

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-13153-JMD
Chapter 7

Stanley W. Jackson,
Debtor

Victor W. Dahar,
Chapter 7 Trustee,
Plaintiff

v.

Adv. No. 02-1085-JMD

Stanley W. Jackson,
Capital Crossing Bank,
Fleet Bank - NH,
Tax Collector, Town of Hebron,
Susan Jackson,
Defendants

S. William Dahar, II, Esq.
Victor W. Dahar, P.A.
Manchester, New Hampshire
Attorney for Victor W. Dahar, Trustee

Tax Collector
Town of Hebron, New Hampshire
PRO SE

Donald C. Crandlemire, Esq.
WIGGIN & NOURIE, P.A.
Manchester, New Hampshire
Attorney for Defendant Susan Jackson

James S. LaMontagne, Esq.
SHEEHAN, PHINNEY, BASS + GREEN
Manchester, New Hampshire
Attorney for Capital Crossing Bank

John R. Michels, Esq.
MICHELS & MICHELS
Londonderry, New Hampshire
Attorney for Defendant Stanley W. Jackson

Thomas E. Carlotto, Esq.
SHECHTMAN, HALPERIN SAVAGE, LLP
Providence, Rhode Island
Attorney for Fleet Bank - NH

MEMORANDUM OPINION

I. INTRODUCTION

Victor W. Dahar, Chapter 7 Trustee, (the “Trustee”) seeks to sell a single family residence owned by the Debtor and his non-debtor spouse free of the non-debtor spouse’s

interests pursuant to section 363(h) of the Bankruptcy Code.¹ The Debtor's spouse, Susan Jackson ("Jackson"), is not a debtor in this Court and opposes the sale on the grounds that the Trustee has not satisfied the requirements of the Bankruptcy Code governing such sales. After a trial on the merits on May 29, 2003 and June 2, 2003, the Trustee and Jackson submitted post-trial memoranda of law on June 13, 2003 and the Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor and Jackson own a home in Hebron, New Hampshire as joint tenants with rights of survivorship. The home is located on approximately 12 acres of land with 225 +/- feet of frontage on Newfound Lake (the "Property"). The residence is adjacent to the lake frontage and is accessed by a private drive through the parcel. Access easements to adjacent parcels cross the Property. The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 15, 2001 (the "Petition Date"). In his bankruptcy schedules the Debtor listed his undivided 50% interest in the Property at \$400,000.00, or a total value for the Property of \$800,000.00. The Debtor also scheduled liens against the Property as a tax lien to the Town of Hebron in the amount of \$5,440.69, a first mortgage held by Capital Crossing Bank in the

¹ In this opinion, the words "Bankruptcy Code" or "Code" shall mean Title 11 of the United States Code.

amount of \$514,905.02 and a second mortgage held by Fleet Bank - NH in the amount of \$142,554.97, for a total of \$662, 900.68. As of the time of trial the liens on the Property were:

Town of Hebron - real estate tax liens	\$ 23,752.12
Capital Crossing Bank - mortgage	\$513,129.03
Fleet Bank - NH - mortgage	<u>\$135,637.40</u>
Total	\$672,518.55

In his bankruptcy schedules, the Debtor claimed, without objection, a \$30,000.00 homestead exemption in the Property under applicable state law pursuant to section 522(b)(2) of the Bankruptcy Code. The parties agree that as of the time of trial Jackson is entitled to a \$50,000.00 homestead exemption in the Property under New Hampshire law.² On June 13, 2002 the Trustee commenced this adversary proceeding seeking authority to sell the Property free of Jackson's interests. On July 1, 2002, the Trustee obtained a purchase and sale agreement with a third party buyer for the Property at a selling price of \$1,225,000.00. As of the time of trial that purchase and sale agreement had expired, but the third party buyer testified that he was still willing to purchase the Property under the terms of the agreement at the same price.

