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Sale of Property co-owned by
ex-spouse

Rethwill v. Hansen, et al. 699-6349-fra
In re Bradley Rethwill 698-62148-fra13

7/12/00 Alley Unpublished

The Defendants in this action are the Debtor's ex-wife and parents-in-law. Prior to the petition date, Debtor and his ex-wife had filed for divorce. The Bankruptcy Court granted relief from stay to allow the state court to issue a final decree of dissolution and to determine issues of property distribution. The state court ruled that the homestead property consisting of a house on 12 acres of land be sold and, from the net proceeds, that \$20,000 be paid to the Debtor's parents-in-law for expenses associated with moving their manufactured home off the property and that the ex-wife be paid the amount of her homestead exemption. Debtor was given exclusive control over the sale of the property.

Debtor asked the Bankruptcy Court to approve a sale of the property for \$220,000. After payment of the purchase-money lien and liens for property tax and federal income tax, the net proceeds would be only \$25,000. The ex-wife would receive only \$5,000 after the \$20,000 payment to remove the manufactured home. The Defendants objected to the sale on a number of grounds, including: 1) that they should be paid from the proceeds prior to payment of liens, 2) that the Debtor did not sustain his burden under Code § 363(h), 3) that the price is inadequate, and 4) that the sale of the property should await a decision of the Oregon Court of Appeals which is reviewing the decree of dissolution.

The Court approved the sale. State and federal law requires that the liens in question be paid prior to a homestead exemption. Moreover, the parties are bound by the terms of the decree of dissolution and the parties cannot use § 363 to revisit the terms of the decree. Additionally, the Debtor's confirmed plan called for a sale of the property and this would trump the provisions of § 363(h). Given the prior attempts at marketing and the fact that the manufactured home could not be sold with the other property due to the temporary permit by which it was originally allowed, the price was found to be adequate. Finally, the pendency of the appeal of the decree of dissolution provides no grounds for delaying the sale, especially given that there was no evidence that the judgment of the state court had been stayed pending appeal.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 698-62148-fra13
BRADLEY K. RETHWILL,)
)
Debtor.)
)
BRADLEY K. RETHWILL,)
)
Plaintiff,)
vs.) Adversary Proceeding No.
) 699-6349-fra
SUSAN M. HANSEN, GEORGE HANSEN,)
and BETTY HANSEN,)
) MEMORANDUM OPINION
Defendants.)

This unfortunate case arises out of a three year struggle, in three courts, over the fate of the homestead of a divorcing couple. The disposition of the property, and the proceeds, have been the subject of a judgment and decree of dissolution of marriage entered by the Circuit Court for Lane County, and plan of reorganization confirmed by this Court. The Court, for the reasons set out below, now concludes that the proposed sale is consistent with the decree and the plan, and should go forward without further delay.

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I. BACKGROUND

1. *The Parties and Property*

The property in question is a 12 acre parcel of agricultural property in rural Lane County. A permanent dwelling on the property is occupied by Susan Hansen, the Debtor's former wife, and their two children. The older child, a daughter, is severely handicapped, and requires around the clock care at the residence.

Also situated on the property is a manufactured home occupied by George and Betty Hansen, Susan Hansen's parents. Ordinarily the property, which is in an exclusive farmland use district, would be limited to a single farm-related dwelling. The manufactured home was placed under a permit from Lane County issued in accordance with ORS 215.283(k), which provides for temporary use of an additional dwelling "for the term of a hardship suffered by the existing resident or a relative of the resident." Both Betty and George have significant health problems. In addition, George is active in the care of Debtor's and Susan Hansen's disabled daughter.

Susan, Betty and George Hansen have all objected to the sale of the property which is the subject matter of this opinion.

2. *History*

Some time in 1997 Debtor Bradley Rethwill commenced proceedings to dissolve his marriage with Susan Rethwill, now Susan Hansen.¹ This Chapter 13 case was commenced by a petition filed on April 17, 1998. At that time Debtor's Schedule A disclosed a one-half

¹ Lane County Circuit Court Case No. 15-97-04455.

1 interest in the subject property. The existence of the dissolution
2 proceeding was noted, without elaboration, in the Debtor's statement
3 of affairs.

4 A plan filed on May 4, 1998 proposed to sell the subject
5 property within six months. The Hansens did not object directly to
6 confirmation: instead, they wrote to the presiding Judge of the
7 Circuit Court objecting to Debtor's efforts to sell the property
8 through the bankruptcy. A copy of the letter was sent to this
9 Court. The Bankruptcy Court wrote to counsel for the Debtor and the
10 Trustee advising that, in light of the continuing property dispute,
11 the Court would postpone a scheduled confirmation hearing and
12 consider, at the postponed hearing, whether the automatic stay
13 should be modified to allow for completion of the dissolution
14 proceeding. This hearing took place on September 23, 1998. The
15 Court concluded that reorganization would not be possible until the
16 parties' property rights were settled by the Circuit Court. On
17 September 25, 1998 an order was entered modifying the automatic stay
18 to allow the dissolution case to proceed. Specifically:

19 The Circuit Court is authorized:

20 1. [To] enter a decree of dissolution of marriage
21 under ORS 107.105 distributing the assets of the
22 parties, and granting any other relief allowable under
23 ORS 107; and

24 2. In doing so, determine any legal issue
25 arising between the parties, or either party and the
26 Trustee, concerning the parties' respective property
rights.

27 The dissolution case was heard by the Circuit Court on
28 January 7, 1999. The Court issued a letter opinion on March 19,
1999, and on or about June 16, 1999 entered a judgment of

1 dissolution of marriage.² The decree contains the following
2 provision regarding the subject property:

3 3. **REAL PROPERTY**

4 The real property shall be immediately placed for
5 sale with petitioner [the Debtor here] in charge of
6 said sale.

7 Petitioner shall endeavor to sell said property
8 within ten months of the listing. Respondent [Susan
9 Hansen] shall cooperate in all reasonable ways to
10 facilitate the listing, showing and sale of said
11 property. Petitioner shall designate a realtor who
12 shall handle all "on site" matters due to the
13 existence of a restraining order against petitioner.
14 If petitioner's presence is required on the property,
15 arrangements shall be made with respondent, through
16 the realtor in such manner as to not run askew of the
17 requirements of any impending restraining order.

18 The net proceeds of this sale of property will be
19 distributed as follows:

20 A. Not to exceed \$20,000 to be paid to
21 respondent's parents for the removal of the
22 manufactured home on said property to the extent that
23 the Bankruptcy Court will allow it. The respondent's
24 parents, George R. and Betty Hansen, seek any
25 appropriate redress through the Bankruptcy Court in
26 keeping with their interest in the property and their
27 identifiable investment in their own home.

28 B. Wife's homestead exemption of \$25,000.

29 C. Husband's homestead exemption of \$8,000.

30 D. The IRS and State Department of Revenue back
31 tax debts in the approximate amount of \$161,900.

32 E. Any other nondischargeable debts of the
33 parties.

34 F. The Court will retain jurisdiction over this
35 sale of the real property and will monitor any
36 problems concerning price, terms, possession, or any
37 other problems with the sale.

38 Respondent shall be entitled to live with the
39 children on the family property until it is sold and
40 shall allow no waste to be committed on the property.
41 Respondent shall maintain the property in its current
42 condition and cooperate fully with the realtor for
43 showing of the property.

44 ² The judgment may be found in this Court's record as Exhibit
45 1 to Document No. 48, and is subject to judicial notice in any
46 event. The Circuit Court's letter opinion has not been made part of
47 the record of this case.

1 A timely appeal was filed raising property and support
2 issues, and the matter is presently before the Oregon Court of
3 Appeals.

4 On November 16 Debtor filed a motion, pursuant to 11 U.S.C. §
5 363(f), to sell the property free and clear of the interests of the
6 other parties, and of lien holders. The matter was heard on
7 December 8, 1999. The Court held that the sale was actually
8 pursuant to 11 U.S.C. § 363(h), and could be authorized only by way
9 of an adversary proceeding. See Fed.R.Bankr.P. 7001(3). An
10 adversary proceeding seeking a sale was commenced on December 8,
11 1999.

12 In the meantime, on December 3, 1999, an amended plan
13 providing for the sale of the property was filed. An order
14 confirming the amended plan was entered on January 25, 2000, over
15 the Hansens' objection.

16 Paragraph 11 of the order provides that:

17
18 Within six months of confirmation, Debtor is to sell
19 residence owned by Debtor and Susan Hansen, fka
20 Rethwill. Up to \$20,000 of sale proceeds to be used
21 to move manufactured home off of property, if required
22 by terms of sale agreement. Sale proceeds then used
23 to pay costs of sale and liens against property
24 including Mellon Bank, Pacific Continental Bank, IRS
25 and Lane County. Next, sale proceeds shall be used to
26 pay Susan Hansen's homestead exemption. Finally, any
remaining net sale proceeds shall be paid to the
Trustee.

There has been no appeal from the order of confirmation.

The sale contemplated by the December 1999 motion fell
through. The Debtor has found a new purchaser, and again seeks

1 authority to sell the property. Inexplicably, the Debtor filed his
2 motion seeking that authority in the main case, rather than in the
3 adversary proceeding. Nevertheless, a hearing on the proposed sale,
4 including testimony and evidence from proponents and opponents, was
5 conducted on July 6, 2000.

6 II. DISCUSSION

7 1. *Procedure*

8 As noted, the sale of property free of the interest of a co-
9 owner requires an adversary proceeding. Fed.R.Bankr.P. 7001(3).³
10 An adversary proceeding was commenced. However, the matter actually
11 came before the Court by way of a motion filed in the administrative
12 case. The Hansens did not object to proceeding in this manner,
13 other than to suggest that they were denied due process afforded
14 under the Part VII rules, after the Court broached the issue at the
15 hearing.

16 Strictly speaking, this matter should have been raised by way
17 of a motion for summary judgment, or an expedited trial in the
18 adversary proceeding. In his defense, the Debtor argues that he was
19 employing a local form mandated by this Court. In addition, and
20 more importantly, he presented evidence to the effect that the sale
21 was conditioned on closure prior to July 27, and that the sale would
22 likely be lost if not closed on time.

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25 ³ "An adversary proceeding is governed by the rules of this
26 Part VII. It is a proceeding: . . . (3) to obtain approval pursuant to
§ 363(h) for the sale of both the interest of the estate and of a
co-owner in a property; . . ." Fed.R.Bankr.P. 7001.

1 Whatever the technical posture of the case, it is clear that
2 a full, fair and complete hearing was accorded to all parties. Both
3 the Debtor and the objecting parties presented detailed evidence,
4 including a written appraisal and the testimony of the appraisal's
5 author. The dispute has been ongoing, in one form or another, for
6 over two years. (Note, for example, the arguments raised in Susan
7 Hansen's letter to the Circuit Court in 1998, raising essentially
8 the same issues as were raised here.) The objecting parties have
9 not been deprived of any opportunities for discovery or presentation
10 of their case, and cannot be said to be prejudiced by the fact that
11 the Debtor proceeds under the wrong caption. Failure to proceed at
12 this juncture would merely exalt form over substance, at undue cost
13 to the Debtor and creditors. See e.g. In re Sutton, 1990 WL 25050
14 (D.N.J. 1990).

15 2. *Merits of the Motion*

16 A. **Effect of Decree and Plan of Reorganization:**

17 The Hansens object on the grounds that the proposed sale is
18 inconsistent with the decree of dissolution. Specifically, they
19 complain that the proposal to pay all debts secured by the subject
20 property before the funds payable to them is inconsistent with the
21 decree.

22 Debtor proposes to sell the property for \$220,000. It is
23 subject to a mortgage, property tax lien, and federal tax lien.
24 After payment of the debts secured by these liens and the costs of
25 sale approximately \$25,000 will remain, of which \$20,000 is payable
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1 to Betty and George Hansen. This will leave only \$5,000 to apply
2 toward Susan Hansen's "homestead exemption."

3 Hansens argue that the proceeds of the sale must be distributed
4 according to the divorce decree, which means that their \$45,000
5 would be paid before any debt owed to the IRS. This, in my view,
6 misconstrues the decree. In providing for payment of "net" sale
7 proceeds, the Circuit Court necessarily meant proceeds after payment
8 of any liens, since the Court is without jurisdiction to act in
9 derogation of the interests of any lien creditor.⁴ The decree must
10 be construed as consistent with applicable law.

11 Susan Hansen claims that her "homestead exemption" must be
12 satisfied. However, a homestead exemption is inferior to the pre-
13 existing mortgage, ORS 23.260, property tax lien, ORS 311.405(2),
14 and federal tax lien, In re Raihl, 152 B.R. 615 (BAP 9th Cir. 1993).
15 The only claim being paid in derogation of her homestead right is
16 the \$20,000 the Circuit Court directed to be paid to the parents to
17 defray the costs of moving the manufactured home.

