TENANCIES UNCOMMON: LIMITS ON REPRESENTING COTENANTS PRO SE

*Robert L. Bentlyewski**

An adversary proceeding that was part of the Bernie Madoff bankruptcy litigation involved a fraud victim making a motion to represent pro se the interests of all tenants in common who co-owned an account with Madoff. This Essay analyzes and expands upon the bankruptcy court's holding, which addressed this novel issue by finding that a tenant in common cannot represent his cotenants pro se for two reasons. First, a tenancy in common is not a legal entity that can speak with one voice. Second, one tenant in common cannot represent one or more other cotenants' interests in litigation without joining the cotenants in the action. Although the court did not discuss it, a third reason the motion was ill-fated was that the right to pro se representation is strictly personal, so a non-lawyer can never extend that right to justify their representation of another person or legal entity. Cotenants have a great deal in common, but not enough to justify one using their right to self-representation to speak for others.

INTRODUCTION

When Bernie Madoff's Ponzi scheme collapsed in December 2008, it created a problem of enormous scope and magnitude for the U.S. Bankruptcy Court for the Southern District of New York (S.D.N.Y.).[1] Many of Madoff's approximately 37,000 hoodwinked investors would turn to the court to seek repayment of their sixty-five billion dollars in investments out of the liquidation of his fraudulent company, Bernard L. Madoff Investment Securities LLC (BLMIS).[2] Massive pension funds, financial institutions, and immensely wealthy individuals were among those bringing claims for compensation.[3] The court set a profusion of new legal precedent interpreting

* J.D. Candidate, 2022, Fordham University School of Law; M.P.A., 2019, The City College of New York; B.A., 2014, Brown University. Thank you to the Honorable Stuart M. Bernstein, Mike Paek, Justin R. Gomes, and the editors of the *Fordham Law Review Online*. Thanks most and as always to my wife, Em.

1. *See* Scott Cohn, *The Stories of Madoff's Victims Vary Widely, as the Fraud Continues to Unwind 10 Years Later*, CNBC (Dec. 11, 2018, 6:00 AM), https://www.cnbc.com/2018/12/10/the-stories-of-madoffs-victims-vary-widely-a-look-10-years-out.html [https://perma.cc/87M3-U7MH].

2. *See id.*

3. *See Financial Scam Hits Wall Street, Global Investors*, NAT'L PUB. RADIO (Dec. 15, 2008, 6:00 AM), https://www.npr.org/templates/story/story.php?storyId=98254992 [https://perma.cc/V3XT-KFQR].

the Bankruptcy Code in complicated cases involving real investments, payouts from fictional gains, and a dizzying trail of subsequent transfers that could hinder recoupment.[4] But not all of Madoff's victims were big institutions or super-rich individuals, and not all of the difficult questions the court faced were on matters of bankruptcy law.

One case that required the S.D.N.Y. Bankruptcy Court to rule on a legal issue far outside of the Bankruptcy Code involved a doctor from Boca Raton, Florida, who, along with his brother, opened an account with Madoff in 1992.[5] The brothers, Dr. Alan Melton and Andrew Melton, shared ownership of the account as tenants in common at first, but they later created a limited liability company (LLC) specifically to hold the account.[6] The Meltons believed that their BLMIS account was worth $2.2 million, the product of years of consistent returns from Madoff's canny investments, but it was actually worth nothing.[7] In fact, they had withdrawn $145,000 more from the account than they had deposited over the years, and since the returns they believed to have accrued were fictitious, there was no actual money in their BLMIS account to recover in the liquidation.[8]

Dr. Melton, acting pro se, emailed the court to put forth a creative reason for why he should be able to collect in the liquidation despite the LLC's negative net equity: he was before the court representing the interests of his original BLMIS account, the tenancy in common (TIC) account he shared with his brother, not the LLC-owned account that was overdrawn by $145,000.[9] The court had no trouble shooting down this approach and finding that the TIC account *became* the LLC account and thus ceased to exist, which seemed clear because the two used the same BLMIS account number.[10] But to get there, the court first needed to decide whether what Dr. Melton wanted to do—argue before the court pro se as a single tenant in common, representing the interest of his cotenant brother—was acceptable under the law to begin with. The question had no easy answer, which caused

4. *See* Daniel Gill, *Madoff's Case Provides Precedent for Future Ponzi Victim Payouts*, BLOOMBERG L. (Apr. 15, 2021, 3:06 PM), https://news.bloomberglaw.com/bankruptcy-law/madoffs-case-provides-precedent-for-future-ponzi-victim-payouts [https://perma.cc/728C-3JH8].

