



**SO ORDERED.**

**SIGNED this 11 day of September, 2006.**

*Dale L. Somers*

Dale L. Somers  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**MICHAEL CHRISTIAN DILLER and  
GINA MICHELLE DILLER**

**DEBTORS.**

**CASE NO. 05-42116  
CHAPTER 7**

**MEMORANDUM AND ORDER GRANTING CHAPTER 7 TRUSTEE'S MOTION  
FOR TURNOVER AS TO DEBTOR, MICHAEL DILLER**

The matter before the Court is the Trustee's Motion for Turnover (Motion) as to Debtor, Michael Christian Diller. The Chapter 7 Trustee, Patricia E. Hamilton, appears in person. Debtor, Michael Diller appears by Brenda Bell. There are no other appearances. The Court has jurisdiction.<sup>1</sup>

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<sup>1</sup> This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July

On April 27, 2006, the Trustee filed her Motion for turnover against Michael and co-debtor, Gina Diller. The Motion alleges that the Debtors are divorced and that a divorce decree has been entered which provides that Michael has a contract right to payment of \$7,000 for equity in the real property Gina is maintaining as her homestead. The Trustee prays for an order of turnover. Debtor, Gina Diller did not oppose the Motion, and an order granting the Motion as to her was filed on July 13, 2006. Debtor, Michael Diller opposed the Motion. For the reasons stated below, the Court grants the Motion as to Michael Diller.

### **FINDINGS OF FACT.**

Debtor, Michael Diller and Trustee have entered into a stipulation of facts in regard to the Trustee's Motion and have consented to the Court taking the matter under advisement based upon the stipulation and the briefs. The stipulation provides as follows. The Debtors, Michael and Gina Diller, filed a joint voluntary Chapter 7 Bankruptcy Petition on June 30, 2005.<sup>2</sup> Post-petition the Debtors were divorced pursuant to a decree entered in the Riley County District Court. Prior to the entry of the divorce decree, the Debtors entered into a Settlement Agreement, which was signed on March 10, 2005.

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10, 1984. A motion to turnover property of the estate is a core proceeding which this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(E). There is no objection to venue or jurisdiction over the parties.

<sup>2</sup> The voluntary filing of a single petition with the consent of both spouses pursuant to 11 U.S.C. § 302(a) allows for joint administration of the estates of a husband and wife. However, absent consolidation of the estates pursuant to 11 U.S.C. § 302(b), each debtor in a joint petition must separately schedule assets, liabilities, and exemptions. 2 *Collier on Bankruptcy* ¶ 302.02[1][b](Alan N. Resnick, & Henry J. Sommer, eds-in-chief 15th ed. Rev. 2006).

The Settlement Agreement, attached as exhibit to the Trustee's brief, as to real property

provides:

The real property owned by the parties, commonly known as 1230 Pierre Street, Manhattan, Riley County, Kansas, shall be set aside to the Wife, (subject to Husband's lien for 1/2 the equity as set forth above) subject to the mortgage indebtedness owed thereon to Washington Mutual Bank. Husband shall sign a Quitclaim Deed to effectuate the transfer at such time as he has received his 1/2 share of the equity in the marital home as a set-off from child support as stated above.

The Pierre Street property is listed on Schedule A as Debtors' homestead and claimed as an exempt homestead on Debtors' Schedule C. The portion of the Settlement Agreement, the caption of which identifies Michael as Petitioner and Gina as Respondent, addressing child support states:

Commencing April 1, 2004, and continuing on the first day of the month thereafter, Husband's child support is \$266.64 per month. . . and husband shall pay the sum of \$150 per month to Wife as and for Child Support beginning April 1, 2005 and continuing until further order of the Court and shall be permitted to set-off the sum of \$116.64 per month as a payment to him toward his 1/2 the equity interest in the marital home. The Petitioner's share of the equity in the marital home is \$7,000 and the Husband shall have the \$116.64 set-off from child support until such time as the set-off total is equal to \$7,000 which is approximately 61 months. . . . If the Petitioner [sic] desires to sell the marital home prior to the time that Respondent [sic] has been paid the sum of \$7,000 by the set-off from child support then the Respondent [sic] shall be paid the difference between the amount set-off from child support minus the \$7,000 at closing. . . .

Neither the pending divorce nor the Settlement Agreement were disclosed in Debtors' Schedules or Statement of Affairs.

On August 24, 2005, the Court granted a motion for relief from stay in regard to the homestead property filed on behalf of creditor Midland Mortgage Company. In his brief, Michael states that a foreclosure action is pending in Riley County, Kansas.

**CONTENTIONS OF THE PARTIES.**

The Trustee claims that Michael's interest in the real property, including the contract right to payment through offset against his child support obligation, is property of the estate. Michael responds that the asset is exempt under two theories. First, he asserts that because the setoff is related to child support, it is exempt property. Second, he states that he intends to use the savings in child support payments resulting from the setoff to reinvest in a house. He also argues that his interest in the homestead is worthless because of the pending foreclosure action, and that generally worthless claims are not pursued by the estate.

**ANALYSIS.**

The Court rejects Michael's defenses and finds that the Trustee's motion should be granted. First, the Court rejects Michael's contention that the payments are exempt because they relate to payment of child support. He states:

Apparently, the trustee wishes to have Michael Diller pay her the sum that he is setting off from child support. The logical way to read the settlement is that child support (which is exempt property) would increase for Michael Diller if he did not take the set off. Michael Diller has nothing to turn over and what he could turnover (his set-off) is the payment of child support.

The Court fails to understand this alleged defense. Michael cannot claim an exemption for child support payments. An individual's wages may be garnished to pay child support.<sup>3</sup> Under Federal law,<sup>4</sup> child support payments are exempt property of the spouse receiving payment, which in this case would be Gina, not Michael. There is no comparable Kansas exemption statute. Under Kansas law, child support is a property interest belonging to the child. The custodial parent merely has a right to enforce the child's property interest,<sup>5</sup> but the right to receive the payments is not property of the parent entitled to the payments.<sup>6</sup> Here Michael is the party required to pay child support. He cites no exemption applicable to funds identified for that purpose.

Second, the payments are not exempt under the homestead exemption. Neither the Trustee nor any other party objected to the Debtors' claimed homestead exemption. However, Michael does not defend the Trustee's motion based upon entitlement to the exemption as stated in K.S.A. 60-2301 because of occupancy of the property on the date of filing. Moreover, even assuming Michael was entitled to a homestead exemption of his equity in the property as of the date of filing under that rationale, the exemption would not extend to his right, as of the date of filing, to receive payment of that equity unless there is a finding that he intends to reinvest his equity in a new homestead. Although Michael contends in his brief that he will reinvest the savings in his child support resulting from the offset in a new homestead, neither the stipulation of facts nor the brief submitted by Michael present any facts

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<sup>3</sup> K.S.A. 60-2310.

<sup>4</sup> 11 U.S.C. 523(d)(10)(D).

<sup>5</sup> See *In re Welch*, 31 B.R. 537 (Bankr. D. Kan. 1983).

<sup>6</sup> See *In re King*, 233 B.R. 176 (Table), 1999 WL 83927(10th Cir. BAP 1999).

from which the Court could make such a finding. Michael agreed to the Court taking the matter under advisement based upon the briefs and the stipulated facts, and the Court need not provide him an opportunity to provide evidence in support of his contention.

The Court understands that the Trustee is claiming that Michael's right to receive his interest in the equity of Gina's homestead is nonexempt estate property. The Court agrees. As to Michael, the right to receive his equity is not exempt as a homestead or otherwise. The Trustee is entitled to turnover of Michael's interest, whether that interest is the "stream of payments" resulting from the monthly off-set to satisfy Michael's child support obligation or a lump sum payment of Michael's share of the equity upon the sale of the homestead, whether through foreclosure or otherwise.<sup>7</sup>

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

**IT IS SO ORDERED.**

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<sup>7</sup> Trustee is entitled to only one recovery. To the extent that Michael satisfies his obligation to the estate, Gina's obligation to make payment pursuant to the order entered against her would be discharged, and vice versa.