

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

KAREN M. NELLIS

CASE NO. 04-60446

Debtor

Chapter 13

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

On May 5, 2004, Daniel R. Elwood (“Elwood”) filed a motion seeking relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), to allow him to continue an action commenced in New York State Supreme Court, Chenango County (“State Court”). Opposition to the motion was filed on May 28, 2004, by Karen M. Nellis (“Debtor”). On June 6, 2004, the Court heard oral argument on the motion and denied the relief sought. However, the Court indicated that it would schedule an evidentiary hearing to

determine whether certain personal property, which Elwood sought to recover from the Debtor, constituted property of the estate pursuant to Code § 541.

The evidentiary hearing was originally scheduled for August 18, 2004, and was adjourned to October 6, 2004, on consent of the parties. After hearing the testimony of several witnesses, including both parties, the Court took the matter under submission and allowed the parties an opportunity to file post-hearing memoranda of law. The matter was submitted for decision on October 29, 2004.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction of the parties and subject matter of this contested matter pursuant to 28 U.S.C. § 1334, 157(a), (b)(1), and (b)(2)(O).

### **FACTS**

The Debtor filed a voluntary petition pursuant to chapter 13 of the Code on January 26, 2004. In her Statement of Financial Affairs, she lists two pending lawsuits commenced against her by Elwood in 2003, one in State Court and one in the City Court of Norwich, New York. Listed on Schedule B to her bankruptcy petition are items of personal property, which include household goods and furnishings located in her bedroom, living room, dining room, den and kitchen, valued at \$8,500. Among other things, she also claims “horse tack” valued at \$900. While the Debtor testified that she had listed all the items under consideration by this Court,

including two saddles, none are specifically identified in her schedules other than as noted above. According to Schedule C, included with the Debtor's petition, she claimed a \$5,000 exemption in "household items."

Elwood testified that he had known the Debtor for the more than twelve years and had become romantically involved with her between 2000 and approximately October 2003. Both parties, however, maintained separate residences in Norwich, New York, during the three years of the relationship. She resided on Cortland Street and he resided on Upper Ravine Road. During those three years, Elwood acknowledged having purchased certain items which are the subject of the dispute now before this Court.

Early on in their relationship in late 2000 or early 2001, according to the Debtor, Elwood purchased a washer and dryer and had them installed in the Debtor's residence on Cortland Street. She testified that he had a washer and dryer at his residence, which she occasionally used. She testified that he had indicated that he did not want her having to go to the laundromat. According to Elwood, his washing machine was approximately 26 years old and his dryer did not work properly. In fact, the Debtor testified that shortly before they broke up in 2003, Elwood's mother had purchased a new washer for him.

According to Elwood, at some point in their relationship he gave the Debtor the money to purchase a headboard and footboard from a college student because she had no bedroom furniture whatsoever. According to the Debtor, both were manufactured by Ethan Allen. In February 2002, he purchased additional items of Ethan Allen bedroom furniture on credit for approximately \$4,000. *See* Elwood's Exhibits 8 and 9, showing downpayments of \$1,100 and \$300 respectively. Included in those items were two dressers, one of which was, according to

the Debtor, a lingerie chest. Elwood explained that his own home was sparsely furnished and originally he had intended to move the pieces into his home after he remodeled his bedroom. However, the furniture remained with the Debtor because, according to Elwood, it was the only bedroom furniture she had.

On or about July 16, 2002, Elwood purchased a gas grill and accessories from Sears Roebuck and Company for a total price of \$453.97. Credited against the purchase price was a “gift card” payment of \$107.99. *See* Elwood’s Exhibit 7. The Debtor testified that the “gift card” was a credit she had received for returning another item and that she had asked that Elwood pickup a gas grill that had been advertised for sale for \$118 and to apply the gift card against the purchase. According to the Debtor, Elwood delivered the grill to her apartment and that it was never at his house until late September or early October 2003 when he removed it from her yard without her consent. The Debtor testified that Elwood returned the grill approximately two weeks later, and it currently is in the Debtor’s possession. According to the Debtor, Elwood returned the grill “when all this separation started” and although he claimed it was his, he knew it wasn’t.

Elwood testified that the gas grill was portable and had been kept mostly at his residence. According to him, he most recently had brought the grill to the Debtor’s apartment at her request because of a party she was giving. It was his testimony that up until a week prior to the hearing when he purchased an outdoor fireplace, he had not had a gas grill at his home, except for that purchased in July 2002, which is at issue herein. This contradicted testimony by the Debtor, which indicated that Elwood owned a grill at the time he purchased the one from Sears.

