

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)	
)	
VIRGINIA NICHOLS DELAP,)	Case No. 04-28349 HRT
)	Chapter 7
Debtor.)	
_____)	
)	
JEFFREY A. WEINMAN, TRUSTEE,)	Adversary No. 08-1402 HRT
)	
Plaintiff,)	
)	
v.)	
)	
HERBERT DELAP and)	
VIRGINIA N. DELAP,)	
)	
Defendants.)	
_____)	

ORDER ON TRUSTEE’S COMPLAINT FOR DECLARATORY RELIEF

THIS MATTER comes before the Court on the Trustee’s Complaint for Declaratory Relief against Herbert A. Delap (“Mr. Delap”) and the Debtor, Virginia Nichols Delap (“Mrs. Delap”). A trial on the matter was held on November 10, 2009, with the Trustee and Mr. Delap appearing in person. Because Mrs. Delap suffers from Multiple Sclerosis, it is difficult for her to appear before the Court. She therefore was excused from appearing in person, and Mr. Delap, a licensed attorney, appeared on behalf of both himself and Mrs. Delap.

I. Background

In 2003, Mrs. Delap commenced a proceeding in the District Court, City and County of Denver, Colorado, (the “Domestic Court”) for legal separation from Mr. Delap. In those proceedings, the Domestic Court entered a Decree of Separation and Permanent Orders. For the most part, the Permanent Orders adopted a separation agreement submitted by the parties (the “Separation Agreement”). In some cases, however, the Permanent Orders modified or clarified the Separation Agreement.

As relevant to this proceeding, the Separation Agreement provides:

Wife currently resides at 13890 E. Marina, [sic] Drive. #610, Aurora, Colorado 80114 (Heather Gardens). This property is presently titled in the name of Husband. The purchase of this property was financed by a loan (payable by Husband) from Guaranty Bank and Trust CO. in the principle [sic] amount of

\$111,929.71 which is secured by a first Deed of Trust on this property. Husband agrees to make all payments to Guaranty Bank or to any lender on a re-finance of this property in a timely manner; pay all Heather Gardens HOA fees/charges, electricity, phone, real property taxes, homeowners or contents insurance, phone, or similar expenses. When the 13890 E. Marina Drive property is sold Wife and [sic] shall received [sic] \$19,500 which represents her equity in the property, plus 4% simple interest from any sales proceeds.

(Separation Agreement, ¶ VIII.B.2). The Permanent Orders adopting the Separation Agreement modify the agreement to some extent. They provide:

Mr. Delap testified, and the Court orders that he will do nothing to dispossess Mrs. Delap of this condo. She will be free to live there until her death or the parties decide that it is in her best interest to move. The provisions regarding payment to [Mrs. Delap] of \$19,500 plus 4% interest are accepted and made an Order of the Court with the additional provision that Mrs. Delap be reimbursed for what ever improves [sic] were made at her expense.

(Permanent Orders, ¶d).

Mr. Delap currently holds legal title to the property at 13890 E. Marina Drive (the "Condo"), and Mrs. Delap currently resides in that property. At trial, Mr. Delap testified that Mrs. Delap suffers from progressive Multiple Sclerosis and is permanently confined to a wheelchair. She is essentially a quadriplegic, but has limited ability to use her right hand. She has difficulty speaking, and has caretakers for about eleven hours everyday. According to her husband, Mrs. Delap has about two hours of stamina per day and will likely live in the Condo for the remainder of her days. The Court accepts these representations as true.

Mrs. Delap commenced her bankruptcy case on August 23, 2004. In the course of that case, she claimed a homestead exemption in the real property located at 200 Ivy Street, Denver, Colorado. She did not claim any exemption in the Condo.

According to the Trustee, the Permanent Orders granted Mrs. Delap a possessory interest in the Condo, as well as an equity interest with a value of at least \$19,500 plus 4% interest. The Trustee brought this proceeding, seeking a determination of the respective rights of the Trustee, Mr. Delap, and Mrs. Delap in and to the Condo.

The Trustee asks that the Court address the right to possession, the right to sell, and any other rights and interests in the Condo. The Court will confine itself to the determination of the rights held by Mrs. Delap at the time of her bankruptcy filing and which, consequently, are a part of her bankruptcy estate. The Court must leave it to the discretion of the Trustee whether, in

light of the Trustee's commitment not to interfere with Mrs. Delap's possession of the Condo, there is any practicable manner in which those rights may be administered or whether abandonment is in the best interest of the estate.

