FEDERAL BAR ASSOCIATION – BANKRUPTCY SECTION NEWSLETTER

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BANKRUPTCY SECTION STEERING COMMITTEE	NEWS & ANNOUNCEMENTS
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PIERCINGS AND VEILS: NOT JUST FOR PUNK ROCK BANDS

Is a Claim for piercing the corporate veil property of the estate?

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Creditors have a number of weapons to combat attempts by a debtor to put its assets beyond their reach. The most common is the power to avoid fraudulent conveyances. The Bankruptcy Code expressly provides that trustees in bankruptcy have the right to assert fraudulent conveyance claims on behalf of the estate either under the direct language of the Code or under state law. *See* 11 U.S.C. § 548.

But what about claims to pierce the corporate veil? Often a creditor may allege that the corporation behind which the true debtor hides is but a flimsy pretext erected solely to avoid liability for the actions of the principal. Are these claims against the bankruptcy debtor pursuable by a trustee? There is no equivalent to § 548 empowering a trustee to assert these claims on behalf of creditors, and so we must start with the question of whether such a claim would be property of the estate subject to liquidation by a trustee. Under 11 U.S.C. § 541(a)(1), the bankruptcy estate encompasses, with some exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case." In *Butner v. United States,* 440 U.S. 48, 55 (1979), the Supreme Court stated, "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."

Michigan law provides that a corporation's veil may be pierced, making the principals of the corporation personally liable for its debts, in limited appropriate circumstances. The test for piercing the corporate veil was described in *Florence Cement Co. v. Vittraino,* 292 Mich. App. 461, 807 N.W.2d 917 (2011). The court there stated as follows:

> The rules regarding piercing a corporate veil are applicable in determining whether to pierce the corporate veil of a limited-liability company. While "[t]here is no single rule delineating when the corporate entity may be disregarded[,] ... [t]he entire spectrum of relevant fact forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate form has been abused." In order for a court to order a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality of another individual or entity, (2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff.

Id. at 468-9 (footnotes omitted). Assuming that these factors can be established, can a bankruptcy trustee assert such a claim on behalf of the estate?

The answer in Michigan appears to be that a trustee cannot do so. *Spartan Tube & Steel, Inc. v. Himmelspach (In re RCS Engineered Products Co.),* 102 F.3d 223 (6th Cir. 1996). In *RCS Engineered Products,* the plaintiff joined with other creditors in filing an involuntary bankruptcy against the debtor, and the following day commenced a state court proceeding against the parent

seeking to pierce the debtor's veil and assert its claims against the debtor's parent company. The case proceeded under chapter 7 and the trustee brought an adversary proceeding against the parent seeking to pierce the veil as well. The parent then brought a declaratory judgment action in state court against both the creditor and the trustee asserting that only one of the claims could proceed. The trustee removed that case to bankruptcy court, and the bankruptcy court ruled that the piercing claim was property of the estate that could be pursued only by the Trustee.

The Sixth Circuit reversed. In doing so, it cited *Butner, supra,* and looked to Michigan law:

> "[T]he general principle in Michigan is that separate corporate identities will be respected, and thus corporate veils will be pierced only to prevent fraud or injustice." *Wodogaza v. H & R Terminals, Inc.,* 161 Mich.App. 746, 756, 411 N.W.2d 848, 852 (1987). *See also Wells v. Firestone Tire and Rubber Co.,* 421 Mich. 641, 650, 364 N.W.2d 670, 674 (1984). A court may find that one entity is the alter ego of another and pierce the corporate veil upon proof of three elements: first, the corporate entity must be a mere instrumentality of another; second, the corporate entity must be used to commit a fraud or wrong; and third, there must have been an unjust loss or injury to the plaintiff. *Nogueras v. Maisel & Assoc. of Michigan,* 142 Mich.App. 71, 86, 369 N.W.2d 492, 498 (1985). Thus, in order for a subsidiary to be able to assert an alter ego claim against its parent company, the subsidiary would need to show that it suffered "an unjust loss or injury" as a result of it being used by the parent as an instrumentality to commit a fraud or wrong against itself. Since it is axiomatic that one cannot commit a fraud or wrong against oneself, a subsidiary would never be able to satisfy the standard for disregarding corporate identity under Michigan law. It would, therefore, appear that under Michigan law a subsidiary may not assert an alter ego claim against its parent company.

The principle behind *RCS Engineered Products* was reaffirmed in *TTOD Liquidation, Inc. v. Lim (In re Dott Acquisition, LLC)*, 520 B.R. 588 (Bankr. E.D. Mich. 2014). There, the trustee sought to bring a state law *alter ego* claim. Recognizing that she did not have standing on behalf of the estate, she argued that the claims she was bringing were on behalf of the debtor's creditors, not on behalf of the debtor. *Id.* at 622. The bankruptcy court rejected this argument, holding that there was no provision in the Code that gave the trustee the power to assert claims on behalf of non-debtor creditors in this manner, and that *RCS Engineered Products* controlled. *See also Simon v. Miller (In re Miller Parking Co., LLC),* 536 B.R. 197, 205 (E.D. Mich. 2015) ("In this case, Trustee Simon is attempting to do exactly what Michigan law prohibits, by asserting a claim 'for the benefit of the corporation or its stockholders.' As the court of appeals noted, the appellant's professed theory of recovery is not only prohibited, it is nonsensical in the context of basic concepts of the law governing the separate identities of business forms.")

While a trustee cannot pierce the debtor's own corporate veil, the trustee is still free to assert piercing claims against non-debtor entities to the extent that those claims may be property of the estate. In *CH Holding Co. v. Miller Parking Co.,* 903 F.Supp.2d 551 (2012), one of the many cases arising out of the Miller Parking bankruptcy, the district court rejected an argument that

Michigan law prevented a trustee from asserting *alter ego* claims against an entity other than the debtor:

> Ackerman, just like the trustee, seeks to pierce the veil not of his debtor, Miller Parking Detroit, but of a separate, third-party corporation, Miller Parking Chicago, which he alleges wrongly received and then distributed the assets of the debtor. The *alter ego* claims against Miller Parking Chicago are only ancillary to the central claim that when the Chicago company made a facially proper and reasonable distribution of its assets, it was not in fact distributing its own assets but those of the debtor, Miller Parking Detroit, that had been fraudulently transferred to it. No authority prevents the trustee, standing in the shoes of a debtor company, from seeking to pierce the veil of a completely separate corporation and recover for the benefit of the debtor's estate and its creditors assets that the trustee maintains were given away by the debtor and then distributed to the other company's shareholders.

Id. at 557.

Courts in other jurisdictions have interpreted applicable state law differently. For example, in *S.I. Acquisition, Inc. v. Eastway Delivery Service, Inc. (In re S.I. Acquisition, Inc.)*, 817 F.3d 1142 (5th Cir. 1987), the circuit court reached the opposite result from that reached in *RCS Engineered Products.* It noted that it could find no Texas law precluding a corporation from bringing an *alter ego* claim against its own principals. The court concluded,

> Since the corporation has an independent existence at law, we do not believe it is inconsistent in light of the above policy to say that a corporation may pierce its own corporate veil and hold accountable those who have misused the corporation in order to meet its corporate obligations.

Id. at 1152.

The fact that a trustee cannot pursue piercing claims should not necessarily cause the shareholders to breathe a sigh of relief. While they may not face the prospect of litigation with the trustee, because those claims are not property of the estate, they remain available for creditors to pursue, after or even during the bankruptcy case. In many instances, from a shareholder's perspective it might be far better to negotiate with a relatively dispassionate bankruptcy trustee than an enraged and motivated creditor.

ENTIRETIES EXEMPTIONS IN PERSONAL PROPERTY – PREPARE TO BE AMAZED!

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Attorneys often mentally link the entireties exemption to real property. However, its application is much broader, extending to a range of personal property categories as well.

The entireties exemption in real estate.

Ownership of real property by the entireties has long been recognized in Michigan. The Court in *Long v. Earle,* 277 Mich. 505, 517, 269 N.W. 577 (1936) described the entireties estate:

> It is well settled under the law of this state that one tenant by the entirety has no interest separable from that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and, as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title.

The entireties estate is distinct from that of joint tenants with full rights of survivorship in that when husband and wife are joint tenants, the interest of either is subject to execution by the party's sole creditors, which is not the case with property held in the entireties.

Michigan's policy with regard to creation of the entireties estate in real property has long been to presume establishment of the entireties estate and to disfavor joint tenancy unless the intent to create a joint tenancy is clearly and expressly stated. In *Hoyt v. Winstanley,* 221 Mich. 515; 191 N.W. 213 (1922), the Court considered whether a conveyance to husband and wife "as joint tenants" created a joint tenancy or a tenancy by the entireties. It held that an entireties estate was created by the conveyance:

> In view of the fact that estates by entirety are a modified form of joint tenancy, that the terms are sometimes used interchangeably, and that our statute treats them as a species of joint tenancy, it is my judgment that the words 'as joint tenants,' coupled with husband and wife in a conveyance to husband and wife, are not sufficient to indicate that an estate in joint tenancy was intended to be conveyed. To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended. Estates in joint tenancy are not favored. Since the enactment of our statutes, all presumptions are against them. See C. L. 1915, §§ 11562 and 11563.
>
> We think it must be held under the circumstances of this case, that the deed to 'Jasper Winstanley and wife as joint tenants,' conveyed an estate by the entirety.

Id. at 519-520. Thus, there is a strong public policy in Michigan in favor of finding the existence of an entireties estate where it applies, and that in order to avoid that construction it must be affirmatively disavowed.

Application of the entireties exemption to personal property.

Michigan common law generally does not recognize an entireties estate in personal property. As the Supreme Court stated in *Scholten v. Scholten,* 238 Mich. 679, 683; 214 N.W. 320 (1927), "Both the note and mortgage in question were made payable to 'Jacob J. Scholtens and Ellen Scholtens, his wife, by entireties.' Such an estate may not be created in personal property."

There are judicial and legislative exceptions to the general common law rule stated above. For example, an interest in crops harvested from entireties property is also held in the entireties. *See Dickey v. Converse,* 117 Mich 449; 76 NW 80 (1898).[1]

MICH. COMP. LAWS ANN. § 557.151 and its application to financial instruments.

The entireties exemption has been extended to certain classes of personal property by statute. MICH. COMP. LAWS ANN. § 557.151 provides that certain financial instruments that are owned by husband and wife are subject to the same "restrictions, consequences and conditions" that apply to real estate owned by husband and wife:

> All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

MICH. COMP. LAWS ANN. § 600.6023a, which codifies the entireties exemption against execution by sole creditors, expressly extends that protection to personal property that falls within the scope of § 557.151, stating, "Property described in section 1 of 1927 PA 212, MICH. COMP. LAWS ANN. § 557.151, or real property, held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse."

The Supreme Court applied its holding in *Hoyt, supra,* to personal property within the scope of MICH. COMP. LAWS ANN. § 557.151 in *DeYoung v. Mesler,* 373 Mich. 499, 130 N.W.2d 38 (1964). There, the Court interpreted the statute to extend the holding of *Hoyt* to the statutorily identified classes of property:

> The language of [the *Hoyt* decision] appears to require that in order not to create a tenancy by the entirety in realty conveyed to husband and wife, even the use of the words 'as joint tenants' is insufficient. The only alternative seems to be to use the words 'not as tenants by the entirety' when such is the intent of the conveyance.

[1] The advent of the Uniform Commercial Code may have an impact of early cases such as *Dickey,* in that the UCC expressly defines crops as personal property. *See, e.g.,* MICH. COMP. LAWS ANN. §§ 440.2105(1) and 440.9102(1)(hh).

> Applying this test to the statute controlling of the instant case, the words 'in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife' of necessity mean in an estate by the entireties unless an intent to do otherwise is affirmatively expressed. The evidence of indebtedness here involved reads simply ' * * * promises to pay to W. Clark Mesler and Marion Mesler, his wife.' It is conceded, as we noted, that the instrument, a debenture, is specifically mentioned in the statute.
>
> We conclude therefore, as did the trial judge, and as did the Court of Appeals in *Commissioner of Internal Revenue v. Hart* (CCA 6th), 76 F.2d 864:
>
> > 'In Michigan, the common-law rule that a conveyance to husband and wife creates a tenancy by the entirety has persisted except in respect to conveyances explicitly indicating that some other kind of tenancy is intended. Even the qualifying phrase 'as joint tenants,' while sufficient to create a joint tenancy in a conveyance to grantees generally, does not avoid the creation of an estate by the entirety when the grantees stand in the marital relation to each other.' (*Citing Hoyt v. Winstanley, supra.*)

Id. at 503-504.

A couple of points in this passage deserve some attention. First, in the wake of *DeYoung,* ownership of property of the types specified in MICH. COMP. LAWS ANN. § 557.151 jointly by husband and wife gives rise to a strong but rebuttable presumption that the parties intended to hold it as entireties.

Second, in *DeYoung* it was "conceded" that a debenture was within the scope of MICH. COMP. LAWS ANN. § 557.151 for the excellent reason that the statute expressly mentions debentures. Given that the statute is in derogation of the common law, query whether it will be narrowly construed, meaning that if an asset cannot be identified as a bond, certificate of stock, mortgage, promissory note, debenture, or other evidence of indebtedness, there is a question whether the courts would hold the statute not to apply. That has been the case in at least one instance.

Inapplicability of MICH. COMP. LAWS ANN. § 557.151 to bank accounts.

An early Supreme Court opinion determined that bank accounts are outside the scope of MICH. COMP. LAWS ANN. § 557.151. In *McMahon v. Holland,* 260 Mich 246, 244 NW 462 (1932), plaintiff and his wife maintained an account in the name of James McMahon or Mary McMahon. Mrs. McMahon became ill and was cared for by her sister. While she was ill, she gave her sister a check on the account for $1,000, which her sister presented and for which the bank issued a certificate of deposit. Mrs. McMahon subsequently died and her husband sought to impose a trust on the certificate of deposit based upon an argument that the funds were entireties property.

The Court rejected this argument:

> In our opinion, this statute does not apply to a bank deposit such as was here made. The Legislature had theretofore passed an act (No. 248, Pub. Acts 1909, Comp. Laws 1929, § 12061 et seq.) in relation to deposits in banks and trust companies in the name of more than one person. Had it been intended that Act No. 212 should include deposits in banks, they would doubtless have been mentioned. They are not included in the words 'other evidences of indebtedness' used therein.

