Dated: September 26, 2018
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
RAYMOND F. THOMAS,
Debtor.

Case No. 17-25100-L
Chapter 7 (asset)

Lynda F. Teems, Chapter 7 Trustee,
Plaintiff,

v.

Adv. Proc. No. 18-00015

Raymond F. Thomas and
Michelle H. Thomas,
Defendants.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Motion for Summary Judgment filed by the Defendants, Raymond F. Thomas and Michelle H. Thomas, husband and wife. The motion raises the question whether a trustee in bankruptcy for one spouse may sell real property held in a tenancy by the entirety for the benefit of joint creditors. Lynda F. Teems (the "Trustee") filed an objection and an amended objection to the motion. In support of the motion, the Defendants have submitted a

Statement of Undisputed Facts with supporting documents. In opposition to the motion, the Trustee has submitted transcripts of the depositions of Michelle Thomas, Raymond F. Thomas, and David Robertson.

JURISDICTION

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of whether to approve a sale of property pursuant to the authority granted at 11 U.S.C. § 363(h) is a core proceeding concerning the administration of the bankruptcy estate. *See* 28 U.S.C. § 157(b)(2)(A). Accordingly, the bankruptcy court has authority to consider and decide the Defendants' motion for summary judgment subject only to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1).

BACKGROUND FACTS

The following facts are not in dispute:

1. Raymond F. Thomas (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on June 9, 2017.
2. Lynda F. Teems was appointed trustee on the same day.
3. The Defendants are owners of two contiguous parcels of real property located in Fayette County, Tennessee, one of which is used as their residence (described by the Fayette County Assessor as Parcel 9.02 and comprised of 3.4 acres containing a single-family house), and the second described by the Fayette County Assessor as Parcel 8.04

comprised of approximately 52 acres. (Taken together these parcels are denoted in this opinion as the Defendants' "Property"). Affidavit of Debtor, Ex. 1 to Defendants' Statement of Undisputed Facts, Adv. Dkt. No. 19.

4. The Defendants own the Property as tenants by the entirety.
5. The Debtor declared the value of the Property to be $527,800 in his bankruptcy schedules. Schedule A, Bankr. Dkt. No. 1.
6. Parcel 8.04 is subject to the United States Department of Agriculture Grassland Reserve Program that mandates that this parcel be used as grasslands through 2019.
7. The Property has one means of ingress and egress located on Highway 194. Affidavit of Debtor.
8. The Defendants reside in a house located on Parcel 9.02.
9. The Debtor initially claimed a $5,000 homestead exemption in the Property pursuant to Tennessee Code Annotated section 26-2-301. Schedule C filed June 9, 2017, Bankr. Dkt. No. 1.
10. The Debtor later amended Schedule C to add an exemption of 100% of the fair market value of the Property pursuant to federal bankruptcy law, 11 U.S.C. § 522(b)(3)(B). Amended Schedule C filed August 7, 2017, Bankr. Dkt. No. 22.
11. The Property is encumbered by a deed of trust dated December 28, 2016 (the "First DOT"), to secure a note given by the Defendants to the Bank of Fayette County (the "Home Note"). Affidavit of Debtor.
12. The balance owed by the Defendants on the Home Note was $269,870.66 as of May 3, 2018. Affidavit of Debtor.
13. Parcel 8.04 is encumbered by a deed of trust dated December 31, 2015, recorded January 6, 2016 (the "Second DOT"), to secure a note given by R and M Farms, a

Tennessee General Partnership, in the original principal amount of $235,000 (the "Farm Note"). Affidavit of Debtor.

14. The Second DOT was later corrected to show the Defendants rather than R and M Farms as grantor. The corrected deed of trust was recorded on April 14, 2016.[1]

15. The balance owed on the Farm Note was $237,824.87 as of May 3, 2018. Affidavit of Debtor.

16. The Defendants guaranteed the Farm Note. Bank of Fayette County Proof of Claim No. 5-1.

17. The Defendants are each 50% partners in R and M Farms. Affidavit of Debtor.

18. The Bank of Fayette County has filed five proofs of claim as follows:

Claim No.	Borrowers	Guarantors	Amount	Security
4-1	R and M Farms	Defendants	$ 455,763.54	None
5-1	R and M Farms	Defendants	$ 242,245.43	None
6-1	R and M Farms	Defendants	$ 297,353.69	None
7-1	R and M Farms	Defendants	$ 165,786.41	None
8-1	R and M Farms	Debtor	$ 57,392.44	None
Total			$1,218,541.51	

[1] The Trustee asserts for the first time in her Amended Objection to the Motion for Summary Judgment that the lien of the Second DOT may be avoided because the notary acknowledgment for the corrected deed is defective. The Trustee has not joined the Bank of Fayette County in its complaint, and has sought no affirmative relief against it. This argument is not properly before the court and will not be addressed in this opinion.

19. Each of the proofs of claim relates to a guaranty provided by the Defendants or the Debtor alone with respect to obligations of R and M Farms. Claim No. 5-1 is made with respect to the Farm Note.

20. The Bank of Fayette County did not file a proof of claim with respect to the Home Note.

21. The Trustee and the Debtor stipulate that the Debtor's homestead exemption under Tennessee Code Annotated section 26-2-301 is allowed only as to Parcel 9.02 and not as to Parcel 8.04. Agreed Order on Trustee's Objection to Amended Exemptions as to Homestead and Entireties Property, November 16, 2017, Bankr. Dkt. No. 102.[2]

22. The Trustee and the Debtor further stipulate that the Debtor's claim of exemption pursuant to Bankruptcy Code section 522(b)(3)(B) is allowed as to all debts except the joint debts of the Debtor, Defendant Michelle Thomas, and R and M Farms owed to the Bank of Fayette County. Bankr. Dkt. No. 102.

23. The Debtor filed reaffirmation agreements with respect to each of the claims of the Bank of Fayette County on January 25, 2018.

24. The Trustee commenced this adversary proceeding by filing a Complaint to Sell Interest in Property on January 26, 2018.

25. The Trustee seeks permission to sell the Property to satisfy the liens secured by the Property and to apply any remaining balance of the sale proceeds to joint debts owed by the Defendants.

26. The Trustee seeks to sell the interest of the estate and of the co-owner pursuant to section 363(h) of the Bankruptcy Code.

[2] Although Crop Production Services, Inc. filed a Motion to Reconsider/Alter/Amend the Agreed Order, its motion was denied by order entered January 30, 2018. Bankr. Dkt. No. 136.

27. The Defendants initially filed a motion to dismiss the complaint, which was denied by order entered April 13, 2018.

28. The Defendants then filed an Answer on May 1, 2018, and the pending Motion for Summary Judgment on May 8, 2018.

29. The Bank of Fayette County was not named a party in this adversary proceeding and has not entered an appearance.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056. "'Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007). The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

> A genuine issue of material fact exists when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, to survive summary judgment, the plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, "[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

DISCUSSION

The Defendants claim that the Trustee may not sell the Property pursuant to section 363(h) for two reasons. First, they argue that the Property cannot be sold as a matter of law. Second, they assert that the detriment of the sale to the non-filing co-owner outweighs the benefit to the estate, if any. The court will consider these arguments in turn.

A. Does Tennessee law preclude the Trustee's sale of the property?

The Defendants assert that Tennessee law prohibits the sale of tenancy by the entirety property by a bankruptcy trustee when only one co-owner is a debtor in bankruptcy notwithstanding the language of section 363(h). The Defendants are mistaken. Nothing in the law of the State of Tennessee prevents a trustee in bankruptcy from selling tenancy by the entirety property for the benefit of joint creditors.

Tennessee law concerning tenancy by the entirety has been summarized by the Court of Appeals for the Sixth Circuit as follows:

> Under Tennessee law, when husband and wife hold property together, they are presumed to hold it as tenants by the entirety unless the documents which evidence their ownership indicate that the property is held separately. Under tenancy by the entirety, the husband and wife *as a unit* have the right to the current use and enjoyment of the property. As individuals, they each possess a right of survivorship: if one spouse dies, then the other spouse takes the property in fee simple absolute. Each spouse may convey his or her right of survivorship without the consent of the other. However, the husband and wife's present right to use and enjoy the property may be transferred only by consent of both the husband and wife. Therefore, a third party, such as a lien creditor, may own one spouse's right of survivorship, without the consent of the other spouse, but a third party may not own a present possessory interest in the property without the approval of both spouses. Accordingly, a creditor of only one spouse may execute a judgment against only that spouse's right of survivorship but not against a spouse's present possessory interest.