Jackson, 59 years old, is married to the Debtor, 71 years old. They jointly designed and built a residence on the Property and have lived there for the past 22 years while raising three children. The home was designed to accommodate single floor living in the event that either the Debtor or Jackson became unable to climb stairs. In recent years, the Debtor has suffered a series of serious health conditions with Jackson serving as his primary care giver. Although their children are all adults, the home is large enough to permit them to both visit or live at the

² Chapter 70 of the Laws of 2001 increased the homestead exemption available under New Hampshire law, NHRSA 480:1, from \$30,000.00 to \$50,000.00 effective January 1, 2002.

residence. At least one child has been living with the Debtor and Jackson at the Property in recent years.

III. DISCUSSION

Section 363(h) permits the Trustee to sell both the estate's interest and Jackson's interest in the Property only if four conditions are satisfied. The first condition is that partition in kind of such property among the estate and the co-owner is impracticable. See 11 U.S.C. § 363(h)(1). The Court granted partial summary judgment in favor of the Trustee on this condition by an Order dated March 31, 2003 (Doc. No. 67). The parties agree that the fourth condition is satisfied since the Property is not used in the production, transmission or distribution, for sale, of energy. See 11 U.S.C. § 363(h)(4). The evidence at trial and the post-trial arguments of the Trustee and Jackson involve the second and third conditions under section 363(h):

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; . . .

A. Sale of the Estate's Undivided Interest

At trial the third party buyer for the Property testified that he would have no interest in purchasing an undivided 50% interest in the property. The Trustee testified that based upon more than twenty years experience as a trustee, he believes that the sale of a 50% interest in a single family residence would be difficult, if not impossible. Jackson offered no evidence regarding the market for or the Trustee's ability to sell an undivided 50% interest in a single family residence. The Trustee's real estate expert, Russ Thibeault, testified that despite the

nearly twelve acre size of the Property, most of the value was in the frontage along the lake. He also testified that attempting to share the use of the lake frontage with another owner would diminish the aggregate value of the Property substantially, possibly up to 50%.

Jackson contends that the Trustee provided no evidence that the sale of the estate's undivided 50% interest in the Property would realize significantly less than the sale of the Property free of the interests of the co-owner. However, the Trustee did present some evidence on the fact that such a sale was unlikely and evidence on the impact that shared use of the Property's lake frontage might have on value. Although the Trustee's evidence was minimal, Jackson did not present any contravening evidence. Furthermore, the Trustee's evidence supports his contention that it would be difficult, if not impossible, to sell an undivided interest in any single family residence, especially where the debtor and his spouse have resided in the property for 22 years and continue to reside there.

The Trustee's expert testified that shared use of the lake frontage would have a material adverse impact on the value of the Property. The evidence at trial fully supports the conclusion that the market for an undivided 50% interest in a single family home is small to non-existent. Bakst v. Griffin (In re Griffen), 123 B.R. 933, 935-36 (Bankr. S.D. Fla. 1991) (finding that the co-owner's undivided one-half ownership interest and actual residence in the property would chill the interest of a prospective purchaser); Maiona v. Vassilowitch (In re Vassilowitch), 72 B.R. 803, 808 (Bankr. D. Mass. 1987) (holding that in the absence of any evidence to the contrary, court took judicial notice that a sale of a 50% interest would be worth less than the sale of the entire interest).

The evidence also reflects the legal status which a third party purchaser of the estate's interest would enjoy. The Debtor and Jackson are in possession of the Property and, as this

adversary proceeding demonstrates, are unwilling to relinquish possession or control of their home to a third party. A sale of the estate's 50% undivided interest could convey no guarantee of any actual possessory interest in the Property. Any buyer of such an interest would either be at the mercy of the Debtor and Jackson or would be faced with the need to seek a partition of the Property as a co-owner. See NHRSA 547-C. This Court has previously granted summary judgment in favor of the Trustee on the partition condition in section 363(h)(1) of the Bankruptcy Code based upon the impracticality of partitioning the Property into parcels of equal value based upon the configuration of the Property, the mortgage liens and the location of the residential structure. Therefore it is likely that an action for partition under state law would result in the sale of the property, precisely the result that Jackson seeks to avoid.

