.

This Note continues to pose *In re Charles* as the breakthrough case in the Eastern District of Missouri because, interestingly, neither the *Kodner* nor the *Mann* case has apparently ever been relied on by any subsequent decision and neither has been subjected to the rigorous study which more publicized opinions receive.

125. 123 Bankr. 52 (Bankr. E.D. Mo. 1991).

126. *Charles*, 123 Bankr. at 55.

127. *Id.* at 53 n.2. The court first noted that *Lockwood* had been expressly overruled by the new section 541(a)(1), *Id.* at 53 n.1, and then based its refusal to follow *Garner* and *Anderson* on the fact that their approach too closely paralleled the pre-Code analysis which *Lockwood* embodied. *Id.* at 53.

found that "[i]t is clear that the drafters of the Code contemplated that all interests of the debtor, including those held by the entirety, would be included, at least initially, in the estate."¹²⁸ Even though a tenant by the entirety in Missouri may only exercise rights to the property when acting as part of the fictional unity, "the Court finds that this ability to act represents an interest cognizable under section 541(a)."¹²⁹

Despite the similarity of results, the court in *In re Charles* declined to follow the reasoning of *In re Townsend*.¹³⁰ This followed from the court's view that, regardless of the outcome of the analysis, any "state law analysis should be conducted *after* the property has been brought into the estate by operation of section 541(a), not before."¹³¹

Addressing the question of exemption under section 522, the court in *In re Charles* employed the standard majority approach. The court noted that the state property law in the state where the property is located is to determine the scope of the section 522(b)(2)(B) exemption.¹³² This requires a review of Missouri entireties law.¹³³ "[U]nder Missouri law, entireties property is not exempt from process to the extent of joint debts."¹³⁴ Therefore, the debtor's funds, held as a tenant by the entirety, are not exempt from administration to the extent of the joint debts.¹³⁵ "Any money remaining after the joint debts of Julie and Cecil Charles are satisfied shall be subject to exemption pursuant to 11 U.S.C. § 522(b)(2)(B)."¹³⁶ With this decision, Missouri bankruptcy courts return to the majority.

128. *Id.* at 54 n.3 (citing *Napotnik v. Equibank & Parkvale Sav. Ass'n*, 679 F.2d 316, 318 (3d Cir 1982)).

129. *Id.* at 54.

130. *Id.* at 54 n.3.

131. *Id.* (emphasis added). The court revisited the issue of timing a bankruptcy court's analysis of state entirety law later in the opinion. *Id.* at 54.

It is also clear that the court in *In re Charles* rejected the "novel construction of Missouri property law" put forward by the *In re Townsend* court. *Id.* at 54 n.3.

132. *Id.* at 54 (citing *Butner v. United States*, 440 U.S. 48, 54 (1979)).

133. The bank account was located in Creve Coeur, Missouri. *Id.*

134. *Id.* at 54-55 (citing *United States v. Hutcherson*, 188 F.2d 326, 330 (8th Cir. 1951) (only joint creditors of a husband and wife may execute against entirety property); *Stifel's Union Brewing Co. v. Saxy*, 273 Mo. 159, 170-71, 201 S.W. 67, 71 (Mo. 1918) (same)).

135. *Id.* at 55.

136. *Id.*

IV. NEW ISSUES ARISING OUT OF THE MAJORITY APPROACH

A. *Unequal Treatment of Legally Equal Creditors*

In 1981, early in the development of case law surrounding the 1978 Code, one court put forth in bold fashion:

One of the longtime principles of bankruptcy law is that all creditors of each class shall be treated equally [T]here should be orderly administration of debtor's property without a race by creditors for judgments and liens which give priority to the more aggressive creditors Instead, this court will exercise its jurisdiction over the entireties property and administer the entireties property for the equal benefit of all joint creditors.¹³⁷

It is unlikely this court foresaw that the procedure it was adopting would ultimately be challenged as violating the very principle it was thought to further.

Under the 1898 Act, the Supreme Court of the United States formulated what has become a guiding principle in bankruptcy administration. In *Moore v. Bay*,¹³⁸ the Court stated that a creditor, on whose claim the bankruptcy trustee is able to void a transfer by the debtor, receives no special consideration.¹³⁹ Rather, what is recovered "for the benefit of the estate is to be distributed in 'dividends of an equal percentum' on all allowed claims, except such as have priority or are secured."¹⁴⁰ Despite criticism of the opinion, Congress expressly approved it, and the opinion continued in the context of current Bankruptcy Code section 544(b).¹⁴¹

The doctrines of tenancies by the entirety in bankruptcy and *Moore* conflicted during the late 1980's. A United States District Court in Florida overturned a decision in which the bankruptcy court relied on *Moore*. The bankruptcy court held that so long as there existed one joint creditor who could attach the property, the tenancy by the entirety property would not be exempt from the estate, but would be administered for the benefit of all creditors, whether joint or sole.¹⁴² The district court reversed this decision,

137. *Michigan Nat'l Bank v. Chrysler (In re Trickett)*, 14 Bankr. 85, 90 (Bankr. W.D. Mich. 1981) (citations omitted) (eschewing the stay-lifting remedy in favor of making the debtor's interest in entirety property part of the bankruptcy estate).