18 This Court has previously held in this case that the parties and
19 the Court are bound by the property distribution made by the Circuit
20 Court. It follows that the plan of reorganization must be construed
21 in light of the decree, and as being consistent with the decree. I
22 hold that the plan has the effect of carrying out the decree of the
23

24 ⁴ ORS 105.285 provides for the order of distribution of
25 proceeds from the sale of real property in which there are co-owners
26 and partition is found to be impracticable. It provides that any
liens be paid in the order of their priority prior to a distribution
of the residue to the owners of the property sold.

1 Circuit Court, and that the proposed sale is consistent with both
2 the plan and the decree.

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4 The Hansens further object that this Court is without authority
5 to approve the sale price over their objection, because jurisdiction
6 to do so was reserved by the Circuit Court. While the Circuit Court
7 may reserve jurisdiction, it may not deprive this Court of
8 jurisdiction over the sale of estate property. The jurisdiction of
9 the Courts is concurrent. Review of the adequacy of the sale price
10 is not, moreover, in derogation of the Circuit Court's decree, but
11 in support of it.

12 **B. The Effect of Code § 363(h)**

13 Hansens argue that the sale is governed by Code § 363(h), and
14 that the Debtor has not sustained his burden of proving that the
15 sale qualifies under that section: Code § 363(h) provides for the
16 sale of property in which the Debtor had, at the time of the
17 commencement of the case, an undivided interest as a tenant in
18 common, joint tenant, or tenant by the entirety. Since the divorce
19 petition had been filed by the time this case commenced, the
20 parties' interest was a "species of joint property." ORS 107.105.
21 For a sale to qualify under § 363(h) the proponent must demonstrate
22 that "the benefit to the estate of a sale of such property free of
23 the interests co-owners outweighs the detriment, if any, to such co-
24 owners."

25 To be sure, the Hansens will be subjected to a considerable
26 hardship if the property is sold and they are forced to relocate.

1 Susan Hansen is required to provide full time care to a seriously
2 impaired child, and does not have the resources to acquire a new
3 residence if she only receives \$5,000 from the sale. George and
4 Betty are in ill health, and also would be adversely affected by the
5 move. Moreover, the elder Hansens are at risk financially because
6 ORS 215.283(k), and the terms of their placement permit, require
7 that the manufactured home be removed from the property within 90
8 days of the time they move away. (Presumably, this is the reason
9 the Circuit Court made the unusual award to them in the decree of
10 dissolution.)

11 Assuming, without deciding, that the detriment to the co-owners
12 outweighs the benefit to the estate, I find that the circumstances
13 of this case require that the property be sold.

14 First, the parties are bound by the terms of the judgment of
15 dissolution. The judgment fashions the property rights of the
16 parties, by requiring its sale and providing for the distribution of
17 proceeds. Admittedly, the property, if sold pursuant to the present
18 motion, will not yield as much money as the Circuit Court evidently
19 contemplated. However, a lower than anticipated value is a common
20 aspect of both bankruptcy and divorce cases, and there is no reason
21 to suppose that the Circuit Court did not take that prospect into
22 account. In other words, the decree must be construed as
23 establishing a priority, rather than an absolute right to payment.
24 To suggest otherwise would be to argue that the Circuit Court
25 mandated a value which, as shall be seen, does not exist.

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1 Code § 363 provides for use, sale or lease of property of the
2 estate. In this case the property is being sold not under the
3 auspices of Code § 363, but of the decree and plan. Where § 363(h)
4 and a decree of dissolution of marriage conflict, the decree of
5 dissolution must prevail. Section 363 is largely procedural in
6 nature, and takes into account the property interests of the parties
7 as they exist at the time of the sale. On the other hand, Oregon
8 law and the dissolution process actually shape the interests of the
9 parties. The decree of dissolution reduced the Hansens' interest in
10 the property to a right to a priority of payment when the property
11 is sold. They cannot employ Code § 363 to revisit the Circuit
12 Court's decision. This is particularly so in light of the fact that
13 the Circuit Court itself must be deemed to have taken the relative
14 hardship of the parties into account. See ORS 107.105(1)(f). See
15 also Matter of the Marriage of Sheumaker, 98 Or.App. 350, 779 P.2d
16 194, 195 n.1 (1989); Matter of the Marriage of Kilpatrick, 38
17 Or.App. 155,162, 589 P.2d 1153,1155 (1979).

18 It also appears that the provisions of the confirmed plan may
19 trump § 363(h). Section 1303 provides that a debtor has, exclusive
20 of the trustee, the rights and powers of a trustee under §§ 363(b),
21 (d), (e), (f), and (l). Exclusion of § 363(h) suggests that, once
22 the property is revested upon confirmation of a plan, the plan,
23 rather than § 363(h), controls the sale and distribution of
24 property.

25 The Hansens maintain that they are not bound by the plan, since
26 they are not, strictly speaking, creditors. I disagree. Susan

1 Hansen is unquestionably a judgment creditor under the judgment of
2 dissolution. The actual, if not stated, effect of the decree is to
3 place the Hansens in the position of lien creditors. The plan and
4 order confirming the plan recognizes reality, and makes appropriate
5 provisions.

6 **C. Adequacy of Price**

7 Susan Hansen objects because she was not consulted about, and
8 does not consent to, the terms of the sale. However, conduct of the
9 sale was clearly left in the Debtor's hands by the Circuit Court,
10 subject to the judicial review of the adequacy of the price. Once
11 that judicial approval is in hand, her consent to the sale is
12 immaterial.

13 Adequacy of price: Finally, the Hansens assert that the \$220,000
14 sale price is inadequate. In support of their claim they present
15 the report and testimony of an appraiser who claims that the
16 property is worth \$300,000. They further argue that the property
17 should be sold with the manufactured home in place, thereby
18 recapturing its value and avoiding the expenditure of \$20,000 to
19 move it. The appraisal is premised on that proposal.

20 The proposal and the appraisal are flawed, because applicable
21 land use law requires that the manufactured home be removed if and
22 when the basis for the installation permit—the health problems of
23 George and Betty Hansen—no longer exist. In other words, unless the
24 property is sold to someone else eligible for a permit, the
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1 manufactured home must be removed upon sale of the property.⁵ The
2 appraiser testified that the manufactured home enhances the value by
3 \$45,000. It follows that his view of the value of the property
4 without the manufactured home would be \$255,000.

5 As is often the case, the marketplace has spoken with greater
6 authority than the appraiser. The subject property was listed for
7 \$298,000 in June 1999. The listing realtor testified that there was
8 no interest for the ensuing 45 days. Thereafter the price was
9 reduced to \$249,500, which reduction elicited "mild interest," but
10 no offers. The property was ultimately reduced to \$239,000.
11 Ultimately the existing sale proposal was negotiated.

12 Neither the decree nor the plan of reorganization require that
13 the subject property be sold for a minimum price. It is sufficient
14 that the price bear a reasonable relationship to the property's fair
15 market value, after reasonable and customary efforts to market the
16 property have been made. I find that such efforts have been made
17 here. The Hansens' evidence of one perspective purchaser having
18 been overlooked is insufficient to establish that good faith efforts
19 to market the property have not been made. This is particularly so
20 in light of the difficulty the marketing professionals have had in
21 showing the property.

22 Finally, the Hansens object to a provision in the sale agreement
23 requiring removal of the manufactured home within 21 days, and
24 imposing a \$100 per day penalty for every day thereafter. While

25 ⁵ The proposed sale here in fact requires the manufactured
26 home's removal.

1 these requirements are rigorous, it must be viewed in light of the
2 fact that the Hansens have had ample notice of the prospect of the
3 move, both by virtue of the requirement that the property be sold,
4 and state law requirements that the manufactured home be removed.

5 **D. Pendency of Appeal**

6 Finally, the Hansens argue that sale of the property should
7 await the decision of the Oregon Court of Appeals, which is
8 reviewing the decree of dissolution. There is no evidence that the
9 judgment of the State Court has been stayed pending appeal. The
10 Debtor and lien creditors are entitled to the relief fashioned by
11 the Circuit Court, and provided for in the plan of reorganization.
12 The pendency of the appeal does not, in and of itself, provide
13 grounds for delaying the sale.

14 **III. CONCLUSION**

15 A judgment and order shall be entered authorizing and directing
16 the sale of the subject property pursuant to the terms of the
17 Debtor's agreement with the purchaser. The proceeds of the sale
18 shall be paid first to the immediate and customary costs of the
19 sale, including real estate commissions previously authorized by the
20 Court; then to any valid and subsisting lien against the property in
21 order of priority. Of the balance, not more than \$20,000 shall be
22 paid to George and Betty Hansen for their actual costs incurred in
23 removing the manufactured home. Such costs shall not include the
24 costs of acquiring a new site. The balance remaining thereafter
25 shall be paid to Susan Hansen.

26 Counsel for the Debtor shall prepare a judgment and order
consistent with the foregoing. This opinion constitutes the Court's

1 findings of fact and conclusions of law, which will not be
2 separately stated.

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FRANK R. ALLEY, III
Bankruptcy Judge

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