Although the Trustee presented minimal evidence on this issue, Jackson presented none. The evidence presented supports the Trustee's position and is consistent with the legal impediments which would undoubtedly reduce the value of a sale of the estate's undivided 50% interest subject to the interests of Jackson. Accordingly, the Trustee has established by a preponderance of the evidence that a sale of the estate's 50% undivided interest in the Property would realize significantly less for the estate than the sale of such interest together with Jackson's interest in the Property.

B. Benefit to the Estate v. Detriment to Jackson

Section 363(h)(3) of the Bankruptcy Code requires the Trustee to prove, and this Court to rule, that the benefit to the estate of a sale free of the interests of a non-debtor co-owner outweighs any detriment to such co-owners. The Bankruptcy Code expressly preserves the economic interests of non-debtor co-owners in the proceeds of sale of property without their consent. See 11 U.S.C. §§ 363(i) and (j). Accordingly, the provisions of section 363(h)(3) of the

Bankruptcy Code would be meaningless unless the Court is required to consider non-economic factors in the balancing test. The requirement to consider non-economic factors is implicit in the Bankruptcy Code. Community Nat'l Bank and Trust Co of N.Y. v. Persky (In re Persky), 893 F.2d 15, 20-21 (2nd Cir. 1989).

Not surprisingly, the balancing of the detriment to a co-owner versus the benefit to the estate is a fact sensitive analysis that is decided on a case by case basis. Where the benefit to the estate is small, or speculative, and the impact on the co-owner's life is large, the courts have denied a trustee's request to sell a personal residence. Berland v. Gauthreaux (In re Gauthreaux), 206 B.R. 502, 506-07 (Bankr. N.D. Ill. 1997) (denying trustee's request to sell where debtor did not live in the property, the non-debtor co-owner could not qualify for a loan sufficient to exercise his right to credit bid and the value to the estate was speculative); Bakst v. Griffin (In re Griffin), 123 B.R. 933, 936 (Bankr. S.D. Fla. 1991) (denying trustee's request to sell where the return to the estate after factoring in the costs and expenses of sale would be minimal, the co-owner could not obtain financing to credit bid and had lived in the property for 14 years); Hunter v. Levesque (In re McCoy), 92 B.R. 750, 753 (Bankr. N.D. Ohio 1988) (denying trustee's request to sell where benefit to the estate was minimal and the economic and emotional harm to a mentally incompetent co-owner was severe); Salem v. Coombs (In re Coombs), 86 B.R. 314, 318 (Bankr. D. Mass. 1988) (denying trustee's request to sell where state law would require proceeds from the sale of property owned as tenants by the entireties to be placed on deposit with interest during the joint lives of the debtor and co-owner). Where the financial benefit to the estate is significant and the impact on the quality of life of the non-debtor co-owner is not substantial, courts have permitted a sale under section 363(h). Maiona v. Vassilowitch (In re Vassilowitch), 72 B.R. 803, 807 (Bankr. D. Mass. 1987) (granting trustee's request to sell even though ex-

spouse and children of the debtor would be forced to move from their home where debtor's interest was the only asset of the estate and would provide almost a 100% dividend to creditors); Neylon v. Addario (In re Addario), 53 B.R. 335, 338 (Bankr. D. Mass. 1985) (granting trustee's request to sell where the co-owner and parent of the debtor would be able to purchase the estate's interest or make other living arrangements and the estate would receive \$27,000 from the sale); Morris v. Ivey (In re Ivey), 10 B.R. 230, 233 (Bankr. N.D. Georgia 1981) (granting trustee's request to sell where estate would receive a minimum of \$4,100 above the amount of any exemptions and debtor's ex-spouse had sufficient equity in the property to finance her right of first refusal under section 363(i) should she wish to do so).