138. 284 U.S. 4 (1931).

139. *Id.* at 5.

140. *Id.* See also 11 U.S.C. § 726 (1988).

141. 11 U.S.C. § 544(b) (1988).

142. *Pepenella v. Life Insurance Co. of Georgia (In re Pepenella)*, 103 Bankr.

choosing instead the majority position of rendering the proceeds of tenancy by the entirety property available only to joint creditors.¹⁴³ The court did not address the question raised by the *Moore* analogy.

In *In re Oberlies*,¹⁴⁴ the bankruptcy court discussed extensively the concerns first voiced in the Florida bankruptcy court decision. In *Oberlies*, the trustee argued that there is no statutory basis requiring the trustee to administer two separate estates, one for joint creditors and one for sole creditors. The trustee insisted that the rule adopted by the majority required the trustee to do just that.¹⁴⁵ This result is mandated by state property law, which must prevail unless some overriding federal policy that takes precedence is presented.¹⁴⁶ The mere lack of legislation authorizing dual estates is insufficient to indicate the existence of such an overriding policy.¹⁴⁷ The trustee made a strong argument, warning that administering two estates would eventually lead to paying unsecured, low priority, joint creditors while higher priority sole creditors received nothing.¹⁴⁸ The court replied that it was only "[b]ankruptcy administration [which] ought not effect any change in these substantive property rights. However since joint creditors could collect from such property, bankruptcy laws ought not dilute the substantive right by making it subject to *pro rata* distribution with others who lack such rights outside of bankruptcy."¹⁴⁹

The argument that operating a dual estate, with a pool of assets entirely for the joint creditors, violates sections 544 and 726 finally prevailed in *In re Amici*.¹⁵⁰ *Amici* stated that so long as there are joint creditors, and the criteria under section 363(h) are met,¹⁵¹ the trustee can sell the interests of

299, 301 (Bankr. M.D. Fla. 1988), *overruling In re Pepenella*, 79 Bankr. 76 (Bankr. M.D. Fla. 1987).

143. *Id.* at 302.

144. 94 Bankr. 916 (Bankr. E.D. Mich. 1988).

145. *Id.* at 920.

146. *Id.* (citing *Butner v. United States*, 440 U.S. 48 (1979)).

147. *Id.*

148. *Id.*

149. *Id.* (emphasis added). In *In re Geoghegan*, 101 Bankr. 329 (Bankr. M.D. Fla. 1989), the bankruptcy court expressed discomfort with the rule laid down in *Pepenella* and *Oberlies*, finding it inconsistent with the Code's distribution guidelines under section 726. *Id.* at 331.

150. 99 Bankr. 100 (Bankr. M.D. Fla. 1989).

151. Section 363(h) reads, in pertinent part:

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

both the debtor and the debtor's non-filing spouse, and use the proceeds to satisfy all creditors and not just joint creditors.¹⁵² The court reasoned that the Code clearly recognizes that, under section 363(h), the trustee must, under appropriate circumstances, be able to sell the entire tenancy by the entirety property to preserve the rights that joint creditors enjoy outside of bankruptcy.¹⁵³ To allow the trustee to use the proceeds only for joint creditors, however, clearly violates the distribution scheme of section 726 and the holding in *Moore*.¹⁵⁴ This is because it would create a sub-class of creditors (joint unsecured creditors) who would receive more beneficial treatment from the trustee than sole unsecured creditors, even though those creditors hold claims of legally the same rank.¹⁵⁵ Therefore, although the court acknowledged the decision in *In re Pepenella*, it reached the opposite result.¹⁵⁶

The converse of the argument posed in *Moore* was presented to the bankruptcy court in *Michigan Nat'l Bank v. Chrysler (In re Trickett)*.¹⁵⁷ Sole creditors sought to invoke the equitable doctrine of marshaling to force joint creditors to seek their satisfaction from the tenancy by the entirety property before the general estate was distributed to all creditors.¹⁵⁸ The marshaling doctrine, however, cannot be used to circumvent a state law exemption.¹⁵⁹ As a result, the bankruptcy court held that this rationale

(1) partition in kind of such property among the estate and such 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 such 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 distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h) (1988).

152. *Amici*, 99 Bankr. at 103.

153. *Id.* at 102.

154. *Id.*

155. *Id.*

156. *Id.* at 103. The most recent effort in this struggle was written in the northern district of Florida. There, the bankruptcy court held, employing rather awkward logic, that the sub-class of preferred creditors about which *In re Amici* warned would not exist because if they did they would violate section 726; therefore, no such class exists. *In re Boyd*, 121 Bankr. 622, 623 (Bankr. N.D. Fla. 1989).