Id. at 248-9.[2]

These facts highlight a problem that would arise if MICH. COMP. LAWS ANN. § 557.151 applied to bank accounts. Specifically, if the account is captioned in the name of "A or B", then presumably the bank will honor claims drawn by either A or B. If, however, these accounts were determined to be entireties property, then every single check paid from the account on the demand of only one holder of the account would be subject to defeasance by the other account holder. It is possible that, had the account been titled as "James McMahon and Mary McMahon, husband and wife, as property of the entireties," and had the bank required two signatures for any draft, the Court may have reached a different conclusion. However, one cannot ignore the basis of this opinion, or the last line quoted above that bank accounts "are not included in the words 'other evidences of indebtedness' used therein." From this language, it must be assumed that bank accounts are not specifically named in the statute and therefore beyond its ambit.

Application of the statute to checks.

The Michigan Court of Appeals decided in a fairly summary fashion that two checks that were payable to husband and wife given to pay off a land contract were within the scope of MICH. COMP. LAWS ANN. § 557.151 in *Theisen v. Theisen,* 27 Mich. App. 356, 183 N.W.2d 373 (1970). While there is law to the effect that proceeds of land contracts are separately exempt, *see infra* at 11, in *Theisen,* the Court of Appeals relied solely upon § 557.151 as authority for applying the entireties exemption to the joint check.

Possible applicability of MICH. COMP. LAWS ANN. § 557.151 to brokerage accounts.

One question left open after *DeYoung* is whether the statute applies to brokerage accounts. A brokerage account may consist of stocks, bonds, mutual funds and other investments, some of which may not be specifically identified by name in the statute. This question was touched on in *Zavradinos v. JTRB, Inc.,* 482 Mich. 858, 753 N.W.2d 60 (2008). *Zavradinos* arose out of an attempt to enforce a judgment against brokerage accounts held by husband and wife as joint tenants with rights of survivorship. After argument, the Supreme Court denied leave without leave. There were three dissents and one concurrence. The unpublished opinion below, *Zavradinos v. JTRB, Inc.,* unpublished opinion *per curiam* of the Court of Appeals, issued August 23, 2007 (Docket No.

[2] I have been unable to locate the Public Act cited in *McMahon.* The current statutory reference is MCL 487.718, which provides:

> Deposits in a statutory joint account shall be subject to the rights of creditors of the persons designated in the statutory joint account contract as owners of the funds to the extent of the ownership, except that the funds shall remain subject to laws applicable to transfers in fraud of creditors.

268570), attached as **Exhibit A**, assumed that the brokerage accounts holding stocks and bonds were within the scope of MICH. COMP. LAWS ANN. § 557.151. *See slip op.* at 1. In neither the unpublished Court of Appeals decision or the various dissents and the concurrence was there a definitive resolution of whether a brokerage account was the same as stocks and bonds. Rather, the focus was entirely upon whether the account was set up in such a way as to give rise to an entireties estate. Given that the issue was unaddressed in the Court of Appeals and that there was no majority opinion on brokerage accounts arising out of the opinion denying leave, there is uncertainty regarding whether brokerage accounts fall within the statute.

Inapplicability of MICH. COMP. LAWS ANN. § 557.151 to living trusts.

Lewiston v. Kohut (In re Lewiston), 539 B.R. 154 (E.D. Mich. 2015) arose out of an appeal of a bankruptcy court ruling that the debtor could not claim an exemption under MICH. COMP. LAWS ANN. § 557.151 in a living trust formed by the debtor and his non-filing spouse. Judge Cohn concluded that a living trust was not "property" that fell within the scope of the statute, affirming the bankruptcy court. After summarizing the statute and *DeYoung,* the court distinguished a living trust from the types of property identified in the statute:

> Trusts, by contrast, are considered a distinct "legal 'entity,' consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries." Restatement (Third) of Trusts § 2 cmt a. (2003). A "living" trust is one created during the lifetime of the settlor (the person creating the trust). *Id.* § 2 cmt.i, illus. 5. Unlike tenancies by the entirety, any property, real or personal, can be held in trust. *Id.* § 8. Within the legal framework of a trust, trustees and beneficiaries have distinct relationships with respect to trust property: although the trustee holds "bare" legal title to the property, beneficiaries hold the beneficial interests, or "equitable title," in the trust property. *Id.* § 42 cmt a.
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> …
>
> Here, there is no question that when the Trust was created, certain assets were transferred to the Trust, and that Lewiston and his wife were named both as beneficiaries and trustees of the Trust; under the 2008 amendment, both Lewiston and his wife were considered Managing Trustees of the Trust. Lewiston says that the Trust is "a vessel for interests in both real estate and personal property," which was "owned jointly by a husband and wife," and that the creation of the Trust was, "in effect," the transfer of property from Lewiston to the joint ownership of Lewiston and his wife.
>
> Lewiston's position lacks legal support and collapses the legal distinction between living trusts and tenancies by the entirety. As explained above, a living trust is a distinct legal "entity," distinguishable from tenancy by the entirety, which is merely a form of joint property ownership between husband and wife. Under Michigan law, a living trust has specific rights, duties, restrictions, consequences, and conditions related to Trust assets, which are different from those pertaining to property held in a tenancy by the entirety. Lewiston provides no support for his assertion that the Trust is held with his wife as tenants by the entirety.

Id. at 158-9. Two key points bear repeating: first, a trust is distinct from entireties property because it can be composed of any property, as opposed to only real property and certain narrow classes of personal property; second, a trust is a distinct legal entity rather than a mode of ownership of the testators.

The court went on to distinguish *Zavradinos,* which was cited by Lewiston:

> Lewiston says that, like the security accounts in *Zavradinos*, the Trust is a "vessel" for assets that are held with his wife in a tenancy by the entirety. The argument lacks merit.
>
> To begin, the Court of Appeals in *Zavradinos* expressly relied on M.C.L. § 557.151, stating that it "explicitly and unambiguously provides that classes of property named in the statute, which includes stocks and bonds, owned by a husband and wife are owned as tenants by the entirety 'unless otherwise therein expressly provided.'" 2007 WL 2404612, at *1. In *Zavradinos*, the parties did not dispute that M.C.L. § 557.151 applied, only differing on whether the security accounts should be considered a joint tenancy or a tenancy by the entirety.
>
> Here, unlike the security accounts in *Zavradinos,* the text of M.C.L. § 557.151 does not include a living trust and/or the beneficial interest in a living trust. The Bankruptcy Court properly held that *Zavradinos* does not support an expansion of the types of properties included in M.C.L. §§ 557.151 and 600.5451(1)(n).

Id. at 159.

Applicability of the entireties estate to interests in limited liability companies.

MICH. COMP. LAWS ANN. § 557.151 predates the creation of limited liability companies and is silent as to interests in them. This was addressed in the Limited Liability Company Act, MICH. COMP. LAWS ANN. § 450.4101 *et seq. (*the "LLCA"), which contains a similar provision regarding interests in LLCs. MICH. COMP. LAWS ANN. § 450.4504(1) states as follows:

> A membership interest is personal property and may be held in any manner in which personal property may be held. A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

While not mentioning the entireties estate directly, this language precisely tracks that of MICH. COMP. LAWS ANN. § 557.151. Further, elsewhere in the LLCA references ownership of membership interests by the entireties. Specifically, MICH. COMP. LAWS ANN. § 450.4303(1)(b) states that cash shall be distributed from a limited liability company:

> On and after July 1, 1997, except as otherwise provided in subsection (2), in equal shares to all members. A membership interest held by 2 or more persons, whether

> as fiduciaries, members of a partnership, tenants in common, joint tenants, *tenants by the entirety,* or otherwise, is considered as held by 1 member for an allocation under this subdivision.

(Emphasis supplied.) It is reasonable to expect that the courts would apply *DeYoung* to the LLCA provisions equally as they have to MICH. COMP. LAWS ANN. § 557.151.

It is important to distinguish the ownership of an interest in a limited liability company that is owned by the entireties from both husband and wife owning separate membership interests in the same limited liability company. Generally a creditor of a multi-member limited liability company can at best obtain a charging order against the debtor member's interest. *See* MICH. COMP. LAWS ANN. § 450.4502(2).

Proceeds of sale of real estate; land contracts.

In the case of *Hendricks v. Wolf,* 279 Mich. 598, 602, 273 N.W. 282 (1937), the Court held that a land contract vendor's interest was a personal property interest that did not come within the statutory phrase "other evidences of indebtedness." The Court relied on the earlier case of *Commissioner v Hart,* 76 F2d 864 (6th Cir 1935), in which the court assumed, but did not decide, that a land contract came within the phrase "other evidences of indebtedness." That case held that the interest was protected nonetheless: "Notwithstanding that land contract interests are for certain purposes deemed to be personal property, it has been the general understanding and construction of the law for many years that the right of survivorship exists with respect to land contract interests if the property was originally held as an estate by the entirety." *Commissioner v. Hart* at 866.

This issue has been separately addressed by statute. MICH. COMP. LAWS ANN. § 557.81 provides that when husband and wife sell real estate held by the entireties, the proceeds are likewise entireties property:

> In all cases where a husband and wife shall sell land held as a tenancy by the entirety and accept in part payment for the purchase price the note or other obligation of said purchaser payable to said husband and wife, secured by a mortgage on said land payable to husband and wife, the said debt together with all interest thereon, unless otherwise expressly stated in said mortgage, after the death of either shall be payable to the survivor, and the title to said mortgage shall vest in the survivor, and in case a contract for the sale of property owned by the husband and wife as tenants by the entirety, is entered into by them as vendors, the same provisions herein applying to the rights of the survivor in mortgages as above set forth, shall apply to the survivor of the contract.

Fraudulent conveyances, divorce and the entireties exemption.

One particularly interesting entireties case is *Estes v. Titus,* 481 Mich. 573, 751 N.W.2d 493 (2008). While its holding is not necessarily limited to personal property, the decision is relevant to parties doing exemption or estate planning using the entireties exemption. In that case, the

issue was whether a claim under the Uniform Fraudulent Transfer Act ("UFTA") could be asserted to reach assets of the wife by the creditor of the husband when the entireties estate was dissolved through divorce. In that case, Jeff Titus, the defendant's husband, was in prison for the murder of plaintiff's husband. Shortly after Mr. Titus' incarceration, his wife filed for divorce and the property settlement agreement approved by the court awarded nearly all the marital assets to his wife. The court explained that the distribution was unequal because Mr. Titus was serving a life sentence and was relieved of any child support obligations for their 17-year old daughter.

The plaintiff sought to intervene in the divorce case, which the divorce court refused to permit. Plaintiff then obtained a wrongful death judgment and sought to join Titus' ex-wife under MICH. COMP. LAWS ANN. § 600.6128 in order to collect the judgment, claiming that the divorce decree amounted to a fraudulent conveyance.

Looking to a specific exception in the UFTA, the Court concluded that the plaintiff could not assert a fraudulent conveyance claim with respect to property of the entireties:

> A UFTA action will not reach such property unless both spouses are debtors on the claim that is the subject of the action. This is because a "transfer" under the UFTA includes "disposing of or parting with an asset or an interest in an asset." [MICH. COMP. LAWS ANN. § 566.31(*l*).] "Asset" is defined in the act as including the "property of the debtor." [MICH. COMP. LAWS ANN. § 566.31(b).] One important exception is "[a]n interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant." [MICH. COMP. LAWS ANN. § 566(b)(iii).] Property held as tenants by the entirety is exempt from the claims of the creditors of only one spouse and is not an asset. Hence, a distribution of such property in a divorce judgment is not a transfer for purposes of the UFTA.

Id. at 580-1 (footnotes omitted). The Court went on to note that "it is difficult to comprehend how disposing of property that a creditor cannot reach could "defraud" that creditor." *Id.* at 582.

To the extent that property was transferred through the divorce decree that was not held by the entireties, however, the Court held that the transfer was fair game under the UFTA:

> We reject Swabash's claim that the UFTA can never reach the transfer of property in divorce actions. The UFTA defines "transfer" at MCL 566.31(*l*) as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, and creation of a lien or other encumbrance."
>
> A court may provide for the distribution of property in a divorce judgment, and, when it enters, the judgment has the same effect as a deed or a bill of sale. A property settlement agreement incorporated in a divorce judgment disposes of the parties' interests in the marital property. As part of the judgment, it effectuates a transfer for purposes of the UFTA when the divorce judgment enters.

> We conclude that plaintiff may challenge the Tituses' property settlement agreement incorporated in the divorce judgment as a transfer within the purview of the UFTA.

Id. at 579-80 (footnote omitted).

United States v. Craft.

The Supreme Court's decision in *United States v. Craft,* 535 US 274 (2002) was one of the most significant entireties decisions in recent years. In *Craft,* the Court considered whether a statutory IRS lien could attach to a husband's interest in entireties property. The Court concluded that the husband's interest was a property right to which the IRS lien could attach.

However, the Court's opinion acknowledged that Michigan law would dictate a different result:

> We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. *We recognize that Michigan makes a different choice with respect to state law creditors: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." Sanford v. Bertrau,* 204 Mich. 244, 247, 169 N.W. 880, 881 (1918). But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. As we elsewhere have held, "'exempt status under state law does not bind the federal collector.'" *Drye v. United States,* 528 U.S., at 59.

Id. at 288 (emphasis supplied).

While at the time much commentary was focused upon the death of the entireties exemption in the wake of the Court's ruling, it appears that *Craft* has been limited to its facts. See, *e.g., Walters v. Leech,* 279 Mich. App. 707, 716, 761 N.W.2d 143 (2008) (quoting language cited above). Bankruptcy courts have continued to give effect to the entireties exemption in the wake of *Craft* when considering use of the entireties exemption. *See, e.g., In re Raynard,* 354 B.R. 834 (6th Cir. BAP 2006).

Additional resources.

There have been some excellent articles written regarding the personal property entireties exemption. *Personal Property Entireties Exemption in Michigan: Does It Apply to Modern Investment Devices?,* Paul H. Steinberg, THE MICHIGAN BUSINESS LAW JOURNAL, Fall 2002 is attached as **Exhibit B**. *Limited Liability Company Interest Ownership by the Entireties and the Potential Aftereffects of* Craft, Marla Schwaller Carew, THE MICHIGAN BUSINESS LAW JOURNAL, Summer 2003 is attached as **Exhibit C**.

Purchasing property on a land sale contract is fairly straightforward. The buyer (vendee) provides the seller (vendor) with a down payment for the home and the seller acts as the bank, financing the balance of the purchase price. Thereafter, the buyer continually makes monthly payments until the land contract is satisfied.

At the outset, the vendee receives equitable title to the property and the vendor retains legal title until the purchase price is satisfied. In the interim, the buyer can assign, sell, or devise its equitable interest in the property. Similarly, the seller can convey, sell, or devise its legal title before the purchase price is satisfied. Although purchasing property on a land contract can run smoothly, issues can arise when the buyer or seller files for bankruptcy.

If a bankruptcy proceeding is filed by the vendor or vendee after execution of the land contract, the land contract will be construed under 11 U.S.C. § 365 to determine whether it is an "executory contract." Executory contracts can be "assumed, assigned or rejected by the trustee" or debtor in possession.

