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As previously discussed, the husband has a property interest under the given facts even if it is assumed that the residential property is the non liable spouse's separate property. Pursuant to United States v. Rodgers, 461 U.S. 677 (1983), the Service can, subject to a district court's discretion, sell the entire homestead property under section 7403. Furthermore, in U.S. v. Craft, 122 U.S. 274 (2002), the United States Supreme Court held that a spouse's interest in property held as a tenant by the entirety "constituted 'property' or 'rights to property' for purposes of the federal tax lien statute." Id. at 288. While addressing a different property right, the Craft decision recognized the continued viability of Rodgers.

The next issue is whether use of the nominee lien is proper under the present circumstances.

IRM 5.17.2.4.8.2 states:

> A nominee situation generally involves a fraudulent conveyance or transfer of a taxpayer's property to avoid legal obligations. To establish a nominee lien situation, it must be shown that while a third party may have legal title to the property, it is really the taxpayer that owns the property and who enjoys its full use and benefit. No one factor determines whether a nominee situation is present, but a number of factors taken together may. The following list is neither exhaustive nor exclusive, but nominee situations typically involve one or more of the following:
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> a. The taxpayer previously owned the property.
> b. The nominee paid little or no consideration for the property.
> c. The taxpayer retains possession or control of the property.
> d. The taxpayer continues to use and enjoy the property conveyed just as the taxpayer had before such conveyance.
> e. The taxpayer pays all or most of expenses of the property.
> ~~f. The conveyance was for tax avoidance purposes.~~

As neither the Code nor Regulations address nominee liens, courts have been left to set forth standards for reviewing the validity of nominee liens filed by the Service. "A court presented with a nominee or alter ego claim attempts to discern whether a taxpayer has engaged in a sort of legal fiction, for federal tax purposes, by placing legal title to property in the hands of another person or entity while, in actuality, retaining all or some of the benefits of being the true owner. The nominee theory is designed to determine whether property should be construed as belonging to the taxpayer if he/she treated and viewed the property as his/her own, in spite of the legal machinations employed to distinguish legal title to the property." May v. A Parcel of Land, 458 F.Supp.2d 1324. (S.D.Ala. 2006).

The Service states that "whether or not a nominee lien is properly filed depends upon who actually owns the property in question, the liable taxpayer or the nominee." 84 DTR L-1, 1991.

In Cody v. United States, 348 F.Supp.2d 682, the Court delineated factors similar to those in the IRM. The

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relevant factors are "(1) whether the taxpayer expended personal funds for the property; (2) whether inadequate or no consideration was paid by the alleged nominee; (3) whether the property was placed in the alleged nominee's name in anticipation of a lawsuit or other liability; (4) whether the taxpayer enjoys the benefits of, retains possession of, and exercises dominion and control over the property; (5) whether a close family relationship exists between the taxpayer and the alleged nominee; (6) whether conveyances between the taxpayer and alleged nominee were recorded; and (7) whether the alleged nominee interferes with the taxpayer's use of the property." Id. at 694-95.

Addressing similar factors, the Sixth Circuit opined that, "[t]hese factors are less probative in the context of a home purchase by a married couple because even if the home is only titled in one name, both ordinarily act as true owners. Stated another way, several of the factors used by courts will provide the same answer for *every* marital relationship in this context, thus providing little utility in distinguishing tax shams from legitimate titling decisions between spouses." Spotts v. United States, 429 F.3d 248, 253.

In Spotts, the Service sent a letter to taxpayer's counsel describing when a nominee lien is filed. The letter stated that "a nominee filing should only be done where the facts and circumstances attending the purchase and/or transfer of property clearly show that the property was acquired and/or transferred in the name of another with a specific intent on the part of a taxpayer to evade or defeat the payment of a known tax liability." Id. At 251.

"The line between what constitutes a nominee situation and what constitutes a fraudulent conveyance sometimes blurs...A nominee situation can best be characterized as a 'simulated' transfer: i.e., a conveyance that is not really intended to divest the transferor of rights. On the other hand, most fraudulent conveyances are not 'simulated' transactions as the parties generally intended to effect an actual transfer of rights." 1989 LGM GL-21.The Ninth Circuit Court of Appeals provided some nuance to the aforementioned distinction in U.S. v. Thornton, 859 F.2d 151, (9th Cir. 1988). The Court stressed that a nominee obtains property directly from the taxpayer, not through "intervention in the chain of title." Id.

The above referenced Litigation Guideline Memorandum concludes by stating "[i]n taking action against such property the Chief Counsel's office will ordinarily limit its theory of recovery to the fraudulent conveyance theory; where necessary, however, it will rely on a nominee theory. District counsel should not use the nominee theory except in those cases whose facts are closely analogous to those contained in court decisions where the Government has prevailed in establishing that actual ownership or beneficial enjoyment of the property was retained by the taxpayer."

Although the legality of filing nominee liens is generally accepted, the use of the nominee lien under the present facts can be questioned after consideration of the above referenced authorities. There was not a fraudulent transfer or effort to avoid legal obligations and it appears that the [redacted] held their property in a legitimate fashion. The nominee lien concept is governed by flexible judicial doctrine; it is uncertain whether a nominee lien would pass muster on these facts. Nonetheless, its use here does not generally fit within the framework set forth by the courts or the Service.

The shadow cast on the propriety of the nominee lien in this situation must be reconciled with Rodgers. Rodgers affirmed a federal district court's discretion to allow the Service to sell an entire homestead and then compensate the non liable spouse for their respective portion of the sold homestead. Accordingly, the Service could theoretically argue that a lien should arise with respect to the entire property because a Court may later authorize the levy, under 6334(e)(1)(A), or sale of the entire property pursuant to section 7403 and Rodgers. However, a problem with this assertion is that it requires that a lien attach to property in which the liable taxpayer has neither an interest nor a purported interest. (the non liable spouse's homestead interest).

A recent case out of a Texas federal court concerning the treatment of a homestead interest when only one spouse bears the tax liability is U.S. v. Harrison, 366 B.R. 656 (Bankr.S.D.Tex.2007). In this case, the husband was the liable spouse and owned the homestead interest in fee simple. The Court recognized that the wife still held a homestead interest. Following Rodgers, the Court simply ordered the sale of the property and permitted the I.R.S. to foreclose on the sale proceeds equaling the value husband's homestead interest.

"The effect of a nominee lien is to indicate to the public that, in the view of the Service, the record title holder is

holding property as a nominee, transferee, alter ego, or holder of a beneficial interest for the taxpayer, and that the Service claims that a federal tax lien relating to the taxpayer attaches to the property. The nominee acts as a cloud on the title and provides the Service with leverage over the taxpayer and thus the underlying property, representing the potential value to satisfy the tax liability." Elliot, William D., Federal Tax Collection, Liens & Levies § 9.10.

The Service is not asserting that the non liable spouse is a nominee holder of the liable spouse's property. Furthermore, the Service is not claiming that a federal tax lien arises with respect to the non liable spouse's interest. Therefore, the nominee lien filing in the present case is not proper.

In light of the inapplicability of the nominee lien, there is concern as to whether the Government's interest is protected if the non liable spouse transfers the homestead property before the 7403 suit to foreclose the tax lien. Notice 2003-60, which addressed Craft and tenancies by the entirety, may provide some guidance in this arena. Notice 2003-60 states:

> The Service will rely on a number of general principles in addressing issues raised as a result of the Court's decision in Craft:
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> (6) Where there has been a sale or other transfer of entireties property subject to the federal tax lien that does not provide for the discharge of the lien, whether the transfer is to the non-liable spouse or a third party, the lien thereafter encumbers a one-half interest in the property held by the transferee...
>
> Q3. If entireties property subject to the federal tax lien is sold or transferred after *Craft* and the Service does not discharge the lien, is the property subject to the federal tax lien in the hands of the transferee?
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> A3. A conveyance of entireties property terminates the entireties estate with respect to that property. Accordingly, after *Craft*, unless the Service discharges the property from the federal tax lien, the lien will encumber a one-half interest in the hands of the transferee, regardless of whether the transferee is a donee or gives value. As explained below, the Service generally will deem the value of the taxpayer's interest in entireties property to be one-half of the total value of the property.

While tenancy by entirety is an entirely different interest than an interest in a homestead, similar reasoning could apply to the transfer of homestead property.

Another possible argument to protect the Government's interest in the window between a lien filing with respect to homestead property and foreclosure of that lien emanates from the fact that proceeds from the sale of homestead property "retain their homestead characteristics for six months after the release of the funds from the registry of the court." Harleaux v. Harleaux, 154 S.W.3d 925 (Tex.App.-Dallas,2005). Tex. Prop.Code Ann. § 41.001(c). The intent is to allow the purchase of a new homestead within six months. However, the Service could argue that if the proceeds retain their homestead character, then the liable spouse still has an interest in those proceeds for six months.

In any event, the nominee lien is not proper and the non liable spouse should be informed if the Service plans a sale of the entire homestead property.