Elwood claims ownership in a 16” Billy Cook Trainer saddle purchased on October 26,

2002 for \$1,075.<sup>1</sup> *See* Elwood's Exhibit 1. According to Elwood, he had been riding for 3-4 years and that this particular saddle had been used by him, as well as the Debtor and Elwood's daughter. It was his testimony that he also owned a 14" youth saddle and a 17" saddle. He testified that the Trainer saddle had been kept in the Debtor's three-horse trailer and that before returning the trailer to her, he had removed the saddle. According to Elwood, in September 2003 the Debtor requested that she "borrow" it to use with her horse. Elwood testified that the Debtor had been hospitalized for depression in the early summer of 2003 and because she had indicated to him that riding was therapeutic for her, he had agreed to let her use the Trainer saddle. However, she later refused to return it. The Debtor testified that she had never seen Elwood using the Billy Cook Trainer saddle to ride and that he had his own saddle. There was also testimony to the effect that while the Debtor owned a horse, Elwood did not.

Elwood testified that in October 2002 he purchased a Yamaha parlor baby grand piano for \$7,500 from a private individual in Cortland, New York. Elwood testified that he was hoping to get his ten year old daughter interested in playing the piano. Both parties agree that the Debtor had given Elwood's daughter lessons although, according to the Debtor, his daughter was more interested in cheerleading than in learning to play the piano.

With respect to the purchase of the piano, Elwood testified that prior to making the purchase he had consulted his investment advisor who allegedly informed him that the purchase

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<sup>1</sup> Elwood also purchased a 16" Billy Cook Custom Show saddle for \$1,800 on January 4, 2002, which according to the Debtor, is hers. *See* Debtor's Exhibit D. However, the Debtor also acknowledged on cross-examination that in June 2004 she had been arrested for having taken the show saddle, *inter alia*, from Elwood's residence without authorization, which was later returned to Elwood by the sheriff and as of the hearing date remained in his possession. The Debtor offered evidence that she had completed the warranty registrations on both saddles in her name. *See* Debtor's Exhibit E.

of a piano would be a good investment. As a result, he used monies from his cash management account to make the purchase. *See* Elwood's Exhibit 10. The Debtor testified that Elwood had commented to her that the piano was a birthday present from him, which he denied.<sup>2</sup> It was Elwood's testimony that while he had arranged for a Cortland moving company to move the piano to the Debtor's apartment, ultimately he intended to have it placed in his home.

According to Elwood, the delay in having the piano delivered to his residence on Upper Ravine Road was due to the fact that he needed to make certain renovations first. He had not wanted to place the piano in the "Great Room" of his residence because the heat generated by the woodburning stove would have dried out the piano. The Debtor testified that he began the renovations to a room used as his office in early 2003. According to Parker Ward ("Ward"), who had known Elwood for approximately 15 years, he assisted with some of the renovations to the office in Elwood's house in approximately August 2003 after the Debtor had done some work on the room. He assisted with knocking down a wall adjacent to the stairs going up to the second floor and prepping the floor in the room for the installation of new tile. It was Ward's understanding that ultimately Elwood intended to move the piano from the Debtor's apartment to the remodeled room in his residence.

Courtney Sullivan ("Sullivan"), a neighbor of Elwood, testified that she had known Elwood for approximately one and a half years and had boarded the Debtor's horse at her barn.

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<sup>2</sup> The piano was purchased on or about October 10, 2002, and her birthday had been October 2d. The Debtor testified that as they left the house of the seller, Elwood wished her a "Happy Birthday." In her affidavit in opposition to Elwood's motion, sworn to on May 25, 2004, the Debtor indicated that Elwood had also commented to several of her family members that it was a birthday present; however, no family members testified at the hearing on behalf of the Debtor.

She testified that she had been approached by the Debtor in late August or early September 2003 about doing some wallpapering in the room in Elwood's house because of her prior experience remodeling and redecorating. It was Sullivan's testimony that she had accompanied the Debtor and Elwood to pick out paint for the room that was being remodeled. According to Sullivan, the three had discussed how well everything was coming together in the room and that the Debtor specifically told her that the room was to be a piano or music room.

According to the Debtor, there was never any discussion of moving the piano to Elwood's house until she became unemployed following her brief hospitalization for a bipolar condition in the summer of 2003. At the time, Elwood was paying all of her bills and he had indicated that he could no longer afford to assist her financially. Because of her financial situation, the Debtor testified that she had considered moving in with Elwood but had refused to do so unless they were engaged to be married. She described the situation as being one in which she felt "her hand was being forced," particularly since she did not want to be homeless. Ultimately, they broke off the relationship sometime around late September or early October 2003.