II. Jurisdiction and Venue

The Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper pursuant to 28 U.S.C. § 1409(a).

III. Discussion

Upon the filing of a bankruptcy case, an estate comprised of "all legal or equitable interests of the debtor in property" is created. 11 U.S.C. § 541(a). A bankruptcy trustee is the representative of the estate and is charged with administering it. 11 U.S.C. § 323. In a chapter 7 case, a trustee's administrative duties include collecting and reducing to money the property of the estate for the purpose of seeing it be distributed to creditors of the debtor. 11 U.S.C. § 704.

Thus, the Trustee requests that the Court determine the extent of Mrs. Delap's interests in the Condo under the Domestic Court's Permanent Orders, and the Trustee's rights as they relate to that interest.

A. Interests in the Condo

In *United States v. Gibbons*, 71 F.3d 1496, 1500 (10th Cir. 1995), the Tenth Circuit concluded that a life estate existed where, pursuant to a decree of dissolution, an ex-wife was given the right to occupy the parties' marital home, which had been held by both in joint tenancy, until her death or remarriage, provided that she paid the mortgage and did not move from the house. The agreement further provided that upon the failure of these conditions, the house was to be sold and the equity therein divided between the ex-wife and ex-husband. In making this determination, the court stated,

Colorado law . . . indicates that [the ex-wife] has a possessory interest in the whole of the property and a remainder interest in one-half. We are satisfied that the possessory interest is a form of life estate-because it is capable of lasting throughout [the ex-wife's] lifetime and it is not terminable at any fixed or computable period of time or at the will of [her ex-husband].

71 F.3d at 1500. *See also Collins v. Shanahan*, 523 P.2d 999, 1003 (Colo. Ct. App. 1974) (holding that a life estate exists if interest can or may continue during life). The express terms of the Permanent Orders entered by the Domestic Court provide that Mrs. Delap "will be free to

live [in the Condo] until her death or the parties decide it is in her best interest to move.” As Mrs. Delap’s possessory interest may continue during her life and is not terminable at any fixed or computable period of time or at the will of Mr. Delap alone, she has a life estate in the Condo. The life estate here is a life estate determinable, for Mrs. Delap’s right to possess the property is subject to the condition that she and Mr. Delap agree that it is in her best interest to remain living there. *See Gibbons*, 71 F.3d at 1502 (holding that ex-wife has life estate determinable on condition that she occupy home, not remarry, and pay mortgage payments as due).

Mrs. Delap’s interest goes beyond the life estate. The parties’ Separation Agreement, which was adopted by the Domestic Court in its Permanent Orders, also provides, “When the 13890 E. Marina Drive property is sold Wife and [sic] shall received [sic] \$19,500 which represents her equity in the property, plus 4% simple interest from any sales proceeds.” Under the Permanent Orders, Mrs. Delap is also to be reimbursed for whatever improvements to the Condo were made at her expense. The Domestic Court’s adoption of the Separation Agreement, which acknowledges that the \$19,500.00 “represents [Mrs. Delap’s] equity in the property,” satisfies this Court that the Domestic Court and the parties all recognized that, prior to the entry of the Permanent Orders, Mrs. Delap possessed an equitable ownership interest in the Condo. This Court finds nothing in either the Separation Agreement or the Permanent Orders that shows any intent that Mrs. Delap’s equitable ownership interest in the Condo was either suspended or supplanted by the lifetime possessory interest that is reflected in the Separation Agreement and the Permanent Orders.

The value of Mrs. Delap’s equity in the Condo is defined in the Separation Agreement and the Permanent orders to be \$19,500.00 plus 4% interest and the value of Mrs. Delap’s improvements to the Condo.¹ The remaining interest in the Condo is vested in Mr. Delap, subject to Mrs. Delap’s possessory life estate.

The Condo was acquired subsequent to Mrs. Delap’s commencement of proceedings for legal separation but prior to the entry of the Permanent Orders. Under Colorado law,

all property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property.

COLO. REV. STAT. § 14-10-113.

¹ According to the Joint Pretrial Statement filed with the Court, Mrs. Delap spent approximately \$10,000 to modify and improve the Condo.

