

FILED
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC

AUG 11 1995

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

By: BARON STOSHON
Deputy Clerk

In Re:)	Case No. 95-30574
)	
DAVID R. LUTHER)	Chapter 7
CAROL LUTHER)	
)	
Debtors.)	JUDGEMENT ENTERED ON AUG 11 1995

**ORDER SUSTAINING TRUSTEE'S OBJECTION
TO CLAIM OF EXEMPTIONS AND GRANTING TRUSTEE'S
MOTION TO CONSOLIDATE**

This case is before the court on the Trustee's *Objection to Exemptions and Motion to Consolidate* filed on June 14, 1995. The court has determined that the Trustee's objection should be sustained and the motion to consolidate should be granted. The court makes the following findings of fact and conclusions of law and enters its Order:

1. On April 27, 1995, David R. Luther and Carol Luther (debtors) filed a joint petition under Chapter 7 of the Bankruptcy Code pursuant to 11 U.S.C. §302. The debtors scheduled debts for which they are jointly obligated.

2. The debtors own their residence as tenants by the entirety. The schedules filed by the debtors value this residence at \$96,500.00. The residence is subject to a mortgage to Centura Bank in the amount of approximately \$89,562.20 as of the filing date. Equity in the debtor's residence, without any deductions for liquidation or other costs, is estimated to be \$6,937.80.

3. The female debtor claimed the entire equity in the residence as exempt pursuant to the N.C. Gen. Stat. §1C-1601(a)(1) homestead exemption provided for by 11 U.S.C. §522(b)(2)(A).

4. In addition, the male debtor claimed as exempt a car pursuant to his \$1,500.00 automobile exemption provided by N.C. Gen. Stat. §1C-1601(a)(3) and \$2,500.00 of his "wildcard" exemption pursuant to N.C. Gen. Stat. §1C-1601(a)(2). The male debtor also claimed \$400.00 in a Centura Bank checking account and a \$600.00 Ohio tax refund as exempt under the "wildcard" exemption of N.C. Gen. Stat. §1C-1601(a)(2).

5. The first issue before the court is whether, when a husband and wife file a joint Chapter 7 petition under Title 11, either spouse alone may claim as exempt the entire equity interest in the couple's homestead owned by them as tenants by the entirety.

6. The nature of a debtor's interest in property held as a tenant by the entirety is determined by nonbankruptcy law. In re Ford, 3 B.R. 559, 565 (Bankr. D.Md. 1980), *affirmed sub nom*, Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981). In North Carolina, the nature of an estate by the entirety is as follows:

A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.

N.C. Gen. Stat. §39.13.6(a) (1982).

7. The debtors have cited In re Arnold, 33 B.R. 765 (Bankr. E.D.N.Y. 1983) and In re Chandler, 148 B.R. 13 (Bankr. E.D.N.C. 1992) for the proposition that one spouse in a jointly filed case may claim a homestead exemption while the other spouse claims exemptions under the "wildcard." The court finds both the Arnold and the Chandler decisions to be distinguishable from this case.

8. In Arnold, the court held that a husband and wife who file a joint petition may claim both the New York homestead and cash exemptions without specifying in the petition which exemption each spouse is claiming. Arnold at 768. However, this case is not persuasive because the court never addressed the nature of each spouse's property interest, or whether the homestead was owned by the couple as tenants by the entirety.

9. In Chandler, the court held that the debtors' Chapter 13 plan met the requirements of the liquidation test of 11 U.S.C. §1325(a)(4) where a liquidation of the debtors' tenancy by the entirety property would have resulted in both debtors claiming the property exempt as to individual creditors under 11 U.S.C. §522(b)(2)(B). Chandler at 15. The court recognized that a debtor could not claim the tenancy by the entirety exemption against joint creditors, but found that a debtor should not lose all benefit of §522(b)(2)(B) when joint creditors are present. Id., citing, Sumy v. Schlossberg, 777 F.2d 921 (4th Cir. 1985). The court is not persuaded by the Chandler decision because it

was in the context of determining each spouse's ability to claim an exemption specifically for property owned as tenants by the entirety pursuant to §522(b)(2)(B). In the case at bar, the female debtor has claimed the entire equity interest in the property as a homestead exemption pursuant to §522(b)(2)(A) and has affirmatively declined to claim the property as exempt under §522(b)(2)(B). Further, the Chandler decision does not address the amount of each spouse's exemptible interest in the tenancy by the entirety property.

10. The court is more persuaded by the reasoning of two other courts who have addressed the precise issue at bar. These courts have determined that in a jointly filed bankruptcy case, one spouses' exemptible interest in tenancy by the entirety property is only one-half of the equity interest. See, In re Flinn, 95 B.R. 13 (Bankr. N.D.N.Y. 1988) and In re Ignasiak, 22 B.R. 828 (Bankr. E.D. Mich. 1982).

11. The court finds that while 11 U.S.C. §522(m) provides that both husband and wife have a personal right to claim the allowable property exemptions in their joint petition, each spouse may only claim an exemption to the extent of his or her interest in the property. It follows that because the debtors in the present case own their residence as tenants by the entirety, each possessing an undivided one-half interest in the whole, each spouse alone may only claim as exempt one-half of the entire equity interest in the homestead. The tenancy by the entirety is a legal fiction that treats a husband and wife as one legal

entity who jointly own the entire property. However, ownership as tenants by the entirety should not enable a couple to manipulate the bankruptcy exemptions to allow one spouse to claim the entire equity interest of property that is clearly jointly owned. Therefore, the court finds that the female debtor is entitled to claim only her one-half interest in the tenancy by the entirety property as her homestead exemption.

12. The second matter before the court is the Trustee's Motion to Consolidate. In light of the fact that most of the debtors' assets are joint assets and the debts are joint debts, the court finds that the two estates should be consolidated.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Trustee's Objection to Claim of Exemptions is sustained;

2. The claim of a homestead exemption by Carol Luther in the residence located at 8617 Stoneface Road, Charlotte, North Carolina, is limited to the sum of THREE THOUSAND FOUR HUNDRED SIXTY EIGHT and 80/100 DOLLARS¹; and

¹Computed as follows:

Value of Property	\$96,500.00
Amount due Mortgage	<u>\$89,562.20</u>
Total Equity	\$6,937.80
One-half Equity	\$3,468.90

3. The Trustee's Motion to Consolidate is granted.

This the 11th day of August, 1995.



George R. Hodges
United States Bankruptcy Judge