5. *See* Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. 08-01789, 2019 WL 3436542, at *1 (Bankr. S.D.N.Y. July 26, 2019) [hereinafter *Melton I*].

6. *See* Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. 08-01789, 2020 WL 3264056, at *1 (Bankr. S.D.N.Y. June 10, 2020) [hereinafter *Melton II*].

7. *See id.* at *6–7.

8. *See id.* at *6. The S.D.N.Y. Bankruptcy Court adopted the "Net Investment Method" to divide BLMIS's funds to its swindled customers in the liquidation. *See In re* Bernard L. Madoff Inv. Sec. LLC, 424 B.R. 122, 124–25 (Bankr. S.D.N.Y. 2010), *aff'd*, 654 F.3d 229 (2d Cir. 2011), *cert. denied*, 567 U.S. 934 (2012). The method entailed calculating each customer's net equity, putting aside the fictional gains and subtracting total withdrawals from total deposits, and returning positive balances to customers on a pro rata basis. *See id.* nn. 4–5.

9. *See Melton II*, 2020 WL 3264056, at *3.

10. *See id.* at *4.

the court to fashion a ruling partly by analogy to case law involving other forms of property ownership.[11]

This adversary proceeding[12] demonstrated the underappreciated complexity of Article I bankruptcy courts' work, showing how their judges are asked to rule on just as broad a range of state and federal civil claims as Article III district courts when arriving at their bankruptcy decisions.[13] More importantly, the case also resolved a complicated common law question regarding the rights of tenants in common to represent cotenants' interests in property pro se. This Essay examines the court's ruling and provides a deeper analysis of the relevant blackletter law.

Part I analyzes the fundamentals of TIC ownership and the legal rights of tenants in common, both collectively and as individuals, and explains that TICs are not legal entities that can appear as parties to litigation. Part II briefly discusses pro se representation and its limits, and then applies the law to Dr. Melton's request. This Essay concludes by summarizing the rule that an individual tenant in common can only represent their personal stake in TIC property pro se, not the interests of fellow cotenants. The S.D.N.Y. Bankruptcy Court did not need to explore the issue comprehensively to dispose of Dr. Melton's motion—not addressing the law of pro se representation at all in its opinion—so this Essay provides a complete analysis to clarify why one tenant in common cannot represent another pro se.

I. TENANCIES IN COMMON

A TIC is an arrangement of shared ownership in which each owner has a full right of possession over a piece of property, even if one owns a greater percentage share of it than another.[14] The co-owners, called "tenants in common" or "cotenants," each have separate title to a share of the property but an "undivided" possessory interest in the whole property.[15] This means

11. *See infra* notes 28–31 and accompanying text.

12. *See* U.S. BANKR. CT., N. DIST. FLA., *Filing an Adversary Proceeding (AP) Without an Attorney*, https://www.flnb.uscourts.gov/filing-adversary-proceeding-ap-without-attorney [https://perma.cc/F4GQ-ZWR9] (last visited Jan. 5, 2022) ("An adversary proceeding (or 'AP') is a lawsuit filed separate from but related to the bankruptcy case. It is an action commenced by one or more Plaintiffs filing a Complaint against one or more Defendants and resembles a typical civil case."); *see also In re* Morris, 950 F.2d 1531, 1534 (11th Cir. 1992) (explaining that adversary proceedings are distinct from bankruptcy cases despite being argued in the bankruptcy court).

13. *See In re* Lerch, 85 B.R. 491, 493 (Bankr. N.D. Ill. 1988) ("The bankruptcy court's jurisdiction to decide any matter is invoked by the filing of a bankruptcy petition . . . . [D]uring the pendency of a bankruptcy case . . . the court enters orders that alter the rights of parties . . . ; all because of the peculiarities of bankruptcy.").

14. *See* Gonzalez v. Wilshire Credit Corp., 25 A.3d 1103, 1107 n.2 (N.J. 2011) ("A tenancy in common is the holding of an estate by different persons, with a unity of possession and the right of each to occupy the whole in common with the [others].") (quoting Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi, 912 A.2d 191, 195 (N.J. Ch. Div. 2006)).

15. *See* Fagnani v. Fisher, 15 A.3d 282, 289 (Md. 2011) ("A tenant in common holds an undivided share in the whole estate, and an equal right to possess, use, and enjoy the property."

that each may use and enjoy the property as if they were the sole owner.[16] For example, if three people each own a one-third share of a tomato garden as tenants in common, any of the three cotenants can walk in and pick a tomato from anywhere in that garden; they are not limited to taking from any particular third of it. The major difference between the rights of a sole owner and those of a tenant in common is that a sole owner can use up or destroy their property if they would like, while tenants in common cannot interfere with their cotenants' rights to enjoy the property[17] without permission from or a contract with their cotenants allowing them to do so.[18]

Dr. Melton and his brother shared their BLMIS account in this manner.[19] For one cotenant to be able to represent their fellow cotenants' similar or identical interests pro se in court—for Dr. Melton to be able to represent his brother—it must mean that either (1) the TIC interests can form a single legal entity that can speak with one voice, and the pro se cotenant can be that voice, or (2) the pro se cotenant can sue on behalf of other cotenants even though their interests are legally distinct. Parts I.A and I.B respectively explain that neither are the case under the common law of TICs.

A. Not Legal Entities

A TIC is not a legal entity on its own,[20] but merely a manner in which other entities or persons share ownership of a piece of property.[21] As a nonentity, a TIC cannot sue or be sued in its own name; it must litigate by and through its cotenant owners.[22] When Dr. Melton and his cotenant brother turned ownership of their BLMIS account over to an LLC, the account went

(internal quotation marks and alterations omitted) (quoting Downing v. Downing, 606 A.2d 208, 211 (Md. 1992))).

16. *See* Butler *ex rel.* Butler v. Rafferty, 792 N.E.2d 1055, 1058 (N.Y. 2003) (calling this aspect of TICs their "distinguishing feature").

17. *See* 86 CORPUS JURIS SECUNDUM, Tenancy in Common § 60 (regarding waste, "[o]dinarily any action by a tenant in common which causes the destruction or permanent injury of the property held in common constitutes waste for which he or she is liable"); *see also* Caprer v. Nussbaum, 825 N.Y.S.2d 55, 63 (N.Y. App. Div. 2006) (regarding overuse and exhaustion of TIC property, one cotenant's use cannot leave another cotenant "excluded from similar use and enjoyment").

18. *See* Reishus v. Bullmasters, LLC, 409 P.3d 435, 439 (Colo. App. 2016) ("[T]he general rules of tenancies-in-common will not control where there is a contrary agreement." (internal quotation marks and alterations omitted) (quoting *Butler*, 792 N.E.2d at 1058 (N.Y. 2003))).

19. *See Melton II*, No. 08-01789, 2020 WL 3264056, at *1 (Bankr. S.D.N.Y. June 10, 2020).

20. *See* Munkdale v. Giannini, 41 Cal. Rptr. 2d 805, 811 (Cal. App. 1995) (calling joint tenancies and TICs "nonentities").

21. *See* Zimmerer v. Clayton, 7 N.J. Tax 15, 22 (1984) ("[T]he term 'partnership' describes a kind of legal entity whereas the term 'tenancy in common' describes a form of property ownership.").

22. *See* Oliver v. Swiss Club Tell, 35 Cal. Rptr. 324, 329 (Cal. Ct. App. 1963) ("A civil action can be maintained only against a legal person, i.e., a natural person or an artificial or quasi-artificial person; a nonentity is incapable of suing or being sued."); *see also* Butler *ex rel.* Butler v. Rafferty, 792 N.E.2d 1055, 1059 (N.Y. 2003) (finding that the remedy for a plaintiff injured on property owned by tenants in common is to sue the cotenants jointly or severally for damages).

from being owned by two legal persons (the brothers, as individual cotenants) to one (the LLC)[23] at that time. "TIC" is merely descriptive of *how* the brothers shared ownership of the account—it is not a separate entity that actually owned the account the way the LLC later did.