157. 14 Bankr. 85, 91 (Bankr. W.D. Mich. 1981).

158. *Id.*

159. *Meyer v. United States*, 375 U.S. 233 (1963).

should also apply to tenancies by the entirety in bankruptcy.¹⁶⁰ The bankruptcy court concluded that "marshaling is inappropriate and that the joint debtors should first proceed to obtain their distribution out of the general estate and then proceed against the entirety estate for the balance."¹⁶¹

B. Practice Considerations

If *In re Charles* changes the Missouri treatment of tenancies by the entirety when a married debtor files for bankruptcy without the other spouse,¹⁶² then a new approach is required in pre-petition counseling of debtors considering bankruptcy. Tenancy by the entirety property may no longer be the "safe haven" it once was. Prior to *In re Charles*, entirety property was beyond the reach of the bankruptcy trustee. Now, debtors retain only the ability to prevent any of the value of these properties from benefiting sole creditors. The debtor now faces the daunting and uncertain prospect of having the trustee, under section 363(h), sell assets held as tenants by the entirety to satisfy the debtor's joint creditors. This leaves the debtor and spouse only the surplus cash. Additionally, because section 363(h) sets out a four-part balancing test,¹⁶³ this issue will have to be litigated in every case, driving up the legal fees of debtors and creditors alike.

The legislative history of the Code is clear that purposeful conversion of non-exempt assets to exempt assets on the eve of bankruptcy is not fraudulent *per se*.¹⁶⁴ Conversions are prohibited, however, when done with an actual intent to defraud creditors.¹⁶⁵ One author noted a high correlation between findings of actual intent and a significant increase in exempt assets shortly before filing.¹⁶⁶ Missouri courts do not hesitate to set aside conveyances that resulted in tenancies by the entirety when actual intent to defraud creditors is shown.¹⁶⁷

160. *Trickett*, 14 Bankr. at 92.

161. *Id.*

162. If the United States Court of Appeals for the Eighth Circuit follows each of the other circuits in confronting these issues, then this shift may occur as a product of the pending appeal of *Garner v. Strauss*, 121 Bankr. 356 (W.D. Mo. 1990), *appeal docketed*, No. 90-3068WM (8th Cir. Dec. 20, 1990).

163. *See supra* note 150.

164. H.R. REP., *supra* note 39, at 6138-39.

165. 3 COLLIER ON BANKRUPTCY § 522.08[4], at 522-33 to -34 (15th ed. 1981).

166. *Estates by the Entirety in Bankruptcy*, *supra* note 2, at 401 n.16., *see also* Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615 (1978).

167. *In re Myers*, 383 F. Supp. 251 (W.D. Mo. 1973); *Bank of New Cambria v.*

V. CONCLUSION

One court, weary of sorting its way through the new 1978 Code, stated that "[i]n essence, this Court faces a conundrum created by Congress' lack of understanding of the concept of tenants by the entireties property."¹⁶⁸ A commentator placed the blame on the common law concept of tenancies by the entirety and stated that "[i]t is doubtful that the immunity from creditors began as a deliberate policy end of the state; [that is] whether at any point in time the state has consecrated a preexisting practical exemption into a rationally designed coherent exemption plan which the federal bankruptcy law ought to respect."¹⁶⁹

Each solution fashioned by the bankruptcy courts has created additional unanswered, and perhaps unanswerable, questions. Judge Conrad, Bankruptcy Judge for the District of Vermont, may have stumbled upon an answer in 1990 when he stated in a footnote:

An issue which came to mind during our research on this question is whether Section 363(h) preempts Vermont's entirety law because it frustrates the underlying Federal bankruptcy scheme. The outcome of [the present] matter does not require us to inquire into Section 363(h)'s preemption effect, but it certainly will have to be decided another day.¹⁷⁰

Perhaps it was the lure of a unified approach, of clean crisp guidelines, that led Judge Conrad to raise the issue of federal preemption; or perhaps it was the wisdom of knowing that, should a court erroneously decide a statute has preemptive effect, Congress is apt to offer more clarity on the subject the next time around. Either way, debtors and creditors would both benefit from a unified and predictable approach to this common issue in bankruptcy.

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Briggs, 361 Mo. 723, 236 S.W.2d 289 (Mo. 1951); *Barnard v. Barnard*, 568 S.W.2d 567 (Mo. Ct. App. 1978).

168. *Virginia Nat'l Bank v. Martin (In re Martin)*, 20 Bankr. 374, 377 (Bankr. E.D. Va. 1982).

169. Kalevitch, *supra* note 2, at 144 n.15.

170. *In re Cerreta*, 116 Bankr. 402, 404 n.3 (Bankr. D. Vt. 1990) (citations omitted).