The Trustee presented the expert testimony of an accountant, Duane A. D'Agnesse, on the net after tax cash flows to the estate and Jackson after a sale of the Property at the \$1,225,000.00 selling price in the current purchase and sale agreement. See Exhibit 8. The accountant testified that if the selling costs are split equally between the estate and Jackson, each being a co-owner of a 50% undivided interest, each party would incur a capital gains tax liability of \$23,722.00 and, after payment of that tax, would receive \$208,211.00 in net proceeds. Id. He also estimated that if the estate were to bear all of the selling expenses it would receive \$171,036.00 after payment of taxes and Jackson would receive \$245,386.00. Id. Both of the accountant's estimates of net after tax cash to the estate would be reduced by the \$30,000.00 homestead exemption payable to the Debtor. Accordingly, the accountant's estimated net after tax cash to the estate ranges from \$141,000.00 to \$178,000.00. Similarly, his estimated net after tax cash flow to the Debtor and Jackson ranges from \$238,000.00 to \$275,000.00.³ Jackson testified that her computation of the

³ On cross examination Jackson attempted to cast doubt on some of the assumed expenses and lien payoffs utilized by the Trustee's accountant. However, the Court does not find that any changes

estate's share of the proceeds of sale would be only \$76,724.00 or 54% of the lowest estimate by the Trustee's accountant. See Exhibit 207. However, Jackson's estimates include charges against the estate for one-half of the mortgage payments on the Property since the Petition Date and a reimbursement to Jackson for the \$30,816.00 capital gains tax which she estimates she would incur. Adding those charges in her computation back to the amount due to the estate results in her computation being made on a comparable basis to the computation by the trustee's accountant. Jackson's estimate would then be \$159,075.00 which is not materially different from the \$141,036.00 estimate by the Trustee's accountant.

The evidence on the cash proceeds accruing to the estate and Jackson on account of a sale of the Property do not differ in any material respect other than on the question of what charges Jackson may make against the estate's share of the proceeds of sale. Regardless of how the expenses of sale are ultimately divided, both the estate and Jackson will receive substantial cash distributions from the sale and the Debtor will be paid his \$30,000.00 homestead exemption.

The Trustee testified that the assets of the estate consist of \$8,000.00 in cash, the Debtor's interest in the Property and any amounts which the Trustee may recover from the Debtor and Jackson is a separate fraudulent conveyance action. The Trustee also testified that approximately \$1,700,000.00 in claims have been filed, but that he has not as yet determined if that sum will be materially reduced through any objections to claims. The maximum recovery expected by the Trustee in the fraudulent conveyance lawsuit is about \$831,000.00, although Jackson believes the Trustee's claims are without merit and that any recovery will be substantially less than \$831,000.00. If Jackson's evaluation of the Trustee's fraudulent transfer action is correct, the

would result in a material change in the accountant's analysis and that any such changes may well be offset by recent decreases in tax rates from those utilized by the accountant.

estate's interest in the Debtor's interest in the Property will be the sole source of recovery for creditors. If the Trustee's evaluation of that action is correct, and the Trustee can collect on his judgment, then the estate's interest in the Debtor's interest in the property is likely to be about one-third of the total assets available to pay creditor claims. Therefore, the estate's interest in the proceeds from the sale of the Property free of Jackson's interest is significant in absolute dollar terms and will constitute at least a material portion, and perhaps substantially all, of any distribution to creditors.

Jackson testified that the forced sale of her home of 22 years would be devastating to her. She testified that after moving expenses, taxes and the expenses of sale, she would not have sufficient funds to purchase a suitable home in the Hebron, New Hampshire area for herself and the Debtor, necessitating her separation from the community she has lived in for more than two decades. She testified that she has only a high school education, has not been employed since 1968 and is not currently employed.⁴

The Court does not doubt that Jackson would suffer emotionally if she were forced to vacate her home of 22 years. However, the evidence at trial establishes that she and the Debtor would receive at least \$238,000.00, after taxes, from the sale proceeds. Jackson believes that she is entitled to certain expense adjustments which would increase this amount. In order to remain in the Property, Jackson and the Debtor will be required to service two mortgages and pay property taxes costing \$6,159.48 per month.⁵ Since Jackson testified that she is unemployed, the

⁴ Although Jackson testified that she is not employed, the evidence at trial indicated that since the Petition Date she has maintained a significant cash flow from the sale of investment real estate titled in her name.

⁵ The real estate taxes for 2002 were \$9,416.81 or \$784.73 per month. See Exhibit 3. The monthly payment on the Capital Crossing Bank first mortgage is \$3,948.52. See Exhibit 4. The monthly payment on the Fleet Bank second mortgage is \$1,426.23. See Exhibit 5.

debt service and taxes on the property must be paid from a combination of her assets and the Debtor's fresh start earnings. If the Debtor and Jackson can afford \$6,159.48 per month for principal, interest and taxes, and upon the sale of the Property will receive a lump sum cash payment, after taxes, of at least \$238,000.00, any argument that they cannot locate and purchase a suitable home is simply not credible. If they cannot afford the monthly cost, they will be forced to sell the Property in any event.

The non-economic factors which bankruptcy courts may consider in weighing the detriment to a non-debtor co-owner spouse caused by the sale of a home include: the life expectancies of the spouses, their respective contributions to the purchase price of the home, tax exemptions available on the property, prospects for acquiring a new home, special physical or mental handicaps and minor children living at home. Persky, 893 F.2d at 21, citing by way of example to United States v. Rodgers, 461 U.S. 677, 704-05 (1983). In this case Jackson is twelve years younger than the Debtor and presumptively has a longer life expectancy. However, her survivorship interest would be defeated even if the Trustee sold the estate's undivided 50% interest in the Property subject to her undivided 50% interest. Mulvanity v. Nute, 95 N.H. 526, 528 (1949). The evidence supports a finding that she has no special physical or mental handicaps, that her prospects for acquiring a new home are good and that there are no minor children living at home. Finally, the estimated amount of the proceeds which Jackson may retain will be increased by a partial exclusion from federal capital gains taxation. Based upon the evidence submitted at trial the Court finds that the sale of the Property will result in a change in the life of the Debtor and Jackson, but not a material adverse change in any objective measure of their quality of life. To be sure, there will be an emotional detriment from the loss of their long

term home; however, that harm is outweighed by the benefit to the estate from the sale of the Property.

C. Allocation of Sale Proceeds

Jackson contends that in the event the Court should permit the Trustee to sell the Property free of her interest, the language in section 363(j) requires that the proceeds be divided according to state law on the partition of real estate. Jackson cites Coombs, 86 B.R. at 317, as authority for that position. However, Jackson's reliance on Coombs is misplaced. In Coombs, the bankruptcy court held that the language of section 363(j) on the division of proceeds did not overcome Massachusetts state law providing that the survivorship interest of a debtor's spouse in property held as tenants by the entirety could not be defeated through a sale without her consent. Coombs, 86 B.R. at 317. No New Hampshire law governing her interest in the Property has been cited by Jackson. In addition, Coombs involved the distribution of the net proceeds of a sale, not the determination of the amount of net proceeds. Even if Coombs were applicable in the manner suggested by Jackson, under New Hampshire law the survivorship interest of a joint tenant may be defeated by a conveyance by the other joint tenant. Mulvanity, 95 N.H. at 528. Coombs, at best, stands for the proposition that the authorization of a sale under section 363(h) does not divest a non-debtor co-owner of vested property rights under state law.

The language of section 363(j) is clear and unambiguous in describing a federal scheme for determination of the amount of the net proceeds. Section 363(j) provides:

After a sale of property to which [section 363(h)] applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(emphasis added). Accordingly, the costs of the sale, including, but not limited to the broker's commission, recording fees, real estate transfer tax, nominal legal expenses for the preparation of documents and compliance with any state laws or regulations in connection with the sale of the Property, are chargeable against the gross sale proceeds before they are divided between the estate and Jackson.

Jackson claims that under New Hampshire law the Court must make an equitable division of the proceeds of sale, rather than simply dividing the net proceeds in accordance with the undivided 50% interest held by the estate and Jackson in the Property as joint tenants. Jackson cites NHRSA 547-C:25 which provides:

When the proceedings are pending, if it is alleged in the petition that the property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience and the court so finds, the court may order it to be sold and the proceeds from the sale to be divided among the owners according to their respective rights, titles, or interests, and may make all other orders that may be necessary to cause such sale and the distribution of the proceeds, as a court of equity may do in like cases.

Jackson argues that state law compels this Court to determine an equitable division of any proceeds from the sale of the Property. However, Jackson cites to no case or other statute which delineates what standards might be applied to such a division of the proceeds.

Jackson correctly argues that the two mortgage liens and the real estate tax lien must be paid from the gross proceeds. She contends that any real estate broker's commission and real estate transfer tax should be paid by the Trustee from the estate's share of the net proceeds. The Court rejects this argument because it is contrary to the clear language of section 363(j). Jackson argues that the Trustee should reimburse her for any capital gains tax which she may incur because she is being forced to sell the Property. The Court finds that this argument is not supported by the statutory language or any applicable equitable principals. The tax impact of the

sale on Jackson has been factored into the balancing of the benefits to the estate and the detriment to Jackson under section 363(h)(3).

Finally, Jackson contends that she is entitled to reimbursement for one-half of the carrying costs, expenses and improvements to the Property between the Petition Date and the date of sale. Her argument is based upon general concepts of equity applicable in federal bankruptcy courts and her argument that section 363(j) of the Bankruptcy Code directs this Court to consider what she claims are equitable considerations in the division of sale proceeds under New Hampshire law dealing with the partition of real estate. See NHRSA 547-C:25. The Court does not construe section 363(j) to mandate the result advocated by Jackson. The Court is hesitant to open the door to equitable considerations which might alter the vested property interests of the estate and Jackson in the Property. Once the door is open, many arguments may come to the table and expect consideration in the division of proceeds. Jackson contends that equity requires that she be reimbursed by the estate for one-half of the debt service payments, both principal and interest, and any maintenance and repair expenses on the property incurred by her since the Petition Date. The Trustee counters that the Debtor and Jackson have had the use of the estate's undivided 50% interest during this period rent free and that any equitable allocation should include a credit for such fair rental value.

The problem with such arguments is where to end the equitable considerations. The evidence is that Jackson has not been employed since 1968. If the Debtor paid most of the purchase price and debt service on the Property from his earnings, should the estate be entitled to more than its undivided 50% interest? Since Jackson is younger than the Debtor should she receive more than her undivided 50% interest because of her greater survivorship interest? The issues, evidentiary consideration, and the likely hearings on such matters could be lengthy. At

the end of such hearings the net changes due to the equitable charges and credits between the estate and Jackson may well be worth less than the cost of the proceedings. Absent a clear Congressional mandate to engage in such an exercise, this Court declines the invitation from the parties to do so.

However, equitable considerations do play a role in compelling the sale of assets to further federal policy interests. See United States v. Rodgers, 461 U.S. 677, 709-11 (1983) (holding that federal courts have discretion in authorizing sales to enforce the collection of taxes). This Court finds that equity dictates that to the extent that Jackson has reduced the principal balance on the mortgage liens on the Property or paid the real estate taxes assessed against the Property between the Petition Date and the date of sale, she should be credited with one-half of such amounts to reflect the benefit conferred on the estate by virtue of its undivided 50% interest in the Property. At such time as the sale of the Property to a specific purchaser is authorized by the Court, Jackson may object to the sale if the proposed order submitted by the Trustee does not provide for the estate to reimburse her for such payments from its share of the sale proceeds.

IV. CONCLUSION

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment authorizing the Trustee to sell the Property free and clear of Jackson's interest. In order to consummate a specific sale the Trustee must file a motion to sell in the main bankruptcy case.

ENTERED at Manchester, New Hampshire.

August 6, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge