



**IT IS ORDERED as set forth below:**

**Date: February 7, 2012**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

In re:	:	Case No. 09-42273-MGD
	:	
<b>JOSEPH P. MALIA and</b>	:	Chapter 7
<b>JANE E. MALIA,</b>	:	
	:	Judge Diehl
Debtors.	:	
	:	

**ORDER GRANTING TRUSTEE’S OBJECTION TO DEBTOR JOSEPH E. MALIA’S  
CLAIMED EXEMPTION AND DENYING TRUSTEE’S OBJECTION TO DEBTOR  
JANE E. MALIA’S CLAIMED EXEMPTION**

This Chapter 7 case is before the Court on the Chapter 7 Trustee’s Objection To Exemption (“Objection”). The Trustee seeks to disallow the Debtors’ claimed exemptions in a promissory note that Debtor Jane E. Malia inherited from her father. For the reasons that follow, the Court grants the Trustee’s Objection as to Debtor Joseph P. Malia but denies the Trustee’s Objection as to Debtor Jane E. Malia.

**FACTUAL AND PROCEDURAL HISTORY**

Joseph P. Malia and Jane E. Malia (“Debtors”) filed a petition for relief under Chapter 7 of

the Bankruptcy Code on June 7, 2009. On Schedule B, Debtors did not disclose any ownership interests in promissory notes. (Docket No. 1). During the section 341 meeting of creditors, however, Jane E. Malia disclosed that she had an ownership interest in a promissory note, which she had inherited from her father. Debtors' Brief p. 2; Trustee's Objection ¶ 6. In May 2011, the Trustee filed a Motion to Sell, Transfer and Assign Promissory Note and Mortgage ("Motion"), which stated that "the Debtors were the owners and Mortgagees on the Promissory Note and Mortgage." (Docket No. 58). After no objection to the Motion was filed, the Court granted the Trustee's Motion in June 2011. (Docket No. 60).

In August 2011, Debtors filed amended Schedules B and C, disclosing an alleged joint ownership interest in the note. (Docket No. 70). Amended Schedule B provided that Debtors had a joint ownership interest in a "Note from Norman and Linda Compton dated 05/18/1998 in the original amount of \$60,000.00. Wife holds note; husband has an interest in the proceeds as spouse and because Debtor and Joint Debtor have always shared in the proceeds." (Docket No. 70). Each Debtor claimed an exemption in the note for \$5,025.00 under O.C.G.A. § 44-13-100(a)(6). Debtors did not allege that the face of the note or any other document provides that Joseph Malia is an obligee on or holder of the note.

Asserting that the Debtors' amendments were made in bad faith, the Trustee filed her Objection on September 23, 2011. (Docket No. 74). The Trustee's objection came on for hearing on November 16, 2011, and the Court orally overruled the Trustee's objection with respect to bad faith. But the Trustee raised another objection during the hearing based on Joseph Malia's lack of an ownership interest in the note. The Court instructed both parties to brief the issue. The Trustee and Debtors filed respective briefs on November 30, 2011. (Docket Nos. 85, 86). The Trustee also

filed a response brief on December 6, 2011. (Docket No. 87). Jane Malia’s claimed exemption is no longer disputed. The issue before the Court is whether Joseph Malia has an ownership interest in the note that gives him standing to claim it as exempt property.

### **DISCUSSION OF LAW**

*A. Joseph Malia does not have an ownership interest in the note under Georgia law.*

Upon filing a bankruptcy petition, “all legal or equitable interests of the debtor in property” become property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). State law determines the nature and existence of a debtor’s property interests. *Southtrust Bank of Ala. v. Thomas (In re Thomas)*, 883 F.2d 991, 995 (11th Cir.1989). Georgia law dictates that an inheritance received by one spouse during marriage remains the separate property of that spouse. *Bailey v. Bailey*, 250 Ga. 15, 16 (1982). But there is an exception to this rule. *Shaw v. Shaw*, 2012 WL 33141 at \*1 (Ga. 2012). A spouse may convert separate property into marital property by taking certain actions showing the intent to convert. *Id.* An established way to signal this intent is to transfer partial, full, or joint ownership to the other spouse. *E.g., Miller v. Miller*, 288 Ga. 274, 280 (2010); *Lerch v. Lerch*, 278 Ga. 885, 885 (2005). For example, the intent to convert has been shown by a spouse deeding title to a residence into both spouses’ names. *Id.* In another case, a spouse showed an intent to convert inherited funds into marital property by depositing them into a joint bank account—to be held as joint tenants with right of survivorship—that was opened for the purpose of receiving the inherited funds. *Shaw*, 2012 WL 33141 at \*1–2.

The property interest at issue in this case is a note inherited by Jane Malia while she was married to Joseph Malia. Jane Malia has an undisputed ownership interest in the note. Joseph Malia, on the other hand, does not have an ownership interest in the note. In order for him to have

an ownership interest in a note inherited by Jane Malia, Jane Malia's actions must have shown an intent to convert this note into joint marital property. Her actions do not show such an intent. Jane Malia did not transfer ownership to Joseph Malia by transferring title into both of their names. While she deposited the payments on the note into a joint bank account, that account was not pre-existing and was not established for the purpose of receiving the inheritance and giving title over the note itself to both spouses.

If Jane Malia had inherited cash and deposited all the cash into Debtors' joint bank account to pay joint expenses, that action might show an intent to convert the cash into marital property. But this situation is different. Jane Malia inherited not cash but a promissory note—which is a single asset separate from the monthly payments (i.e., proceeds) made on it. To convert this asset into marital property, Jane Malia's actions must show an intent to convert the asset itself, not just the monthly proceeds of it. That is because she could share the monthly proceeds of the note without ever intending to give Joseph Malia an ownership interest in the note itself. Consequently, her sharing the proceeds is not a clear manifestation of an intent to convert the note into marital property. Though Joseph Malia may have grounds for claiming an ownership interest in the proceeds from the note that were deposited into the joint account pre-petition, he cannot claim an ownership interest in the note itself. Thus, Joseph Malia does not have an ownership interest in the note.

Although Joseph Malia does not have an ownership interest in the note under Georgia law, Debtors assert two other arguments to defeat the Trustee's Objection. Under the theories of judicial admission and judicial estoppel, Debtors argue that the Trustee is barred from now objecting to Joseph Malia's claimed exemption in the note.

B. *The Trustee's statement that both Debtors own the note is not a binding judicial admission.*

Debtors argue that the Trustee's Objection should be denied because the Trustee made an "admission in judicio"—i.e., a judicial admission—as to Joseph Malia's ownership interest in the note. Judicial admissions are "formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them." *Keller v. U.S.*, 58 F.3d 1194, 1199 n.8 (7<sup>th</sup> Cir. 1995); KENNETH S. BROUN, 2 MCCORMICK ON EVID. § 254 (6<sup>th</sup> ed. 2009). Judicial admissions must be clear, deliberate, and unequivocal factual assertions—whether made in pleadings, stipulations, responses to discovery, or orally in trial or court proceedings. *In re Jones*, 197 B.R. 949, 956 (Bankr. M.D. Ga. 1996). A statement that is a legal conclusion, however, does not constitute a judicial admission. *MacDonald v. General Motors Corp.*, 110 F.3d 337, 341 (6<sup>th</sup> Cir. 1997) (ruling that opinions and legal conclusions, as opposed to statements of fact, do not constitute binding judicial admissions); *In re Stalnakar*, 408 B.R. 440, 444-45 (Bankr. M.D. Ga. 2009).

In this case, the Trustee's statement attributing a property interest to Joseph P. Malia does not constitute a judicial admission. The Trustee's statement in the Motion that Debtors—rather than solely Debtor Jane Malia—owned the note is a legal conclusion, not a statement of fact. Ownership interests in property are determined by state law. Whether Joseph Malia has an ownership interest in the note is not a fact that can be shown with simple evidence. On the contrary, one must apply Georgia law to the facts of this case, examining whether Jane Malia took certain actions that show an intent to convert the note inherited by her alone into marital property. To state that both Debtors own the note is therefore a legal conclusion that is not binding on the Trustee as a judicial admission.

C. *Judicial estoppel does not bar the Trustee from arguing that Joseph Malia lacks an ownership interest in the note.*

Finally, Debtors assert that the Trustee is barred by judicial estoppel from contesting Joseph Malia's ownership interest in the note. Judicial estoppel is an equitable doctrine that prevents a party from "prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). By "prohibiting a party from deliberately changing positions according to the exigencies of the moment" judicial estoppel protects the integrity of the judicial process. *Id.* at 750–51 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5<sup>th</sup> Cir. 1993)). Application of judicial estoppel is appropriate when (1) a party's later position is clearly inconsistent with an earlier one; (2) the party succeeded in persuading the court to accept the earlier position; and (3) the party asserting the inconsistent position would gain an unfair advantage or impose an unfair disadvantage. *Id.*

Here, judicial estoppel does not bar the Trustee from disputing Joseph Malia's ownership interest in the note. First, the Trustee did not prevail on an earlier, contradictory argument to the Court. The Trustee's Motion did state that the Debtors—rather than solely Jane Malia—owned the note. But the Trustee did not argue before the Court that the parties had a joint ownership interest. Indeed, it was unnecessary for the Trustee to persuade the Court of a joint interest as opposed to merely a single interest held by Jane Malia. The note could be sold so long as one of the Debtors' estates had an interest in the note. A joint ownership interest was thus neither argued by counsel nor relied on by the Court.

Second, the Trustee did not gain an unfair advantage by stating in the Motion that Debtors owned the note. As explained above, pleading joint ownership as opposed to single ownership of

the note was not necessary for the Court to grant the Trustee's Motion. If it had been necessary, then the Trustee might be gaining an unfair advantage now. But that is not the case. Nor does the Trustee's Objection impose a disadvantage on the Debtors. There is no disadvantage to Jane Malia, as the Objection does not affect her exemption. And the Trustee would only impose a disadvantage on Joseph Malia if he had gained a legal right or interest when the Trustee stated that both Debtors owned the note. Joseph Malia did not gain anything from the Motion that the Objection now takes away—other than a hope that the Trustee would not object to his claiming an exemption in the note. The Motion could not create an ownership interest for Joseph Malia, as his ownership interest is determined by Georgia law. As discussed above, Joseph Malia does not have an ownership interest in the note under Georgia law. Although the Motion includes a statement “clearly inconsistent” with the Trustee's current position, the other two elements—that the Trustee persuaded the Court of his earlier argument and gained an unfair advantage—are not present.

Because Joseph Malia does not have an ownership interest in the note, and because the Trustee's Objection is not barred as a judicial admission or by judicial estoppel, Joseph Malia is not entitled to claim an exemption in the note. Accordingly, it is

**ORDERED** that the Trustee's Objection to Debtor Joseph E. Malia's Exemption is GRANTED. It is further

**ORDERED** that the Trustee's Objection to Debtor Jane E. Malia's Exemption is DENIED, as set forth on the record on November 16, 2011.

The Clerk of Court shall serve a copy of this Order on Debtors, the Chapter 7 Trustee, and all creditors and parties in interest in the case.

**END OF DOCUMENT**