A. Vendor is Debtor

When the vendor is the debtor in bankruptcy, 11 U.S.C. §§ 365(i) and (j) serves as a protective measure to the vendee's interest. Regardless of whether the trustee or debtor in possession assumes or assigns the land contract, the vendee is not harmed. The vendee's only obligation is to make the on-going monthly payments. On the other hand, if the trustee or debtor in possession elects to reject the land contract, under which the vendee is in possession, the vendee may elect to either treat the contract as terminated or remain in possession. If the vendee treats the land contract as terminated, it is granted a lien on the property in the amount of the purchase price paid. 11 U.S.C. § 365(j). If the vendee elects to remain in possession, it must continue to make the monthly payments and does not have any other right to damages. 11 U.S.C. § 365(i)(2). The trustee or debtor in possession, pursuant to 11 U.S.C. § 365(i)(2)(B), must deliver title to the property after the vendee has satisfied its obligations under the land sale contract.

B. Vendee is Debtor

If the vendee is the debtor in bankruptcy, the bankruptcy courts are divided as to whether the vendee (or trustee) must assume or reject the contract as an executory contract or whether the land contract should be treated like a mortgage. "While some courts consider installment land sales contracts to be executory because performance remains on both sides, numerous other courts categorize them as non-executory because they are in the nature of a sale and security device." *Kane v Inhabitants of Harpswell (In re Kane)*, 248 B.R. 216, 223 (BAP 1st Cir,, 2000). The Sixth and Eighth Circuit characterize land sale contracts as executory. See *In re Terrell*, 892 F,2d 469, 473 (6th Cir., 1989) (finding a purchaser's interest in a land sale contract was executory because both parties had unperformed obligations); see also *In re Speck*, 798 F.2d 279, 280 (8th

Cir., 1986) (holding land sale contracts are executory because obligations remain on both sides). For example, in *In re Terrell*, the Sixth Circuit Court of Appeals found that the debtor-purchaser's interest in the land sale contract was an executory contract because there were material obligations left to be performed by both parties to the contract. The Sixth Circuit stated:

> Under Michigan law, the failure of either party to perform his remaining obligations would give rise to a material breach allowing the other party to avoid continued performance. The failure of a vendee to continue paying installments gives the vendor a number of remedies for breach, including forfeiture and foreclosure . . . Likewise, if a vendor fails to transfer title when promised or impairs his or her ability to deliver title in the future, he or she has committed a material breach entitling the vendee to sue for specific performance or to cease performance and sue for rescission. [892 F.2d at 473.]

However, other courts and commentators have disagreed and found that land sale contracts are non-executory and not subject to 11 U.S.C. § 365. See *In re Heward Bros*, 210 B.R. 475, 479 (Bankr. D. Idaho, 1997) (finding the land sale contract was a security device not an executory contract under 11 U.S.C. § 365); See also *In re Rehbein*, 60 B.R. 436, 441 (BAP. 9th Cir., 1986) (finding land sale contract was not an executory contract where debtor had fully performed by placing deed in escrow). In fact, Collier on Bankruptcy has taken the approach that land sale contracts are non-executory contracts because they are indistinguishable from mortgages.

> In some places, it is common for purchasers of real estate to enter into installment land sales contracts, under which at the end of the installment payments the seller transfers title to the buyer. In virtually every other respect, such as responsibility for taxes, insurance and maintenance, the transaction is indistinguishable from a sale in which the seller takes back a mortgage to secure payment. Because of the similarity of such contracts to secured mortgage loans, courts have often treated them as secured debts rather than executory contracts. The classification of a particular contract depends on the terms of the transaction. If the seller has no significant duty to the buyer other than to convey title upon completion of payments, the contract should be found to be a secured debt and not an executory contract. Treatment of the contract as a secured debt rather than an executory contract has a number of ramifications, including the inapplicability of section 365. [*3 Collier on Bankruptcy P* 365.02[1][a] (15th ed. rev. 2000)(footnote omitted).]

When Courts take the latter approach – land sale contracts are non-executory – they tend to compare land sale contracts with leases that are disguised security agreements.

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

_____,

Debtor(s)

_____/

Case No. _____
Chapter 13
Hon. _____
Filed: _____

ORIGINAL CHAPTER 13 PLAN

PREAMBLE

To Debtors: Plans that do not comply with local rules and judicial rulings may not be confirmable.

In the following notice to creditors, you must check each box that applies.

To Creditors: Your rights may be affected by this Plan. Your claim may be reduced, modified, or eliminated.

You should read this Plan carefully and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the Plan's treatment of your claim or any provision of this Plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this Plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any Plan.

The following matters may be of particular importance. ***Debtors must check one box on each line to state whether or not the Plan includes each of the following items. If an item is checked as "Not Included" or if both boxes are checked, the provision will be ineffective if set out later in the Plan.***

A limit on the amount of a secured claim, set out in Paragraph III.C.2.c and III.C.1.f., which may result in a partial payment or no payment at all to the secured creditor	☐ Included	☐ Not included
Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Paragraph IV.R.	☐ Included	☐ Not included
Nonstandard provisions, set out in Paragraph IV.R.	☐ Included	☐ Not included

I. PLAN PARAMETERS

A. APPLICABLE COMMITMENT PERIOD (ACP) - 11 U.S.C. § 1325(b)(4).

( ) The ACP is 60 months.

( ) The ACP is 36 months. However, the duration of payments may be extended to complete the Plan.

B. LIQUIDATION ANALYSIS.

1. The amount to be distributed to holders of allowed unsecured claims shall not be less than the value of the non-exempt equity of the Debtor(s) less the costs of sale. The liquidation value of the estate as required by 11 U.S.C. § 1325(a)(4) is $_____.
2. The estimated base amount to be paid to the general unsecured creditors is $_____.

II. FUNDING

A. PLAN PAYMENT. The Debtor(s) shall make payments in the amount of $_____ per ( ) week, ( ) bi-weekly, ( ) semi-monthly, ( ) monthly, and/or ( ) other (see Additional Plan Payment Provisions) for the minimum of the ACP.

( ) Additional Plan Payment Provisions:

III. DISBURSEMENTS

A. ADMINISTRATIVE CLAIMS. The Debtor(s) shall pay in full, in deferred cash payments, all allowed claims entitled to priority under 11 U.S.C. § 507, including:

1. Court filing fee.
2. Trustee fee.
3. Attorney fees exclusive of costs and expenses: An initial fee of $_____ less fees paid of $_____, leaving a fee balance in the amount of $_____ to be paid by the Trustee pursuant to the priorities set forth in paragraph IV.H of the Plan, unless otherwise marked below:
   a. ( ) Attorney fees shall be paid at the rate of $_____ per month until paid in full pursuant to paragraph IV.H of the Plan.
   b. ( ) Attorney fees shall be paid after all necessary equal monthly payments on secured continuing claims, secured claims, assumed executory contract/unexpired lease claims which is a modification of paragraph IV.H.
4. Expenses advanced to the Debtor(s) (paid by the attorney to the Clerk of the Court or the service provider) include:

   $_____ filing fee (enter amount or N/A);

   $_____ mandatory credit counseling or financial management class (enter amount or N/A); and

   $_____ other (explain and enter amount, or enter N/A).

B. PRIORITY CLAIMS.

1. Domestic Support Obligation (DSO)[i]: Prepetition DSO payment arrears as of the petition date shall be paid directly by the Debtor(s) unless marked below:

( ) by the Trustee.

Mandatory information:

Name of DSO Payee(s)	Monthly Amount	Estimated Arrears

2. a. Prepetition Priority Tax Claims: Prepetition priority tax claims are allowed claims entitled to priority under 11 U.S.C. § 507 and shall be paid in full by the Trustee.

Mandatory information:

Creditor Name	Estimated Amount[ii]	Nature of Debt

b. Post-Petition Priority Tax Claims: Absent objection, post-petition priority tax claims shall be paid in full pursuant to 11 U.S.C. § 1305(a)(1) and (b). Any portion of a post-petition claim under 11 U.S.C. § 1305 that is not paid through the Plan for whatever reason, including dismissal or conversion to Chapter 7, will remain non-dischargeable, even if the Debtor(s) receive(s) a discharge.

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[i] The Debtor(s) will comply with 11 U.S.C. § 1325(a)(8) and shall, prior to confirmation of the Plan, provide the Trustee with an affidavit or other evidence (*e.g.*, wage deduction, a statement from friend of the court, or a statement from the recipient) that all post-petition, pre-confirmation DSO payments are current.

[ii] The amount stated is an estimate only and the proof of claim controls as to the amount of the claim. This provision does not preclude any party in interest from filing an objection to the claim.

3. Other Priority Claims and Plan Treatment:

C. SECURED CLAIMS.

1. Real Property:

a. Mortgage Payments: Unless otherwise stated, the Trustee shall commence paying the first post-petition mortgage payment on the first day of the month following the month of the petition date.

b. Principal Residence Post-Petition Mortgage Payments and Prepetition Arrears: The following is the street address and the tax ID parcel no. for the principal residence of the Debtor(s):

Property No. 1_____ Property No. 2_____

Creditor Name	Estimated Monthly Payment Amount[iii]	Estimated Arrears[iv]	Taxes & Insurance Escrowed With Lender? Y/N
#1			
#2			

c. Non-Residential Post-Petition Mortgage Payments and Prepetition Arrears: The following is the street address and the tax ID parcel no. for the non-residential real property of the Debtor(s):

Property No. 1_____ Property No. 2_____

Creditor Name	Estimated Monthly Payment Amount[iii]	Estimated Arrears[iv]	Taxes & Insurance Escrowed With Lender? Y/N
#1			
#2			

d. Prepetition Real Property Tax Claims: Claims of taxing authorities on real property pursuant to State law will be paid pro-rata as set forth in paragraph IV.H unless a fixed monthly payment is set forth below after the post-petition on-going mortgage payment(s).[v]

Taxing Authority	Amount	Delinquent Tax Years	Optional Equal Monthly Payment

e. Real Property Tax Escrow:

The Debtor(s) will not utilize a tax escrow with the Trustee unless marked below.

( ) The Debtor(s) will utilize a tax escrow through the Plan. The Debtor(s) must provide the tax bill to the Trustee and verify taxes are paid each year until completion of the Plan. Tax escrow accounts will fund after on-going monthly mortgage payments but prior to other secured creditors.

[iii] The monthly payment amount is an estimate and the Trustee shall pay the monthly payment amount based on the proof of claim as filed. The Plan authorizes the Trustee to make post-petition regular mortgage or land contract payments prior to the proof of claim being filed. This provision does not preclude any party in interest from filing an objection to the claim.

[iv] The amount of prepetition arrears is an estimate and the Trustee shall pay the prepetition arrears based on the proof of claim as filed. Any claim filed for prepetition arrears shall be paid through the Plan over a reasonable period of time and pro-rata with other secured creditors without interest.

[v] Any creditor in this class shall retain its lien on the real property pursuant to applicable State law and shall be entitled to receive its statutory interest and collection fees as set forth in its proof of claim.

Real Property Address	Parcel Number	Taxing Authority	Monthly Escrow Amount

f. Wholly Unsecured Liens: The following claims shall be treated as unsecured by this Plan because there is no equity in the property to secure the claim. Upon completion of the Plan, the lien shall be discharged and removed from the property. The Debtor(s) may move under Fed. R. Bankr. P. 7070, on notice to the holder of such a claim who refuses to release the lien, for an order declaring the lien released and for related relief. These claims are as follows:

Property Address	Creditor	Claim Amount[vi]	Property Value	Senior Lien Amount

2. <u>Personal Property</u>:

a. Pre-Confirmation Adequate Protections Payments (APP): If the Trustee is to pay pre-confirmation APP the secured creditor's name, address, the account number and the payment amount must be provided and it must be signified by entering the monthly payment amount in the box marked "Pre-Conf. APP" under b. or c. of this paragraph. The Trustee will not disburse an APP until a proof of claim is filed with documentation of a perfected lien satisfactory to the Trustee.

b. Secured Claims Subject to Final Paragraph of 11 U.S.C. § 1325(a): Each secured creditor in this class has a lien that is not subject to 11 U.S.C. § 506.[vii] Claims in this class shall be paid as follows plus an additional pro-rata amount that may be available from funds on hand at an interest rate specified below or the contract rate specified in the proof of claim, whichever is lower.

Creditor, Address & Account No.	Collateral	Balance Owing	Interest Rate	Pre-Conf. APP	Equal Monthly Payment

c. Secured Claims Subject to 11 U.S.C. § 506[viii]: Claims in this class shall be paid as follows plus an additional pro-rata amount that may be available from funds on hand at an interest rate specified below or the contract rate specified in the proof of claim whichever is lower. Creditor will be paid the fair market value (FMV) as a secured claim and any balance due as a general unsecured claim.

Creditor, Address & Account No.[ix]	Collateral	FMV	Interest Rate	Pre-Conf. APP	Equal Monthly Payment

[vi] This is the estimate of the Debtor(s) as to the amount owing to the creditor. The proof of claim shall control as to amount of the claim. This provision does not preclude any party in interest from filing an objection to the claim.

[vii] Such a claim is not subject to "cramdown" and will be paid the full balance owing. If the collateral is a motor vehicle and is destroyed, the Debtor(s), with consent from the secured creditor and Trustee, or by order of the Court, may use the collateral insurance proceeds to purchase replacement collateral, to which the creditor's lien shall attach.

[viii] If the collateral is a motor vehicle and is destroyed, the Debtor(s), with consent from the secured creditor and Trustee or by order of the Court, may use the collateral insurance proceeds to purchase replacement collateral, to which the creditor's lien shall attach.

[ix] If the creditor files a proof of claim with a balance owing which is different from the amount listed above, the proof of claim shall control as to the amount of the debt, unless a party in interest objects to the proof of claim.

3. **Secured Claims of Taxing Authorities:** Secured claims of taxing authorities shall be paid as follows:

Creditor & Address	Collateral Real/Personal Property	Secured Claim Amount[x]	Interest Rate[xi]	Equal Monthly Payment

4. **Collateral to Be Surrendered/Executory Contracts to Be Rejected:** The property listed below is surrendered to the creditor, and the executory contracts/unexpired leases are rejected:

Creditor	Property/Contract Description

The automatic stay shall be terminated upon entry of the confirmation order and any deficiency claim or claim arising from rejection shall be treated as a general unsecured claim, subject to paragraph IV.G.

