

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re:

JOHN ROLAND KEHOE,

Case No. 6:11-bk-14120-ABB

Chapter 7

Debtor.

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**ORDER**

This matter came before the Court on the Objection to Debtor's Claim of Exemptions (Doc. No. 16) filed by the Chapter 7 Trustee Dennis D. Kennedy ("Trustee") against the Debtor John Roland Kehoe pursuant to 11 U.S.C. Section 522(l) and the Debtor's Response thereto (Doc. No. 22). An evidentiary hearing was held on January 9, 2011 at which counsel for the Debtor and counsel for the Trustee appeared.

The Court directed the Debtor to file a supplemental response within seven days and the Debtor timely filed a Supplemental Response (Doc. No. 31). The Trustee's objection is due to be overruled for the reasons set forth herein. The Court makes the following findings and conclusions after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

***Exemptions***

The Debtor filed this individual Chapter 7 case on September 16, 2011 ("Petition Date"). He has been employed by Walt Disney World for over nineteen years as a ride and show technician earning gross monthly wages of \$4,352.88. He owns three parcels of real property: (i) 15707 Bay Lakes Trail, Clermont, Florida 34711, owned individually; (ii) a condominium located at 2025 Ludlow Lane, Orlando, Florida 32839, owned individually; and (iii) 1108 Pioneer Circle, Groveland, Florida 34736 upon which

is situated a 1997 double-wide trailer with two bedrooms and two bathrooms (collectively, the “Groveland Property”). The Groveland Property is within a mobile home park and the trailer is positioned on an attached foundation. The Groveland Property is unencumbered and is valued by the Debtor in Schedule A at \$24,000.00 (Doc. No. 1).

The Debtor owns the Groveland Property as tenants by the entireties with his wife Shirley Johnson Kehoe (“Mrs. Kehoe”). He and Mrs. Kehoe were married in December 2007 and continue to be married. They reside at the Groveland Property.

The Debtor individually owns a 2001 Subaru Outback station wagon with 118,000 (“Subaru”) miles which he values in Schedule B at \$6,287.50. The Subaru is unencumbered. He claimed exemptions in the Subaru and Groveland Property in Schedule C (Doc. No. 1):

- (i) Groveland Property claimed as fully exempt in the amount of \$24,000.00 pursuant to 11 U.S.C. Section 522(b)(3)(B); and
- (ii) \$4,000.00 for the Subaru pursuant to Fla. Stat. § 222.25(4) and \$1,000.00 pursuant to Fla. Stat. § 222.25(1).<sup>1</sup>

The Debtor did not claim a homestead exemption pursuant to section 4, article X of the Florida Constitution for any real property.

The Trustee objects to the Subaru’s \$4,000.00 exemption claim on the basis the Debtor “is receiving the benefits of a homestead exemption and thus does not qualify for the \$4,000.00 exemption” of Fla. Stat. Section 222.25(4).<sup>2</sup> The Trustee, in his Objection at footnote 2 and orally at the January 9, 2012 hearing, made reference to the Florida

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<sup>1</sup> The Trustee does not object to the \$1,000.00 exemption claim.

<sup>2</sup> Doc. No. 16, p. 3.

Supreme Court decision Osborne v. Dumoulin, 55 So. 3d 577 (Fla. 2011), but provided no explanation as to how that case may be applicable to this matter.

The Debtor asserts he is entitled to utilize the Fla. Stat. Section 222.25(4) exemption because: (i) he neither claimed nor is receiving any benefits from the homestead exemption of Article X, section 4 of the Florida Constitution; and (ii) the Debtor and Mrs. Kehoe have no joint debts, so this case presents no issue of the Trustee being impeded from administering a jointly owned asset where joint debts exist.

### *Analysis*

The claiming of exemptions in a bankruptcy case filed in Florida involves federal bankruptcy statutory law, Florida State statutory law, Florida State case law, and the Florida Constitution. The party objecting to an exemption claim must establish by a preponderance of the evidence the claim of exemption is invalid. FED. R. BANKR. P. 4003(c); In re Mohammed, 376 B.R. 38, 41 (Bankr. S.D. Fla. 2007).

The Debtor's exemption claims in Schedule C derive from all four exemption sources. The Debtor claims the Groveland Property as exempt pursuant to Section 522(b)(3)(B) of the Bankruptcy Code which provides property a debtor owned on the petition date as tenants by the entirety is exempt. Florida State case law defines the elements of tenants by the entirety property.<sup>3</sup> A bankruptcy trustee may administer tenants by the entirety property for the benefit of joint creditors. In re Hinton, 378 B.R. 371, 377-78 (Bankr. M.D. Fla. 2007). The parties do not dispute the Groveland Property constituted tenants by the entirety property on the Petition Date and is exempt pursuant to 11 U.S.C. Section 522(b)(3)(B).

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<sup>3</sup> Beal Bank, SSB v. Almand & Assoc., 780 So. 2d 45, 52 (Fla. 2001).

Fla. Stat. Section 222.25(4) provides a debtor may exempt his interest in personal property up to \$4,000.00 “if the debtor does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the State Constitution.” FLA. STAT. § 222.25(4) (2007). The homestead exemption is “self-executing” and a debtor may obtain its protections without claiming the exemption. Osborne v. Dumoulin, 55 So. 3d at 587. The relevant time period for determining whether a debtor is entitled to utilize the statutory exemption of Section 222.25(4) is the petition date. Id. at 588.

