A DEBTOR'S RIGHT TO AVOID JUDGMENT LIENS;
IS IT TIME TO REVISIT *In Re: Levinson* ?

By: Robert L. Pryor

While a bankruptcy discharge discharges most debts, it does not automatically avoid liens. When a creditor sues, obtains a judgment, and dockets it in the county where the Debtor's homestead is located, the lien created upon the Debtor's homestead remains unaffected and continues as an in rem claim against that property (although the Debtor's in personam liability may have been otherwise discharged).

In order to avoid the judgment lien itself, a Debtor must look to certain very limited sections of the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code" or "Code") to determine whether there is a separate specific statutory authorization which would allow the Debtor to avoid and thus remove that judgment lien from the property as well. Section 522(f) is generally regarded as the principal and most powerful vehicle to accomplish this objective. However, under the district court decision, In re Levinson, 395 B.R. 554 (E.D.N.Y. 2008), the ability to utilize this section to facilitate a Debtor's fresh start has been meaningfully eroded.[1] It is submitted that both fundamental logic as well as a rapidly expanding body of case law outside of the Eastern District of New York would suggest that a re-analysis of the holding of Levinson may be timely.

In Levinson, the Debtor claimed a homestead exemption (at that time $50,000, now $165,550) in the home he owned with his wife as tenants by the entirety. He claimed, consistent with the then-prevailing viewpoint, that the value of his interest in the home should be valued at one-half of the total value of the property, the other one-half being ascribed to his wife who had not joined him in filing his Chapter 7 bankruptcy petition. The District Court affirmed the lower court

[1] "Commentators have noted that a majority of courts hold that a bankruptcy court is not bound by the decision of a single district court judge in a multi-judge district." In re Romano, 350 B.R. 276, 279 (Bankr. E.D.La. 2005). See also In re McBrearty, 335 B.R. 513 (Bankr. E.D.N.Y. 2005). Notwithstanding, courts in this district have deferred to the district court. See e.g., In re Heaney, 453 B.R. 42 (Bankr. E.D.N.Y. 2011).

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decision in rejecting his position, reasoning that, because a tenancy by the entirety, as distinct from a joint tenancy or tenancy in common, exhibited the unique characteristic that both spouses "were deemed seized of the whole," 395 B.R. at 558, the value of the Debtor's interest was equal to 100% of the equity. The Court stated that "a tenancy by the entirety is described in Law French as being per tout et non per my, by the whole and not by the share (moiety) meaning each holds the whole or entire interest and lacks the power to alienate an undivided share." Id. citing Citibank N.A. v. Goldberg, 178 Misc. 2d 787, 679 NYS2d 237, 1998 N.Y. Misc. LEXIS 484 (Nassau 1998). From this, the Court concluded that because the Debtor's equity in his home was equal to 100% of its value, the value of his interest was thus determined to be **twice** as great as he had posited and, as a consequence, the judgment lien was found not to impair the Debtor's homestead exemption to which he was entitled and therefore the judgment lien could not be avoided.

The Levinson decision relied upon several cases that supported its conclusion, albeit none from New York or the Second Circuit, specifically, Brinley v. L'DP Mortg., Ltd. (In re Brinley), 403 F.3d 415, 420 (6th Cir. 2005) and Snyder v. Rockland Trust Co. (In re Snyder), 249 B.R. 40, 45 (B.A.P. 1st Cir. 2000).

Distilled to its essence, Levinson stands for the proposition that because tenants by the entirety are each 100% owners of an undivided interest in real property, then 100% of the equity in said property belongs to each tenant by the entirety. However, such conclusion is facially suspect under both principles of mathematics and logic. If each tenant is deemed to have an interest of 100% of the equity then it must follow that we are valuing the equity at 200% of its actual value, thus departing from both accuracy and reality.

Ample precedent existed at the time of the Levinson decision to justify an alternative result. In In re Flinn, 95 B.R. 13 (Bankr. N.D.N.Y. 1988), in a joint Chapter 7 filing, one spouse claimed as exempt the entire equity in a tenancy by the entirety property, so that the other spouse could claim a cash exemption. The Court, after acknowledging that in a tenancy by the entirety, each spouse "is seized of the whole and not of any undivided portion of the estate", id. at 15, next addressed the value of each debtor's interest in the homestead. Judge Gerling stated:

> Each spouse is entitled to a one-half share notwithstanding his or her own individual contributions to payment on the property. . . . Each spouse may claim exemptions only to the extent of his or her entireties interest in the homestead. . . . Therefore, [the husband] cannot claim the entire equity interest in the homestead and permit his wife . . . to avail herself of the cash exemption.

Id. at 16.

In In re Rouse, 56 B.R. 534 (Bankr. S.D.N.Y. 1986), the Court confronted the valuation of a debtor's interest in tenancy by the entirety property in a different context. There, the non-debtor husband transferred his interest in a homestead, subject to existing judgment liens, to his wife prior to her Chapter 13 bankruptcy filing. The judgment creditors asserted that insofar as their liens attached to tenancy by the entirety property, the liens extended as to the entire equity in which the debtor and her non-debtor spouse possessed an undivided interest. The Court, relying upon substantial state court authority, rejected the creditors' position in stating:

> Prior to the transfer of Arthur Rouse's ownership rights in the residence to his wife as sole owner, his creditors could only look to his share of the real estate for satisfaction of their claims against him. This is so because his creditors' rights under their liens against him could not exceed his interest in real estate; they could get no more than he had. Eisenberg v. Mercer Hicks Corp., 199 Misc. 52, 54, 101 N.Y.S.2d 662, 665 (Sup. Ct. N.Y. Co. 1950), *aff'd.* 278 App. Div. 806, 104 N.Y.S.2d 804 (1st Dept. 1951); Ptaszynski v. Flack, 263 App. Div. 831, 31 N.Y.S.2d 599 (2d Dept. 1941); Lopez v. McQuade, 151 Misc. 390, 273 N.Y.S. 34 (Sup. Ct. Kings Co. 1934); 176 East 123rd Street Corp. v. Frangen, 67 Misc.2d 281, 323 N.Y.S.2d 737 (Civ. Ct. N.Y. Co. 1971).

Id. at 536.

The Court further reasoned:

> The defendant lien creditors contend that after Arthur Rouse transferred his interest in the West Nyack Home to his wife as sole owner, she not only acquired his interest subject to the claims of his lien creditors, but that they could also realize upon her previously

undivided moiety as well. This position is incorrect. Finnegan v. Humes illustrates this point. There, the husband and wife held certain real estate by the entirety when a judgment creditor of the husband docketed his judgment. Subsequently the husband and wife deeded the property over to a straw man who then deeded the property back to the wife on the same day. The judgment creditor had meanwhile bought the husband's interest at an execution sale and the transfer to the wife in fee was brought up as a defense to the judgment creditors' subsequent action for the ejectment of the wife. The Appellate Division held that:

> In our opinion the transfer of the estate by the tenants by the entirety to a third party and by a third party to the [wife] had no effect upon the [judgment creditors'] rights. Such rights were to the husband's interest only and the manipulation of the title by the tenants by the entirety was always subject to the lien of the judgment and could not increase or diminish the [judgment lienors'] rights.

Id. at 537 *citing* Finnegan v. Humes, 252 App. Div. 385, 387, 299 N.Y.S. 501 (4th Dept. 1937) *aff'd without opp*, 277 N.Y. 682, 14 N.E.2d 389 (1938).

The New York Court of Appeals has reached the conclusion as well that the value of an individual tenant by the entireties interest is less than the value of the entire equity in the homestead in the case of Goodrich v. Otego, 216 N.Y.112 (1915). In Goodrich, a husband, but not his wife, commenced suit against the Village of Otego for damage to tenancy by the entirety property caused by the regrading of a village street. The Court of Appeals determined that insofar as the plaintiff's wife had not joined in the proceeding, the plaintiff could not recover for the value of any diminution to her interest in the property. Contrary to Levinson, the New York Court of Appeals clearly held that each tenant by the entirety holds a separate and divisible interest in tenancy by the entirety property notwithstanding the fact that a tenancy by the entirety creates an indivisible

ownership interest in said property.

Recent bankruptcy court decisions interpreting New York tenancy by the entirety law have held that the Levinson decision may evidence a basic illogic insofar as it does not follow from the premise that the spouses together hold a 100% undivided interest in their homestead, that the value of each of their interests is similarly 100%. See In re Naples, 521 B.R. 715 (Bankr. W.D.N.Y. 2014); In re Bradigan, 501 B.R. 151 (Bankr. W.D.N.Y. 2013).

In Bradigan, Chief Judge Bucki analyzed New York Court decisions addressing the implications of a tenancy by the entirety ownership interest. In so doing, Judge Bucki articulated the underlying problem (in his view) with the Levinson decision. In reviewing New York law, Judge Bucki stated:

> However, "being seized" constitutes only a partial description of the debtor's interest, which is itself subject to limitations such as the rights of any co-owner by the entirety. Despite being "seized of the whole," neither co-tenant by the entirety has any ability either to mortgage or to convey that whole. . . . Rather, each spouse retains an interest that amounts to less than the whole in which he or she is seized. Thus, in this district, Judge John C. Ninfo, II, concluded that "even when property is held by a husband and wife as tenants by the entirety, each spouse has a separate recognizable interest in the property." In re Laborde, 231 B.R. 162, 166 (Bankr. W.D.N.Y. 1999).
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> No one can dispute that each spouse is seized of the whole property that he or she may own as a tenant by the entirety. The issue in bankruptcy is how to value that unique interest. Although seized of the whole, the separate interest of one spouse is subject to rights of the co-owner. By reason of this limitation, we must value the debtor's interest at something less than the interest of a single owner in a fee simple absolute. In a tenancy by the entirety, each spouse enjoys an identical form of ownership. Because each has equal claim of ownership, both the debtor and his non-debtor spouse may appropriately divide the homestead's total value for purposes of

> valuation in bankruptcy.
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> Mathematically, the total must always equal the sum of its parts. To the extent that husband and wife each hold a recognizable interest in property their respective individual interests must necessarily equal something less than the whole. The hold otherwise would invite havoc in those instances where wife and husband file separate and non-joint petitions for bankruptcy relief. Surely, neither of their separate trustees can administer the whole of property held by the entireties, but must accept an allocation as between the two estates. Exemptions, if claimed, would then apply to the allocated interest of each spouse. Similarly, where only one spouse files, he or she may exempt an aggregate interest in that same allocation.

Id. at 154.

In In re Naples, 521 B.R. 715, 717 (Bankr. W.D.N.Y. 2014), bankruptcy Judge Kaplan fully endorsed the holding and language of Judge Bucki in Bradigan. In addition, Judge Kaplan articulated another viewpoint as to why Levinson should be reconsidered:

> The present writer respectfully submits that Levinson misreads the Klein decision, [V.R.W., Inc. v. Klein, 68 N.Y.2d 560, 503 N.E.2d 496, 510 N.Y.S.2d 848 (N.Y. 1986)], and so it incorrectly defined that debtor's § 541 property interest. The Klein decision is not difficult to understand so long as one reads it as stating a complete two-part doctrine, and refrains from placing undue emphasis on one part of it. To paraphrase its holding: (1) When one entireties tenant dies, the survivor acquires fee title, but not because the survivor's interest has been increased by virtue of the death, rather, the death ended the limitation upon the survivor's interest (which always was a shared ownership of the whole), (2) Prior to a death, and so long as the marriage is still intact, an entireties tenant is free to transfer or encumber his or her undivided interest "subject to the continuing rights of the other." To this writer, a voluntary bankruptcy filing is such an encumbrance.
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> Levinson, at the bankruptcy court level, focused too much (in my view) on the first part of the Klein holding; i.e., one tenant is "seized of the whole." Also, it jumped to the conclusion that because "[the] value of a debtor's interest is a function of state law, "being seized of

> the whole means valuing the interest of all of the equity value. This court suggests that *Levinson* skipped a step. It did not focus enough on the freedom that one entireties tenant has to alienate his or her own undivided interest.

As the recent New York bankruptcy court decisions illustrate, it may be appropriate to reconsider Levinson because of several problematic implications it creates: (a) first it may fairly be read to reach the conclusion that tenants by the entireties equity in their property is equal to 200%, or twice the actual fair market value of their equity, (b) second, it may overread the implications of the fact that tenants by the entirety have an indivisible interest in their homestead, (c) third, it fails to analyze the value of a non-debtor spouse's interest in a homestead after having concluded that the debtors jointly have an interest in 100% of its equity, and (d) finally, it is inimical to fundamental principles of bankruptcy and debtor-creditor law.

It is submitted that not only is a reconsideration of Levinson appropriate because it is inconsistent with the decisions of the New York Court of Appeals in Goodrich, and Klein and may be fairly read to value the equity in tenancy by the entirety property at twice the actual equity therein, but because a contrary result is more consistent with the policy considerations underlying both tenancy by the entirety and bankruptcy law.

The purpose of owning property as tenancy by the entirety is to protect the homestead from a creditor of only one spouse by precluding the creditor from partitioning and forcing the sale of the entire homestead. It is therefore unique in that it affords protections to married couples unavailable to either joint tenants or tenants in common. The result of Levinson however is to penalize one spouse and place that spouse on a worse footing than if the property were owned as joint tenants or tenants in common, in which cases his equity would be valued at only fifty (50)

percent of the total equity in his home.

The Levinson case, far from achieving the salutary goal of providing greater protections to married couples, instead serves to limit the scope of lien avoidance under the Bankruptcy Code so that it provides less protection to tenants by the entirety than available to joint tenants or tenants in common. Insofar as the greatest number of cases filed in bankruptcy courts involving a jointly owned homestead are cases where the homestead is owned as tenants by the entirety, the negative impact of Levinson in the context of non-business bankruptcies cannot be overestimated.

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