5. **Junior Lien Holders on Surrendered Property:** If a creditor holding a junior lien has filed a secured proof of claim, such claim shall be treated as a general unsecured claim if the value of the property, set forth below in the column entitled "Property Value," is equal to or less than the amount of the senior secured claim, absent an objection. These creditors are as follows:

Creditor, Address & Account No.	Property Address	Claim Amount[ix]	Property Value	Senior Lien Amount

D. **ASSUMED EXECUTORY CONTRACTS AND UNEXPIRED LEASES.** The following executory contracts and/or unexpired leases, including land contract(s), are assumed:

Creditor, Address & Account No.	Property Description	Monthly Payment Amount	No. of Months Remaining	Cure Amount

E. **DIRECT PAYMENT BY THE DEBTOR(S) OF THE FOLLOWING DEBTS. All claims shall be paid by the Trustee unless listed herein:**

Creditor, Address & Account No.	Collateral/Obligation	Balance Owing	Interest Rate

F. **UNSECURED CREDITORS.**

General Unsecured Creditors: Claims in this class are paid from funds available after payment to all other classes. The allowed claims of general unsecured creditors will be satisfied by:

( ) Payment of a dividend of 100%, plus present value of _____% interest, if necessary to satisfy 11 U.S.C. § 1325(a)(4), **OR**

( ) Payment of a pro-rata share of a fixed amount of $_____ or payment from all disposable income to be received by the Debtor(s) in the ACP, whichever pays more. This fixed amount shall be reduced by additional administrative

[x] The amount stated is an estimate only and the proof of claim controls as to the amount of the claim. This provision does not preclude any party in interest from filing an objection to the claim.

[xi] The interest rate on tax claims that is in effect during the calendar month in which the plan is confirmed shall control. 11 U.S.C. § 511(b). The Trustee has the authority to make adjustments to its records to comply with the Bankruptcy Code.

expenses including attorney fees approved under 11 U.S.C. § 330(a). However, this fixed amount shall not be reduced below the liquidation value specified in paragraph I.B.

G. **SPECIAL UNSECURED CREDITORS.** The special unsecured claims listed below are an exception pursuant to 11 U.S.C. § 1322(b)(1) and may include, but are not limited to, non-sufficient funds (NSF) checks, continuing professional services and non-dischargeable debts (*e.g.*, student loans, criminal fines).[xii] These special unsecured claims shall be paid as follows:

In a 36 month ACP case with the base to general unsecured creditors paid within 36 months, the special unsecured creditors will be paid pro rata with other general unsecured claims during the first 36 months and then that portion of the special unsecured creditor's claim that can be paid during the remainder of the 60 months from the date the first Plan payment is due will be paid exclusive of all other general unsecured claims during the remaining 60 months.

In a 36 month ACP case with the base to general unsecured creditors paid beyond 36 months, the special class unsecured creditors will be paid pro rata with other general unsecured claims during the first 36 months and until the specific fixed base amount to the general unsecured creditors is satisfied and then that portion of the special unsecured creditor's claim that can be paid during the remainder of the 60 months from the date the first Plan payment is due will be paid exclusive of all other general unsecured claims during the remaining 60 months.

In a 60 month ACP case, special unsecured creditors will be paid pro rata with the general unsecured creditors during the 60 months.

Special Unsecured Creditor Name	Reason For Special Treatment	Interest Rate

IV. GENERAL PROVISIONS

A. DISPOSABLE INCOME, TAX RETURNS & TAX REFUNDS. Debtor(s) submit(s) all or such portion of future earnings or other future income of Debtor(s) to the supervision and control of the Trustee as is necessary for the execution of the Plan. Unless this Plan provides for a dividend of 100% to all allowed general unsecured claims, the Debtor(s) shall pay all disposable income as defined in 11 U.S.C. § 1325(b) during the ACP. Unless otherwise provided in this Plan, Debtor(s) shall remit to the Trustee tax returns and tax refunds and other disposable income for the ACP for administration pursuant to the Plan or as otherwise ordered by the Court. Income tax refunds and other disposable income paid to the Trustee in a Plan with a 36 month ACP will operate to decrease the term of the Plan to the ACP but not below the 36 month ACP, rather than increase the dividend paid to general unsecured creditors. The Debtor(s) shall continue the same level of tax deductions as when the case was filed except as affected by changes in dependents and/or marital status.

Based on the disposable income available, the Trustee shall have the discretion without further notice to creditors to:

1. Increase the percentage to the unsecured creditors as a result of additional payments made under this provision subject to the limitation set forth in this paragraph;
2. Reduce the term of the Plan but not below the ACP; and
3. Determine if available funds are not disposable income when the Debtor(s) provide(s) the Trustee with supporting documentation.

B. VESTING OF ESTATE PROPERTY. Upon confirmation of the Plan, all property of the estate shall remain property of the estate until discharge unless marked below:

( ) Pursuant to 11 U.S.C. § 1327(b) upon confirmation of the Plan, all property of the estate shall vest in the Debtor(s), except (i) future earnings of the Debtor(s); (ii) additional disposable income, and (iii) other real and personal property necessary to fund the Plan which is identified as follows:

Regardless of whether any real or personal property is vested in the Debtor(s) or the estate, insurance proceeds derived from such real or personal property shall be deemed property of the estate. Subject to footnotes vii and viii of paragraph III.C.2, such insurance proceeds may be used by the Debtor(s), upon prior Court approval, to purchase replacement collateral.

In any case, all property of which Debtor(s) retain(s) possession and control shall be insured by the Debtor(s). The Trustee is not required to insure property and has no liability for damage or loss to any property in the possession and control of the Debtor(s).

[xii] If the table below is blank, or this case has a 60 month ACP, then there will be no special treatment for special unsecured creditors.

C. POST-PETITION ACTION BY DEBTOR(S).

1. **Post-Petition Sale of Property of Estate:** In the event that the Debtor(s) seek(s) to sell, before entry of the discharge, property of the estate constituting personal property with a value in excess of $2,500, or any real property regardless of value, the Debtor(s) shall request prior Court approval pursuant to 11 U.S.C. § 363 and any applicable rules.

2. **Post-Petition Sale of Property of Debtor(s):** In the event that the Debtor(s) seek(s) to sell, before entry of the discharge, personal property of the Debtor(s) with a value in excess of $2,500, or any real property regardless of value, the Debtor(s) shall seek prior Court approval with notice to any parties in interest as the Court may direct.

3. **Post-Petition Incurrence of Debt by Debtor(s) and Related Relief:** Upon the prior written approval of the Trustee, the Debtor(s) may incur post-petition debt for a motor vehicle, whether through financing or lease transaction. The Debtor(s) may trade in an existing motor vehicle provided that the Debtor(s) satisfy in full any obligations related to such motor vehicle. The Debtor(s) may incur other, similar post-petition debt as allowed by the Court.

D. UNSCHEDULED CREDITORS FILING CLAIMS. If a creditor's claim is not listed in the schedules, but the creditor files a proof of claim, the Trustee is authorized to classify the claim into one of the classes under this Plan and to pay the claim within the class, unless the claim is disallowed.

E. LATE FILED CLAIMS. If a claim is not timely filed, the Trustee may in his/her discretion provide notice of intent to pay the claim.

F. LIMITATION ON NOTICES.

1. **General:** If the Debtor(s) file(s) a plan modification pursuant to 11 U.S.C. § 1329 or a motion requesting relief, the plan modification or motion, and appropriate notice thereof, shall be served on (a) the Trustee, (b) the United States Trustee, and (c) any party or entity adversely affected by the plan modification or request for relief. If service under (c) requires service on the creditor matrix, subsequent to the claims bar date pursuant to Fed. R. Bankr. P. 3002, service may be made on creditors that hold claims for which proofs of claim have been filed, and any governmental unit that is a creditor in the case.

2. **Fee Applications:** Subsequent to the claims bar date pursuant to Fed. R. Bankr. P. 3002, if an attorney for the Debtor(s) files an application for compensation pursuant to 11 U.S.C. § 330, the application, including appropriate notice and an opportunity to object, shall be served on (a) the Trustee, (b) the Debtor(s), and (c) the United States Trustee. Appropriate notice of the application, including an opportunity to object in the same form as attached to the Local Bankruptcy Rules, shall be served on (a) creditors that hold claims for which proofs of claim have been filed, and (b) any governmental unit that is a creditor in the case.

If service is made pursuant to this paragraph, the Debtor(s) shall file a certificate of service specifying parties and entities served.

G. CLAIMS AND AMENDED CLAIMS. If a proof of claim is filed and Trustee has previously made a distribution to general unsecured creditors, the claim shall be entitled to the same pro rata distribution as that previously paid to general unsecured claims, to the extent possible, even if the base to general unsecured claims exceeds the amount stated in the confirmed Plan. The Trustee shall not be required to recover any overpayments to general unsecured creditors as a result of the filing of the aforementioned claims**.**

1. With respect to secured claims filed by creditors holding liens in real property surrendered pursuant to the Plan, each such secured creditor must file a proof of claim asserting its unsecured deficiency, if any, by no later than 90 days after any disposition, including a foreclosure sale. The proof of claim for any deficiency must be conspicuously identified as an "UNSECURED DEFICIENCY CLAIM." Attached to the proof of claim for the deficiency amount must be a detailed statement providing that the property was disposed of, the amount of the sale proceeds, a summary of costs incurred in connection with the disposition, and the unsecured deficiency balance remaining. This proof of claim must be filed even though a previous secured or unsecured claim was asserted prior to the disposition of the property. The failure to timely file a deficiency claim shall preclude the secured creditor from receiving further distributions under the Plan and such secured creditor's claim shall be subject to discharge.

2. With respect to secured claims filed by creditors holding liens in personal property surrendered pursuant to the Plan and non-debtor counterparties whose executory contracts or unexpired leases are rejected under the Plan, each such secured creditor or non-debtor counterparty must file a claim asserting its unsecured deficiency or rejection damages, if any, by no later than 180 days after entry of the order confirming the Plan. The proof of claim for any deficiency or rejection damages must be conspicuously identified on the proof of claim as an "UNSECURED DEFICIENCY CLAIM" or a "REJECTION DAMAGES CLAIM," as applicable. Attached to the proof of claim for the deficiency or rejection damages must be a detailed statement providing, if applicable, the date the property was disposed of, the rejection damages, the amount of any sale proceeds, a summary of costs incurred in connection therewith, and the unsecured deficiency balance remaining. This proof of claim must be filed even though a previous secured or unsecured claim was asserted prior to the surrender, rejection, or disposition of the property or rejection of the executory contract or unexpired lease. The failure to timely file a deficiency

or rejection damages claim means that such creditor or non-debtor counterparty shall be precluded from receiving further distributions under the Plan and such claim shall be subject to discharge.

3. A claimant treated as holding a wholly unsecured claim pursuant to paragraph III.C.1.f shall file a proof of claim within the time prescribed in Fed. R. Bankr. P. 3002(c), and any such claimant who does not file a proof of claim is not entitled to receive a distribution under the Plan. If such claimant files a secured proof of claim, the Trustee is authorized to treat such claimant as holding an unsecured claim.

H. TRUSTEE POST-CONFIRMATION DISBURSEMENT.

1. Priority of Payments: Unless otherwise specifically stated in the Plan, the following categories of claims will be paid in the following order (on a pro-rata basis within each category):

a. unpaid court filing fees, regardless of any Plan provision to the contrary;

b. trustee administrative fee;

c. allowed DSO claims paid through the Plan;

d. attorney fees and expenses, as allowed by an Order of the Court, subordinated to monthly continuing claims payments covered under 11 U.S.C. § 1322(b)(2);

e. continuing, long-term, nonmodifiable allowed claims[xiii];

f. other allowed secured claims (including arrears) and allowed claims arising from assumed executory contracts or unexpired leases (including any cure) with respect to which (i) the last payment will become due within the term of the Plan; and (ii) the Plan provides for equal monthly payments;

g. arrears on continuing claims and other secured claims for which the Plan does not specify equal monthly payments;

h. allowed priority unsecured claims; and

i. allowed general unsecured claims.

2. Post-Petition Mortgage Payments: If the Plan directs the Trustee to make any post-petition mortgage payment, the Trustee may:

a. modify the on-going mortgage payment upon receiving a notice pursuant to Fed. R. Bankr. P. 3002.1(b);

b. increase the Plan payment by the amount of any mortgage payment increase plus additional trustee commission for any mortgage increase;

c. amend a wage order or ACH payment amount for such increase with notice to the employer or ACH payor, Debtor(s) and the attorney for the Debtor(s); and

d. adjust the post-petition mortgage or land contract payment date, or the date through which any arrears or cure is calculated, as needed to conform to any proof of claim filed by the mortgagee or land contract vendor.

3. Initial Disbursement Date: Except as otherwise stated in this Plan, a payment designated as equal monthly payments on secured claims, executory contracts/unexpired leases, priority unsecured claims, attorney fees, and tax escrow accruals shall be deemed to commence the first day of the month following the month of the petition date.

I. TAX RETURNS. All tax returns due prior to the petition date have been filed, except: _____.

J. DEBTOR(S) ENGAGED IN BUSINESS.

1. Any Debtor who is self-employed and incurs trade credit in the production of income shall comply with 11 U.S.C. § 1304 regarding operation of the business and any order regarding the continuation of a business operation entered in this case;

2. Any Debtor who, directly or indirectly, holds a controlling interest in a limited liability company, partnership or other corporation that incurs trade credit in the production of income, or who is otherwise in control of such an entity, shall cause the entity to comply with 11 U.S.C. 1304(c) and any order regarding continuation of a business operation entered in this case as if the Debtor were "engaged in business" within the meaning of that section;

[xii] Claims in this category include non-modifiable claims, including allowed secured claims, on which the last payment is due after the term of the Plan, and for which the Plan provides for a set monthly payment (subject to adjustment as set forth below). This category includes residential mortgage obligations, land contract obligations, and other long term, non-modifiable obligations under assumed executory contracts/unexpired leases.

3. The duties listed in 11 U.S.C. § 1304(c) are imposed on any Debtor described in this Paragraph IV.J, and are incorporated herein by reference.

K. **EFFECT OF ADDITIONAL ATTORNEY FEES BEYOND THE NO LOOK FEE.** Any attorney fees and expenses beyond the no-look fee shall be paid as administrative expenses and shall not be paid out of the base previously disbursed to general unsecured creditors. The Trustee shall not recover funds disbursed to general unsecured creditors to satisfy any administrative expenses awarded to the attorney for the Debtor(s).

L. **PLAN REFUNDS.** The Trustee may agree to reasonable refunds to the Debtor(s) from the funds paid to the Trustee. The Plan duration may be extended to repay all such refunds. The trustee may require the Debtor(s) to file an amendment to the Plan.

M. **TRUSTEE'S AVOIDANCE POWERS.** The Debtor(s) acknowledges that the Trustee has discretion to utilize certain powers under Chapter 5 of the Bankruptcy Code. Notwithstanding any other language in this Plan, no lien shall be involuntarily avoided unless an adversary proceeding is filed, except that judicial liens may be avoided pursuant to 11 U.S.C. § 522(f) in connection with confirmation of the Plan upon proper notice. The Debtor(s) may not commence any avoidance action without court authorization or written consent of the Trustee. The Debtor(s) acknowledge(s) that any avoidance actions are preserved for the benefit of the estate pursuant to 11 U.S.C. § 551.