The Debtor did not claim the homestead exemption in Schedule C. The issue for determination is whether the Debtor, through the homestead exemption’s self-executing nature, is somehow receiving the benefits of the homestead exemption. The determination as to whether a debtor is receiving the benefits of a homestead exemption turns upon the facts of the debtor’s particular case “after a fact-intensive inquiry.” Id. at 589 (*quoting* In re Bennett, 395 B.R. 781, 790 (Bankr. M.D. Fla. 2008)).

There is little case law addressing the interplay amongst the Florida homestead exemption, Fla. Stat. Section 222.25(4), and the tenants by the entireties exemption of 11 U.S.C. Section 522(b)(2)(B). The Florida Supreme Court in Dumoulin reviewed two cases that involved the interplay amongst these exemption provisions: In re Hernandez, No. 07-16379-BKC-RAM, 2008 WL 1711528 (Bankr. S.D. Fla. Apr. 10, 2008) and In re Bennett, 395 B.R. 781.

The Bankruptcy Court in In re Hernandez held the individual husband debtor was not entitled to the Fla. Stat. Section 222.25(4) \$4,000.00 personal property exemption because the non-debtor’s wife’s right to assert the homestead exemption for a parcel of

tenants by the entirety property meant the debtor was still receiving the benefits of the homestead exemption:

[T]he retention of homestead rights by the non-debtor wife means that the Debtor is receiving the benefits of the constitutional protection by shielding TBE assets from the reach of his joint creditors. Because of this benefit, he may not claim the Statutory Personal Property Exemption.

...

Since the non-debtor wife's homestead rights on the petition date will prevent the Trustee from administering property the Debtor claimed exempt as TBE, joint creditors existing on the petition date are affected by the homestead protection.

In re Hernandez at \*5.

The Bankruptcy Court in In re Bennett, citing to In re Hernandez, explained a debtor who does not claim a homestead exemption may still receive the benefits of the homestead exemption “in certain limited circumstances”:

For example, a debtor may choose to let a homestead remain property of the bankruptcy estate, while a non-debtor spouse could still shield the real property under the Homestead Exemption from administration by the trustee, even to satisfy joint debts that could otherwise be satisfied by jointly owned property.

In re Bennett, 395 B.R. at 790.

The Dumoulin, In re Hernandez, and In re Bennett decisions do not present a rule of law that governs the adjudication of the Trustee's exemption objection in the Debtor's case. The Florida Supreme Court in Dumoulin concluded after its case law review “each case must be decided on its own facts because the debtor in bankruptcy may still receive the homestead exemptions protections despite failing to assert the homestead exemption” and did not make any holdings regarding tenants by the entirety property. Dumoulin, 55 So. 3d at 589. The In re Hernandez and In re Bennett decisions are distinguishable.

The Courts that issued the In re Hernandez and In re Bennett decisions were concerned about a trustee's ability to administer tenants by the entirety property where the debtor and the non-filing spouse have joint debts. Those Courts found the non-filing spouse's right to claim a homestead exemption interfered with a Chapter 7 Trustee's ability to administer the tenants by the entirety properties for the benefit of the joint creditors. This issue does not arise in the Debtor's case.

The Debtor and his non-filing spouse do not have any joint debts.<sup>4</sup> While the Debtor's non-filing spouse retained her homestead rights in the Groveland Property, such retention does not in any way prevent the Chapter 7 Trustee from administering any tenants by the entirety property for the benefit of joint creditors. The Chapter 7 Trustee may not administer the tenants by the entirety property, the Groveland Property, because no joint debts exist. In re Hinton, 378 B.R. at 377-78. The Debtor is not, in any respect, receiving the benefits of the homestead exemption and is entitled to claim the \$4,000.00 statutory exemption pursuant to Fla. Stat. Section 222.25(4).

The Trustee's objection raises a constitutional issue that has not been addressed by the parties. The Trustee's position, stated as a general proposition, is that an individual debtor who owns tenants by the entirety property is not entitled to claim the statutory exemption of Fla. Stat. Section 222.25(4) because, by virtue of such ownership, he is receiving the benefits of the homestead exemption. This position effectively bars any married debtor who owns tenants by the entirety property from claiming the personal property exemption of Fla. Stat. Section 222.25(4). Excluding this class of persons from claiming the statutory personal property exemption is contrary to constitutional authority and public policy.

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<sup>4</sup> Doc. No. 1, Schedule H; Doc. No. 31.

### *Conclusion*

The Trustee has not established by a preponderance of the evidence the Debtor's claim of exemption pursuant to Fla. Stat. Section 222.25(4) is invalid. The Debtor has neither claimed nor is receiving the benefits of the Florida homestead exemption and he is entitled to claim the \$4,000.00 exemption of Fla. Stat. Section 222.25(4). The Trustee's objection to the Debtor's exemption claim in the Subaru is due to be overruled.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the Trustee's Objection to Exemption (Doc. No. 16) is hereby **OVERRULED** and the Debtor's claim of exemption in Schedule C (Doc. No. 1) for the Subaru in the amount of \$4,000.00 pursuant to Fla. Stat. Section 222.25(4) is hereby **ALLOWED**.

Dated this 30th day of March, 2012.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge