



SO ORDERED.

SIGNED this 6th day of April, 2016.


LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)	
)	
JAMES EDISON KENNEDY)	CASE NUMBER: 08-81687
)	CHAPTER 7
Debtor.)	
_____)	

MEMORANDUM AND ORDER DENYING MOTION TO REOPEN CASE

This matter came before the Court on February 11, 2016 upon a motion by Katharine Gardner Kennedy to reopen her late husband James Edison Kennedy's Chapter 7 case. Gerald S. Schafer appeared for Ms. Kennedy, who was also present. After reviewing Ms. Kennedy's motion, arguments, and brief, this Court finds as follows:

FACTUAL BACKGROUND

James Edison Kennedy (the "Debtor") filed a voluntary Chapter 13 Petition on November 5, 2008. On his Schedule A, the Debtor listed his residence, located at 780 Diamond Head Drive, Pinehurst, Moore County, North Carolina 28374 (the "real property"), with no indication as to whether it was held in fee simple, jointly, or as tenancy by the entirety. The real property was valued at \$200,000.00, subject to three mortgages totaling \$178,000.00. The first mortgage

was with Wells Fargo for \$88,000.00, the second mortgage was with Bank of America for \$55,000.00, and the third mortgage was with Chase for \$35,000.00. According to the Deed of Trust attached to Wells Fargo's Proof of Claim for the Debtor's first mortgage (Claim No. 8), the Debtor purchased the real property on May 20, 1994, and the Deed of Trust shows the Debtor as unmarried. The Deeds of Trust for Bank of America and Chase (Claim Nos. 2 and 17) are similarly only in the Debtor's name. However, the Debtor erroneously scheduled the real property on local exemption Form 91C as property held in tenancy by the entirety with the Debtor's wife, Katharine Gardner Kennedy, and thus the Debtor claimed the entire property as exempt.¹

Additionally, on his Schedule F, the Debtor listed two claims by Unifund CCR Partners ("Unifund") with judgments against only the Debtor in Moore County. The first judgment was entered in case number 07 CVD 1806 for \$24,418.74 at 8% interest accruing from July 31, 2015 plus attorney fees of \$4,333.96. Unifund filed its Proof of Claim on this judgment for \$35,363.74 on November 25, 2008 (Claim No. 5). The second judgment was entered in case number 07 CVD 1859 for \$11,768.24 at 8% interest accruing from August 31, 2005 plus attorney fees of \$2,079.40. Unifund filed its Proof of Claim on this judgment for \$17,235.62 also on November 25, 2008 (Claim No. 6). Both judgments attached to the real property in Moore County. During the pendency of his case, the Debtor never made any attempt to avoid either judicial lien held by Unifund.

On December 22, 2011 the Debtor's case was converted to Chapter 7, and on January 27, 2012 the Chapter 7 Trustee filed a Report of No Distribution. In that Report, the Trustee

¹ Despite Proofs of Claim reflecting three Deeds of Trust in the Debtor's name only, the Debtor's counsel never investigated the erroneous exemption.

provided notice of abandonment for the real property, but no motion to abandon was ever brought.

The Debtor was diagnosed with cancer some time after his case was filed, and he decided to title the real property in both his and his wife's names.² On April 3, 2012, six days before his death, the Debtor conveyed the real property to himself and Ms. Kennedy as tenants by the entirety. That transfer was made without authorization from the Trustee or from the Court. On April 9, 2012, the Debtor passed away. The Debtor received a discharge on April 9, 2012, and the case closed on April 16, 2012.

Ms. Kennedy became the sole owner of the real property upon the death of the Debtor as a result of the tenancy by the entirety. She paid off the second and third mortgages using the Debtor's life insurance proceeds and remained current on the first mortgage. Ms. Kennedy eventually decided to sell the real property, and located a buyer in late 2015, however the two judgment liens held by Unifund still remained.³ After retaining new counsel, on January 7, 2016 Ms. Kennedy filed a Motion to Reopen Case (Docket No. 81) to avoid Unifund's liens against the real property.

The Motion states the real property was erroneously scheduled as entirety property, when in fact the Debtor owned the property individually and the judgment liens against the real property therefore attached. Ms. Kennedy notes that the Debtor did not avoid the liens despite claiming the real property as exempt, and that she is in the process of selling the property and needs the judicial liens set aside under the Debtor's exemptions. The Motion therefore seeks permission for Ms. Kennedy to reopen the Debtor's case to avoid the liens. The Motion was

² According to Ms. Kennedy's Affidavit, the Debtor understood that he could not transfer title to entirety property without completing his case and receiving a discharge.

³ According to Ms. Kennedy's Affidavit, when she discovered that Unifund's liens remained against the property in advance of closing, the liens had grown to an amount in excess of \$72,000.

later amended to reflect Ms. Kennedy's status as Personal Representative of the Debtor's probate estate (Docket No. 84),⁴ and Ms. Kennedy filed Letters Testamentary in support of the Motion (Docket No. 86). The Letters Testamentary state, "The fiduciary is fully authorized by the laws of North Carolina to receive and administer all of the assets *belonging to the estate*, and these Letters are issued to attest that authority and to certify that it is now in full force and effect." (emphasis added).

At the hearing, the Court posed three questions to Ms. Kennedy's counsel: (1) whether a deceased debtor's case can be reopened by the legal representative of the deceased debtor's probate estate; (2) whether the legal representative of the deceased debtor's probate estate can amend the debtor's exemptions to reflect an election to which the debtor would have been entitled as of the petition date; and (3) whether a judicial lien can be avoided *nunc pro tunc* to the petition date. Counsel was asked to submit a brief addressing these three questions, in addition to any and all other issues not raised by the Court related to the pending Motion. The brief was filed on March 4, 2016.

APPLICABLE LEGAL STANDARD

A bankruptcy case can be reopened pursuant to 11 U.S.C. § 350(b), "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Whether to reopen a bankruptcy case depends on the circumstances of the case and is left to the sound discretion of the bankruptcy court. *Hawkins v. Landmark Fin. Co.*, 727 F.2d 324, 326 (4th Cir. 1984); *In re Hamlett*, 304 B.R. 737, 740 (Bankr. M.D.N.C. 2003).

⁴ The Motion was amended a second time (Docket No. 89) to correct a scrivener's error.

The court considers two factors when reopening a bankruptcy case, prejudice and ability to prevail. First, the court looks to ensure that no party's rights are prejudiced by actions taken between the case closing and the motion to reopen. *In re Midlands Util., Inc.*, 251 B.R. 296, 299 (Bankr. D.S.C. 2000); *In re Hardy*, 209 B.R. 371, 373-74 (Bankr. E.D. Va. 1997). Second, the court determines "if the underlying cause of action to the Motion To Reopen is 'likely to be sustained when considered on its merits.'" *In re Hardy*, 209 B.R. at 373 (quoting *In re Carter*, 156 B.R. 768, 770 (Bankr. E.D.Va. 1993)). The movant is burdened with showing that the court has the authority to grant the underlying relief sought. *In re Midlands Util., Inc.*, 251 B.R. at 299. The movant need not prove his case in the motion to reopen, and the court should avoid ruling on the merits of the underlying matter. *In re Jones*, 367 B.R. 564, 567 (Bankr. E.D. Va. 2007). But as granting a motion to reopen does not afford the movant relief, rather merely provides the opportunity to seek the requested relief, it follows that should the movant's objective be unachievable and thus futile, the court should not reopen the case. *In re Clary*, 440 B.R. 122, 123 (Bankr. E.D. Va. 2010); *In re Coastline Care, Inc.*, 299 B.R. 373, 377 (Bankr. E.D.N.C. 2003). See *Thompson v. Commonwealth of Va. (In re Thompson)*, 16 F.3d 576 (4th Cir.1994) (holding that a Chapter 7 case need not be reopened since the purpose for reopening would accord no relief); *In re Locklair*, No. 03-50924, 2006 WL 1491440 (Bankr. M.D.N.C. 2006) (Judge Aron) (declining to reopen a Chapter 7 case because the relief requested involved an asset that had been abandoned by the Trustee and was therefore irrevocably no longer part of the estate).

MOVANT'S ARGUMENTS

In support of the Motion, counsel for Ms. Kennedy filed a brief arguing that the Court has the authority to grant relief by first reopening the Debtor's closed Chapter 7 case, then by

allowing Ms. Kennedy to amend the Debtor's exemptions, and ultimately by granting Ms. Kennedy lien avoidance as to Unifund's two judicial liens.

(1) Reopening the Decedent Debtor's Case by the Legal Representative of the Probate Estate

First, Ms. Kennedy argues that a bankruptcy case may be reopened despite the Debtor's death. The Bankruptcy Rules provide some instruction on how to proceed when a debtor dies prior to case completion. Pursuant to Rule 1016, "Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Whereas the Rule's language continues to permit for continued administration in Chapters 11, 12, and 13, the Rule is clear that Chapter 7 cases *shall* continue. Rule 1016 provides no instruction, however, when attempting to reopen a deceased debtor's closed case.

In the Fourth Circuit, reopening closed cases pursuant to § 350(b) is at the court's discretion. *Hawkins v. Landmark Fin. Co.*, 727 F.2d at 326. Section 350(b) is silent on who may reopen a closed case, and under what circumstances; however, Bankruptcy Rule 5010 instructs that either the debtor or another party in interest may make a motion to reopen under § 350(b). FED. R. BANKR. P. 5010. In this case, the Debtor has been deceased for almost four years and cannot himself reopen his case. Ms. Kennedy is ultimately seeking to reopen the case on behalf of the Debtor and avoid two judicial liens held by Unifund, which is "to accord relief" under § 350(b). Therefore, to reopen the case, Ms. Kennedy must be able to step into the

Debtor's place and act on his behalf in such a way that accords the Debtor, or in this instance the Debtor's probate estate, some relief.⁵

Multiple bankruptcy courts have concluded that a closed bankruptcy case can be reopened following the death of a debtor by the decedent debtor's representative. The Eastern District of Oklahoma heard a motion to reopen a closed Chapter 7 by the personal representative of a deceased debtor whose case had closed multiple years prior. *In re Henson*, No. 06-80191-TRC, 2013 WL 5417197, at *1 (Bankr. E.D. Okla. Sept. 26, 2013). In *Henson*, the court found that, while a personal representative cannot be substituted as a petitioner in an active case, a personal representative can reopen a case to enforce an order of the Court, in that case a discharge injunction order.⁶ *Id.* at 2. Similarly, in *In re Mobley*, No. 99-92579, 2004 WL 377679 (Bankr. C.D. Ill. Mar. 1, 2004), the court found that the deceased debtor's sole heir who was appointed as Independent Representative of the debtor's probate estate was able to reopen a closed Chapter 7 case for the purpose of avoiding a lien. And the Bankruptcy Court in South Dakota grappled with the tension between § 350(b) and Rule 1016 in *In re Walters*, 113 B.R. 602 (Bankr. D.S.D. 1990), ultimately finding that neither the Bankruptcy Code nor the Bankruptcy Rules require that the § 109(h) requirements as to who may be a debtor need be met upon reopening a case. *Id.* at 605. "Therefore, reopening a case under 11 U.S.C. § 350(b) and continuing case administration despite death under Bankruptcy Rule 1016 are both deemed

⁵ Ms. Kennedy's brief also argues that she has standing to reopen the Debtor's case as an interested party due to her pecuniary interest in the property. However, a mere pecuniary interest is insufficient to constitute standing. Wells Fargo, for instance, has a pecuniary interest in the property as the mortgage holder, but that pecuniary interest does not afford Wells Fargo standing to reopen the case to avoid judicial liens. Additionally, that Ms. Kennedy owns the property is insufficient to distinguish her position from any other holder of a pecuniary interest, as if, for instance, the Debtor had sold the real property while in bankruptcy, and the purchaser now wished to reopen the case to avoid Unifund's liens and resell the property, the purchaser would lack standing to reopen the case and act as the Debtor. C.f. *In re Krantz*, No. BR 10-28557, 2012 WL 6028846, at *3-4 (Bankr. D. Utah Nov. 29, 2012) (discussing debtors who sold and repurchased their home, and then filed a motion to avoid a judicial lien; the court found standing not as subsequent purchasers, but because the debtors were entitled to lien avoidance as of the petition date).

⁶ The Court in *Henson* ultimately denied the motion to reopen, but on separate grounds.

effective.” *Id.* *Walters* thus held that the deceased debtor’s Chapter 11 case could be reopened to avoid tax liens. Here, Ms. Kennedy provides Letters Testamentary, evidencing her position as Personal Representative of the Debtor’s estate, and allowing her to stand in the Debtor’s place in matters of the Debtor’s probate estate.

(2) Amending the Decedent Debtor’s Exemptions

Ms. Kennedy further argues that she can act in the decedent Debtor’s place as his Personal Representative to amend the Debtor’s exemptions to correctly exempt the real property as of the petition date.

It is well settled that a debtor’s exemptions in real property survive the debtor’s death. *Armstrong v. Peterson (In re Peterson)*, 897 F.2d 935, 939 (8th Cir. 1990) (“Peterson’s homestead exemption became fixed and vested on the date of filing. Peterson’s death, which occurred eight months after the date of filing, is irrelevant for determining his right to a homestead exemption.”); *see, e.g., Ohanian v. Irwin (In re Irwin)*, 338 B.R. 839, 851 (E.D. Cal. 2006); *In re Mobley*, No. 99-92579, 2004 WL 377679, at *2; *In re Doyle*, 209 B.R. 897, 907 (Bankr. N.D. Ill. 1997); *In re Combs*, 166 B.R. 417, 421 (Bankr. N.D. Cal. 1994); *In re Costello*, 72 B.R. 841, 844 (Bankr. E.D.N.Y. 1987); *In re Friedman*, 38 B.R. 275, 275-76 (Bankr. E.D. Pa. 1984). Furthermore, a decedent debtor’s personal representative has authority to claim any exemption to which the debtor would have been entitled, not only the election made by the debtor upon filing. *See Brown v. Sommers (In re Brown)*, 807 F.3d 701, 707 (5th Cir. 2015) (“[The Debtor’s personal representative] stands in Debtor’s shoes. The Texas Bankruptcy

Court has authorized her to claim any exemptions to which Debtor would have been entitled.”); see also *In re Goswami*, 304 B.R. 386 (B.A.P. 9th Cir. 2003).⁷

Here, the decedent Debtor erroneously elected to exempt the real property as entireties property held with Ms. Kennedy, though when the Debtor filed his case in 2008 the property was solely owned by him and not with his wife as tenancy by the entirety. Since the decedent Debtor would have been entitled to claim the real property as exempt up to \$18,500 under the homestead exemption, rather than his erroneous election to schedule the property as entireties property, Ms. Kennedy asserts that she could amend the decedent Debtor’s exemptions to reflect that to which he would have been entitled on the petition date.

(3) Avoiding Judicial Liens *Nunc Pro Tunc*

Lastly, Ms. Kennedy asserts that after amending the decedent Debtor’s exemptions, Ms. Kennedy could avoid Unifund’s judicial liens *nunc pro tunc*. Pursuant to 11 U.S.C. § 522(f)(1)(A), “[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is a judicial lien . . .” The Unifund judgments would have been avoidable so long as the decedent Debtor had an interest in the real property at the time Unifund’s liens attached to the property. *Farrey v. Sanderfoot*, 500 U.S. 291, 299 (1991).

The decedent Debtor would have been entitled to avoid Unifund’s judicial liens during the pendency of his case pursuant to § 522(f)(1)(A).⁸ The Fourth Circuit has ruled that a debtor’s

⁷ “[The Court] held that debtors may not file amended schedules in a reopened case without court approval. We disagree. There is no basis in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure for imposing such a requirement. If the drafters had intended to require court permission before the filing of amended schedules in reopened cases, they would have explicitly said so.” 304 B.R. at 392.

⁸ The decedent Debtor would have actually been able to avoid Unifund’s junior lien entirely, but only partially avoid the senior lien; \$3,500 would have remained after the three Deeds of Trust plus the \$18,500 homestead exemption.

ability to avoid judicial liens using exemptions turns on whether a debtor would have been entitled to avoid those liens using the allowable exemptions as of the petition date. *In re Opperman*, 943 F.2d 441 (4th Cir. 1991). *See also In re Bowes*, No. 04-81207 C-7D, 2005 WL 1288109, *2 (Bankr. M.D.N.C. Feb. 18, 2005) (“Similarly, the implication in [North Carolina statute] that exemptions can be waived by conveyance of the property ‘must not be applied in preference to the avoidance power of section 522(f).’”). Because the Debtor no longer owns the real property and therefore the liens do not presently impair any of the Debtor’s exemptions, Ms. Kennedy, as the Debtor’s Personal Representative, would have to reopen the case and avoid Unifund’s liens *nunc pro tunc* to the petition date.

As Ms. Kennedy’s brief highlights, there is precedent from the First and Ninth Circuits, as well as in districts across the country, in allowing lien avoidance *nunc pro tunc*. In *In re Chiu*, 304 F.3d 905 (9th Cir. 2002), the Ninth Circuit first recognized the right in bankruptcy to avoid judicial liens *nunc pro tunc*. Referencing prior Ninth Circuit case law, the Court identified three elements for § 522(f)(1) lien avoidance, “(1) there was a fixing of a lien on an interest of the debtor in property; (2) such lien impairs an exemption to which the debtor would have been entitled; and (3) such lien is a judicial lien.” *Id.* at 908 (citing *Estate of Catli v. Catli (In re Catli)*, 999 F.2d 1045, 1406 (9th Cir. 1993)). The second and third elements were met. *Id.* The Ninth Circuit B.A.P. had previously ruled that the first element was also met, looking to the petition date to determine whether the homestead exemption was impaired by a lien fixed to the property. *In re Chiu*, 266 B.R. 743, 753 (B.A.P. 9th Cir. 2001) *aff’d*, 304 F.3d 905. Relying on the *Farrey* decision, the Ninth Circuit affirmed the Ninth Circuit B.A.P.’s ruling that a judicial

lien need not impair the homestead exemption at the time the motion to avoid the lien is filed.⁹ *In re Chiu*, 304 F.3d at 909. The next year, the Ninth Circuit B.A.P. stated, “Lien avoidance actions are among the ‘various activities’ that may occur after a case is closed. In the absence of prejudice, lien avoidance actions are not barred either by entry of a discharge order or the closing of the bankruptcy case.” *In re Goswami*, 304 B.R. at 392.

Four years later, the First Circuit joined the Ninth in recognizing the right to avoid judicial liens *nunc pro tunc*. *Wilding v. CitiFinancial Consumer Fin. Servs. (In re Wilding)*, 475 F.3d 428, 432 (1st Cir. 2007). In *Wilding*, a Chapter 7 debtor successfully completed a no-asset case, and after the case closed the debtor reopened the case and filed a motion to avoid a discharged judicial lien to unfix the lien in the collateral, the debtor’s residence. *Id.* at 430. Using the Ninth Circuit’s *Catli* framework, the Court determined that whether a lien impairs an exemption to which the debtor would have been entitled is determined as of the petition date. *Id.* at 433. *Nunc pro tunc* lien avoidance has since been accepted by numerous courts. *In re Fix*, 542 B.R. 502, 509 (Bankr. D. Mont. 2015); *In re Krantz*, No. BR 10-28557, 2012 WL 6028846, at *3 (Bankr. D. Utah Nov. 29, 2012); *Unifund C.C.R. Partners v. Sheckard (In re Sheckard)*, 394 B.R. 56 (E.D. Pa. 2008); *In re Nestor*, No. 05-6772, 2007 WL 3405108 (Bankr. N.D.W. Va. Nov. 8, 2007); *In re Bradley*, 369 B.R. 147, 151 (Bankr. S.D.N.Y. 2007); *In re Brodsky*, No. 05-81736, 2007 WL 7136477, at *3 (Bankr. N.D. Ga. Mar. 13, 2007); *In re Orr*, 304 B.R. 875, 877 (Bankr. S.D. Ill. 2004); *In re Mailhot*, 301 B.R. 774 (Bankr. D.R.I. 2003); *In re Fairchild*, 285 B.R. 98, 100 (Bankr. D. Conn. 2002). In these cases, the court allowed the debtor to avoid a lien *nunc pro tunc*. However, in each of these cases, the motion was brought by debtor himself,

⁹ While the Ninth Circuit affirmed the B.A.P. ruling, it determined that lien avoidance depends on the time the lien became fixed to the property, rather than the petition date.

and not by a state appointed personal representative whose authority to act was defined by state law.

STANDING

Though Ms. Kennedy has shown that the Bankruptcy Code may allow for a deceased debtor's case to be reopened, and also that courts have held that a judicial lien may be avoided *nunc pro tunc*, not one case in Ms. Kennedy's excellently reasoned brief allowed the personal representative of a deceased debtor's probate estate to reopen a case to avoid liens *nunc pro tunc* under the circumstances presented here.¹⁰ Ms. Kennedy is asserting a state law basis, her status as personal representative, for standing to reopen the decedent Debtor's case; the Court must therefore start with state law.

In North Carolina, the broad powers conferred to the legal representative of a decedent's estate are bounded by the limits of the probate estate itself. Also, the burden is on the party acting on behalf of the estate to show that proposed actions are within the authority granted by § 38A-13-3(a). *Hunter v. Newsom*, 468 S.E.2d 802, 806-07 (N.C. App. 1996) (finding that there was no identifiable authorization from statute or from decedent's will for the executor to take out a loan).

The grant of power to a personal representative for a decedent's estate under North Carolina law is found in N.C. GEN. STAT. § 28A-13-3(a):

A personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent person would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including the powers specified in the following subdivisions:

...

¹⁰ The Court was also unable to find a single such case.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

...

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto . . .

...

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter. . . .

While the powers enumerated in § 28A-13-3(a) would appear at first glance to grant Ms.

Kennedy standing to reopen the decedent Debtor's case, a personal representative is only enabled to exercise those enumerated powers on behalf of the *decedent's estate*. Thus, under North Carolina law, Ms. Kennedy's powers as a personal representative of the deceased Debtor are limited to matters related to the collection, preservation, liquidation or distribution of a decedent's estate. The real property is not and has never been part of the probate estate, and Unifund has no claim to assets against the Debtor's probate estate.

In this case, the real property never came into the probate estate due to its status as entirety property. Entireties property is property transferred to a married couple in tenancy by entirety. Under common law, tenancy by the entirety is a concurrent ownership arrangement whereby the marital unit entity holds real property, and each spouse has a claim to 100% of the real property with right of survivorship, subject to the other's interest while alive. 41 Am. Jur. 2d Husband and Wife § 18. North Carolina recognizes conveyances in tenancy by the entirety. N.C. GEN. STAT. § 39-13.3; *Combs v. Combs*, 160 S.E.2d 308, 311 (1968). Upon one spouse's death, the surviving spouse takes the entire property pursuant to the original conveyance. *Woolard v. Smith*, 94 S.E.2d 466, 469 (1956) ("Death creates no new estate in the survivor. The survivor takes by virtue of the original conveyance."). Because the surviving spouse takes pursuant to the original conveyance, the property is never included in the probate estate. *See, e.g., Matter of Estate of Francis*, 394 S.E.2d 150 (1990) (concluding that entirety property

passes to the surviving spouse outside the will). If entireties property passes under the original conveyance outside the will, upon the decedent Debtor's death the real property held as entireties property between the decedent Debtor and Ms. Kennedy became wholly Ms. Kennedy's, and beyond the reach of her powers as personal representative of the estate.

Where property was never part of a decedent's estate, there is no North Carolina statutory authority which confers standing on the personal representative to act with regard to that property. In *Estate of Scurlock v. Wells Fargo Home Mortgage, Inc.*, No. COA13-1254, 2014 WL 4071668 (N.C. Ct. App. Aug. 19, 2014), the personal representative submitted the decedent's will to probate, and pursuant to North Carolina statute certain realty vested in an heir with title relating back to the date of death. *Id.* at *4. The personal representative never sought to bring the realty back into the estate, and the property therefore was never part of the estate. *Id.* As a consequence, the personal representative lacked standing in bringing that case. *Id.* Here, similarly, the decedent Debtor's estate never owned or controlled the real property, so Ms. Kennedy cannot act on behalf of the estate with regard to the property.

The North Carolina Supreme Court was particularly instructive in *In re Miller*, 584 S.E.2d 772 (N.C. 2003), where the Court found that the executrix of an estate could not purport to act on behalf of a decedent's estate in handling legal matters where there were no assets in the estate and no activity regarding the estate. *Id.* at 781. *Miller* concerns a purported waiver of a decedent's attorney-client privilege by his executrix in a criminal proceeding. *Id.* at 779. The State argued that the § 28A-13-3 grant of power extended to waiving privilege where the decedent took no affirmative steps to preclude his estate from waiver. *Id.* at 779-780. The Court noted that the executrix had reopened the estate just before the State filed its petition, and observed:

At that time, the estate had been closed; it contained no assets; and as far as the record shows, there were no claims pending for or against the estate. Therefore, Mr. Willard's estate was not at risk of incurring civil liability. Because there were no assets in the estate, there was nothing for the executrix to collect, preserve, liquidate, or distribute.

Id. at 781. The Court determined that privilege was waived not to benefit the estate, but rather to enable the executrix to submit an affidavit to further the ongoing criminal investigation, and that § 28A-13-3 did not grant the power to waive privilege.¹¹ *Id.* at 781-782.

Just as was the case in *Miller*, here the decedent Debtor's probate estate is not benefitted or in any way impacted by Ms. Kennedy's Motion. And the claims by Unifund that Ms. Kennedy seeks to avoid are not claims against an asset in the probate estate or the probate estate itself, as the decedent Debtor received his Chapter 7 discharge on April 9, 2012. 11 U.S.C. § 727(b).¹² Here, the liens remain a cloud on the title to the real property, but neither Ms. Kennedy nor the probate estate is personally liable. Ms. Kennedy cannot purport to act on behalf of the estate; rather, only Ms. Kennedy's interests are furthered by her Motion.

Although courts have allowed deceased debtors' personal representatives to reopen their cases, none of the cases cited by Ms. Kennedy involve both a non-filing, non-debtor spouse as representative and real property owned in tenancy by the entirety prior to the debtor's death. In *Costello*, husband and wife were co-debtors, and the husband was seeking to reopen their joint Chapter 7 case on both of their behalf. 72 B.R. at 842. In *Mobley*, the debtor's sole heir was appointed as Independent Representative of the probate estate and was seeking to avoid a lien on real property that was part of the probate estate. 2004 WL 377679 at *1. And in *Walters*, though

¹¹ In *Miller*, the executrix reopened the decedent's probate estate "to handle legal matters," which the Court found to be an insufficient basis. *Id.* at 781.

¹² "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title."

the debtor's widow became executrix of his estate, the real property in question was owned by the debtor, sold by the debtor, subsequently quit-claimed back to the debtor individually, and came into the debtor's probate estate with liens clouding the title.

The Court has considered reopening the case on its own motion to afford Ms. Kennedy the opportunity to avail herself of standing under § 28A-13-3(a)(24) to avoid the real property transfer from the decedent Debtor to entireties property, thereby bringing the property into the probate estate. Pursuant to 11 U.S.C. § 549(a), "[T]he trustee may avoid a transfer of property of the estate— (1) that occurs after the commencement of the case; and (2) . . . (B) that is not authorized under this title or by the court." In this case, the decedent Debtor was never authorized by the Court to transfer the property to entireties property with Ms. Kennedy, and the property was abandoned when the case was closed, after the transfer had already been completed. Under § 549(d), however, the time period in which to bring an avoidance action expired in April 2014. Thus, the effect of removing the real property from the estate via transfer to entireties property cannot be revisited, and Ms. Kennedy is left without remedy to assert standing to reopen this case.

As the real property is not, and never was, part of the probate estate and Unifund holds no claims against the probate estate, Ms. Kennedy cannot act in this bankruptcy case as the decedent Debtor's personal representative in bringing a Motion to Reopen. Ms. Kennedy is understandably in a difficult position, as the decedent Debtor and his attorney failed to properly investigate the title to real property when the bankruptcy petition was filed and again failed to act in avoiding Unifund's judicial liens as of right before transferring the property to entireties, thereby depriving Ms. Kennedy of standing in his case following his death and subsequent discharge. Ms. Kennedy was also inadvertently hurt by the transfer of the real property to

entireties property. But Unifund's liens were part of the case record, and Ms. Kennedy failed to act for almost four years after the case was closed. There is a limit to this Court's ability to correct the attorney errors, the misguided decisions, and the significant delays that created the current set of circumstances.

Accordingly, the decedent Debtor's case will not be reopened, and Ms. Kennedy's Motion is denied.

END OF DOCUMENT

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08-81687 C-7

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