According to the Settlement Statement (Exhibit #2) reflecting the acquisition transaction, the contract sale price of the Condo was \$140,000.00 when it was acquired on August 13, 2003. The principal amount of the loan used to partially fund the acquisition is shown to have been \$112,000.00. Thus, it appears that the Delaps had equity of approximately \$28,000.00 at the time the Condo was purchased and Mrs. Delap's share of that equity would have been at least \$14,000.00. Thus, the information contained in the Settlement Statement is consistent with the Court's finding that Mrs. Delap possessed an equity interest in the Condo prior to the entry of the Permanent Orders effective on May 12, 2004.

Finally, the Separation Agreement provides that "[w]hen the [Condo] is sold Wife and [sic] shall received [sic] \$19,500 which represents her equity in the property, plus 4% simple interest from any sales proceeds." The Permanent Orders modified the Separation Agreement by adding that upon sale of the property, Mrs. Delap would be "reimbursed for what ever improves [sic] were made at her expense."

Mr. Delap takes the position that the Trustee can never reach the value of Mrs. Delap's interest because the parties will never agree to sell the Condo. That argument assumes that Mrs. Delap's interest only springs into existence upon satisfaction of the contingency that both parties agree to sell the Condo. As noted above, the Court interprets the documents to recognize Mrs. Delap's equitable ownership interest in the Condo at least as of the time the Permanent Orders were entered. In light of the fact that the documents clearly reflect that Mrs. Delap had an equitable ownership interest in the Condo at the time the Permanent Orders were entered, Mr. Delap's argument must fail unless Mrs. Delap's ownership interest was replaced by her possessory life estate only to come back into existence upon the parties' agreement to sell the Condo. The Court will not assume such a remarkable intention absent very specific language to that effect in the Separation Agreement or Permanent Orders. The Court finds no such language. Instead, the Court finds that the above language concerning the right to receive the value of her interest upon sale merely addresses the timing of her right to receive the cash value of her interest, not the existence of the interest itself.

There is scant difference between the provision in the Separation Agreement that gives Mrs. Delap the right to receive the cash value of her interest in the Condo upon the parties' agreement to sell and the position of any party with an interest in jointly owned property. In the normal course of events, a joint owner of real estate will only realize the cash value of that interest upon the agreement of all joint owners to sell such property. At the same time, state laws typically provide a remedy for a cotenant to force the sale and division of proceeds. *See, e.g.,* COLO. REV. STAT. § 38-28-101 et seq. Section 363(h) is the Bankruptcy Code analog to the state law partition process. *See In re Belyea*, 253 B.R. 312, 314-16 (Bankr. D. N.H. 1999).

B. The Condo Is Not Exempt Property

As noted above, Mrs. Delap did not claim an exemption for the Condo in her bankruptcy case. Mr. Delap argues that the Condo is exempt from administration by Trustee because he claimed the property as exempt in his individual bankruptcy case (Case No. 09-10675 HRT). The Court rejects that argument. Mr. Delap's claim of exemption in his bankruptcy proceeding merely served to exempt his interest in the Condo from his bankruptcy estate. It had no effect on the Trustee's rights in Mrs. Delap's case.

IV. Conclusion and Declaration of Rights

In light of the foregoing discussion, it is

ORDERED that the Court hereby concludes that, at the time of the filing of her bankruptcy petition, Mrs. Delap's non-exempt interests in the Condo were as follows:

1. An equitable ownership interest in the Condo valued at \$19,500.00 plus 4% interest and the value of improvements (\$10,000); and
2. A possessory life estate interest in the Condo.

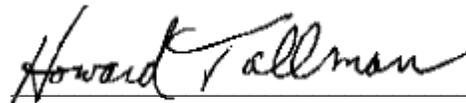
It is further

ORDERED that under 11 U.S.C. § 541(a), upon the commencement of her bankruptcy case, Mrs. Delap's interests, as enumerated above, became property of her bankruptcy estate and subject to administration by the Trustee. It is further

ORDERED that all of the remaining right, title and interests in the Condo, not specifically reserved to Mrs. Delap and made part of her bankruptcy estate are vested in Mr. Delap.

Dated this 4th day of February, 2010.

BY THE COURT:



Howard R. Tallman, Chief Judge
United States Bankruptcy Court