Arango v. Third Nat'l Bank (In re Arango), 992 F.2d 611, 613 (6th Cir. 1993) (internal citations omitted). The Tennessee Supreme Court has clarified that "[e]ach spouse holds an interest in the entirety – the whole property – rather than in undivided parts." *In re Estate of Fletcher*, 538

S.W.3d 444, 448 (Tenn. 2017). In another case decided earlier but in the same year, the Tennessee court explains:

> A tenancy by the entirety is held exclusively by persons who are legally married. It is ancient in origin and remains firmly established in Tennessee. *Griffin*, 632 S.W.2d at 534–35; see Tenn. Code Ann. §§ 36-3-505, 31-1-108. Tenancy by the entirety is based on the concept that those who are married are not separate persons; rather, they "are but one person." *Tindell v. Tindell*, 37 S.W. 1105, 1106 (Tenn. Ch. App. 1896) (quoting *Den v. Hardenbergh*, 10 N.J.L. 42, 45 (1828)); *see Taul v. Campbell*, 15 Tenn. (7 Yer.) 319, 333 (1835) (noting that a husband and wife "take but one estate, as a corporation would take, being by the common law deemed but one person"). Consequently, co-tenants in a tenancy by the entirety do not hold their interest by moieties (by parts), they hold by the entirety: "Each is not seised of an undivided moiety, but both are ... seised of the whole. They are seised, not *per my et per tout* [by the half and by the whole], but solely and simply *per tout* [by the whole]." *Tindell*, 37 S.W. at 1106 (quoting *Den*, 10 N.J.L. at 45).

Bryant v. Bryant, 522 S.W.3d 392, 400 (Tenn. 2017) (footnotes omitted). Upon the death of a spouse, the survivor continues to own the whole estate in fee simple. *Id.*

When a bankruptcy petition is filed, a bankruptcy estate is created consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). When one, but not both, spouse files a petition in bankruptcy, the debtor's interests in tenancy by the entirety property nevertheless become property of the bankruptcy estate. Each spouse considered alone holds a present interest in the use and enjoyment of tenancy by the entirety property (the *usufruct*) and an expectancy that he will be the survivor and owner of the whole upon the death of his spouse. Both of these interests become property of his bankruptcy estate upon the filing of a bankruptcy petition. *See Arango*, 992 F.2d at 613-14. The debtor may, however, exempt the present possessory interest as to his individual creditors pursuant to section 522(b)(3)(B) of the Bankruptcy Code.

Section 522(b)(1) permits an individual debtor to exempt property of the estate listed either under paragraph (2) or, in the alternative, paragraph (3) of subsection (b). Subparagraph (b)(2) incorporates the federal bankruptcy exemptions listed at subparagraph (d), "unless the State law

that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize." 11 U.S.C. § 522(b)(2). Paragraph (3)(A) directs that the law of the place of the debtor's domicile during the 730 days immediately prior to the filing of the bankruptcy petition is to be consulted to determine whether the federal bankruptcy exemptions are available. 11 U.S.C. § 522(b)(3)(A).

The Debtor was domiciled in Tennessee during the 730 days immediately prior to the filing of his bankruptcy petition, so Tennessee law will apply. Because Tennessee is an "opt out" state, the exemptions provided at section 522(d) are not available to him. Tenn. Code Ann. § 26-2-112. Instead, he must look to the exemptions provided at section 522(b)(3), which include property that is exempt under federal law other than section 522(d), or state or local law applicable on the date of the filing of the petition, and property specified at subparagraphs (B) and (C) of that section.

Section 522(b)(3)(B) is the relevant exemption claimed by the Debtor in his amended Schedule C. That section provides:

> (3) Property listed in this paragraph is
>
> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C. § 522(b)(3)(B). Of the two interests that a single spouse has in tenancy by the entirety property, the usufruct and the expectancy, only the usufruct is exempt from process initiated by a creditor of one spouse under Tennessee law. *Robinson v. Trousdale County*, 516 S.W.2d 626, 632 (Tenn. 1974) (Neither of two spouses "may sell, encumber, alienate or dispose of any portion [of tenancy by the entirety property], except his or her right of survivorship, without the consent of the other."). Because a spouse may alienate his or her expectancy without the consent of the other, the expectancy may be levied on and sold for the benefit of creditors of the debtor-spouse. *Third Nat'l Bank v. Knobler*, 789 S.W.2d 254, 255 (Tenn. 1990).

As to joint creditors, however, tenancy by the entirety property is not exempt from process under Tennessee law. *In re Maino,* 136 B.R. 1006, 1007 (Bankr. W.D. Tenn. 1992) ("[W]hen both tenants by the entirety are liable to a creditor, under Tennessee law, such a joint creditor, outside of bankruptcy, may execute upon the tenancy property."); *Newson v. Shackleford,* 43 S.W.2d 384, 385 (Tenn. 1931) ("[N]otes executed after the Married Woman's Act (Pub. Acts 1913, c. 26) removed the common-law disabilities of coverture were a joint obligation of the husband and wife equally binding on both and which the vendor could enforce against them by judgment and execution or by enforcement of his vendor's lien.") The section 522(b)(3)(B) exemption only applies *to the extent that* such interest is exempt from process under applicable nonbankruptcy law. Tenancy by the entirety property is not exempt from process issued on behalf of joint creditors. Thus, the section 522(b)(3)(B) exemption is not available to a single debtor with respect to joint creditors, and the trustee in bankruptcy may sell tenancy by the entirety property pursuant to section 363(h) for the benefit of joint creditors. *See Liberty State Bank and Trust v. Grosslight (In re Grosslight),* 757 F.2d 773, 776 (6th Cir. 1985) ("If not specifically exempted, the debtor's interest in the entireties property may be sold pursuant to 11 U.S.C. § 363(h)-(j)."). The Trustee and the Debtor have stipulated that the section 522(b)(3)(B) exemption does not apply to the claims of Bank of Fayette County.

In his original Schedule C, the Debtor also claimed the Tennessee homestead exemption with respect to his Property. That exemption, however, is not available with respect to his right of survivorship. As Bankruptcy Judge Richard S. Stair, Jr. points out, the bankruptcy courts in Tennessee have consistently held that a debtor may not claim a homestead exemption in the right of survivorship. *In re Arwood,* 289 B.R. 889, 895 (Bankr. E.D. Tenn. 2003), and cases cited therein. Bankruptcy Judge William Houston Brown similarly held that the survivorship interest, if sold, is sold subject to the debtor's homestead exemption. *In re Dick,* 136 B.R. 1000, 1004

(Bankr. W.D. Tenn. 1992) ("[T]he debtor will receive the cash value of the exemption if and when he survives his wife."). These bankruptcy judges reasoned that because of the nature of the right of survivorship – that of an expectancy – the debtor does not have a fully vested right in property to which the homestead exemption might apply. *Arwood,* 289 B.R. at 896. Thus, the trustee in bankruptcy may sell the debtor's right of survivorship subject to the homestead exemption. *Id.* at 897. If and when the debtor is the survivor, he would be entitled to receive the value of the exemption from the purchaser. He is not, however, entitled to the value of the homestead exemption from the proceeds of sale. *Id.*

The result is different as to joint creditors, however. In the event that the trustee in bankruptcy sells tenancy by the entirety property for the benefit of joint creditors, both the debtor and the non-filing spouse are permitted to claim their homestead exemptions in the proceeds. *See Maino,* 136 B.R. at 1007-08. By Agreed Order entered November 16, 2017, the parties have stipulated that the Debtor's homestead exemption is allowed only as to Parcel 9.02, and not as to Parcel 8.04. The homestead exemption will apply to any proceeds in excess of those needed to satisfy the consensual lien of Bank of Fayette County.

In support of their motion for summary judgment, the Defendants rely upon four cases, none of which pertains to the use of section 363(h) to sell tenancy by the entirety property for the benefit of joint creditors. The first of these is *Waldschmidt v. Shaw (In re Shaw),* 5 B.R. 107 (Bankr. M.D. Tenn. 1981) (Hippe, B.J.). In that adversary proceeding, the trustee in bankruptcy sought permission pursuant to section 363(h) to sell the residence owned by the debtor and her non-filing spouse as tenants by the entirety. The debtor claimed the exemption provided by 11 U.S.C. § 522(b)(2) (predecessor to 11 U.S.C. § 522(b)(3)(B)). The bankruptcy judge permitted the trustee to sell only the debtor's right of survivorship subject to the homestead exemption to which she would be entitled should she survive her husband. The judge reasoned that the right of

survivorship is not a sufficient interest to support the power of sale provided at section 363(h). *Id.* at 110. He claimed that:

> [O]ne spouse's right of survivorship is not an undivided interest in entireties property as specifically required by § 363(h)(2) but rather one that is separate and alienable as such. It is for this reason that it remains in the estate after the § 522(b)(2)(B) exemption and it is for this reason that it does not give the trustee the right to sell the entire property pursuant to § 363(h). The Congress did not intend to give a trustee for the estate of one spouse the rather drastic authority to sell the entire property unless the entire interest of the debtor spouse as tenant by the entirety is included in the estate.

Shaw, 5 B.R. at 110. This opinion does not address the right of the trustee in bankruptcy to sell tenancy by the entirety property for the benefit of joint creditors.

The second case relied upon by the Defendants is *Ray v. Dawson (In re Dawson),* 10 B.R. 680 (Bankr. E.D. Tenn. 1981) (Kelley, B.J.), *aff'd sub nom Ray v. Dawson,* 14 B.R. 822 (E.D. Tenn. 1981). In that case, Bankruptcy Judge Kelley provides a very useful history of section 363(h), beginning with its predecessor under the Bankruptcy Act and the decision of the Tennessee Supreme Court in *Robinson v. Trousdale County,* 516 S.W.2d 626 (Tenn. 1974). Under the Bankruptcy Act, section 70(a)(5), the trustee acquired title to any property that prior to bankruptcy could have been transferred by the bankrupt or levied upon and sold by his creditors. Under Tennessee law, this included the right of survivorship, but not the right to use, possess, and enjoy the property during the marriage. The trustee in bankruptcy obtained title only to the right of survivorship, which caused problems for joint creditors, particularly when the other spouse filed later. *Dawson,* 10 B.R. at 682-83. The potential for abuse led to a series of proposals by the Commission on Bankruptcy Laws, which included, first, a definition of property of the estate broad enough to cover all of a spouse's interests in entireties property, rather than just the interest that was leviable under state law. Second, the Commission proposed that the trustee be given the right to sell the interest that came into the estate and the other spouse's interest, with the non-filing

spouse's interest protected in the distribution of proceeds. Third, the Commission proposed that all debtors use exemptions set by the bankruptcy law, which included a homestead exemption that would apply to the debtor's interests in entireties property. The trustee was specifically permitted to sell the debtor's and spouse's interests in *nonexempt* property owned by them as tenants by the entirety. *Id.* at 683.

Not all of the reforms proposed by the Commission became law. The crucial difference, said the judge in *Dawson*, is that the Code allows a debtor to choose either the exemptions provided by the Bankruptcy Code or those provided by state law. If the debtor chooses the state exemptions, he can also exempt his interest in property held as a tenant by the entirety pursuant to 11 U.S.C. § 522(b)(2)(B). The bankruptcy judge noted that Congress might have better described such property as "immune" from process rather than "exempt" from process, because what is intended is property that cannot be reached by execution. The judge then reasoned:

> Since Congress meant immune from process, it was adopting in part the test used under § 70(a)(5) of the Bankruptcy Act. It is not known why Congress did this, but the effect is clear enough. If a debtor chooses state exemptions, then property in which he is a tenant by the entirety will be treated substantially as it was under the Bankruptcy Act.

Dawson, 10 B.R. at 683, citing *Hadley v. Koehler (In re Koehler),* 6 B.R. 203 (Bankr. M.D. Fla. 1980). Although the debtor did not claim the exemption provided at section 522(b)(2)(B), the bankruptcy judge analyzed the case as if he had. If the debtor had claimed the section 522(b)(2)(B) exemption, all of the debtor's interest as a tenant by the entirety would have come into his estate, and the portion immune from process, his present right to use, possess, and enjoy the property during his marriage, would have gone out of the estate by virtue of the Tennessee law concerning the tenancy by the entirety. All that would have been left in the bankruptcy estate was the debtor's survivorship interest. As a result, the judge said, the requirements of section 363(h) could not be met because the value of the survivorship interest alone, which he reasoned would be less than the

value of the survivorship interest together with the present right of use, could not outweigh the detriment to the debtor's non-filing spouse in the event their property was sold. In other words, the bankruptcy judge in *Dawson* did not determine *as a matter of law* that section 363(h) does not apply to a tenancy by the entirety created under Tennessee law. He assumed that it did, but found that on balance, the benefit to the estate was outweighed by the detriment to the non-filing spouse. *Dawson*, 10 B.R. at 684. Moreover, he did not address the authority of the trustee to sell tenancy by the entirety property for the benefit of joint creditors. He did, however, clarify the abuse that led to the introduction of section 363(h) – serial filings by spouses to avoid the claims of their joint creditors.

The third case relied upon by the Defendants is *In re Walls*, 45 B.R. 145 (Bankr. E.D. Tenn. 1984) (Bare, B.J.). In this case, the bankruptcy trustee proposed to sell the debtor's survivorship interest in his marital residence owned by the debtor and his non-filing spouse. The debtor objected on the basis that the survivorship interest could not be sold for less than the homestead exemption ($5,000). The trustee responded that the homestead exemption was intended to protect the debtor's right of occupancy, and that his proposed sale would not interfere with that right. Reviewing Tennessee law, the bankruptcy judge said that where a debtor's spouse is not a debtor in bankruptcy, Tennessee law permits the trustee to sell only the survivorship interest of property held by the entirety. The judge noted that it was well-settled law that in Tennessee, homestead rights attach to property owned as tenants by the entirety, but that the unsettled question was whether a debtor in bankruptcy might assert that exemption as to his survivorship interest to block a trustee's proposed sale. The judge reviewed the decisions of the Tennessee courts, which had allowed the sale of a debtor's interest in homestead property subject to the homestead right for more than 100 years. The judge also reviewed the bankruptcy decisions in *Shaw* and *Dawson*, with which he concurred, holding that "Tenn. Code Ann. § 26-2-301 (1980) does not in any way

preempt a trustee's sale of a debtor's survivorship interest in entireties property." *Walls,* 45 B.R. at 149.

> The purpose of the homestead statute is fulfilled through sale of the survivorship interest subject to the [husband]'s defeasible homestead right. The debtor and his wife may continue to occupy the entireties property during their joint lives. The purchaser at the trustee's sale of the debtor's survivorship interest cannot obtain possession of the entireties property, nor is he entitled to profits or rents during the joint lives of the debtor and his wife. If the debtor predeceases his wife, the purchaser's interest will be extinguished. On the other hand, if the debtor survives his wife, the purchaser will succeed to the fee interest subject to the debtor's homestead right. In either event the debtor is afforded the protection and exemption to which he is entitled.
>
> Further, creditors are afforded an opportunity at the chance of reaching the equity in the debtor's entirety property.

Walls, 45 B.R. at 149 (internal citation omitted). The judge in *Walls* did not address section 363(h) at all, but his comments are helpful in distinguishing the *protection* provided by the tenancy by the entirety from the limited homestead *exemption* provided with respect to the value of a homestead. The tenancy protects the right of the tenants to remain in their home throughout their marriage notwithstanding the claims of the creditors of one of them. The homestead exemption, on the other hand, reserves a portion of the value of a debtor's home notwithstanding execution by his creditors. The tenancy does not protect the tenants from claims of joint creditors, however, and the opinion in *Walls* does not address the authority of the trustee in bankruptcy to sell tenancy by the entirety property for the benefit of joint creditors.

The fourth case relied upon by the Defendants is *Forbes v. Hankins (In re Hankins),* 53 B.R. 18 (Bankr. M.D. Tenn. 1985) (Paine, B.J.). In that case, the trustee in bankruptcy sought to sell four parcels of land owned by the debtor and her non-filing spouse as tenants by the entirety. The trustee argued that Tennessee law does not prevent the sale of a debtor's undivided interest in tenancy by the entirety property and that the estate's ownership of the debtor's interest in the tenancy by the entirety property is sufficient to allow a sale of the entire property pursuant to

11 U.S.C. § 363(h). Relying upon the decision of the court of appeals in *Citizens & Southern Nat'l Bank v. Auer,* 640 F.2d 837, 839 (6th Cir. 1981), the bankruptcy judge held that the debtor's possessory interest in entirety property is "effectively immune from process under Tennessee state law and may not be sold by the trustee." *Hankins*, 53 B.R. at 19. With respect to the trustee's argument under section 363(h), the bankruptcy judge reasoned that the trustee had no right to proceed under section 363(h) because the debtor's survivorship interest could be sold separately. Relying upon *Shaw,* the judge said that section 363(h) applies only to sale of a bankruptcy estate's "undivided interest" in property, not to a divided interest such as the right of survivorship. The judge held that the trustee might sell the survivorship interest subject to the homestead exemption, but had no authority to sell the four parcels. Just like the other opinions relied upon by the Defendants, this opinion does not in any way address the authority of the trustee in bankruptcy to sell tenancy by the entirety property for the benefit of joint creditors.

The present question is whether a trustee in bankruptcy is prohibited from selling tenancy by the entirety property pursuant to section 363(h) for the benefit of joint creditors as a matter of Tennessee law. While the cases relied upon by the Defendants are helpful in providing background to the treatment of tenancies by the entirety in Tennessee and under the Bankruptcy Code, they do not address the issue before the court. In fact, nothing in Tennessee law prevents a trustee in bankruptcy from selling tenancy by the entirety property for the benefit of joint creditors.

B. Are the conditions of Code section 363(h) satisfied?

Having determined that there is no impediment in Tennessee law to prevent the Trustee from selling the Defendants' Property for the benefit of their joint creditors, the court turns to the specific conditions included in section 363(h). Section 363(h) of the Bankruptcy Code permits a trustee to sell both the estate's interest and the interest of any co-owner in property in which the

debtor had, as of the commencement of the case, an undivided interest as tenant by the entirety, only if the following conditions are satisfied:

1. Partition in kind is impracticable;
2. Sale of the estate's undivided interest would realize significantly less for the estate than sale free of the interests of co-owners;
3. The benefit to the estate of the sale free of the interests of co-owners outweighs the detriment, if any, to co-owners; and
4. The property is not used in the sale, production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

See 11 U.S.C. § 363(h). The arguments of the parties focus on whether the sale of the property will result in any benefit to the bankruptcy estate, and/or whether any benefit to the bankruptcy estate outweighs the detriment to the co-owner. The parties agree that partition of the Property is impractical and that the Property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. Thus, determination must be made about whether there are material issues of disputed fact with respect to the potential benefit to the estate and the potential detriment to the non-filing spouse in the event that the Property is sold. The burden of proof initially lies with the Trustee, but then shifts to the Defendants if the Trustee is successful in showing that a sale will benefit the estate. *O'Connell v. Prakope* (*In re Prakope)*, 317 B.R. 593, 602 (Bankr. E.D. N.Y. 2004) ("The burden of proving compliance with each of the four statutory conditions for a section 363(h) sale rests with the Trustee. Once the trustee makes out his prima facie case demonstrating that the estate would benefit from the sale of the residence, the burden shifts to the defendant.").

The Trustee asserts that the sale of the Property will benefit the estate by enabling the Trustee to pay general unsecured claims for debts that are jointly owed by the Defendants. This

is true. Either the Property can be sold for more than the liens against it, thereby leaving a surplus for application to the unsecured claims of the Bank of Fayette County, or it can be sold for less than the liens, thereby reducing the potential for a deficiency. If the Property is sold for an amount that enables the Trustee to reduce or eliminate the unsecured claims of the Bank of Fayette County, the estate will benefit by the reduction in the pool of claims sharing other estate assets. The claims of the Bank of Fayette County represent five of the nine proofs of claim timely filed. The remaining claims are the following:

Claim No.	Creditors	Amount
1-2	Crop Production Services	$936,834.92
2-1	Discover Bank	$ 1,413.00
3-2	Internal Revenue Service	$ 0.00
9-1	CNH Industrial Capital America, LLC	$ 39,089.19
Total		$977,337.11

An objection is pending with respect to the claim of Crop Production Services, but not as to the other two claims. There are creditors who would benefit if the claims of the Bank of Fayette County, which are joint claims, are reduced or paid from the sale of the Property. The record does not provide information concerning other assets held by the estate, but a reduction in the unsecured pool would increase the shares of the remaining creditors.

The Defendants respond that there is no benefit to the estate because the proceeds of the sale can only be used to pay the claims of the Bank of Fayette County. They do not, however, account for the potential reduction in the claims of the Bank of Fayette County. They point to the decision in *Rhiel v. Central Mortg*. Co. (*In re Kebe),* No. 10-52667, 2014 WL 8276561, at *14 (Bankr. S.D. Ohio, Dec. 23, 2014), in which the bankruptcy judge said that when balancing the benefit to the estate against the detriment to co-owners, the court may consider economic as well

as non-economic detriment, including the psychological, emotional, and physical impact on the nondebtor co-owner of losing a home through involuntary displacement. The Defendants fail to consider the fact that Michelle Thomas is not a "nondebtor co-owner," but a debtor co-owner. It is true that she is not a debtor in bankruptcy, but she is indebted to the Bank of Fayette County just as her husband is. She is attempting to gain the advantage of her husband's bankruptcy filing without filing a bankruptcy case herself, precisely the result that section 363(h) was intended to prevent. Outside of bankruptcy, nothing would prevent the Bank of Fayette County from foreclosing upon its liens or executing upon the Property under appropriate circumstances. Having invoked the jurisdiction of the bankruptcy court, the Debtor cannot now complain about the results that flow from the acts of the Trustee in furtherance of her duties, especially when it is so clear that his real intention is to shield his wife from the consequences of her own acts. Had the Defendants filed a joint bankruptcy case, there would be no question concerning the authority of their trustee to sell their property for the benefit of their joint creditors. Unless and until the Bank of Fayette County forgoes its claims against the Debtor's estate, the potential for a reduction in their claims to benefit that estate is real. The Trustee has made a *prima facie* showing of benefit to the estate.

The extent of that benefit, however, is unknown. On the surface, it appears that there are liens in the amount of $507,695.53, secured by property that the Debtor initially valued at $527,800. The Debtor subsequently argued that the value of the Property may be less because the Property is subject to the Grassland Reserve Program, but he has not amended his bankruptcy schedules to reflect that. The court does not know what assets are available to satisfy the claims of R and M Farms, and thus does not know how to value the unsecured claims filed by the Bank of Fayette County. The court is aware of the bank's concern that it has not been a party to this litigation through the affidavit of Mr. David Robertson, Special Assets Officer of the Bank of

Fayette County, but the bank has made no effort to intervene in the litigation. If the benefit to the estate is *de minimis,* the court will be disinclined to order a sale in the face of the apparent desire of the Bank of Fayette County that the Defendants remain in possession of its collateral. If the benefit is in fact *de minimis*, then the Trustee should abandon the Property pursuant to section 554 rather than sell it. *See* 11 U.S.C. § 554(a) ("After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). Material issues of fact remain concerning the benefit to the estate that would result from a sale of the Property, but the Trustee has made a *prima facie* showing of the potential for benefit.

The burden thus shifts to the Defendants to show that the benefit to the estate of the sale of the Property free of the interests of Michelle Thomas, the only co-owner, does not outweigh the detriment, if any, to her. Through the Affidavit of the Debtor, the Defendants argue that sale of the Property would result in detriment to R and M Farms, which would be forced to discontinue farming operations if the Property were sold. They also argue that sale of the Property would result in loss of the Debtor's salary from R and M Farms. The Defendants also offer the Affidavit of Mr. Robertson, who asserts that the bank prefers that the Defendants remain in possession of the Property in order to pay their various obligations to the bank. Mr. Robertson asserts that sale of the property would be detrimental to the interests of the Bank. The Defendants have made no attempt to show any detriment to Michelle Thomas that would result from the sale of the Property. Rather, they state: "The Trustee has raised questions regarding the value of the real property, whether the value exceeds the Bank of Fayette County's liens, and the extent of detriment to Mrs. Thomas and her family. But, none of this is material because Tennessee law inhibits the § 363(h) sale and the Trustee has not made a *prima facie* showing of benefit." Reply in Support of the Motion for Summary Judgment and In Response to Trustee's Amended Objection, August 17,

2018, Adv. Dkt. No. 35. The court disagrees but will not speculate concerning what that detriment to Mrs. Thomas might be considering the fact that she is a co-debtor with her husband on the obligations to the Bank of Fayette County. The Bankruptcy Code does not direct that the court consider detriment to any party other than the co-owner.

CONCLUSION

The only motion for summary judgment before the court is that filed by the Defendants. The Defendants have failed to show that they are entitled to judgment as a matter of law. To the contrary, the Trustee clearly has the authority under Tennessee law to sell tenancy by the entirety property for the benefit of joint creditors of a debtor and a non-filing spouse. When the court considers the benefit to the estate and the potential detriment to the non-filing co-owner, however, it is convinced that there are genuine issues of material fact that remain to be determined.

Accordingly, the Motion for Summary Judgment is **DENIED.**

cc: Debtor
Attorneys for Debtor
Defendants
Attorneys for Defendants
Plaintiff
Attorney for Plaintiff