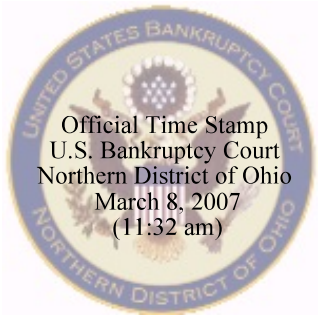
NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 05-94971
	)	
JAMIE LEE SMITH and MICHELLE EILEEN SMITH,	)	Chapter 7
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
MARVIN A. SICHERMAN, TRUSTEE,	)	Adversary Proceeding No. 06-1300
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
AMERICAN STOCK TRANSFER AND TRUST COMPANY, et al.,	)	**MEMORANDUM OF OPINION** (NOT FOR COMMERCIAL PUBLICATION)
	)	
Defendants.	)	

This adversary proceeding presents the question of who owns certain shares of FirstMerit Corp. stock. The plaintiff trustee asks that the stock be declared property of the chapter 7 estate and turned over to him. Defendant Jerry Smith asserts that he owns the stock.[1]

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E) and (K).[2]

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[1] The trustee was granted default judgment against American Stock Transfer & Trust Co., and the debtors Jamie and Michelle Smith. As a result, those parties do not have an interest in the stock and are required to turn any stock in their possession over to the trustee.

[2] This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

THE FACTS

Stipulations of Fact[3]

Debtors Jamie Smith (the debtor) and Michelle Smith filed their chapter 7 case on October 15, 2005. Jerry Smith is the debtor's father. American Stock Transfer & Trust Co. holds 1,821.636 shares of FirstMerit Corp. in the names of the debtor and Jerry Smith "JT TEN." An additional 276 shares of FirstMerit stock held in certificate form in the names of the debtor and Jerry Smith "JT TEN" are lost or missing. The stock designation "JT TEN" means the stock is held as joint tenants with right of survivorship. For tax purposes, the dividends and interest earned by the stock have been reported under the debtor's social security number. At all times before the bankruptcy filing, the debtor reported the dividend and interest income earned by the stock on his income tax returns and Jerry Smith did not.

The Trial

A.

The parties presented additional evidence at a trial held on February 21, 2007. The plaintiff presented his case through cross-examination of Jerry Smith, the debtor, and Paula Leonard, an employee of Jerry Smith. Jerry Smith presented his case through his own testimony, together with the testimony of the debtor and Ms. Leonard. Both sides offered exhibits which were accepted into evidence.

The following findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the court considered each witness's demeanor, the substance of the testimony, and the context in

[3] Docket 47.

which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogdon (*In re Trogdon)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

B.

Jerry Smith, age 66, is the father of the debtor and 9 other children. He has sold insurance for years through his agency JL Smith and Associates. He describes himself as semi-retired for the past 8 to10 years. Paula Leonard has worked for Mr. Smith for the past 23 years as his secretary and primary assistant.

Mr. Smith has significant investment experience in stocks and mutual funds, although he has little formal education. Ms. Leonard assists him in buying and selling these investments and they attempt to keep meticulous records. Mr. Smith testified that, over the years, he has owned a number of joint investment accounts with his children. He began establishing these accounts under the Uniform Gift to Minors Act (UGMA), intending to fund his children's college expenses. He has also established UGMA accounts for his grandchildren. He does not view the

UGMA accounts as gifts. He does not have a will and he testified that he establishes the joint accounts to protect his children in the event of his death. When one of his daughters filed a chapter 7 bankruptcy case, he was involved in a dispute with the trustee regarding accounts which he held jointly with her.

The debtor Jamie Smith is 38 years old. He trained in the insurance sales business with his father in the early 1990's. He has been self-employed selling insurance for about 15 years. When the debtor was a minor, his father established unspecified UGMA accounts and investments in his name. Ms. Leonard had authority (but not a power of attorney) to handle these investments and to sign the debtor's name to transfer the accounts.

The debtor and Mr. Smith had a falling out in 1997 and the debtor sued his father for alleged mismanagement of the invested funds. Details regarding the lawsuit were not provided. The debtor stated, however, that based on his attorney's review of the situation, he now believes that any UGMA monies that were held in his name were either given to him or spent for his benefit, although he is not completely certain of that. The relationship between the debtor and Mr. Smith has improved since that time.

The facts surrounding the purchase of the stock at issue are obscure. The stock certificate bears the date of May 13, 1996.[4] No documents evidencing the purchase were offered into evidence. Jerry Smith testified that he recalled purchasing the stock with his own funds through a broker and that a check was written from his business account or from a mutual fund.

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[4] Curiously, Mr. Smith's trial brief states that the stock represented by the certificate was purchased on January 11, 1990, but there was no testimony to support that. Also, Mr. Smith's trial brief states that the stock purchased was in First Bancorporation of Ohio and that FirstMerit purchased that entity and re-issued the stock on May 13, 1996. Again, however, there was no evidence to support that statement. *See* docket 58 at 3.

Mr. Smith could not identify the broker or the date of the purchase and he does not specifically recall the details regarding who wrote the check. He also stated that he never told the debtor that the stock was a gift. Mr. Smith did not state that he ever held the stock certificate.

Ms. Leonard testified that the stock was purchased through a broker and that she prepared a check on one of Mr. Smith's business accounts to pay for it and that either she or Mr. Smith signed the check. On cross-examination, she admitted that she does not have any specific recollection regarding the purchase of the stock. She believes the stock was purchased through a broker and that either she or Mr. Smith signed a business check to pay for it based on the normal practice in the office.

The debtor testified that he does not know who purchased the stock, but assumes it was his father. The debtor did not provide any of the funds for the purchase and he does not believe that any of the funds used to purchase it were his. He never had the stock certificate and has no knowledge regarding the stock account. The account statements are sent to him quarterly by the American Stock Transfer & Trust Co., but he does not know anything about American Stock Transfer. He is uncertain whether any FirstMerit stock was ever held in a UGMA account in his name.

The 1099 tax forms for the stock dividends and interest bear the names of the debtor and Mr. Smith and are mailed directly to the debtor. The dividends for the stock were reinvested. The debtor reported the stock dividend and interest income on his federal income tax returns. He and Mr. Smith use the same accountant, George Schupp. The debtor gave the 1099 form to Mr. Schupp each year and relied on his expertise on this issue.

At some point, Mr. Smith decided he wanted the debtor's name removed from the stock account because he did not trust him and wanted to be able to sell the stock. To achieve this

result, he had his office prepare a letter dated March 12, 2001 stating that the debtor was giving up all rights to the account and requesting that the account be transferred to an individual account in Mr. Smith's name under his social security number. The letter is addressed to "BFC Care of Equiserve." There was no testimony regarding BFC or Equiserve and their relationship to the stock. Mr. Smith and the debtor each separately signed this letter at a bank in the presence of a bank officer. The debtor stated that he signed this letter because it was Mr. Smith's money and he needed it. The debtor's name was not removed from the stock after this, however, because the debtor became upset with his father and canceled the transaction.

On November 10, 2001, the debtor signed and sent a letter to Mr. Smith making a different proposal. The background to the letter is this: The witnesses testified that Jerry Smith made a loan to the debtor in February 1994, with interest at the rate of 4%. The money was loaned in the form of two checks: $10,000.00 payable to Homeowners Realty and $3,887.55 payable to Jamie Smith for the purchase of an office building. There is no note or other writing memorializing this loan.

The witnesses also testified that Mr. Smith made another loan to the debtor in connection with his business at a 9% interest rate. Once again, there is no note or other writing memorializing this loan. Mr. Smith testified that this loan was about $70,000.00. Paula Leonard testified that it was "an office loan;" the debtor would send his payments in, she entered the payments in a computer, and then sent the information to the debtor. The witnesses did not testify regarding when this loan was made. The record of the loan which Ms. Leonard maintains shows a starting balance of $61,340.89 as of December 31, 1996.

The November 10, 2001 letter from the debtor to Jerry Smith stated:

Dear Jerry,

I would like to take care of financial matters with you regarding the personal loan and the First Merit Stock. I would be more than happy to pay off what I owe on the personal loan and take my name off the First Merit Stock, however, I feel that I should be reimbursed for the taxes that I paid for the past several years. In turn you will receive the stocks solely in your name. Please let me know if you would prefer to receive the payment now or whether I should continue to make monthly payments of $700.00.

Fidelity Contra Funds	$ 2,604.00	Dividends
Fidelity Growth Funds	$ 1,986.00	Dividends
First Merit Corp.	$ 9,107.00	Dividends
2001	$ 1,168.00	through 9-17-01
	$14,847.00	
	@ 35%	
	$ 5,196.45	

First Merit has already sent the paper work to me, which I will forward to you. If you are willing to deduct this from the total owed, please send me the final figures. Thank you for your help on this matter.[5]

When Mr. Smith received this letter, he understood it to mean that the debtor wanted to be reimbursed for the taxes which he had paid on the stock dividends and other investments. Mr. Smith did not question the accuracy of the dividend amounts or the claimed 35% tax rate and instructed his office to do what was requested. The personal loan referred to in the letter appears to be the $70,000.00 business loan as the monthly payments noted on the record of that loan in 2001 were $700.00.

The debtor sent Mr. Smith the paperwork regarding the stock transfer and Ms. Leonard prepared a schedule for the loan which incorporated the debtor's numbers. (Def. exh. B). The schedule attributes the tax payments listed by the debtor in his letter to the period 1984 through 2001. Each year thereafter, the debtor has sent the 1099 form reporting the stock dividends to

[5] Def. exh. E.

Mr. Smith with a notation indicating that his loan account should be credited. Ms. Leonard updates the account statement and sends it to the debtor. The last loan statement for 2006 states that the debtor is still being credited for his payment of taxes related to the stock income. It also shows that the tax credits are the only amounts which have been credited to the debtor on the loan.

Despite all of this, the debtor's name was never removed from the stock.[6] The debtor included the stock in his bankruptcy filing on the personal property schedule. The stock is scheduled as the debtor's property with a value of $56,023.97 and this description:

> Stock in FirstMerit Corporation (held in the names of Jerry L. Smith and Jamie L. Smith, Joint tenants, though the source of the funds was solely Jerry L. Smith)[.][7]

DISCUSSION

A. The Applicable Law

A chapter 7 estate is broadly defined to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). State law determines a debtor's property rights. S*ee Butner v. United States*, 440 U.S. 48, 55 (1979). The trustee has the burden of proof in this turnover action. *See Kentucky Co. v. Hayes (In re Hayes)*, 407 F.2d 1031, 1033 (6th Cir. 1969); *In re Danowski*, 320 B.R. 886, 887 (Bankr. N.D. Ohio 2005).

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[6] Mr. Smith's trial brief included this factual statement regarding ownership of the stock which is not supported by the evidence: "Debtor acknowledged that the First Banc/First Merit share's were his father's because, in another transaction, Jerry Smith permitted Debtor to cash in two mutual funds in exchange for Debtor's interest in the First Banc/First Merit shares." Docket 58 at 8.

[7] Joint exh. 1 at 1-7.

The parties agree that Ohio law determines who owns the FirstMerit stock. Ohio law recognizes the contractual creation of a joint and survivor interest in stock. *See* OHIO REV. CODE § 1701.24(D), *see also In re Hutchinson's Estate*, 166 N.E. 687 (Ohio 1929). The ownership of stock jointly held with a right of survivorship is governed by the same case law as that governing similar bank accounts. *See Krakoff v. United States*, 439 F.2d 1023, 1025-26 (6th Cir. 1971). In *Estate of Cowling*, the Ohio Supreme Court discussed the ramifications of joint and survivor ownership of stock investments and brokerage accounts and stated that ownership is to be determined in this manner:

> 'The existence of a joint and survivorship bank account raises a rebuttable presumption that co-owners of the account share equally in the ownership of the funds on deposit.' *Vetter v. Hampton* (1978), 54 Ohio St.2d 227, 8 O.O.3d 198, 375 N.E.2d 804, paragraph three of the syllabus. This presumption applies in the absence of evidence to the contrary. *Id*. at paragraph four of the syllabus: see *Wright v. Bloom* (1994), 69 Ohio St. 3d 596, 602-603, 635 N.E.2d 31. A joint and survivorship account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." *In re Estate of Thompson* (1981), 66 Ohio St.2d 433, 20 O.O.3d 371, 423 N.E.2d 90, paragraph one of the syllabus; see Uniform Probate Code 6-103. We expressly stated that Thompson did not "significantly alter our earlier case law" but merely amended our analytical framework to better effectuate "the intent of the parties to create joint and survivorship accounts." *Thompson*, 66 Ohio St.2d at 439, 20 O.O.3d 371, 423 N.E.2d 90. This language indicates that, although we adopted a new presumption for determining ownership of joint and survivorship accounts, the presumption of equal ownership continues to exist when net contributions are not proven . . . .

Estate of Cowling v. Estate of Cowling, 847 N.E.2d 405, 409-10 (Ohio 2006).

B. Discussion

Under Ohio law, Mr. Smith and the debtor are presumed to share the stock equally. The presumption can be rebutted by showing the net contribution that each party made to purchase the stock or by presenting clear and convincing evidence of a different intent. The trustee contends that he rebutted the presumption based on the stipulations and trial evidence and that the debtor should be determined to be the owner of the stock. Mr. Smith argues that he purchased the stock in a crude attempt at estate-planning. He claims that he rebutted the presumption of joint ownership and should be found to be the sole owner of the stock because he purchased the stock with his money and both he and the debtor intended that it belong to him.

The court concludes that neither party has shown what amounts the debtor and Mr. Smith contributed towards the purchase of the stock. There was no evidence to support a finding that the debtor's funds were used to purchase the stock. Although the trustee was able to raise doubt regarding whether Mr. Smith dealt properly with the UGMA accounts which he established for his children, the trustee did not show that the debtor's funds were actually used to purchase the stock. Conversely, although the three witnesses testified regarding Mr. Smith's purchase of the stock with his own funds, their testimony was weak, inconclusive, and ultimately unsatisfactory and unpersuasive. Mr. Smith did not introduce any documentary evidence to establish when and how the stock was purchased. This failure is telling based on Ms. Leonard's testimony that she and Mr. Smith try to keep meticulous records regarding Mr. Smith's investments. Ms. Leonard did not have any memory of the purchase and her testimony merely addressed standard office practice. The debtor testified only that he assumed the stock was purchased with Mr. Smith's funds. Mr. Smith's testimony that his funds were used to purchase the stock was self-serving and the court does not accept it as fact because he was unable to provide any details regarding

the purchase. Consequently, the presumption of equal ownership of the stock has not been rebutted by evidence regarding the parties' contributions.

As noted above, the presumption of equal ownership can also rebutted based on clear and convincing evidence of a different intent. To be clear and convincing, evidence "must have more than simply a greater weight than the evidence opposed to it, and it must produce in the trier of fact's mind a firm belief or conviction about the facts to be proved or the truth of the matter." *In re Judicial Campaign Complaint Against Runyan*, 707 N.E.2d 580, 581 (Ohio 1999). The trustee met this burden and established that the debtor was the intended owner of the stock. The evidence shows that the debtor received the quarterly stock statements and that stock dividends and interest were reported under his social security number. The debtor reported the stock dividend and interest income on his federal income tax returns and he scheduled the stock as his personal property in his bankruptcy case. These facts lead to the inescapable conclusion that the debtor was the intended owner of the stock.

Mr. Smith's efforts to construe the facts in a different fashion fail for a number of reasons.[8] Mr. Smith argues he never gave the debtor a copy of the stock certificate because he never intended to give the debtor a present interest in the stock; however, there was no evidence that Mr. Smith ever held the stock certificate. Mr. Smith also argues that the debtor agreed to pay the taxes associated with the stock in connection with the $10,000.00 loan. The evidence does not support this argument. The only testimony linking the tax issue with the loan was that Mr. Smith agreed in 2001 to give the debtor a credit against the loan for taxes which he had already paid. And Mr. Smith's exhibits show that the debtor began paying the taxes related to

[8] These arguments were made in Mr. Smith's trial brief (docket 58) and in his counsel's closing argument.

the stock in 1984 (Def. exh. B), whereas the $10,000.00 loan was not made until 1994 (Def. exh. A). Mr. Smith argues that he did not have the debtor's name taken off the stock following his receipt of the appropriate documents in late 2001 as a result of "administrative neglect." However, there was no testimony to that effect. Only two people could have "neglected" the issue: Mr. Smith or Ms. Leonard. Ms. Leonard's testimony established that she unfailingly followed Mr. Smith's instructions and Mr. Smith's testimony showed that he paid close attention to investments. Under the circumstances, it is more likely than not that Mr. Smith's failure to remove the debtor's name from the stock was not "administrative failure," but a decision to maintain the status quo regarding ownership of the stock. Finally, Mr. Smith argues that the debtor should not be responsible for the manner in which he treated the dividends on his tax returns or the stock ownership on his bankruptcy petition because he relied on his accountant and bankruptcy attorney to take appropriate actions. The debtor, however, signed both the tax returns and the bankruptcy schedules under the penalty of perjury. The information included in them is highly relevant in determining the debtor's intent regarding ownership of the stock.

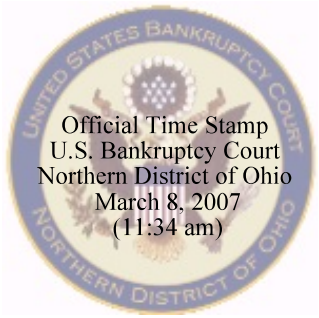
CONCLUSION

For the reasons stated above, the trustee is granted judgment against defendant Jerry Smith and the FirstMerit stock at issue is determined to be solely the property of the chapter 7 estate. A separate judgment will be entered regarding this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



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MARVIN A. SICHERMAN, TRUSTEE,	)	Adversary Proceeding No. 06-1300
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
AMERICAN STOCK TRANSFER AND TRUST COMPANY, et al.,	)	**JUDGMENT** (NOT FOR COMMERCIAL PUBLICATION)
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff trustee is granted judgment against defendant Jerry Smith and the FirstMerit Corp. stock at issue in this adversary proceeding is determined to be solely the property of the chapter 7 estate.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge