No. 06-2786

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: MAURICE F. CUNNINGHAM
Debtor

_____

WILLIAM J. PASQUINA, P.C., Creditor,
Plaintiff-Appellant

v.

MAURICE F. CUNNINGHAM, Debtor
Defendant-Appellee

_____

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, William J. Pasquina, P.C. submits the following corporate disclosure statement:

"William J. Pasquina, P.C. has no parent corporation and there are no publicly held companies that own 10% or more of William J. Pasquina, P.C. stock."

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STATEMENT OF BASIS OF APPELLATE JURISDICTION

The Court has appellate jurisdiction over this bankruptcy appeal from the final Order of the United States District Court for the District of Massachusetts (Worcester Division) (the Hon. F. Dennis Saylor, IV, Judge) (the "District Court") entered on November 28, 2006 (R. 19, Addenda to Brief), affirming the order of United States Bankruptcy Court for the District of Massachusetts (the Hon. Joel B. Rosenthal, Bankruptcy Judge) (the "Bankruptcy Court"), denominated "Order on Motion by Debtor Confirming Sale Proceeds of 95 Johnston Street, N. Andover, MA as Exempt Pursuant to 11 U.S.C. § 522(c)", entered in the bankruptcy case on the December 7, 2005 (Addenda to Brief), under 28 U.S.C. § 158(d). A Notice of Appeal was timely filed in this matter on December 26, 2006 by Appellant. (R. 19)

STANDARD OF REVIEW

No special deference is ceded to the District Court's determinations on this case; instead this court's standard of review must be to examine the Bankruptcy Court's finding of fact under the clear error standard and the conclusions of law drawn by the Bankruptcy Court under the de novo

standard of review. Gannet v. Carp, 340 F. 3d 15, 21 (1st Cir. 2003) citing Gronan v. Watman, 301 F. 3d 3, 7 (1st Cir. 2002).

STATEMENT OF THE ISSUES PRESENTED

1. Are cash proceeds of a Debtor's post-petition sale of Homesteaded Massachusetts real estate exempt property within the meaning of 11 U.S.C. § 522 (c) where creditor holds a debt non-dischargeable under 11 U.S.C. § 523 (a)4 and (a)(6) and where M.G.L. C.188 makes no provision to protect proceeds and debtor (now deceased) conceded he was not investing the cash proceeds in a new homestead dwelling unit where he and his wife then lived in a dwelling unit titled in her name? (R. 18, #1)

2. Did the bankruptcy judge err when he failed to abstain on the issue of whether or not cash proceeds from the sale of a Massachusetts Homestead (M.G.L. Ch 188) are exempt from attachment, levy, seizure, or restraint by this creditor where the state court was prepared to rule on the issue which is predominantly an issue of state law? (R. 18, #1)

STATEMENT OF THE CASE

Creditor, William J. Pasquina, P.C., at the time of bankruptcy filing of Debtor, Attorney Maurice F. Cunningham, recovered judgment in case 97-1081C "William J. Pasquina, P.C. Maurice F. Cunningham and Maurice F. Cunningham, P.C." in Essex Superior Court after a 4/20/00 jury verdict favorable to Pasquina, P.C. and a 3/22/01 order for judgment by Judge Kottmyer. (R. 131) The state court case had been tried bifurcated as to liability, with the jury determining liability on tort counts and Kottmyer, J. finding for Plaintiff/Creditor on the breach of fiduciary duty count, followed by a separate trial to Kottmyer only on damages in 2000. (The state court then requested the parties assistance computing the G.L.C.231§6C interest on the various components of the ad damnum, and the court then entered its money judgment (as a ministerial act) on April 1, 2003). The state court docket reflects judgment on June 20, 2001 of $191,072.30 plus interest (R. 36, #84) and on April 1, 2003 judgment for $288,613.04 plus interest of $2941.51 from March 1, 2003 was entered. (R. 38, #104)

Debtor filed a voluntary Chapter 7 bankruptcy petition on 2/28/03. Within his petition he claimed his then home owned as tenants by the entirety with his wife Margaret at 795 Johnson St., North Andover, MA exempt by reason

of a Declaration of Homestead filed pre-petition by debtor and the Bankruptcy Court determined in its order of 6/4/04 that the claimed homestead real estate was exempt from claims of creditors.

A non-dischargeability adversary proceeding entitled "William J. Pasquina, P.C. vs. Maurice F. Cunningham", being Adv. 03-4217 was filed 7/24/03. The Massachusetts Superior Court's Findings of Fact and Conclusions of Law were in evidence in the adversary proceeding, which was tried in May, 2005, and went to judgment on creditor's behalf July 28, 2005. (R. 41) The judgment held the debt owed by Debtor to William J. Pasquina, P.C. non-dischargeable under both 11 U.S.C. § 523 (a)(4) and 11 U.S.C. § 523 (a)(6). The parties had stipulated to damages. (The Bankruptcy Court's factual determinations are set forth in the Statement of Facts below). The adversary was closed on 9/20/05 (R. 7)

By August 18, 2005, creditor filed proceedings in the State Court under MRCP 69 in the original case (Essex Superior 97-1081C) to reach and apply certain assets, (adding several additional reach and apply defendants[1]) including among others initially wife's share of the proceeds from the then

[1] Including: debtor's wife, Margaret Cunningham, two attorneys and an insurance company.

pending sale of their homesteaded real estate owned by debtor and wife as tenants by the entirety, which had the benefit of debtor's homestead. Creditor subsequently sought to tie up debtor's share as well following the report in the 10/3/05 Massachusetts Lawyers Weekly regarding the Phillip Hyde bankruptcy case. *Massachusetts Lawyers Weekly*, "Home Sales Proceeds – Exemption", 10/3/05, available at 2005 WLNR 24530985. The Massachusetts Superior Court in Civil Action No. 97-1081C, Murtagh, J., issued an order dated 9/14/05 (R. 155) providing some injunctive relief and creditor moved on 9/21/05 for broader relief[2].

[2] Creditor got an order requiring one referral attorney to pay some $106,788.43 (of which the bankruptcy estate received $12,500 – Creditor may receive a $3,808.75 dividend from the $12,500) and a second attorney to pay over $26,000 and certain other post-petition fees. The second attorney subsequently paid additional amounts reflected on a schedule filed in Metropolitan Life Insurance Co. v. Margaret Cunningham and William J. Pasquina, P.C., 06-CV-11615 RCL (an updated copy of which is attached as "Addendum A"). The $106,788.43 pre-petition fee had been secreted from the bankruptcy schedules. The smaller (worker's compensation) fees arose after the filing. Creditor requested a judgment in the federal case relating to certain life insurance proceeds, in a cross-claim against the debtor's wife upon a constructive trust theory which may render this appeal moot. Injunctive relief as to further fees from each of these lawyers is in place under separate State Court orders. The state court declined to restrain payment of the insurance proceeds.

That court, Murtagh, J., held hearings on creditor's motion for broader relief, but prior to the state court deciding[3], debtor moved on 11/3/05 in the Bankruptcy Court for determination that the proceeds of the voluntary sale of Debtor's former home were exempt (R. 111) incorporating Creditor's State Court brief. Debtor opposed (R. 119, 122), incorporating further briefs from the State Court. A hearing was held 12/6/05. The Bankruptcy Court found on 12/7/05 husband's share of the proceeds was exempt (R. 159). Creditor timely appealed (R. 109). Creditor sought an injunction/stay pending appeal making clear its position that the Texas case, in re Reed, is distinguishable and that the state court judge had constrained himself in deference to the bankruptcy court (R. 62). The Bankruptcy Court's order shows it was cognizant of the abstention issue but improperly chose to decide the issue without adequately reviewing the relevant and cited authority.

The Order of the Bankruptcy Court was appealed to the United States District Court, District of Massachusetts on December 14, 2005. Argument

[3] Creditor's counsel who was present before Judge Murtagh told the bankruptcy court, "it was my reading, although the Judge [Murtagh] didn't rule, based on what he said, that his intention was to find that the proceeds were not exempt." (R. 62)

was heard on the appeal on April 28, 2006 by Judge Saylor[4]. Saylor issued an Opinion on the Order of the Bankruptcy Court on November 28, 2006 affirming the lower court's ruling. Creditor timely appealed the decision on December 27, 2006. On February 5, 2007, counsel for Debtor filed a Suggestion of Death in the Bankruptcy Court reflecting Debtor's death on May 6, 2006.

Creditor requests that this court reverse the Bankruptcy Court and District Court and declare the rights of the parties, including a declaration that the cash proceeds of a voluntary sale of homesteaded Massachusetts real estate are not exempt from pre-petition creditors with non-dischargeable debts under 11 U.S.C. § 523(a)(4) and § 523(a)(6).

[4] Creditor provided to the District Court prior to oral argument supplemental authority written by creditor counsel. John Neylon, *Why Proceeds of a Sale of Homesteaded Real Estate Are Protected, If At All, Only By State Statute and Not Section 522(c) of the Bankruptcy Code*, 39 Business Law Review 99 (2006). Available at http://www.neylonlaw.com/cpanrbla/NARBLA-Paper.pdf. (R. 19, #12)

STATEMENT OF THE FACTS

The transcript from Judge Rosenthal's Decision of 7/26/05 in the Adversary Proceeding (R. 41) provides the following facts:

> "The parties stipulated on the record the Pasquina claim in these proceedings is $288,000 and is an allowed claim;" (R. 44)

> "William Pasquina, the sole shareholder of William Pasquina, P.C., and the debtor, Maurice F. Cunningham, were high school classmates. Pasquina hired Cunningham as an associate attorney, trained him to handle Workmen's Compensation and Social Number (sic Security) matters. Cunningham worked as an associate attorney from the 1980s through 1996.

> In February '95 Pasquina was seriously injured in an automobile accident and was out of the office for an extended period of time, never actually returning full-time to the office. After the accident Cunningham managed the Pasquina, P.C. office, staff and entire case load." (R. 44-45)

"Pasquina determining that he could no longer practice law sometime in November '95, discussions ensued between Pasquina and Cunningham concerning Cunningham taking over the practice and paying Pasquina for the fees and expenses on cases." (R. 45)

"…a final deal was never reached, …" (R. 45)

"… Cunningham misled Pasquina, Pierce, and the staff of Pasquina, P.C. into believing he would join Pierce & Associates." (R. 46)

"Cunningham acknowledged in his testimony that he knew that Pasquina was entitled to fee money on these cases," (R. 48)

"Cunningham did not set aside or pay over one penny to provide for Pasquina, P.C.'s acknowledged interest in the fees…" (R. 48)

"… Cunningham's explanation of why he did not remit Pasquina, P.C.'s interest in the fees and expenses…, (was) merely a pretext. His flawed understanding of *quantum meruit,* … was merely a pretext in his mind for converting these funds to his own use." (R. 49)

"The conduct of Cunningham is akin to that described in Chapter 277, Section 39, …Cunningham had a clearly formed intent on March 17, 1997 to obtain files of clients by false pretenses and to deprive Pasquina, P.C. of the fair value determined by the Superior Court and stipulated… …significant work in process on the improperly removed files." (R. 51)

"…Cunningham knowingly and fraudulently received funds belonging to Pasquina, P.C., …the funds did not belong to him…, but instead of taking steps to either liquidate in that amount and protect Pasquina, P.C.'s interest, he spent the money." (R. 52)

"…all the parties stipulate as to the amount of Pasquina's claim. Judge Kottmyer's finding and conclusions of law, … specifically her conclusions numbered 1 and 2." (R. 53)

Conclusions of Law

(From J. Kottmyer's findings in evidence and previously relied upon by the court)

1. Cunningham occupied a position of trust and confidence at Pasquina P.C. Cunningham owed a duty of loyalty to Pasquina P.C. Meehan v. Shaugnessey, 404 Mass. 419, 438, 535 N.E.2d 1255, 1265 (1989) ("[E]mployees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interest of their employer.") (R. 144)
2. Cunningham breached the duty of loyalty by:

    a. deceiving Pasquina P.C. by causing Pasquina, Leyden and others employees of Pasquina P.C. to believe that he would join Pierce & Associates after he had decided that he would not do so; (R. 144)

    b. failing to disclose that he did not intend to join Pierce & Associates before letters were sent by Pasquina and Pierce to Pasquina P.C.'s clients and referral attorneys; (R. 144)

c. seeking an unfair advantage by causing Pasquina P.C. to send letters to clients and referral attorneys which erroneously stated that he would join Pierce & Associates and provide continuity in representation on the same day on which he notified clients that he was opening his own office; (R. 144)

d. secretly removing files from the offices of Pasquina P.C. without authorization; (R. 144) and

e. depriving Pasquina P.C. of fair compensation for services rendered by Pasquina P.C. on the transferred cases and of reimbursement of expenses advanced on those cases. (R. 144)

The 795 Johnson St. real estate was sold on November 21, 2005 and the lenders attorney issued a check for $150,723.42 to Attorney Frederick Fairburn, counsel for the sellers, Mr. and Mrs. Cunningham, who was holding same (pursuant to a letter agreement of November 17, 2005 in lieu of an injunction) pending further order of the state court. After the Bankruptcy Court order of 12/7/05, which prompted this appeal, the State

Court indicated only one half of that needed to be held. After the state court refused to issue an injunction on the life insurance proceeds in the Rule 69 proceedings Attorney Fairburn inexplicably released the remaining funds to Margaret Cunningham[5].

SUMMARY OF THE ARGUMENT

Cash proceeds from a sale of Massachusetts homestead real estate are not forever protected from post petition creditors. The Bankruptcy Court and the District Court confused the relevant authority and the issues in the rulings appealed from. (See infra p. 14-22)

Cash proceeds from a sale of Massachusetts homestead real estate are not protected from a pre-petition creditor whose debt has been declared non dischargeable under 11 U.S.C. § 523 (2)(4) and §523(2)(6) (fiduciary defalcation and intentional tort) by virtue of 11 U.S.C. § 522 (c) although that section does protect the homesteaded real estate itself from such a claim (even though not protecting the real estate from other limited categories of

[5] Appellant reserves the right to hold Attorney Fairburn and Margaret Cunningham liable for their complicity in unilaterally violating the State Court's security arrangement, but given the funds available in the Federal Court life insurance interpleader it appears that security may suffice to satisfy the judgment arising from the perfidious 1997 deals of the deceased debtor.

non dischargeable debts (e.g. taxes, alimony, child support)). (See infra p. 23-34)

Creditor claims the Bankruptcy and District Courts misapplied the Texas authority they relied upon (In re Reed, which actually supports Creditor's position) with the facts in this case. (See infra p. 23-25)

ARGUMENT

I. THE CASH PROCEEDS OF THE VOLUNTARY SALE OF HOMESTEAD PROPERTY ARE NOT PROTECTED FROM THE REACH OF CREDITORS WITH NON-DISCHARGEABLE DEBTS

The Massachusetts Homestead Exemption Statute, codified and defined at ALM GL c. 188, §1 (2005) ("the Act") clearly does not provide for an exemption of the proceeds that derive from the sale of a homestead property. That statute reads as follows: "An estate of homestead * * * ***in the land and buildings*** may be acquired pursuant to this chapter * * *" (emphasis added). There is no reference in the statutory scheme, nor is there any case law in Massachusetts, stating that the cash proceeds from the voluntary sale of a homestead estate are similarly protected. There is, however, legislative history behind the Act that demonstrates that the legislature did not intend to

exempt proceeds of a homestead sale from attachment and execution. Further, a glimpse at the laws in other states further bolsters the fact that the legislature was well aware of how to exempt the proceeds of a homestead, but chose not to do so.

A. The Legislative History of the Homestead Act

A look into the legislative history of the Act demonstrates that, while at one time proceeds from an involuntary sale of the homestead were exempt, further amendments to the Act removed that provision, thus indicating intent by the Massachusetts legislature to leave proceeds unprotected.

In the earliest version of the Homestead Act, entitled "An Act to exempt from Levy on Execution the Homestead of a Householder having a Family," St. 1851, c. 340, § 1 *et seq.* ("the 1851 statute"), the legislature allowed limited protection to proceeds acquired from an involuntary sale. The 1851 statute provided that "the judgment creditor may require the premises to be sold by such sheriff or his deputy, at public sale * * * and out of the proceeds of said sale to pay to debtor the sum of five hundred dollars, to be exempted from liability from his debts for one year thereafter, and to apply the balance to such execution * * *" St. 1851, c. 340, § 7.

Four years later, however, the legislature amended the homestead statute and, in the amended version, removed the provision exempting proceeds from attachment. See St. 1855, c. 238, § 1 *et seq*. The Massachusetts legislature has amended the Homestead Act at least twenty-two (22) times between 1970 and 2004. During that period, Massachusetts never extended the homestead exemption to proceeds of a sale of the homestead.[6]

Notwithstanding more than twenty-five amendments to the Massachusetts homestead statute since 1851, the exemption for proceeds derived from an involuntary sale has never found its way back into the statute, and there has never been an exemption in the statute for proceeds derived from a voluntary sale. It is crystal clear that the Massachusetts legislature (i) knows how to exempt proceeds when it desires to do so, (ii) desired to provide a limited one-year exemption for proceeds only from an involuntary sale of the homestead when it originally enacted the 1851 Statute, and (iii) removed any protection from proceeds derived from any sale of homestead property when it first amended the 1851 Statute four years later.

[6] Provisions of the Massachusetts Homestead Act were amended by the legislature in 1970, 1971, 1973, 1975, 1975, 1977, 1978, 1979, at least twice in 1983, 1984, 1985, 1986, 1989, 1990, 1991, 1992, 1995, 1996, 2000 and 2004. See Mass. Gen. L. c. 188, § 1 et seq.

Consequently, it is entirely clear that the legislature was well aware of how to exempt the proceeds of a homestead sale from attachment, even to the point of differentiating between voluntary and involuntary sales. Further, after four years with such an exemption, they apparently decided, for reasons unknown, to remove the exemption. The current version of the Act, first enacted in 1939, has never contained any such exemption for proceeds. Therefore, it would be improper for a court to impose its own opinion on what the law should be when it is clear that the state legislature considered the matter, and chose not to allow an exemption for proceeds resulting from the voluntary sale of property protected by the Act.

For the First Circuit to uphold what the Cunninghams are asking would be beyond judicial legislation — it would be legislating provisions into the Homestead Act that are contrary to the expressed intent of the Massachusetts legislature. Further, it would lead to numerous questions as to how such protections would be implemented. For example, how long are the proceeds protected? How much of the proceeds are protected? Do the proceeds have to be reinvested in another homestead and, if so, how quickly? Can the

proceeds be commingled with other assets? Can the proceeds be used for any purpose? Is the debtor's intent regarding the proceeds relevant?

B. Other States Offer Models on How to Exempt Proceeds

If the Massachusetts legislature wants to exempt proceeds for the sale of homestead property, not only could it look at its own past Act, it could look to other jurisdictions, most of which do not exempt proceeds of the sale of a homestead. See *In re Blair*, 125 B.R. 303, 304-05 (Bankr. D. N.M. 1991) (collecting homestead statutes from various states). In fact, creditor conducted a survey of other states' statutes and case law and creditor made known to the state court and the Bankruptcy Court that there are thirty-three states that do not provide a statutory exemption for proceeds of the sale of a homestead,[7] there are fifteen states that provide a statutory exemption for

[7] Alabama (Code of Ala. § 6-10-2); Arkansas (A.C.A. § 16-66-210); Delaware (De. Code Ann. § 10-4902); Florida (Fla. Const. Art. X, § 4); Georgia (O.C.G.A. § 44-13-1); Hawaii (HRS § 651-92); Idaho (Id. Code § 11-601); Illinois (735 ILCS 5/12-901); Indiana (Ind. Code Ann. § 34-55-10-2); Iowa (Iowa Code § 561.16); Kansas (KSA § 60-2301); Kentucky (KRS § 427.060); Louisiana (La. Const. Art. VII, § 20); Maryland (Md. Code Ann. § 11-504); Massachusetts (ALM GL c. 188, § 1A); Michigan (MCLS § 600.6023); Mississippi (Miss. Code Ann. § 85-3-21); Missouri (R.S.Mo. § 513.475); Nevada (NRS § 21.090); New Jersey (N.J. Stat. § 2A:17-17); New Mexico (N.M. Stat. Ann. § 42-10-9); North Carolina (N.C. Gen. Stat. (§ 1C-1601); North Dakota (N.D. Cent. Code § 28-22-01); Ohio (ORC Ann. 2329.66); Oklahoma (31 Okla. St. § 1); South Carolina (S.C. Code Ann. § 15-41-30); South Dakota (S.D. Codified Laws § 43-45-3); Tennessee (Tenn.

proceeds[8] and two states that do not offer homestead protection at all.[9] Several other state supreme courts, when confronted with an absence of statutory language protecting the proceeds of a homestead sale, have concluded that to do so would be an improper attempt at judicial legislation. See Drennan v. Wheatley, 210 Ark. 222, 195 S.W.2d 43, 44 (Ark. 1946) ("Appellant invokes the well-established doctrine that exemption laws must be liberally construed, and argues that under such construction the proceeds of the sale of her homestead, intended for investment in another home, should be held not subject to seizure for debt. While these laws should receive a most liberal interpretation in favor of the party asserting the

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Code Ann. § 26-2-301); Vermont (27 V.S.A. § 101); Virginia (Va. Code Ann. § 34-4); West Virginia (W. Va. Code § 38-9-3); Wyoming (Wyo. Stat. § 1-20-101).

[8] Alaska (Alaska Stat. § 09.38.010) (proceeds must be reinvested in new homestead); Arizona (A.R.S. § 33-1101) (proceeds protected for 18 months); California (Cal Code Civ. Proc. § 704.730) (proceeds protected for 6 months); Colorado (C.R.S. 38-41-207) (proceeds protected for 1 year); Connecticut (Conn. Gen. Stat. § 52-352b) (proceeds protected for 1 year); Maine (14 M.R.S. § 4422) (proceeds protected for 6 months); Minnesota (Minn. Stat. § 510.02) (proceeds protected for 1 year); Montana (MT Code 70-32-201) (proceeds protected for 18 months); Nebraska (R.R.S. Neb. § 25-1552) (proceeds protected for 6 months); New York (NY CLS CPLR § 5206) (proceeds protected for 1 year); Oregon (ORS § 18.395) (proceeds protected for 1 year provided that there is intent to purchase new homestead); Texas (Tex. Prop. Code Ann. § 78-23-3) (proceeds protected for 6 months); Utah (Utah Code Ann. § 78-23-3) (proceeds protected for 1 year); Washington (Rev. Code Wash. § 6.13.070) (proceeds exempt for 1 year); Wisconsin (Wis. Stat. § 815.20) (proceeds exempt for 2 years, provided that there is an intent to purchase new homestead).

[9] Pennsylvania and Rhode Island.

homestead right, courts may not, under the guise of construction, read into the constitution and statutes, something that the framers thereof did not see fit to place there."); Smith v. Hart, 207 N.W. 657, 658 (S.D. 1926) ("The statutes in many states make specific provision with reference to exempting proceeds of voluntary sale of homestead, in varying amounts up to the entire equivalent of the homestead exemption, under varying circumstances, and for varying periods of time. We have no such statute in this state. The statute above recited by its terms applies only to proceeds in the case of execution sale, and to apply it to a voluntary sale would be the most palpable sort of judicial legislation."); Mack v. Boots, 29 Ariz. 116, 239 P. 794 (Ariz. 1925) ("The law designates the species of property it exempts, and does not allow the debtor to choose himself in respect to the kind or species of property to be exempted. To permit this would be to substitute the choice of the debtor for the provision of the statute. When exempt property is voluntarily converted into money, or other property not also exempted by law, the right is gone."); Fred v. Bramen, 97 Minn. 484, 107 N.W. 159 (Minn. 1906) ("To sustain the exemption claim in this case this court would not only have to read into the statute that moneys owing from the sale of a homestead were exempt, but that they remained exempt for the period of one year from the time of sale whenever the original owners of such homestead

intend to use the money in the purchase of a homestead within that year. We are of the opinion that it would be judicial legislation to do in this respect what the legislature had failed to do.")

C. Proposed Massachusetts Legislation Includes Specific Limited Proceeds Exemption Provisions

In 2001, the Boston Bar Association's Legislative Committee proposed a replacement to the Homestead Act. The proposed Act included a provision specifically protecting the cash proceeds of a homestead sale until the debtor had established a new homestead. William Hovey, *Automatic, Paperless Homesteads Would Eliminate Much Confusion*, Massachusetts Lawyers Weekly, Dec. 24, 2001. Even under this provision the debtor in this case would not be protected because he and his wife had already established a new homestead at least as early as December 2004 in their previously acquired Florida condominium(in a gated community), record title to which is in debtor's wife's name. The 2001 proposed act was side tracked by the passage of an increase in value of real estate protected from $300,000 to $500,000. Present S. 835 and 883, sponsored by Senator Michael Creedon (who sponsored the recent increase) and the Boston Bar Association would increase a Massachusetts Homestead to $750,000 and contains a similar

provision[10]. This is further persuasive authority because former S. 917 the 2001 proposed replacement act, includes a specific provision protecting proceeds from a homestead sale in a specially labeled "homestead account" with the inference being that the current act should not be interpreted as offering similar protection.

D. Debtor And His Spouse Initially Abandoned His Homestead Exemption On His North Andover Property Once They Moved Permanently To Florida, Placed The North Andover Property On The Market And Thereafter Once The North Andover Property Was Sold

The Act exempts real property from certain creditors only if that property is intended to be used, or is in fact used, as a principal residence. What the homestead exemption does not do, however, is create a shield around property that is not used as a principal place of residence. Consequently, property that has been abandoned is no longer protected by the homestead exemption. See In re Webber 278 B.R. 294 (Bankr. D. Mass. 2002). Moreover, neither the debtor's nor the spouse's proceeds resulting from the sale of that formerly protected homestead property are protected from creditors.

[10] The Real Estate Bar Association is sponsoring S. 878. Each bill is available at http://www.mass.gov/legis/billsrch.htm.

In order to demonstrate abandonment, there must be clear and convincing evidence that the owner no longer has the specific intent to occupy the premises. See In re Taylor, 280 B.R. 294 (Bankr. D. Mass. 2002). Where there is no intent of returning, there is sufficient evidence of abandonment. See Foster v. Leland, 141 Mass. 187, 6 N.E. 859 (1886). Furthermore, acquiring a new homestead is sufficient to demonstrate abandonment of the old. In re Silloway, 94 Mass. 30 (1866) Any issue about Debtor's abandonment was mooted when the premises were sold and initially the entire net proceeds of $151,000 was held in escrow pending further orders of the court[11].

[11] Here the Debtor had abandoned his homestead located at 795 Johnson Street in North Andover at least as early as December 2004. The Debtor retired from his law practice, referring his cases to other lawyers, moved to Bonita Springs, Florida into a condominium formerly used as a rental and vacation home by Debtor and his wife, record title to which is in the wife. Upon sale of the North Andover property, he clearly did not intend to live at the North Andover property ever again. The debtor and his wife have established a new homestead in their Florida property (record title to which is in the wife), and therefore the cash proceeds from the voluntary sale of the North Andover property will not be used to establish a new homestead. As such, it is indisputable that he has abandoned his estate of a homestead in 795 Johnson Street in North Andover. Thus, upon abandonment of the property, the Debtor lost his homestead protection and the lien related to the non-dischargeable debt owed the plaintiff may attach to such property.

E. The Case Relied On By The Lower Courts Has Not Been Interpreted Correctly And The Cash Proceeds Do Not Go Back Into The Estate Of The Debtor, But Are Available To Creditors With Non-Dischargeable Debts As A Matter Of State Law

In both the Bankruptcy Court and the District Court decisions in this case Judges Rosenthal and Judge Saylor relied heavily on the case of *In Re Reed*, 184 B.R. 733 (W.D. Tex. 1995) to support the conclusion that proceeds from the sale of exempt property are also exempt[12]. However, footnote 7 of the *Reed* decision explicitly states that the case does not make that assertion, the footnote states:

> It is important to note that the court is *not* holding that the proceeds of the disposition of exempt property are therefore also "exempt." When a debtor claims exemptions under state law, only state law controls whether a given property is "exempt." Our holding is only that under bankruptcy law, if a given property owned by the Debtor is removed from the estate, it is no longer property of the estate. The conversion of that property into some other form which under applicable

[12] The Bankruptcy Court and the District Court miss the point because: 1. Trustee abandoned his interest in real estate that has now been sold (some $151,000 of proceeds originally held in escrow, but ½ released after Bankruptcy Court's ruling boxing in the State Court judge and the second ½ released by the whim of the escrow attorney Frederick Fairburn); 2. The Bankruptcy Court, at page 3 "adopts the reasoning and holding of Lowe v Yochem (In re: Reed) 184 B.R. 733, 737-38 (Bank W.D.Tex 1995) that the sale of exempt property (here real estate) does not make the sales proceeds property of the estate. "The majority of courts, however, hold that a post-petition change in the character of property claimed as exempt will not change the status of that property, relying on the principle that once property is exempt, it is exempt forever and nothing occurring post-petition can change that fact." (Rosenthal, J. decision dated December 7, 2005)

> law, would not be exempt will not restore the property to the estate, but that is not the same as saying the property as transmogrified is still exempt.

Reed, 184 B.R. at 738 (emphasis in original). . The first sentence of the footnote makes it clear that the *Reed* court is not saying that the proceeds are exempt. The *Reed* decision is simply holding that when exempt property is converted into non-exempt property, such as the cash proceeds from a voluntary sale, this non-exempt property does not return to the debtor's estate. This is consistent with our position and the fact that the property will not return to the debtor's estate does not prevent the creditor here from attaching because his debt is non-dischargeable. Accordingly, the *Reed* court recognized that there are two distinct analyses: (i) when property is deemed outside of the estate, and (ii) whether exempted property that is turned into some other form of property is subject to claims of creditors

F. Creditor Conceded Proceeds Of Exempt Property Do Not Return To The Estate

In re Buick, 237 B.R. 607 (Bankr. W.D. Pa. 1999) and *In re Bedell*, 173 B.R. 463 (Bankr. W.D.N.Y. 1994) make it clear that proceeds from a sale of property claimed as exempt do not go back into the estate of the debtor. Creditor does not quarrel with that, our position is that the sale

proceeds under state law are available to post-petition creditors and just those pre-petition creditors who hold non-dischargeable debts. The Bankruptcy Court found federal pre-emption in § 522(c) which protects homestead real-estate from a claim such as creditors, but does not protect proceeds from a voluntary sale of the real estate. That is a matter of state law. In re: Reed at footnote 7 recognizes that it is a matter left to the states and state law. Massachusetts offers no protection for such proceeds [see action of Massachusetts Superior Court judge noted at P.7 Chapter 7 Case No. 03-14530-JNF, In re Hyde 334 B.R. 506 (Bkrtcy D. Mass 2005)]. Hyde was argued before the First Circuit Court of Appeals on January 9, 2007 before Judges Lipez, Boudin and Lynch (Case No. 05-2897) and no decision has yet issued.

G. 11 U.S.C. § 522(c) Does Not Enlarge State Homestead Statutes to "Transmorgify" Non-Exempt Proceeds Into Protected Property

Had Congress intended such a broad reading of § 522(c), it easily could have provided, as it has in other sections of the Bankruptcy Code, that "property exempted under this section and the proceeds thereof is not liable ...." See, e.g., 11 U.S.C § 363(a) (cash collateral includes proceeds), 11 U.S.C. § 541(a)(b) (property of estate includes proceeds), 11 U.S.C. § 543 (turnover

by custodian), and 11 U.S.C. § 552 (postpetition effect of security interest). That Congress chose not to include proceeds of exempt property within the protection of section 552(c) is evidence of its interest not to do so. In not providing protection under Section 522(c) to the proceeds of property exempted by a debtor, Congress left it up to the individual states to determine to what extent an exemption in property might extend to the proceeds later derived from a voluntary sale thereof.

Under M.G.L. c. 188, the Massachusetts Homestead Act, a homestead is extinguished upon a voluntary sale, and, notwithstanding the Masschusetts state legislature's ability to do so, it did not extend any protections to proceeds derived from a voluntary sale. Nothing in Patriot Portfolio v. Weinstein, 164 F3d. 677, 1st Circuit 1999 changes this. Although the bankruptcy court stated:

> "with respect to the Debtor, whatever share of the Homestead Proceeds belong to him under state law are exempt from the claims of his pre-petition creditors, including the Creditor. See Patriot Portfolio v Weinstein (In re Weinstein), 164 f.3d 677, 683 (1st Cir. 1999), quoting In re Whalen-Griffin, 206 B.R. 277, 290 (Bankr. D. Mass. 1997) ('Because the exceptions to the Massachusetts homestead have the same effect on the homestead as the exceptions set forth in § 522(c), … the Massachusetts homestead statute is preempted to the extent that it permits exempt property to be liable for debts other than those expressly enumerated in § 522(c)(1)-(3), particularly because the language employed by Congress in § 522(c) is devoid of ambiguity.')"

the cited language applies to real estate only, not the proceeds of the sale.

H. The Proceeds Of The Sale Of Homestead Property Are Not Protected From The Reach Of Creditors; This Is Consistent With Results When A Debtor Converts Exempt Property to Non-Exempt Property

Notwithstanding the fact that the Debtors homestead exemption on the North Andover property expired when he abandoned such property, the cash proceeds following the sale of homestead property are not exempt from the reach of creditors under the Act. The plain language of the statute is clear: "An estate of homestead * * * ***in the land and buildings*** may be acquired pursuant to this chapter * * *" (emphasis added). There is no reference in the statute, nor is there any case law in Massachusetts, stating that the liquid proceeds from the sale of a homestead estate are similarly protected. Nevertheless, there certainly are cases that involve the transformation of exempt assets other than the estate of homestead, and the courts in those cases held that, once the transformation occurs, the exemption is lost. See e.g. Hoult v. Hoult, 373 F.3d 47 (1st Cir. 2004); In re Wiesner, 267 B.R. 32 (Bankr. D. Mass. 2001); In re Toone, 140 B.R. 605 (Bankr. D. Mass. 1992).

Furthermore, as it is the policy behind the Act is to maintain a home for the family in preference to creditors when their financial condition is threatened, it is unclear how protecting proceeds from the sale of the home

furthers that policy – especially when those proceeds are not being earmarked or used to purchase a new home. Consequently, neither the proceeds that the Debtor will realize from the sale of his North Andover property, nor those that his wife will receive are protected by the extinguished homestead exemption and all are available to the plaintiff.

In In re Toone, the debtor, former president of the First National Bank of Marlborough, had $220,000 in that bank's qualified plan and claimed the same as exempt under both M.G.L. C. 235 § 34A and ERISA, 29 U.S.C. 1056(d) after he had his attorney in fact son Attorney David Toone withdraw the same for purposes of rolling them over into an IRA account so-called, in accordance with I.R.C. grace provisions. The FDIC, a pre-petition creditor, had a $48,000,000 judgment. The bankruptcy court (Hillman, J) found once the ERISA plan administrator wrote checks to Debtor's attorney in fact, as a matter of state law, (here, the U.C.C.) were no longer exempt property and the pre-petition creditor recovered. See, *In re Toone* 140 B.R. 605, 607 (Bankr. D. Mass. 1992) ("Whatever the status of the funds may be during the roll-over period for purposes of taxation, the Court finds that they are no longer within the protection afforded by ERISA and the Internal Revenue Code" once they are withdrawn from the plan, even during the roll-over period). Cunningham's situation here is similar. Exempt assets were

converted into non-exempt assets, cash. Once this occurred any protection debtor or spouse may have had vanished. Cunningham's conduct in the within proceeding, converting exempt real estate to non-exempt cash is exactly parallel.

In *In re Wiesner*, where homestead Massachusetts real estate was properly claimed as exempt, the court found the fire insurance proceeds payable after a fire were not exempt under the Homestead Act. *In re Wiesner*, 267 B.R. 32 (Bankr. D. Mass. 2001). Likewise, a homestead does not run with the property or remain in effect once the property changes hands. The Homestead Act specifically provides that the homestead terminates upon the granting of a deed. When the Cunninghams sold the North Andover property, his homestead terminated and so did any protection for the net proceeds from the sale.

In Hoult v Hoult, the defendant entered into a post-judgment stipulation to address a non-dischargeable judgment. The court found the anti-alienation provision of ERISA applies to benefits only where held by the plan administrator and not after they reach the hands of the beneficiary. Hoult v. Hoult, 373 F.3d 47, 54 (1st Cir. 2004), cert. denied, 160 L. Ed. 2d 462, 125 S. Ct. 619 (U.S. 2004).The court reasoned as follows:

> "The plain language of [the anti-alienation provision of ERISA] is that "each pension plan shall provide that benefits provided under the plan

> may not be assigned or alienated." That language governs only the plan itself. Standing alone, it "does not read comfortably as a prohibition against creditors reaching pension benefits once they have left the hands of the administrator…If Congress had intended [the anti-alienation provision of ERISA] to reach that far, it could easily have employed the type of language found, for example, in the Veterans Benefits Act…which prohibits attachment of benefits "either before or after receipt by the beneficiary."
>
> That Congress chose not to do so is significant. Id.

Consistent with this Court's reasoning in Hoult, Congress could easily have extended the provisions of Section 522(c) to "proceeds" had it chosen to do so, and the Massachusetts Legislature could easily have extended the protections of the Homestead Act to proceeds had it chosen to do so. The fact that both legislative bodies have not extended such protection is significant and is fatal to Cunninghams' position.

I. The Debtor's Wife Is Not Protected By The Homestead Once The Tenancy By The Entirety Is Severed

The Act explicitly states that only "one owner may acquire an estate of homestead * * *". However, when the property that is subject to the homestead is a tenancy by entirety, the homestead held by one owner is effectively held by the other owner as well. This is because in a tenancy by entirety "husband and wife are seized of the estate so granted as one person,

and not as ordinary joint tenants or as tenants in common." In re Snyder, 249 B.R. 40, 44 (Bankr. D. Mass. 2000). Thus, a tenancy by entirety is a legal creation in which the "interests of both the husband and wife extend to the whole of the property, not merely to some fractional interest that the other does not also hold." Id. Further, any creditors of one party may not encumber the property as it is also held by the other, non-debtor party. Rather, the creditor must wait until after the end of the tenancy by entirety to encumber the debtor.

Of course, once the property is sold, the parties' interests are no longer held in entirety, and each spouse's interests are now subject to the claims of creditors. Id.[13] Such is the situation in the case at bar, where the plaintiff is the creditor of both the Debtor and his wife, Mrs. Cunningham,

[13] ALM GL c. 188, §1 (2005) states that "[t]he interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the non-debtor spouse * * *." In the case at bar, the North Andover property is no longer the principal place of residence of the Cunningham's. Therefore, plaintiff, as a creditor of Mrs. Cunningham, could theoretically have obtained an attachment against her interest in the North Andover property without being frustrated by Mr. Cunningham's rights in entirety. However, Creditor now is merely trying to attach the proceeds that will result from the sale of the property. The wife's one half interest is presently held by attorney Frederick Fairburn, subject to the Superior Court, Murtagh, J. possibly dissolving the injunction. Creditor seeks the husband's share as well.

albeit for separate reasons. Once they sold their North Andover property, they were no longer tenants by the entirety. The proceeds of the home are divided up equally and creditors can proceed against each party separately. Furthermore, to the extent that the homestead exemption still applies to the Debtor's proceeds of the sale, which we vehemently argue against, that exemption no longer protects Mrs. Cunningham's assets, as her share of the proceeds are now legally separate and unrelated to that of the Debtor. Therefore, there is absolutely no rational basis for holding that the homestead exemption applies to Mrs. Cunningham as well once the tenancy by entirety is destroyed.[14] Moreover, plaintiff's claims against Mrs.

[14] There are two bankruptcy cases that appear to reach the issue of a homestead exemption protecting tenancy by the entirety properly, but are actually factually dissimilar and therefore not applicable. In re Ballirano, 233 B.R. 11 (BNKR. D. Mass. 1999) stated that, for purposes of determining the amount a debtor may claim for a homestead exemption, the court would value that exemption based on the whole equity of the home, as opposed to only half of the equity. The court based its decision on the fact that the debtor/husband and his wife owned the home as tenants by entirety and thus, for purposes of valuing the exemption claimed by the husband, he should be allowed to claim the whole equity. This decision does not, however, address the issue of what happens when the tenancy by the entirety is destroyed. Therefore, it is irrelevant to our case, as plaintiff does not contest the criteria for evaluating the value allotted to the Debtor as a homestead exemption when he owned that property as a tenant by the entirety with his wife. The second case that merits mention for its inapplicability is In re Snyder, 249 B.R. 40 (Bankr. D. Mass. 2000). In that case, the court held that the value of a debtor's homestead exemption would be determined at one point in time, and would not be revisited later when there was a change in the nature of his estate, e.g., when the tenancy by entirety was terminated. Again, that case

Cunningham are not derived from his claims against the Debtor. They are separate claims arising from the fraudulent activity of Mrs. Cunningham in converting plaintiff's property. Therefore, any personal defenses and exemptions that the Debtor may have are not applicable to plaintiff's claims against Mrs. Cunningham.

II. ABSTENTION: THE BANKRUPTCY JUDGE SHOULD HAVE ABSTAINED FROM RULING ON THIS ISSUE OF STATE LAW BECAUSE IT HAS FAR REACHING POLICY IMPLICATIONS AND MOTION IS AN EXAMPLE OF FORUM SHOPPING BY THE DEBTOR

The issue of whether the cash proceeds from a voluntary sale of homestead property are still protected by the homestead exemption is a state law issue and one that has not been previously ruled upon by Massachusetts state courts. The ruling on this issue will have a major impact on Massachusetts state law and how the Homestead Act operates. The US Supreme Court has outlined a number of circumstances where it is desirable for federal judges to abstain from ruling on important state law issues in

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did not deal with the issue of whether the homestead exemption survived the termination of a tenancy by the entirety with relation to the debtor's spouse. Rather, it merely addressed whether a court should reevaluate the amount of the debtor's exemption once he was on his own. As such, the case is not applicable to the one before the State and Federal Courts.

order to reduce the likelihood of an erroneous ruling by the federal court which is exactly what has happened in the present case. In the case of Louisiana Power & Light Company v. City of Thibodaux, 360 U.S. 25, full cite 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959) the Supreme Court ruled that it was a proper exercise of discretion in judgment for the federal court to abstain from ruling on a state law issue that had not yet been decided by the state courts. In the majority opinion of Thibodaux, Justice Frankfurter writes: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law.[15]" The issue presented before the court today is clearly a decisive issue of state law as it is a situation that will likely occur frequently and the ruling will have an enormous impact to the parties involved.

The bankruptcy judge should also have abstained because to allow this important state law issue to be decided by a federal bankruptcy court would be a clear example of forum shopping by the debtor. The prior state court judgment by Judge Kottmyer and the post bankruptcy filing under MRCP 69 in the State Court before Judge Murtagh were favorable to the creditor in this case. The debtor knew that his only chance to prevail was to have the issue decided by a federal bankruptcy judge who was unfamiliar or

[15] Louisiana Power & Light Company v. City of Thibodaux, 360 U.S. 60 at 27.

uninterested with the state law surrounding the issue and mistakenly determined he was deciding a federal law issue. In the case of In re Masterwear Corp., 241 B.R. 511 (Bktcy. S.D. N.Y. 1999), the court outlined 12 factors to govern whether discretionary abstention should be granted. The factors comprised the following:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the court's] docket, (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by

one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Masterwear, 241 B.R. 511 at 520. When applying these factors to the present case it is clear that this should have been a case of abstention. The efficiency of the estate administration (because there is nothing left for the Bankruptcy Court to do fn.) would not have been negatively impacted as the state court would likely have ruled in a timely fashion. The issue presented is a state law issue which the debtor succeeded in confusing with the issue of stronger bankruptcy protection for the real estate (but not the proceeds) based upon 11 USC § 522(c) and Patriot Portfolio, LLC v. Weinstein (In re Weinstein), protects the proceeds of a voluntary homestead sale is one clearly left to the states. The homestead issue is unsettled where it had not been ruled on previously by the Massachusetts or Federal courts. The issue is narrowly defined and easily severable to allow for a state court ruling. Finally, the fact that the debtor chose the improper Federal Bankruptcy Court motion only as it became apparent he was facing a negative ruling in State Court is clear evidence of forum shopping. Taken together, these factors show that justice would have been served better if the Bankruptcy Court had abstained from this issue.

CONCLUSION

Creditor requests that this court declare all the rights of the parties, including a declaration that the cash proceeds of a voluntary sale of homesteaded Massachusetts real estate are not exempt. Creditor had previously requested that the First Circuit consider the case in the first instance. Creditor also requests that this court issue an injunction to prevent the debtor's spouse from spending both spouses' share of the proceeds, pending determination of the appeal and to the extent dissipated declare that Margaret Cunningham's share of any life insurance proceeds should be available to satisfy Creditor's judgment. Creditor also requests that the Federal Court, if it deems appropriate, certify the homestead proceeds issue to the Massachusetts Supreme Judicial Court for determination.

Respectfully submitted,
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By its Attorney

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Dated: April 9, 2007

Certificate of Service

I, John Neylon, hereby certify that on this date, April 9, 2007, ten copies of the within brief, along with a CD-ROM and five copies of the record appendix, were delivered to the court, and one copy of the brief and appendix were sent via first-class mail to George Nader, Esq. at Riley & Dever, P.C., 210 Broadway, Lynnfield, MA 01940, counsel for Appellee.

April 9, 2007

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John G. Neylon

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains at total of 8,475 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word XP 2000 in Times New Roman type style, font size 14.

Dated: April 9, 2007

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