B. Suing on Behalf of Other Cotenants

With TIC property unable to stand as a legal person on one side of the "v." in a legal case, the question becomes whether one cotenant—Dr. Melton—can step in and litigate on behalf of other cotenants despite their having distinct legal interests. Usually, a cotenant is limited to only representing their personal stake in TIC property in court, not representing the full interest.[24] For example, if a brother and sister are equal cotenant owners of a house and owed a total of one thousand dollars in rent from a lessee, the sister can sue the lessee for the $500 owed to her personally but not the full one thousand dollars.[25] The policy justification for requiring cotenants to join each other in lawsuits and not allow any one cotenant to represent the full interest is to avoid "(1) a multiplicity of suits; (2) several recoveries for one [breach or tort; and] (3) an inconvenience for the parties."[26]

If Dr. Melton had been right that the TIC-owned BLMIS account still existed, he only could have filed a claim with the court to recover the one-half to which he held legal title. But he filed "on behalf of Melton TIC" as if it were an entity, or at least as if he was representing both its owners, which was outside his power as an individual cotenant.[27]

The S.D.N.Y. Bankruptcy Court found a case analogizing condominium ownership to TIC ownership to be instructive.[28] In *Caprer v. Nussbaum*,[29] the New York court explained how a single owner in a condominium complex is personally affected by the general finances of the complex and the conditions in the common areas that tenants share, but one owner cannot personally take legal control over those general finances or areas.[30] Under New York law, condominiums have boards of managers that are recognized as legal entities with "exclusive capacity . . . to sue on behalf of the

23. *See* O'Reilly v. Valletta, 55 A.3d 583, 587 (Conn. App. 2012) ("A limited liability company is a distinct legal entity whose existence is separate from its members.").

24. *See* Nemet v. Bos. Water & Sewer Comm'n, 775 N.E.2d 750, 757 (Mass. 2002) ("[O]ne cotenant [may] bring suit against a third party without being required to join other cotenants as necessary parties. However, the cotenant bringing the action is permitted to recover for damages only to his or her interest." (internal quotation marks, citations, and alterations omitted)).

25. *See* Most v. Passman, 70 P.2d 271, 272–73 (Cal. App. 1937) ("[W]here one tenant in common obtains judgment against a stranger for possession of the entire premises, he cannot recover all the rents and profits, but only a proportion thereof corresponding to his interest in the land.").

26. Vee Bar, Ltd. v. BP Amoco Corp., 361 S.W.3d 128, 132 (Tex. App. 2011).

27. *Melton II*, No. 08-01789, 2020 WL 3264056, at *3 (Bankr. S.D.N.Y. June 10, 2020).

28. *See id.* (citing Caprer v. Nussbaum, 825 N.Y.S.2d 55 (N.Y. App. Div. 2006)).

29. 825 N.Y.S.2d 55 (N.Y. App. Div. 2006).

30. *See id.* at 64.

condominium" as a whole.[31] The only manner by which owners personally may sue to rectify problems with the common finances or spaces is by filing derivative suits on behalf of their board of managers, like shareholders in a corporation.[32] Condo owners must work through a recognized legal entity for such matters.

Tenants in common do not have boards of managers or corporate boards on behalf of which they can derivatively sue, so they are just as powerless to represent common interests as condo owners without a board.[33] If a tenant in common wishes to sue to advance the shared interests of all cotenants, they need to join all the other cotenants in the suit,[34] even if that just means getting their brother to sign the court filings.[35]

The S.D.N.Y. Bankruptcy Court did not need to go any further to dispose of Dr. Melton's motion. However, this Essay looks at the one remaining legal question that would have needed to be resolved in Dr. Melton's favor for him to pursue his desired claim: If he could speak individually for the common interest of all cotenants,[36] could he do so pro se? If not, it would have served as an independent ground for the court to deny his motion.

II. PRO SE REPRESENTATION

Any person in the United States can choose to represent themselves in a court of law without the assistance of a lawyer.[37] To do so is to be litigating "pro se," which is Latin for "for oneself."[38] In criminal cases, the Sixth Amendment[39] "grants to the accused personally the right to make [their]

31. *Id.*

32. *See id.* at 68. ("[W]hile a condominium unit owner may not, as a general matter, sue individually to protect his or her interest in the common elements of the condominium, a unit owner may bring a derivative action on behalf of the condominium.").

33. *See id.* at 64.

34. *Melton II*, No. 08-01789, 2020 WL 3264056, at *3 (Bankr. S.D.N.Y. June 10, 2020) (quoting *Caprer*, 825 N.Y.S.2d at 64); *see also* Vee Bar, Ltd. v. BP Amoco Corp., 361 S.W.3d 128, 132 (Tex. App. 2011) (stating that it is a "well settled rule that in a suit to recover for injury to real property, all the tenants in common must join"); Low v. Mumford, 14 Johns. 426, 426 (N.Y. Sup. Ct. 1817) (providing the common law rule that "[i]n an action for a nuisance to land, all the co-tenants must join as plaintiffs").

35. The S.D.N.Y. Bankruptcy Court allowed the Melton brothers to make a motion to vacate an order the year before when they were *both* listed as pro se movants. *See Melton I*, No. 08-01789, 2019 WL 3436542, at *1 (Bankr. S.D.N.Y. July 26, 2019).

36. There are certain circumstances in which a tenant in common can litigate to protect their personal interest in property that incidentally implicates every cotenant's interest, so it is not impossible that a similar case could require further analysis. For example, if a trespasser is occupying all of a property owned by tenants in common, one cotenant can sue to eject the trespasser to aver their own possessory interest, even though that interest is identical to their cotenants'. *See* Dahlberg v. Holden, 238 S.W.2d 699, 702 (Tex. 1951) ("The general rule is that a plaintiff by showing that he owns a definite undivided interest in a tract of land, and that the defendant is a trespasser [claiming to own the land outright], may recover the entire interest.").

37. 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

38. *Pro Se*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. U.S. CONST. amend. VI.

defense."[40] The statutory right to proceed pro se in criminal and civil cases predates the constitutional right, stemming from the Judiciary Act of 1789[41] signed by President George Washington one day before the Sixth Amendment was proposed.[42]

While a *personal* right to representation exists, U.S. law provides no right to represent *others*.[43] States may regulate what qualifications law practitioners must attain and maintain to represent others.[44] For this reason, a person who wants to see another's legal rights protected in a court of law needs to hire a lawyer for that person.[45] Part II.A explains that the self-representation right is not transferable to other persons or entities, and Part II.B applies the law to Dr. Melton's motion.

A. Exclusively a Personal Right

The right to argue before a court pro se does not extend to representing others—not even very close relatives. For example, when a non-attorney parent wishes to represent their minor child's interests pro se, they are not allowed to do so and must hire a lawyer for their child.[46] The same applies to a court-appointed non-attorney guardian wishing to argue pro se on behalf of their minor ward.[47] Under the Federal Rules of Civil Procedure, courts must appoint a minor involved in a case with a qualified guardian ad litem who is an attorney,[48] and having a non-attorney parent or guardian provide what will likely be less proficient representation is not a sufficient substitute as a matter of policy.[49] Once a person seeks to represent another pro se, they

40. Faretta v. California, 422 U.S. 806, 819 (1975).

41. 1 Stat. 73, 92 § 36 (1789). The provision is now under 28 U.S.C. § 1654, and the language has changed little.

42. *Faretta*, 422 U.S. at 813.

43. *See* Bradwell v. Illinois, 83 U.S. 130, 139 (1872). The specific holding of *Bradwell*—that states do not need to allow women to practice law—was overruled as recognized in *Planned Parenthood of the Heartland v. Reynolds* ex rel. *State*, 915 N.W.2d 206, 245 (Iowa 2018).

44. *In re* Griffiths, 413 U.S. 717, 722–23 (1973) ("It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant [possesses] 'the character and general fitness requisite for an attorney and counselor-at-law.'" (quoting Law Students Rsch. Council v. Wadmond, 401 U.S. 154, 159 (1971))).

45. There are exceptional circumstances in which courts recognize third-party standing, however. Courts make such exceptions when a litigant has (1) suffered an "injury in fact," (2) the litigant's injury has given him or her a "sufficiently concrete interest in the outcome of the issue in dispute," (3) the litigant has a "close relation" to the third party, and (4) there exists "some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 411 (1991) (internal citations and quotation marks omitted) (quoting Singleton v. Wulff, 428 U.S. 106, 112–16 (1976)).

46. Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) ("[A] minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney.").

47. Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990).

48. FED. R. CIV. P. 17(c)(2).

49. *See Cheung*, 906 F.2d at 61 ("[I]t is not in the interests of minors or incompetents that they be represented by non-attorneys.").

have stretched the definition of pro se beyond what it can bear, and they are requesting to engage in the unlicensed practice of law.[50]

B. Dr. Melton's Pro Se Problem

Dr. Melton's motion was unsuccessful because the court held: "[h]e lack[ed] standing to assert the rights of the other tenants in common . . . and they have failed to join in the Letter Motion to assert their own interests."[51] Even if the court had ruled differently on the standing issue and allowed Dr. Melton to represent his brother's interest in the TIC property, he would not have been able to do so pro se. The two theories upon which he could have done so would have been (1) that the cotenant brothers' identical interest in the BLMIS account made them a single legal entity, or (2) he was capable of making a motion on behalf of other tenants in common without their joinder. These theories both fall flat for the reasons put forth in sections I.A and I.B, respectively, but they also fail to clear an additional hurdle: neither business entities nor groups of non-lawyer individuals can ever be represented pro se.

If the court found that Dr. Melton's TIC account was still active and an entity capable of filing a claim, he would need to hire a lawyer to make that filing. Business entities are legal abstractions, not people, and "abstractions cannot appear pro se."[52] Even when a person is the sole shareholder of a business entity, and the business is merely their alter-ego and no one else would be harmed by a judgment against it, they cannot represent the entity's interests pro se.[53] The sole shareholder and the business are two distinct legal persons, and the shareholder cannot transfer their personal, statutory self-representation right to the separate entity.[54] When a business entity appears before a court, the attorney representing it is the business's agent, and a person cannot simultaneously be arguing pro se, "for oneself," and on behalf of another party.[55] Dr. Melton would not have been allowed to serve as both the co-owning principal and the litigating agent of a separate legal entity had the court considered it.

Just as a parent cannot represent their child pro se,[56] one sibling cannot represent another pro se,[57] nor can any other non-lawyer represent another

50. *Id.*; *see also* State v. Settle, 523 A.2d 124, 129 (N.H. 1987) (stating that an unincorporated association of persons is "[by] its very nature as a collection of individuals necessarily and by definition [precluded from] appearance pro se by one individual").

51. *Melton II*, No. 08-01789, 2020 WL 3264056, at *3 (Bankr. S.D.N.Y. June 10, 2020).

52. Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1427 (7th Cir. 1985).

53. Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co., 748 F.2d 602, 609 (11th Cir. 1984).

54. *Id.*

55. Zapata v. McHugh, 893 N.W.2d 720, 725 (Neb. 2017) (stating that it is well-accepted that businesses "must appear through an agent; thus, they are not their own proper persons who may appear in court without the representation of an attorney").

56. Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986).

57. Gayle v. NYS Div. of Parole, No. 95 CIV. 10552, 1997 WL 53156, at *2 (S.D.N.Y. Feb. 10, 1997) (Sotomayor, J.) (finding that one brother could not make a pro se motion on behalf of his late brother's estate, stating "[a] person proceeding pro se can not represent anyone but himself").

individual. The reason behind this rule involves less abstraction than the one prohibiting pro se representation of businesses, being evident from a plain reading of the statute creating the right to self-representation. The statute, 28 U.S.C. § 1654, allows for representation "personally," meaning representation of oneself, "or by counsel."[58] A non-lawyer representing another person falls into neither of those categories.

The Melton brothers, even if identically aggrieved, would not be able to proceed with Dr. Melton representing them, just as a class of all-pro se litigants cannot carry out a class action suit.[59] Had Dr. Melton passed the Bar instead of the Boards, he would have no problem representing his brother. But a person cannot represent another in court unless they are a lawyer, regardless of their relationship. Each Melton could have filed a claim for the half of the account balance to which they believed they were owed, but neither of them could have made a pro se argument regarding the other brother's half.[60]

The reason the Meltons transferred ownership to a single LLC was likely to avoid having to protect their identical but separate legal interests individually. But with the benefits of corporate abstraction comes the burden of having to hire a lawyer to represent the resultant entity.[61] Dr. Melton could not bypass that requirement by utilizing his personal right to self-representation.

CONCLUSION

An individual tenant in common cannot represent the legal interests of their cotenants pro se. A tenant in common cannot litigate on behalf of an entire TIC because a TIC by definition is a collection of multiple persons' interests, not a single entity that can speak with one voice.[62] A tenant in common cannot represent anything but their personal stake in TIC property; they cannot bring or defend claims involving their cotenants' interests.[63] Even if they could, they would not be allowed to do so pro se because the right to self-representation is truly limited to oneself, and thus it cannot be extended to even closely related persons or legal entities.[64] If the Melton

58. *See* Turner v. Am. Bar Ass'n, 407 F. Supp. 451, 477 (N.D. Tex. 1975) ("28 U.S.C.A. § 1654, which was enacted to enforce the Sixth Amendment's guarantees to right to counsel, only allows for two types of representation: that by an attorney admitted to the practice of law by a governmental regulatory body and that by a person representing himself.").

59. *See* Nwanze v. Philip Morris Inc., 100 F. Supp. 2d 215, 218 n.3 (S.D.N.Y. 2000) (stating that there is a "well established federal rule forbidding pro se plaintiffs from conducting class action litigation").

60. *See* Nemet v. Bos. Water & Sewer Comm'n, 775 N.E.2d 750, 757 (Mass. 2002), discussed *supra* at note 24.

61. *See* United States v. Hagerman, 545 F.3d 579, 582 (7th Cir. 2008) (Posner, J.) ("Pro se litigation is a burden on the judiciary, and the burden is not to be borne when the litigant has chosen to do business in entity form. He must take the burdens with the benefits." (internal citations omitted)).

62. *See supra* Part I.A.

63. *See supra* Part I.B.

64. *See supra* Part II.A.

brothers wanted to file a claim to protect their interests as tenants in common, all owners who made up the TIC needed to join the action.[65] And even if all cotenants joined, no single tenant in common could lead the litigation pro se because the right to self-representation cannot be extended to allow for representing other persons or legal entities.[66]

The Meltons were put in a terrible situation, victimized in a fraud of historic proportions.[67] Savings that they likely were depending on for their retirements, which they had every reason to believe they had responsibly invested and grown, were gone in a flash. The S.D.N.Y. Bankruptcy Court made an admirable effort to be understanding and accommodating to the Melton brothers, whose losses made up a relatively small part of the massive mess of a bankruptcy the court had to administer. However, the court could not grant Dr. Melton's motion to proceed in the case pro se because it violated both the common law of TICs and the statutory limits of pro se representation.[68] We all may be our brothers' keepers, but we cannot necessarily be their lawyers.

65. *See supra* Part II.B.

66. *See id.*

67. *Melton I*, No. 08-01789, 2019 WL 3436542, at *1 (Bankr. S.D.N.Y. July 26, 2019) (calling Madoff's fraudulent enterprise the "largest Ponzi scheme in history").

68. *See Melton II*, No. 08-01789, 2020 WL 3264056, at *5 (Bankr. S.D.N.Y. June 10, 2020) ("The Court sympathizes with the Meltons and the personal tragedies that Madoff's Ponzi scheme has visited upon them and their families. Nevertheless, the Court must be guided by the legal principles . . . that govern the allowance of the Customer Claim.").