N. **LIEN RETENTION.** With respect to each allowed secured claim provided for by the Plan, the holder of such claims shall retain the lien securing such claim until the earlier of (i) the underlying debt determined under applicable non-bankruptcy law is paid in full, or (ii) entry of the discharge; provided, however, that entry of the discharge shall not release a lien that secures a claim subject to treatment under 11 U.S.C. § 1322(a)(5). Upon the occurrence of (i) or (ii) above, the holder shall release its lien and provide written evidence of the same to the Debtor(s) within 30 days after (i) or (ii) above. Notwithstanding the foregoing, if this case of the Debtor(s) under Chapter 13 is dismissed or converted without completion of the Plan, the holder of such claim shall retain its lien to the extent recognized by applicable non-bankruptcy law.

O. **MODIFICATION OF THE AUTOMATIC STAY.** Upon the filing of a motion for relief from the automatic stay, the Trustee shall suspend disbursement of funds to that creditor but shall hold said funds until further order of the Court. Upon entry of an order modifying the automatic stay and unless otherwise provided for in such order, the Trustee shall not disburse held or on-going payments to that creditor on that claim, until creditor files an amended claim or Debtor(s) file(s) an amended Plan directing the Trustee how to pay creditor's claim. Such amended proof of claim or Plan amendment shall be filed within 120 days after entry of the order modifying the automatic stay. An amended claim filed by such creditor shall be afforded the same secured status as provided for under the Plan. If a creditor fails to file an amended claim or Debtor(s) fail(s) to file an amended Plan directing the Trustee how to pay creditor's claim within 120 days of the entry of the order modifying the automatic stay, any held amounts shall be released for the benefit of the other creditors in accordance with the confirmed Plan and Trustee shall cease holding any future funds for on-going payments on such claim unless otherwise ordered by the Court. However, if a creditor files a claim after the order modifying the automatic stay and the confirmed Plan directed that such creditor was to be paid directly by Debtor(s) on such claim, such claim will not be paid by the Trustee.

P. **NOTICE OF FEES, EXPENSES AND CHARGES PURSUANT TO FED. R. BANKR. P. 3002.1.** The claim evidenced by notice of fees, expenses and charges pursuant to Fed. R. Bankr. P. 3002.1 will be treated as a separate debt or claim consistent with treatment of the underlying claim provided for under the Plan.

Q. **NON-APPLICABILITY OF FED. R. BANKR. P. 3002.1.** The requirements and provisions of Fed. R. Bankr. P. 3002.1 shall not apply to the Trustee in any chapter 13 case where the Plan as confirmed surrenders property to the creditor as provided in 11 U.S.C. § 1325(a)(5)(C) or proposes that Debtor(s) pay the creditor directly or to any claim as to which the automatic stay is modified for purposes of allowing the secured creditor to exercise its rights and remedies pursuant to applicable non-bankruptcy law.

R. **NONSTANDARD PROVISIONS. Nonstandard provisions must be set forth below. A nonstandard provision is a provision not otherwise included in this Model Plan or deviating from it. Nonstandard provisions set out elsewhere in this Plan are ineffective and void. The following Plan provisions will be effective only if there is a check in the box "Included" in the Preamble.**

BY FILING THIS DOCUMENT, THE ATTORNEY FOR THE DEBTOR(S) OR DEBTOR(S) THEMSELVES, IF NOT REPRESENTED BY AN ATTORNEY, ALSO CERTIFY(IES) THAT THE WORDING AND ORDER OF THE PROVISIONS IN THIS CHAPTER 13 PLAN ARE IDENTICAL TO THOSE CONTAINED IN THE APPROVED MODEL PLAN PURSUANT TO LOCAL BANKRUPTCY RULE 3015(d) FOR THE WESTERN DISTRICT OF MICHIGAN BANKRUPTCY COURT, OTHER THAN ANY NONSTANDARD PROVISIONS INCLUDED IN PARAGRAPH IV.R.

Date: _____

, Debtor

Date: _____

, Debtor

Date: _____

, Counsel for the Debtor(s)

Exhibits

to

Entireties Exemptions

NORMAN C. WITTE
WITTE LAW OFFICES, PLLC

Exhibit A

DIMITRIOS ZAVRADINOS, Plaintiff-Appellee,

v.

JTRB, INC., JTR II, L.L.C., RTI, INC., LITTLE DADDY'S OF BLOOMFIELD HILLS, MICHIGAN, L.L.C., RICHARD ROGOW, ATHANASIOS PERISTERIS, and DARREN MCCARTY, Defendants,

and ROBERT PROBERT, Defendant-Appellant, and LIZA DANIELLE PROBERT, Intervening Party-Appellant.

No. 268570

Court of Appeals of Michigan

August 23, 2007

UNPUBLISHED

Oakland Circuit Court LC No. 2004-062158-CK

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant Robert Probert and intervening party Liza Danielle Probert appeal from a circuit court order rejecting their objections to plaintiff's garnishment of two brokerage accounts. The trial court determined that the accounts were subject to garnishment because they were owned as joint tenants with rights of survivorship, not as tenants in the entirety, and further, that plaintiff had overcome the presumption that the Proberts owned the accounts equally. We reverse and remand.

There is no dispute that property held by spouses as tenants by the entirety is not subject to garnishment because of MCL 600.6023a, and that the accounts are within the categories of property governed by MCL 557.151. Accordingly, the accounts are considered held in an estate by the entireties "unless an intent to do otherwise is affirmatively expressed." *DeYoung v Mesler,* 373 Mich 499, 504; 130 NW2d 38 (1964).

The trial court determined that the evidence showed that the Proberts owned the accounts as joint tenants with rights of survivorship, not as tenants by the entirety. To the extent that the Proberts are challenging this determination, it involves an assessment of intent and a finding of fact. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C).

At the evidentiary hearing, Janet Kemp, a financial consultant for Smith Barney, testified that the accounts were stock accounts and were set up in 2000 and 2001 by the Proberts, as joint tenants with rights of survivorship. Kemp agreed that an individual who wanted to set up an account as tenants by the entirety could have done so. Plaintiff introduced an account application for another account held by the Proberts. On that application, the type of account selected was "JRS Joint (*with rights of survivorship),* " while the box for "ENT Tenants by the Entirety, " two lines below, was not selected.[1] Liza Probert testified that she and Robert had been married since 1993. She did not testify regarding the Proberts' intent at the time the accounts were opened.

MCL 557.151 explicitly and unambiguously provides that classes of property named in the statute, which includes stocks and bonds, owned by a husband and wife are owned as tenants by the entirety "unless otherwise therein expressly provided." In interpreting this statute, the Supreme Court in *DeYoung, supra* , held even listing the husband and wife as "joint tenants" is insufficient to create an ordinary joint tenancy rather than as tenants by the entirety. *Id.* at 503. Indeed, the Court suggests that the "only alternative seems to be to use the words 'not as tenants by the entirety' when such is the intent of the conveyance." *Id.* at 503-504.

In the case at bar, there is no such express provision that the Proberts did not hold the stock account as tenants by the entirety. The only evidence that would support such a conclusion is that one form, which references a different account number, has a variety of ways to title an account and the box for a joint tenancy was checked rather than the box for tenants by the entirety. And its unclear whether that form was part of a form signed by the Proberts or whether it was merely filled out by the financial advisor and not actually signed or acknowledged by the Proberts.

Therefore, for plaintiff to prevail, we would have to conclude that a form that may or may not have been signed by the account holders that selects a joint tenancy rather than a tenancy by the entirety for a different account at the same financial institution meets the statutory standard of expressly providing for a form of ownership other than as tenants by the entirety. We cannot make that leap of logic. The possible expression of an intent for one account simply does not expressly provide an intent for a different account. For that matter, we cannot say that it satisfies the requirement of *DeYoung* that the words "not as tenants by the entirety" be used where such is the intent.

Furthermore, the trial court's reliance on *In re VanConett Estate*, 262 Mich App 660; 687 NW2d 167 (2004), is misplaced. *VanConett* involved property owned by three persons, two of whom were husband and wife. Title to the property conveyed the land to all three "as joint tenants with full rights of survivorship and not as tenants in common." *Id.* at 667. This Court concluded that this was sufficient to prevent a tenancy by the entireties from being created. *Id.* Even assuming that *VanConett* correctly interpreted and applied *DeYoung* to the facts of that case, *VanConett* does not apply here. First, *VanConett* concluded that the requirements of *DeYoung* were met because "explicit language was used, " presumably referring to the phrase "and not as tenants in common." *VanConett, supra* at 667. No explicit language of any sort was used in the case at bar. Second, *VanConett* involved property jointly owned by three people, not just by the husband and wife as is the situation in the case at bar.

The trial court concluded that the fact that the Proberts' accounts were created as a joint tenancy with rights of survivorship that that was sufficient to create a joint tenancy rather than a tenancy by the entireties. The trial court's conclusion is erroneous. First, *DeYoung* makes it clear that a conveyance to a husband and wife as joint tenants is insufficient to defeat the presumption in favor of a tenancy by the entirety because a tenancy by the entirety is a form of joint tenancy. *Id.* at 503-504. And if the trial court was drawing a distinction between property titled as "joint tenants" and "joint tenants with rights of survivorship, " no such distinction can be drawn. Not only does *DeYoung* not draw such a distinction, but MCL 557.151 itself equates a joint tenancy with full rights of survivorship to the presumption of a tenancy by the entireties when held by a husband and wife. Therefore, this was not sufficient to rebut the presumption of a tenancy by the entireties.

For the above reasons, we conclude that the trial court erred in determining that the presumption in favor of a tenancy by the entirety was defeated. Rather, the trial court should have held that the Proberts held the accounts as tenants by the entirety. Accordingly, on remand, the trial court shall enter a judgment in favor of the Proberts.

In light of our conclusion on this issue, we need not address defendants' argument that the trial court erred in rejecting their argument that Liza is presumed to have contributed half the balance in the funds and only the half attributable to Robert is subject to garnishment. See MCL 487.718.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendants may tax costs.

DISSENTING

FITZGERALD, P.J.

Defendant Robert Probert and intervening party Liza Danielle Probert appeal as of right from a circuit court opinion and order rejecting their objections to plaintiff's garnishment of two brokerage accounts. The trial court determined that the accounts were subject to garnishment because they were owned as joints tenants with rights of survivorship, not as tenants in the entirety, and further, that plaintiff had overcome the presumption that the Proberts owned the accounts equally. I would affirm.

There is no dispute that property held by spouses as tenants by the entirety is not subject to garnishment because of MCL 600.6023a, and that the accounts involved in this case are within the categories of property governed by MCL 557.151. MCL 557.151 establishes that certain personal property held by a husband and wife, including bonds and stock certificates, is subject to the same "restrictions, consequences, and conditions" incident to ownership of real property. Accordingly, the accounts are presumed held in an estate by the entireties "unless an intent to do otherwise is affirmatively expressed." *DeYoung v Mesler,* 373 Mich 499, 504; 130 NW2d 38 (1964).

The Proberts do not dispute that the presumption of tenancy by the entireties may be overcome, but contend that overcoming the presumption would require the accounts to "clearly state 'not as tenants by the entireties.'" However, this Court did not require that disclaimer in *In re VanConett Estate,* 262 Mich App 660; 687 NW2d 167 (2004). I would decline to impose such a requirement in this case.[1] The trial court determined that the evidence showed that the Proberts owned the accounts as joint tenants with rights of survivorship, not as tenants by the entirety. To the extent that the Proberts are challenging this determination, it involves an assessment of intent and a finding of fact. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C).

At the evidentiary hearing, plaintiff introduced an account application for an account held by the Proberts that was opened on December 24, 1998.[2] On that application, which the Proberts both signed, the type of account selected was "JRS Joint (*with rights of survivorship),* " while the box for "ENT Tenants by the Entirety, " two lines below, was not selected. Janet Kemp, a financial consultant for Smith Barney, agreed that an individual who wanted to set up an account as tenants by the entirety could have done so. She testified that the accounts at issue are stock accounts opened in 2000 and 2001 by the Proberts as joint tenants with rights of survivorship. Plaintiff produced an "Application Detail Report" for each account indicating that the accounts were JTWROS (joint tenants with rights of survivorship). Liza

Probert testified that she and Robert had been married since 1993. She did not testify regarding the Proberts' intent at the time the accounts were opened.[3]

In light of this evidence, the trial court's findings that the Proberts opened the accounts as joint tenants with rights of survivorship and that the Proberts intended to create an estate other than an estate by the entireties is not clearly erroneous. Plaintiff rebutted the presumption of a tenancy by the entirety by evidence demonstrating the Proberts' express intent to establish the investment accounts as joint tenants with rights of survivorship.

The Proberts further contend that even if the accounts are held in joint tenancy with rights of survivorship, Liza is presumed to have contributed half the balance in the funds and only the half attributable to Robert is subject to garnishment. See MCL 487.718.

The trial court correctly recognized that where an account is held under a joint tenancy, the co-owners are presumed to be equal contributors and equal owners. *Danielson v Lazoski,* 209 Mich App 623, 625; 531 NW2d 799 (1995); *Dep't of Treasury v Comerica Bank,* 201 Mich App 318, 328; 506 NW2d 283 (1993). However, the presumption may be rebutted. *Danielson, supra* at 626. Whether the presumption of equal ownership has been overcome is a question of fact. *Id*. at 629.

The Proberts essentially claim that where the joint owners are married, the presumption of joint ownership exists regardless of evidence concerning their contributions to the account. However, the respective contributions of spouses are relevant in overcoming the presumption of equal ownership in a joint account. For example, in *Sussex v Snyder,* 307 Mich 30; 11 NW2d 314 (1943), a husband and wife had a joint-deposit checking account. A judgment was entered against the husband, and the plaintiff sought to garnish the joint account. The Court noted that the plaintiff had failed to present evidence "showing what part of the money in the joint account, if any, had been deposited by either defendant [husband] or [his wife]." *Id*. at 37. "[I]n the absence of proof as to the amount contributed by either George or Elizabeth Snyder to the joint account, it is presumed that they were equal contributors and owners of the funds in such account." *Id*. at 38. The Court's statements indicate that actual contributions to the account by married individuals may overcome the presumption of equal ownership.

Here, the undisputed evidence at the hearing indicated that Liza did not make any contributions to the accounts. Under the circumstances, the trial court's finding that the evidence overcame the presumption of equal ownership is not clearly erroneous.

I would affirm.

Notes:

[1] It is unclear to us whether the Proberts signed this form or not. There is no signature on this page, but there are other forms associated with the opening of this account that are signed.