Elwood testified that following the breakup, he and the Debtor had reached a "clear and definitive" agreement that he would return to her what was hers and she, in turn, would return to him what was his. It was his testimony that sometime in October or November 2003, after having returned several items of personal property belonging to the Debtor, he had hired a moving company to move various items from the Debtor's apartment to his house. The Debtor testified that Elwood arrived at her apartment at approximately 8:30 a.m. on or about November 4, 2003, and indicated that he had hired a mover to move the items of personal property now under consideration by this Court. The Debtor acknowledged that she had refused to let either

him or the movers into her apartment. She denied that there had ever been any “clear and definitive” agreement with respect to the items and when he had demanded entrance into her apartment to recover the items, she had responded that they had been given to her as gifts by Elwood and she wanted an opportunity to discuss her rights as regards the property with someone. It was apparently after that that Elwood allegedly commenced the action in State Court by the filing of a Summons, dated December 19, 2003, alleging conversion. *See* Exhibit attached to Elwood’s motion, filed May 5, 2004.

The Debtor called as her witness Doreen Maltzan (“Maltzan”), a horse trainer who had dated Elwood for a couple of months during the summer of 2004. Maltzan testified that Elwood had expressed to her his feelings of betrayal and hurt in connection with his relationship with the Debtor. According to Maltzan, the Debtor had mentioned that Elwood had purchased the furniture and the piano for the Debtor because he felt sorry for her and had tried to help her out. Maltzan also testified that Elwood had indicated to her that at that time he was trying to get back from the Debtor items he had bought, including a saddle, some furniture and a piano, because he felt the Debtor did not deserve them as she had made his life “like a slow train wreck.” On cross-examination, Maltzan testified that she was not certain exactly what items Elwood had bought for the Debtor.

## **DISCUSSION**

In this case, the Debtor asserts that the washer and dryer, gas grill, Yamaha parlor grand piano, certain pieces of Ethan Allen bedroom furniture and two Billy Cook saddles were given

to her by Elwood as gifts. According to the testimony at trial, all of these items are currently in the possession of the Debtor, except for the Billy Cook show saddle in Elwood's possession.

Code § 541 provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Property interests are created and defined by state law. *Butner v. United States*, 99 S.Ct. 914, 918, 440 U.S. 48, 55-56, 59 L.Ed.2d 136 (1979).

Under New York law, the Debtor, as the purported donee, has the burden of establishing "by clear and convincing proof the intent of the donor to make the gift, delivery of the gift pursuant to the donor's intent and acceptance of the gift by the donee." *In re Monks*, 247 A.D.2d 922, 922-23 (N.Y. App. Div. 1998) (citations omitted); *see also In re Moffett*, 49 Misc. 2d 225, 227 (N.Y. Sur. Ct. 1966) (noting that "[t]he law never presumes a gift. On the contrary, the burden of establishing it rests on the donee, who must show by the clearest evidence each and every element essential to supporting a gift. The evidence taken as a whole must be inconsistent with any other design on the part of the donor, such as a transfer for purposes of custody.").

In this case, the Debtor presented her own testimony, as well as that of Maltzan, who had dated Elwood for a couple of months over the summer of 2004. There is no dispute that the Debtor accepted all the items now claimed by Elwood. Indeed, all but the show saddle were in the possession of the Debtor at the time of the hearing. The real question is whether Elwood delivered the items with the intent of making them gifts to the Debtor. The Court will examine each item individually.

#### **Washing Machine and Dryer**

Elwood does not dispute that at the time he purchased the washer and dryer he already owned similar appliances, albeit older models. He arranged for both to be delivered to the Debtor's apartment, and there is nothing in the testimony to indicate that they were given to the Debtor on a temporary basis when purchased in early 2001. Indeed, there was testimony from the Debtor that Elwood's mother had actually purchased a new washer for him shortly before the relationship ended in the fall of 2003. The Court concludes that Elwood purchased the appliances as gifts to the Debtor and that they constitute property of the estate, subject to any claim of exemption by the Debtor.

### **Gas Grill**

The Court finds the Debtor's testimony credible insofar as she indicated that she had given Elwood a gift certificate for \$107 to be used in purchasing a gas grill for her. The fact that he elected to purchase a more expensive model than she had requested does not alter the Court's opinion that the difference between the price of the grill she wished to purchase and the one he ultimately selected represented a gift on the part of Elwood. The fact that its portability allowed the grill to be used at both the Debtor's apartment and Elwood's house does not alter the Court's conclusion under the circumstances as presented at the hearing. Therefore, the Court concludes that the grill is property of the estate, subject to any exemption the Debtor may have claimed.

### **Ethan Allen Furniture**

Elwood testified that he had given the Debtor money to purchase a headboard and footboard since she apparently had no bedroom furniture whatsoever. According to the Debtor, those pieces were manufactured by Ethan Allen. Subsequently, Elwood purchased what the Debtor described as a dresser and lingerie chest, also manufactured by Ethan Allen. According

to the evidence presented, at no time did Elwood have any possession or control of the furniture once he and the Debtor had picked it up from the furniture store and delivered it to her apartment. While there was some mention by Elwood that he ultimately intended to have the furniture moved to his residence, the Court does not find that testimony particularly credible. It may have been that he believed that ultimately the Debtor would move into his residence and bring the furniture with her. However, that does not change the Court's view that the lingerie chest and dresser were gifts to the Debtor. Accordingly, the Court concludes that they are property of the estate, subject to any claim of an exemption by the Debtor.

### **Billy Cook Saddles**

According to the testimony, the only saddle in the Debtor's possession at the time she filed her petition was the Billy Cook Trainer saddle. Based on the testimony, it appears that at the time of the hearing Elwood had in his possession three saddles, i.e. a 14" youth saddle, a 17" saddle and the 16" Billy Cook Custom Show saddle, which had been returned to him by the sheriff following the Debtor's unauthorized removal of it from Elwood's residence in June 2004. Elwood testified that he had loaned the Billy Cook Trainer saddle to the Debtor after her hospitalization. The Court is of the opinion that the Billy Cook Trainer saddle, purchased by Elwood in October 2002 was intended to be a gift to the Debtor. At the time, he owned three other saddles and owned no horse. The Debtor, on the other hand, owned a horse and, according to Elwood, the Debtor indicated to him that she was more comfortable riding with the 16" Billy Cook Trainer saddle than another which she tried using when she rode following her hospitalization. Therefore, the Court concludes that the 16" Billy Cook Trainer saddle is property of the estate, subject to any claim by the Debtor of an exemption in it.

**Yamaha Parlor Baby Grand Piano**

Neither party dispute the Debtor's ability to play the piano. Furthermore, neither party disputes that Elwood encouraged his daughter to learn to play the piano and had received several lessons from the Debtor. In meeting her burden of proving that the piano was a gift, the Debtor offered testimony to the effect that she and Elwood had gone to look at the piano in Cortland, New York, and after making the purchase, he had commented on it being quite a birthday present. Other than indicating in her written opposition to Elwood's motion that he had mentioned to several family members that it was a birthday present to her, the Debtor offered no corroborating testimony to support that assertion. On the other hand, Elwood testified that while he had arranged to have the piano delivered to the Debtor's apartment, he subsequently had begun remodeling a room in his residence to accommodate the piano. His testimony was corroborated by the sworn testimony of both Ward and Sullivan, who testified that it was their understanding from conversations with both Elwood and the Debtor that the room was being remodeled as a piano or music room. There was also the sworn and uncontradicted testimony of Elwood that he had consulted with a financial advisor concerning the investment potential of such a purchase. While he offered no corroborating testimony from the advisor, the Court notes that it was not his burden to establish that the piano was not a gift. The testimony offered by Elwood suggests the possibility that the piano was moved to the Debtor's apartment with the intent that the Debtor simply retain custody of it until the room could be remodeled. This suggests the possibility that delivering the piano to the Debtor's apartment was intended to be

a mere transfer for purposes of temporary custody. The Court concludes that the Debtor has failed to meet her burden of proof of showing otherwise. Accordingly, the Court finds that the piano is not property of the estate and may be recovered by Elwood.

Based on the foregoing, it is hereby

ORDERED that the Debtor arrange for the turnover of the Yamaha parlor baby grand piano to Elwood<sup>3</sup> within thirty days of the date of this Order based on the Court's conclusion that it is not property of the estate; and it is further

ORDERED that the Debtor shall retain the washer and dryer, gas grill, the Ethan Allen dresser and lingerie chest, and the 16" Billy Cook Trainer saddle currently in her possession as property of the estate.

Dated at Utica, New York

this 10th day of December 2004

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge

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<sup>3</sup> The Court believes it appropriate, however, that Elwood bear the cost of having the piano moved from its present location. According to the Debtor, she purchased a house in early July 2004, shortly after confirmation of her chapter 13 plan on June 29, 2004. There was no testimony as to the specific location of the piano at the time of the hearing.