[1] In *In re VanConett Estate,* the Court examined language in a deed conveying land to "HERBERT L. VANCONETT, ILA R. VANCONETT, and FLORENCE H. VANCONETT as joint tenants with full right of survivorship and not as tenants in common." This Court recognized that the presumption of a tenancy by the entireties "may be overcome by explicit language in the deed." *Id.* at 667, citing *DeYoung, supra* at 503-504. The Court held that the language used was sufficiently explicit. "[B]ecause explicit language was used, a tenancy by the entireties was not created between Herbert and Ila, and all three held the property as joint tenants with full rights of survivorship." *In re VanConett Estate, supra* at 667.

[2] The application for this account indicated that it was a "new account." This account predated the opening of the accounts at issue in this case and was the only account application entered into evidence.

[3] Robert Probert did not testify.

Citing References :

Exhibit B

Personal Property Entireties Exemption in Michigan: Does It Apply to Modern Investment Devices?

by Paul H. Steinberg*

Introduction

Under Michigan common law, the right of survivorship in jointly held personal property was not favored unless expressly intended by the parties. Consistent with this policy, entireties ownership of personal property was not recognized at common law. In 1927, the Michigan Legislature enacted MCL 557.151, which recognized entireties ownership in specifically identified items of personal property. By recognizing entireties ownership, the act enabled a judgment debtor to protect such property from most claims of creditors, except those holding joint claims against both spouses, on the theory that the entireties estate is not severable.

Six types or classes of personal property are recognized by MCL 557.151 as having the same consequences of joint ownership as those enjoyed by husband and wife in real property. The act did not envision modern and diverse property interests with similarities to the properties described in the act but not specifically named.

A recent case, decided in the bankruptcy court and affirmed on appeal, sheds some light on the protection afforded to entireties personal property sharing some common attributes with those properties specifically identified in the act. However, the practitioner should be cautious in assuring his or her client that a particular item of personal property not specifically named in the act is free from process by aggressive judgment creditors.

This act—and the entire scheme of exemptions under Michigan law—should be reexamined and updated to eliminate ambiguities and bring such exemptions into the realities of the twenty-first century. This would benefit both judgment debtors and their creditors.

*The author gratefully acknowledges and thanks Judy B. Calton, Richard F. Fellrath, Paul J. Randel, and William H. Goldenberg for their valuable comments and assistance and, in particular, Judith Greenstone Miller for enlightening the author on the Michigan Land Contract Act and for her other helpful comments.

Entireties Ownership of Property in Michigan

The definition of entireties ownership of real property is as follows: "an estate by entireties refers to a form of co-ownership held by husband and wife with right of survivorship."[1]

Under Michigan common law, in the absence of fraud, the interest of a husband and wife in entireties property cannot be reached by a creditor of one of the spouses alone.[2] One notable exception emanates from the recent case *United States v Craft,* in which the U.S. Supreme Court held that a federal tax lien filed against an entireties interest of only one spouse subjects that spouse's interest in the property to the federal tax lien. The case was remanded for a determination of the valuation of that interest.[3] Although not technically an "exemption," the protection of entireties property is the result of the nature of its ownership and not part of the statutory scheme.[4]

Entireties Ownership in Personal Property

Earlier case law disfavored joint ownership of personal property. Before 1921, the Michigan Supreme Court, in *Ludwig v Brunner*, clearly expressed the opinion that in Michigan "joint tenancy in personal property with its right of survivorship does not exist."[5] Furthermore, in *Hart v Hart,* the court stated the following:

> From an examination of the authorities, we conclude that it is the fixed and settled law of this jurisdiction that the right of survivorship does not attach, as matter of law, to personal property held in joint ownership, nor that bequests to two or more persons by operation of law pass to the survivor; in other words, joint tenancy, in personal property, with its right of survivorship, does not obtain in this jurisdiction.[6]

In the case of *Lober v Dorgan,* the Michigan Supreme Court distinguished the facts of its case from those of *Ludwig*:

> In the *Ludwig* Case we said we

> would not, *as a matter of law*, infer from the words "joint tenants" the ordinary incident of survivorship, but that is not the question here. Here it is a question of contract. The parties themselves have provided for survivorship by agreement. The parties having so contracted, is there any valid reason why we should refuse to enforce their agreement? Our statute does not prohibit such a contract. There is nothing in the agreement which is immoral or against the public good.[7]

Justice Sharpe, concurring in the majority opinion of Justice Bird, made it clear that the court was not overruling prior case law and that the facts of this case distinguished themselves from earlier cases: "The right of the survivor [in this case] to take is not in any way dependent upon the joint estate. It obtains by reason of the express language of the instruments themselves. The intention is clearly expressed."[8] Quoting from the case of *Wait v Bovee*,[9] the court noted, "'[t]he drift of policy and opinion, as shown by legislation and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, *except in a few special cases, and it should not be applied except where the law in its favor is clear.*'"[10]

Following *Lober* in a case decided before the enactment of MCL 557.151, the Michigan Supreme Court recognized the right of survivorship in personalty (personal property) where created by the express act of the parties. However, the court found that an estate by the entireties "may not be created in personal property."[11]

In 1927, the Michigan Legislature enacted MCL 557.151, described as "[a]n act to provide for the joint ownership by husband and wife in joint tenancy of certain classes of personal property with right of survivorship." It provides as follows:

> All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences, and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

Although it is now established law that in the absence of statutory provisions to the contrary, a right of survivorship may be created in personal property[12] as recently as 1964 (37 years after enactment of 557.151). In the case of *De Young v Mesler*, Justice Souris, in his dissenting opinion, pointed out that "as a general rule . . . [a husband and wife] cannot own personalty by the entirety":[13]

> I find it impossible to read the statutory words of joint tenancy, used as they are in the classical sense of joint tenancy of realty with survivorship rights, "as if" the legislature had intended, instead, to create a statutory presumption of title by the entirety. In the first place, as has been noted above, our State does not favor entirety ownership of personalty as, concededly, it does realty, and, absent some plausible reason therefore, it defies belief that the legislature would have intended such a sharp departure from our past legal history in this State. Secondly, had the legislature so intended, it seems to me beyond doubt that it would have expressed such intention by use of language which is appropriate therefor—that it would have said "tenancy [or, more appropriately, title] by the entirety", instead of "joint tenancy" and instead of "held jointly by husband and wife with full right of ownership by survivorship.". . . It hardly is to be doubted that had the legislature intended by . . . [557.151] to create a *statutory presumption* that all bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness held by husband and wife as payees, indorsees, or assignees were to be held by them as entirety property, it would have stated such intention appropriately.[14]

It is important to note that the personal property that was the subject of analysis in *De Young* was a jointly titled debenture and that the majority opinion expressly found "that the instrument, a debenture, is specifically mentioned in the statute."

I quote extensively from the dissent of

This act—and the entire scheme of exemptions under Michigan law—should be reexamined and updated to eliminate ambiguities and bring such exemptions into the realities of the twenty-first century.

Justice Souris not in an effort to promote its position, but to illustrate that joint ownership with rights of survivorship in personal property has historically neither been presumed nor favored by law. For this reason, MCL 557.151 should not be read expansively but should be limited to the specific properties identified in the statute itself. It is one thing to presume entireties ownership in personal property jointly held by husband and wife, which Justice Souris decries, but it is quite another thing to argue the expansion of the exemption provided by MCL 557.151 to property not specifically identified in the statute. *De Young* did not purport to do this.

The Statutory Scheme of Exemptions Under Bankruptcy Law

MCL 557.151 should not be read expansively but should be limited to the specific properties identified in the statute itself.

Although entireties property comes into the bankruptcy estate by operation of 11 USC 541, the Bankruptcy Code allows a debtor to exempt from property of the estate any property that the debtor may exempt under the Bankruptcy Code itself[15] or, in the alternative, any property that is exempt under nonbankruptcy federal law or state or local law that applies on the date of the filing of the petition,[16] and "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."[17] The right of an individual debtor to exempt his or her property is an important right because, subject to certain limitations, "property exempted under . . . [11 USC 522] is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 title as if such debt had arisen, before the commencement of the case."[18]

The debtor has an affirmative duty to list the property claimed as exempt.[19] A party in interest, including the trustee appointed in the case, "may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under §341(a) is concluded, or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later."[20] The objecting party has the burden of proof to show that the exemptions are not properly claimed.[21] Property that is not exempt may be administered by the trustee for the benefit of creditors of the bankruptcy estate.[22]

The Applicability of Case Law and MCL 557.151 to Specific Types of Personal Property

Bank Deposits

Bank deposits are not included in the phrase "other evidences of indebtedness" used in MCL 557.151.[23] In *Modderman*, the court further declared that not only are the deposits in a joint name of husband and wife subject to garnishment, but the creditor has the right to overcome the presumption that each of the parties contributed one-half of the funds.[24]

As noted above, in Michigan, the holders of a joint bank account are joint tenants with the right of survivorship.[25] Moreover, MCL 487.718 provides the following:

> Deposits in a statutory joint account shall be subject to the rights of creditors of the persons designated in the statutory joint account contract as owners of the funds to the extent of the ownership, except that the funds shall remain subject to laws applicable to transfers in fraud of creditors.[26]

The distinction between survivorship and the ability to exempt property is highlighted by *Lilly v Schmock*,[27] in which the court acknowledged the right of parties to create a joint estate with right of survivorship in personalty in the case of bank deposits but did not recognize that such ownership protects such funds from creditor claims against one of the spouses.[28]

Mortgages and Land Contract Vendors' Interests

A mortgage interest is an interest in real property. Therefore, if it is held by the entireties, it is subject only to claims of joint creditors. It is also well established that rents payable to husband and wife on property owned by the entireties are not subject to garnishment.[29]

In Michigan, a land contract vendor's interest in real property has sometimes been viewed as an interest in personal property under the doctrine of "equitable conversion." Under this doctrine, a contract for the sale of land operates as an equitable conversion: the vendee's interest under the contract becomes realty, and the vendor's interest constitutes personalty.[30]

Although several cases have found the vendor's land contract interest to be protected as an entireties interest in personal

property,[31] MCL 557.81 conclusively protects the survivorship rights of each mortgagee and land contract vendor who holds his or her interest by the entireties:

> In all cases where a husband and wife shall sell land held as a tenancy by the entirety and accept in part payment for the purchase price the note or other obligation of said purchaser payable to said husband and wife, secured by a mortgage on said land payable to husband and wife, the said debt together with all interest thereon, unless otherwise expressly stated in said mortgage, after the death of either shall be payable to the survivor, and the title to said mortgage shall vest in the survivor, and in case a contract for the sale of property owned by the husband and wife as tenants by the entirety, is entered into by them as vendors, the same provisions herein applying to the rights of the survivors in mortgages as above set forth, shall apply to the survivor of the contract.[32]

In 1998, the Land Contract Act was amended "to recognize the creation, recording, and enforcement of mortgages of the respective interests of vendors and vendees of land contracts."[33] At least for the purposes of the act itself, it defines the interests of vendors and vendees subject to a land contract as real property interests.[34] As an interest in real property, and with the support of prior case law, the ability to protect either a vendor or vendee's interest in a land contract by the entireties should be laid to rest.

Other Evidences of Indebtedness

The cases discussed previously that deal with attempts to garnish a land contract payment are instructive because they illustrate the trend of the courts to limit the scope of protection of personal property held by husband and wife to those properties specifically within the language of the statute. As noted, a land contract receivable is not considered evidence of indebtedness within MCL 557.151, but it is protected as a *real* property interest and, of course, within the specific statutory protection of MCL 557.81. The following are examples of other evidences of indebtedness that the Michigan courts have identified as either falling within or outside the protection of MCL 557.151:

- **Promissory note:** A promissory note is specifically protected under the statute.[35] In the case of *Kuklish*, the court held that a promissory note made jointly to the name of husband and wife would, under MCL 557.151, pass to the wife on the death of the husband, and that his will could not defeat that right of survivorship.
- **Check:** A check made payable to a husband and wife creates an entireties interest that passes to the surviving spouse under MCL 557.151.[36]
- **Tax refund:** In the case of *Jahn v Regan*, the U.S. District Court noted that "[u]nder Michigan law a tenancy by the entireties can only be created in personal property by statute."[37] With respect to the taxpayer's claim that a tax refund payable jointly to them as husband and wife was property protected as evidence of indebtedness and, therefore, owned by them as tenants by the entireties under MCL 557.151, the court had the following to say:

> A tax refund or overpayment for a jointly filed tax return cannot be reasonably characterized as an "evidence of indebtedness" in the same manner as a mortgage or a bond. The refund plaintiffs are pursuing is not a document of indebtedness of the government. It is not even a negotiable instrument made payable to them. Therefore, plaintiffs' joint tax overpayment is not within MCL §557.151 and not held by them as tenants by the entireties.[38]

Exemptibility of an "Investor's" Account or "Stock Brokerage" Account

Modern investment products are far more numerous and creative than the few designated joint ownership interests protected under MCL 557.151, which specifically references only bonds, certificates of stock, and debentures. The nature and scope of an individual's investment interests is limitless: options; money market, mutual fund and cash management accounts; repos; certificates of deposit; variable annuities; limited partnership investments; zero coupon bonds; and managed futures are just some of the investment devices that do not neatly fall within the definitions of the statute. In a different context, the U.S. Supreme Court examined the definition of a security within the meaning of the Security and Exchange Act of 1934:

> In defining the scope of the market

As an interest in real property, and with the support of prior case law, the ability to protect either a vendor or vendee's interest in a land contract by the entireties should be laid to rest.

> that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits, "*SEC v W.J. Howey Co.*, 328 U.S. 293, 299 (1946), and determined that the best way to achieve its goal of protecting investors was "to define 'the term security in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" [39]

In the recent case of *Shapiro v Nicoloff (In re Nicoloff)*,[40] the debtor claimed ownership in "stocks held jointly with wife," valued at $85,598.24. In fact, the debtor's interest was an interest in an account designated as the "Olde Investor's Account," which was an investment account containing interests in publicly traded stock and money. The Olde Account was later acquired by H & R Block. The H & R investment fund did not fit within the precise definitions of bonds, certificates of stock, or debentures—the protected assets described in the statute—and so the debtor's claim of exemption in the proceeds of the account was challenged by the trustee. If the debtor were in possession of actual certificates of stock held jointly with his wife, the trustee would likely not have challenged the debtor's right to exempt them as entireties property. Instead, the trustee argued, the H & R account was more in the nature of a bank account, containing features of liquidity and ability to deposit cash proceeds. It was neither a bond nor certificate of stock.

The court's decision [in Shapiro v Nicoloff*] rested on the critical fact that any distribution from the account was required to be in the form of a check payable to both husband and wife, thus creating an entireties interest.*

The bankruptcy court overruled the trustee's objection, and this was upheld on appeal to the district court. The court's decision rested on the critical fact that any distribution from the account was required to be in the form of a check payable to both husband and wife, thus creating an entireties interest, relying on *Theisen v Theisen*.[41] The trustee's argument that the funds in the investment account should be treated as though they were in a joint bank account was rejected, noting that funds in a joint bank account are governed by MCL 487.703: "In Michigan, co-owners of a joint bank account are joint tenants with the right of survivorship. . . . Decisional law makes it plain that any of the co-owners of a joint account may withdraw the entire account."[42] Because the funds and the investment account that was the subject matter of the *Nicoloff* case could not be withdrawn by "any" of the co-owners of the joint account, the court found that it should not be treated as a joint bank account.

Nicoloff seems to rest its decision not so much on the nature of the property itself (the court does not expressly acknowledge that the investment account is property within MCL 557.151), but on the fact that it is jointly owned. However, jointly owned property is generally not exempt from process by a creditor holding a claim against either of the co-owners. Therefore, *Nicoloff* may provide some comfort of protection for something called a "jointly owned entireties investment account," but not a great deal.

Conclusion

If the rule of law is to provide predictability and fundamental fairness, MCL 557.151 and the general scheme of exemptions in Michigan do not serve these goals in the current debtor-creditor arena. The hodgepodge of common and statutory laws has resulted in uncertainty in the rights of creditors to attach property and of debtors to protect the same. And the list of exemptions range from the archaic ("10 sheep, 2 cows, 5 swine, 100 hens, 5 roosters, and a sufficient quantity of hay and grain . . . for properly keeping the animals and poultry for 6 months")[43] to the arcane (benefit, charity, relief, or aid to be paid, provided, or rendered by a society).[44]

For several years, the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar has examined the Michigan exemption scheme, and since 2001, the Advisory Committee to the Civil Law and Judiciary Subcommittee of the House Civil and Judiciary Committee has indicated an interest in reviewing Michigan's exemption laws. If you would provide me with any comments, they would be appreciated and shared with members of these committees.[45]

NOTES

1. *Lilly v Schmock*, 297 Mich 513, 517, 298 NW 116 (1941).

2. *General Electric Co v Levine*, 50 Mich App 733, 213 NW2d 811 (1973); *In re Trickett*, 14 BR 85, 86–87 (Bankr WD Mich 1981); *In re Grosslight*, 757 F2d 773, 776 (6th Cir 1985); *see* Bienenfeld, *Creditors v Tenancies by the Entirety*, 1 Wayne L Rev 105 (1955). *Grosslight* and *Trickett*, while acknowledging the ability of an individual debtor to exempt entireties (real) property, deal with the question of the right of a creditor holding a joint claim to attach entireties property. In such cases, a creditor, or

a bankruptcy trustee acting on behalf of joint creditors, may preserve its rights against entireties property.

3. *United States v Craft*, 122 S Ct 1414 (2002). For a discussion of the case, *see* Paul L. B. McKenney, *Tax Matters: Whose House Is It Anyway?*, MI Bus LJ, Summer 2002, at 7, and Paul H. Steinberg, *Hot Issues in Consumer Bankruptcies*, Bankruptcy Nuts & Bolts at 2-2 (ICLE 2002).

4. There are numerous statutory exemptions in Michigan, including a $3,500.00 homestead exemption and a $750.00 personal property exemption allowed by Mich Const 1963, art 10, §3. The primary provision for protection of personal property is MCL 600.6023. *See, e.g.,* insurance proceeds and disability benefits, MCL 500.2207 and 500.4054; workers' compensation, MCL 418.821; crime victims' compensation awards, MCL 18.362.

5. *Ludwig v Brunner*, 203 Mich 556, 559,169 NW 890 (1918).

6. *Hart v Hart,* 201 Mich 207, 214–215, 167 NW 337 (1918).

7. *Lober v Dorgan,* 215 Mich 62, 64, 183 NW 942 (1921).

8. *Id.* at 68.

9. *Wait v Bovee,* 35 Mich 425 (1877).

10. *Lober v Dorgan, supra* note 6, at 68; s*ee In re Peterson's Estate*, 239 Mich 452, 454, 214 NW 418 (1927).

11. *Scholten v Scholten,* 238 Mich 679, 683, 214 NW 320 (1927).

12. *See Commissioner v Hart*, 76 F2d 864, 865–866 (6th Cir 1935).

13. *De Young v Mesler*, 373 Mich 499, 506, 130 NW2d 38 (1964).

14. *Id.* at 506–507.

15. 11 USC 522(b)(1).

16. 11 USC 522(b)(2)(A).

17. 11 USC 522(b)(2)(B).

18. 11 USC 522(c).

19. Fed R Bankr P 4003(a).

20. Fed R Bankr P 4003(b).

21. Fed R Bankr P 4003(c).

22. 11 USC 704.

23. *McMahon v Holland*, 260 Mich 246, 248–249, 244 NW 462 (1932); *American Nat'l Bank & Trust Co v Modderman*, 37 Mich App 639, 195 NW2d 342 (1972).

24. *American Nat'l Bank & Trust Co,* 37 Mich App at 642. In that case, however, the trial court had ruled that the creditor had not overcome the presumption of one-half ownership.

25. MCL 487.703.

26. *See State of Michigan, Department of Treasury v Comerica Bank,* 201 Mich App 318, 326, 506 NW2d 283 (1993).

27. S*upra* note 1.

28. *See Churchill, Joint Bank Accounts: One Size Doesn't Fit All,* 78 Mich Bar J 292 (1999), at 295, fn.3: "But, money in a couple's joint bank account which originated from the sale or rental of real estate owned by the entirety, may likewise be owned by the entirety; *Muskegon Lumber & Fuel Co v Johnson*, 338 Mich 655, 62 NW2d 619 (1954) and *SNB Bank and Trust v Kensey,* 145 Mich App 765, 378 NW2d 594 (1985)." This is consistent with the right of spouses to protect proceeds derived from entireties real property discussed in the previous section.

29. *People's State Bank v Reckling*, 252 Mich 383, 233 NW 353 (1930); *American State Trust Co v Rosenthal*, 255 Mich 157, 237 NW 534 (1931); *Bankers' Trust Co v Humber*, 264 Mich 71, 249 NW 454 (1933).

30. *Charter Twp of Pittsfield v Saline*, 103 Mich App 99, 302 NW2d 608 (1981); *Brooks v Gillon*, 352 Mich 189, 89 NW2d 457 (1958); *In re Plymouth Glass Co*, 171 F Supp 650 (ED Mich 1957).

31. In the case of *Hendricks v Wolf,* 279 Mich 598, 602, 273 NW 282 (1937), the court held that a land contract vendor's interest was a personal property interest that did not come within the statutory phrase "other evidences of indebtedness." The court relied on the earlier case of *Commissioner v Hart,* 76 F2d 864 (6th Cir 1935), in which the court assumed, but did not decide, that a land contract came within the phrase "other evidences of indebtedness." *Hendricks* held that the interest was protected nonetheless: "Notwithstanding that land contract interests are for certain purposes deemed to be personal property, it has been the general understanding and construction of the law for many years that the right of survivorship exists with respect to land contract interests if the property was originally held as an estate by the entirety." *Commissioner v Hart* at 866.

32. *See Papp v Brownlee*, 361 Mich 501, 503, 105 NW2d 430 (1960); *Battjes Fuel & Building Material Co v Milanowski,* 236 Mich 622, 624, 211 NW 27 (1926).

33. John G. Cameron, Jr., *Michigan Real Property Law: Principles and Commentary, 2002 Cumulative Supplement to Volumes 1 and 2* at 148 (ICLE 2002).

34. MCL 565.357(2).

35. *Kuklish v Wohleben*, 349 Mich 24, 84 NW2d 535 (1957).

36. *Theisen v Theisen*, 27 Mich App 356, 183 NW2d 373 (1970).

37. *Jahn v Regan,* 584 F Supp 399, 409 (ED Mich 1984).

38. *Id.*

39. *Reves v Ernst & Young*, 494 US 56, 60–61 (1990).

40. *Shapiro v Nicoloff,* Civ. Case No. 01-CV-71591-DT (ED Mich 9/25/01) (Hon. Patrick J. Duggan) (unpubl.).

41. *Theisen v Theisen, supra* note 36.

42. *Shapiro v Nicoloff, supra* note 39, quoting from *Department of Treasury v Comerica Bank,* 201 Mich App 318, 325, 506 NW2d 283 (1993).

43. MCL 600.6023(1)(d).

44. MCL 500.8181.

45. The author would also appreciate any "war stories" or other published or unpublished opinions on personal property exemptions under Michigan law.

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Exhibit C

Limited Liability Company Interest Ownership by the Entireties and the Potential Aftereffects of Craft

By Marla Schwaller Carew

Ownership of Property by the Entireties

Michigan is one of a handful of states that retain real property ownership by the entireties.[1] This form of ownership, in which a husband and wife hold property with rights of survivorship, was first recognized by Blackstone[2] and later described by the Michigan Supreme Court in *Long v Earle* as follows:

> [O]ne tenant by the entirety has no interest separable from that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title.[3]

Entireties ownership has traditionally offered married owners protection from creditors of one spouse. The Michigan Supreme Court summarized this protection in *Sanford v Bertrau*: "It has been repeatedly held in this State that where a judgment is recovered against one of two tenants by the entireties no lien can attach to the interest of one."[4] In 1971, the Court of Appeals for the Sixth Circuit reinforced that belief in *Cole v Cardoza*.[5] This case, in which married homeowners brought suit to challenge federal tax assessments stemming from unpaid tax liabilities attributable to the husband's wagering, addressed the question of whether a federal tax lien could attach to real property owned by the entireties.[6] The court stated that it could not.

> In Michigan tenants by the entirety hold under a single title. Neither spouse has the power without the concurrence of the other to alienate the estate or any interest therein, and neither the land nor the rents and profits therefrom are subject to levy or execution for the sole debts of the husband. Thus, in the present situation, the federal tax lien does not attach to the subject property owned by Eugene and Mary Cole by the entirety, because the Government's tax lien is against Eugene Cole.[7]

The security that entireties homeowners could receive under the "single title" theory of *Cole* was addressed and eventually eroded by a string of cases[8] culminating most recently and notoriously with the U.S. Supreme Court's holding in *United States v Craft*.[9] While the Court's holding will be dealt with at greater length below and final guidance on *Craft* is not yet available from the IRS,[10] it suffices at this time to note that the significant pre-*Craft* cases addressed the power of federal tax liens to reach real property and thus that none may be used as a reliable indicator of a non-government creditor's rights in personal property held by the entireties.

While the benefits and predictability of real property entireties ownership has been available for Michigan spouses for well over a century,[11] the creation of tenancy by the entireties ownership interests in personal property is not favored in Michigan courts,[12] and such ownership is available only if explicitly provided for in a statute.[13] For example, in a rare mention of entireties ownership outside of the real estate laws, MCL 557.151 permits a type of ownership "incident to the ownership of real estate held jointly by husband and wife" for "all bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of

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indebtedness hereafter made payable to persons who are husband and wife." Consistent with the statute's limited allowance of personal property entireties ownership is the relative scarcity of case law that addresses ownership of personal property held by husband and wife[14] or the "single title" and "multiple interests" theories of entireties property addressed by the *Craft* Court.[15]

2002 Amendments to the Limited Liability Company Act

2002 PA 686, effective December 30, 2002, created a second category of personalty that may be owned by the entireties—limited liability company (LLC) interests. 2002 PA 686 amended the following sections of the Michigan Limited Liability Company Act[16] (the Act). Section 504 of the Act states:

> A membership interest is personal property and may be held in any manner in which personal property may be held. A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.[17]

Entireties ownership has traditionally offered married owners protection from creditors of one spouse.

In regard to distributions and voting rights, new language in Sections 303(1)(b) and 502(1)(b) of the Act establishes that any single interest owned by tenants by entirety must be treated as owned by one member.[18] Though unrelated to attachment by creditors of one spouse, these provisions appear to follow the "single title" theory of entireties ownership established in *Cole*.

The provisions permitting and explaining ownership by the entireties were proposed as amendments to the Act by the Ad Hoc Drafting Committee, an informal group of Michigan business and tax lawyers interested in assisting the Michigan legislature.[19] The committee recommended adding entireties language before the Supreme Court's decision in *Craft* was released in an effort to offer LLC members the benefits available to Michigan entireties stock owners under the Michigan Compiled Laws.[20] While some features of ownership by the entireties, such as exemption from certain actions against one spouse and ease of transfer after death, would obviously benefit LLC members, any potential hazards of LLC interest ownership by the entireties remain open to speculation in the aftermath of *Craft*.

For a summary of the facts of *Craft*, see "*United States v Craft*: How Did We Get Here?" by Lynn M. Brimer, in this issue.

The *Craft* Court's Reasoning

Although the *Craft* Court's holding and reasoning pertain to real property, a number of ideas embraced by a majority of the Supreme Court could potentially appear in personal property entireties disputes. First, the Court looked to the proposition that federal law creates no property rights but rather attaches consequences to rights or interests created by state law.[21] "'[W]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of federal tax lien legislation.'"[22] The Court then explored the rights and interests that Michigan grants to entireties owners of real property through the classic "bundle of sticks" analogy and a study of statutory rights granted to Michigan entireties owners of real property, such as the rights of survivorship, use, exclusion of third parties, alienation with mutual consent, and ownership as tenants in common after divorce.[23] It found that while an entireties owner could not unilaterally alienate property, it possessed a roster of other unilaterally exercisable rights as part of its entireties share.[24]

The Court then looked to the federal tax lien statute, IRC 6321, to determine whether the multiple rights Michigan grants to one entireties property owner qualify as "property" or "rights to property" under that statute. The Court concluded that the state rights do qualify as "property" or "rights to property" on two grounds. First, Don Craft's rights qualified as "property" or "rights to property" because the statutory language authoriz-

ing the tax lien is "'broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have.'"[25]

Second, Don Craft's rights qualified as "property" or "rights to property" because three of those rights were

> some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it. These rights alone may be sufficient to subject [the owner's] interest in the entireties property to the federal tax lien. They gave [the owner] a substantial degree of control over the entireties property . . . .[26]

The Court ended this discussion with the proposition set forth in *Drye v United States*: "[I]n determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' the important consideration is the breadth of the control the [taxpayer] could exercise over his property."[27] The *Drye* Court found control sufficient to cause a state right to become "property" or "rights to property" when a taxpayer's right to disclaim an inheritance allowed him "either to inherit or to channel the inheritance to a close family member"[28] but noted that even an interest that may not be alienated (an interest in a spendthrift trust) could constitute property for IRC 6321, as the trust beneficiary could have some dominion over the property while lacking the ability to transfer his or her interest to third-party creditors.[29]

After it determined that Don Craft had "property" or "rights to property" for the purposes of IRC 6321, the Court revisited *United States v Rodgers*[30] and the holding that "federal tax liens may attach to property that cannot be unilaterally alienated."[31] While the facts in *Rodgers* concerned the judicially decreed sale of Texas homestead property and the *Rodgers* Court stated that "tenancies by the entirety pose a problem quite distinct from that at issue in the case of homestead rights,"[32] the *Rodgers* Court found homestead owners' separate interests to be "property" for a federal tax statute. The *Craft* Court justified its application of the *Rodgers* holding to different facts with a question that hinted at the Court's concern—if Don Craft's rights to the entireties property do not constitute "property" or "rights to property" belonging to him or to Sandra Craft (who had no more interest in their home than he did), then to whom do they belong? The Court's answer was that such property must belong to someone, if only to foil attempts at federal tax avoidance.[33] Whether any court will extend the collection powers of non-IRS creditors so far in dissimilar cases is unknown but currently appears doubtful. In the last quarter of 2002, North Carolina and Rhode Island bankruptcy courts confronted with Chapter 7 filings and entireties homeowners refrained from extending *Craft* beyond its facts, in one case stating that application to non-IRS creditors was legally incorrect and inappropriate:

> [T]he power of the federal tax collector to disregard state exemptions has not been expanded to other creditors . . . .
>
> . . . Unlike a federal tax collector, a bankruptcy trustee has the rights and powers of a hypothetical judicial lien creditor . . . . A bankruptcy filing does not elevate the rights of the hypothetical judicial lien creditor, nor does the trustee stand in the shoes of the IRS.[34]

2002 PA 686 . . . created a second category of personalty that may be owned by the entireties.

Entireties Ownership of LLC Interests post-*Craft*

What do the *Craft* Court's conclusions regarding Michigan entireties ownership of real property mean to entireties owners of LLC interests? A number of theories promoted by the *Craft* Court could make the interest of one spouse in LLC entireties property more likely to be subject to creditors' liens. These theories are state law determination of a property owner's rights and interests; the separation of entireties ownership rights into a "bundle of sticks" (especially the rights deemed most essential by the *Craft* Court—use, income and exclusion); and the exercise of dominion and control over property as a characteristic sufficient to cause a state law right to become "property" or "rights to property" under federal law. Alternatively, the reluctance of some state courts to extend *Craft* beyond its facts could eliminate this risk, at least against non-government creditors.

Limited Liability Company State Law Rights and Interests

The Michigan Limited Liability Company Act grants a number of rights and interests to members. These include the right to form a state-sanctioned limited liability entity,[35] to transact business under an assumed name,[36] to make contributions to and receive distributions from the company,[37] to vote,[38] to appoint a manager,[39] to transfer the member's interests to any transferee and make that transferee a recipient of distributions,[40] to consent to the admission of transferee members with full rights of participation,[41] and to prevent the admission of transferee members possessing full rights of participation.[42] Entireties owners of LLC interests receive some of the same rights (e.g., use, income and exclusion) granted to entireties owners of real property.[43]

Entireties owners of LLC interests receive some of the same rights . . . granted to entireties owners of real property.

Given the list of rights granted to LLC members, the application of *Craft's* "bundle of sticks" approach to identifying rights possessed by an individual entireties owner could in many instances find "property" to which a federal lien like that in IRC 6321 would attach.

Exercise of Dominion and Control

While a court could easily list the individual rights or interests contained in LLC membership interests owned by the entireties and possessing rights of participation in all company activities, the application of the *Drye* "control or dominion" test to interests held by transferee entireties owners could be more difficult. MCL 450.4505(2) states that an ordinary assignee of a member's interest receives only the right to receive distributions from the company and not the ability to participate actively in LLC operations. MCL 450.4506 states that to become a member of a limited liability company with full rights of participation, an assignee's admission must receive the unanimous vote of all other company members.

A court could easily find that an LLC member with full participation rights exercises dominion and control over his or her property. Even in a manager-managed LLC such a member is entitled (and statutorily required) to vote on certain critical matters such as dissolution and merger.[44] What kind of dominion and control under the *Drye* test does an assignee who receives only distributions exercise? This question has not been addressed in regard to LLC membership interests, and it is uncertain whether the right to distributions alone would be deemed sufficiently like the rights of a spendthrift trust beneficiary or a disclaiming heir to constitute property.[45]

What Might a Creditor with a Lien on Entireties LLC Interests Receive After Default?

If a creditor were able to attach a lien to Michigan LLC entireties property, what rights would that creditor have against the membership interests? Barring special provisions in the security agreement or other documents, such a creditor (unlike the creditors in *Rodgers* and *Craft*) would not be able to force a sale of the property or sharing of sale proceeds under statutory law. Rather, the creditor would be limited to receiving a share of LLC distributions. Under MCL 450.4507, a judgment creditor may appeal to a court of competent jurisdiction with a charging order against the LLC membership interest. However, the same section provides that such a creditor may receive no more than an assignee would receive under MCL 450.4505, a right to receive company distributions.

In *Hopson v Bank of North Georgia*,[46] a creditor of a Georgia LLC (organized under a statute similar to the Michigan Limited Liability Company Act[47]) who sought to foreclose on LLC membership interests found that it could foreclose but take no more than an economic interest in the company. Both the Georgia LLC statute and the company's operating agreement required unanimous approval of all members before any transferee could exercise the full rights of a member.[48] While the secured creditor was able to foreclose on its interests, had it read the operating agreement carefully and obtained the necessary signatures, it could have received a more active role in the LLC.

Protection for Secured Creditors

Entireties ownership of real property is presumed to commence on the filing of a deed listing the owners as husband and wife.[49] When will entireties ownership of LLC interests held by husband and wife

before January 1, 2003, commence? There is a general presumption that changes in the law apply prospectively.[50] Thus, the Act amendments should cause existing interests held by "husband and wife" to become statutory entireties property automatically and vest with the owners all of the rights available to real property owners by the entireties.[51]

Given this likely automatic vesting of entireties protection and the substantial uncertainty regarding whether *Craft* might be extended beyond its facts, creditors are faced with a number of questions regarding the protection of their interests in LLC membership interests. One question faced by creditors is whether a married LLC member who owns her interest individually and transfers her interest to herself and her spouse "as husband and wife" would make a fraudulent transfer under the Michigan Uniform Fraudulent Transfer Act[52] or the United States Bankruptcy Code.[53] This question is untested by litigation, but such a transfer could meet the test for fraudulent transfers set forth in 11 USC 548 and MCL 566.34–.35. First, the transfer to "husband and wife" could qualify as a "transfer" as, post-*Dry*e and -*Craft*, it could be deemed to be a disposal of "property" or "an interest in property."[54] Second, with new entireties protections in place, such a transfer could qualify as one that could "hinder, delay or defraud" another creditor.[55] While these results are untested they are plausible and creditors should be aware of the uncertainty.

In light of the current uncertainty regarding the future treatment of personal property owned by the entireties, creditors can take a variety of actions to improve the predictability of their rights in the collateral. First, creditors could require married non-entireties owners and their spouses to execute security agreements and amended operating agreements with provisions that prohibit any transfer of interest without the creditor's prior written approval. The documents could include a provision that transfer to the debtor and spouse "as husband and wife" without the creditor's prior written consent will presumptively constitute a fraudulent conveyance and be void ab initio. These measures could help to give creditors a more predictable stance against married debtors who own LLC membership interests individually.

Second, in cases in which LLC membership interests owned either by a married individual or married couple serve as collateral (or merely as assets of a debtor that might be reached in subsequent litigation), creditors could require both spouses to execute all security agreements or, at the very least, require a guaranty from the nondebtor spouse. These measures could eliminate arguments regarding whether a creditor of one spouse may reach entireties property, as both spouses would be automatically bound.

Finally, if a secured creditor wishes to participate in LLC management upon foreclosure of its lien on membership interests, the creditor should make sure that it receives and reads the LLC's operating agreement and investigates the ease with which it would be able to obtain all necessary signatures for admission as a full member on default. Negotiations on member agreements might resolve uncertainty regarding future actions by the other members.

Summary

The impact of *Craft* on LLC membership interests owned by the entireties is very difficult to predict, given the unusual facts of the case and the unwillingness of the few courts to address *Craft* to extend its holding beyond its facts. However, the convergence in 2002 of the Supreme Court's opinion and the amendment to the Michigan Limited Liability Company Act permitting ownership by the entireties could produce a radical change in creditors' rights to collateral consisting of LLC membership interests. Until *Craft's* effect on personal property is better known, creditors can attempt to protect their interests by remaining aware of relevant case law developments and taking a handful of relatively simple steps designed to make their rights on foreclosure more predictable.

In light of the current uncertainty regarding the future treatment of personal property owned by the entireties, creditors can take a variety of actions to improve the predictability of their rights in the collateral.

NOTES

1. John G. Cameron, Jr., *Michigan Real Property Law* §9.11–§9.16 (ICLE 2d ed 1993 & Cum Supp). See Richard R. Powell & Patrick J. Rohan, *Powell on Real Property* 52, (1968 ed), for a list of all states that recognize ownership by the entireties in whole or part and the states' treatment of creditors. See also Steve R. Johnson, *After* Drye: *The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 Ind L J 1163, 1170 (2000), for analysis of jurisdictions that offer a "full bar" on creditors reaching the entireties property and states that permit a modified bar.

2. " 'And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety . . . the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.' " John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L Rev 35, 38 (1997).

3. *Long v Earle*, 277 Mich 505, 517, 269 NW 577 (1936).

4. *Sanford v Bertrau*, 204 Mich 244, 252–253, 169 NW 880 (1918).

5. 441 F2d 1337 (6th Cir 1971).

6. *Id.* at 1343.

7. *Id.* (citation omitted).

8. *See Drye v United States*, 528 US 49 (1999); *United States v Rodgers*, 461 US 677 (1983); *United States v Certain Real Property Located at 2525 Leroy Lane*, 910 F2d 343 (6th Cir 1990); *United States v 44133 Duchess Drive*, 863 F Supp 492 (ED Mich 1994); *Fischre v United States*, 852 F Supp 628 (WD Mich 1994); *United States v One Single Family Residence with Outbuildings*, 699 F Supp 1531 (SD Florida 1988).

9. 535 US 274 (2002).

10. Deborah Butler, Assistant Chief Counsel, Department of Treasury, Internal Revenue Service, stated at a 2003 meeting of the American Bar Association Tax Section that IRS guidance might be available in second quarter 2003.

11. " 'The estate by entireties was not created by statute in this State, but is preserved by statute as it existed at common law.' " *Sanford*, 204 Mich at 251 (quoting *Sharpe v Baker*, 51 Ind App 547, 558, 96 NE 627 (1911)).

12. "The policy of Michigan is against recognizing the existence of tenancy by the entirety interests in personalty." *In re Jones*, 31 BR 372, 376 (ED Mich 1983); *Deyoung v Mesler*, 373 Mich 499, 130 NW2d 38 (1964).

13. *Jahn v Regan*, 584 F Supp 399 (ED Mich 1984); *Guldager v United States*, 204 F2d 487 (6th Cir 1953); *Peoples State Bank of Pontiac v Reckling*, 252 Mich 383, 384–385, 233 NW 353 (1930); *Battjes Fuel & Bldg Material Co v Milanowski*, 236 Mich 622, 624, 211 NW 27 (1926).

14. A few cases from outside of Michigan have held that entireties interests in personalty must be created with explicit language and may not be inferred. *In re Welty*, 217 BR 907 (Wyo 1998); *In re Podzamsky*, 122 BR 596 (MD Fla 1990); *In re Golub*, 80 BR 230 (MD Fla 1987).

15. 535 US at 282–288; see, e.g., *Department of Treasury v Comerica Bank*, 201 Mich App 318, 506 NW2d 318 (1993) (in which court permitted state tax levy against bank account owned by husband and wife as joint tenants [not tenants by entirety] and recovery by nondebtor spouse of her interest and did not address individual spouse's and creditor's rights to entireties property).

16. MCL 450.4101 et seq.

17. MCL 450.4504(1).

18. MCL 450.4303(1)(b), .4502(1)(b).

19. E-mail dated March 11, 2003, from James Cambridge, Kerr, Russell and Weber, PLC, a member of the Ad Hoc Drafting Committee, to Marla Schwaller Carew.

20. *Id.* MCL 557.151 lists "certificates of stock" as one type of personal property that may be owned by husband and wife "in joint tenancy . . . in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either."

21. *Craft*, 535 US at 278.

22. *Id.* (quoting *Drye*, 528 US at 58).

23. 535 US at 277–284 (citing MCL 552.102, 557.71, 700.2901(2)(g)).

24. 535 US at 281.

25. 535 US at 283 (quoting *United States v National Bank of Commerce*, 472 US 713, 719–720 (1985)).

26. *Id.* (citations omitted).

27. *Id.* (quoting *Drye*, 528 US at 61).

28. *Drye*, 528 US at 60.

29. *Id.* at 60 n7.

30. 461 US 677.

31. *Craft*, 535 US at 284.

32. *Rodgers*, 461 US at 702 n31.

33. *Craft*, 535 US at 285.

34. *In re Knapp*, 285 BR 176,182–183 (MD NC 2002); *see also In re Ryan*, 282 BR 742 (D RI 2002); *Hatchett v United States*, No 00-1645, 2003 US App LEXIS 11094 (6th Cir June 4, 2003) (application of *Craft* to similar facts, court followed *Craft*).

35. MCL 450.4202.

36. MCL 450.4206.

37. MCL 450.4301–.4306.

38. MCL 450.4502.

39. MCL 450.4402–.4403.

40. MCL 450.4505(2).

41. MCL 450.4506(1).

42. *Id.*

43. *Craft*.

44. MCL 450.4502(4).

45. *Drye*, 528 US at 52.

46. 258 Ga App 360, 362, 574 SE 2d 411 (2002).

47. Ga Code Ann §14-11-101(13) defines "limited liability company interest" to mean a member's share of the profits and losses of the company; Ga Code Ann §14-11-502 states that an assignee receives a right to share in profits and losses; and Ga Code Ann §14-11-503 requires unanimous approval of other members to permit an assignee to exercise full participation rights.

48. *Hopson*, 258 Ga App at 361–362.

49. *Cameron*, supra n1.

50. *Selk v Detroit Plastic Prods*, 419 Mich 1, 9, 345 NW2d 184 (1984).

51. MCL 450.5102 states that the Act "may be . . . amended . . . and every limited liability company subject to this Act is bound by the changes." However, this does not address the effect of retroactive application of amendments on secured creditors.

52. MCL 566.31 et seq.

53. 11 USC 301 et seq.

54. 11 USC 101(54).

55. 11 USC 548(a)(1)(A).

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