

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)	
)	
JAY F. SESSIONS,)	Case No. 08-16242 HRT
)	Chapter 7
Debtor.)	
_____)	
)	
HARVEY SENDER, TRUSTEE,)	Adversary No. 08-01841 HRT
)	
Plaintiff,)	
)	
v.)	
)	
JOSEPH M. CARAVANA, SR.; EDITH)	
ANN OWEN; JOSEPH M. CARAVANA,)	
JR.; CARL JAN CARAVANA; and)	
JUDITH ANN CALDWELL,)	
)	
Defendants.)	
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court after trial held on July 21, 2009, on the Plaintiff's Complaint, which seeks to sell property owned jointly by the Debtor and his four siblings, under 11 U.S.C. § 363(h). The Court is now prepared to rule and hereby makes the following findings of fact and conclusions of law.

Background

In 2001, Joseph M. Caravana, Sr. executed a quit claim deed conveying his home at 787 S. Nelson Street, Lakewood, Colorado 80226 (the "Home") to himself and his five children and stepchildren: Jay F. Sessions; Edith Ann Owen; Joseph M. Caravana, Jr.; Carl Jan Caravana; and Judith Ann Caldwell. Subsequently, Joseph M. Caravana, Sr. passed away. The five siblings continued to own the Home as joint tenants.

At the time of trial, Debtor Jay F. Sessions and two of his siblings, Edith Ann Owen, and Joseph M. Caravana, Jr., lived in the Home. They each have a separate room in the Home, which has three bedrooms upstairs and two bedrooms in the partially-finished basement. The three siblings maintain a joint checking account to which they make regular monthly contributions – the siblings pay \$300 each, and anyone else living with the siblings pays \$150 each, and the funds are

used to pay for utility expenses, taxes, insurance, and repairs for the Home. Although the Home has been maintained, it has not been updated over the years.

Edith Ann Owen is 66 years old. She has COPD and had to take early retirement from her job because of her disability. She has no income other than Social Security payments of \$1,293 per month, roughly half of which she spends on insurance and medical expenses. She testified that it would be a hardship for her to find a new place to live, because she has so little disposable income.

Joseph M. Caravana, Jr. is 62 years old. He is employed part-time at a garden center, working 26 hours per week at \$10 per hour, netting roughly \$170 per week. He also receives \$813 per month from Social Security. He testified that he looked into other places to live, but apartment complexes cost \$1,500 to \$1,800 per month.

Carl Jan Caravana lives in Glendale, Arizona, with his wife. He is 59 years old. He was born mentally disabled. He did not attend school and cannot read or write. At one time, he was employed in a mailroom, but he was injured and is now no longer able to work. His only income is Social Security payments of \$734 per month. He testified that he would like to live in the Home, but his wife was unwilling to live there. He does not pay anything for maintenance of the Home and has not received any payments as a result of his ownership interest. He was originally opposed to selling the Home, but he later changed his mind, and at trial he testified that he would like the Home to be sold.

Judith Ann Caldwell also lives in Glendale, Arizona, with her husband. She is 59 years old. She receives disability payments of \$850 per month. She is also able to do some part-time data entry, earning a low hourly wage. She testified that she would have liked to move into the Home, but she felt rebuffed by Edith Ann Owen, and she was unable to make the monthly contributions into the joint account for maintenance of the Home. She does not pay anything for maintenance of the Home and has not received any payments as a result of her ownership interest. She was originally opposed to selling the Home, but she later changed her mind, and at trial she testified that she would like the Home to be sold because she needs the money to pay living expenses.

The Debtor's Chapter 7 Trustee, Harvey Sender, testified that there are no encumbrances on the Home. He believes that there is significant equity in the Home for each of the siblings and for the Debtor's estate if the Home is sold. The Debtor's schedules value the Home at \$220,000, and the Trustee has obtained a comparative market analysis that values the Home at \$217,898. Using a sale price of \$217,898, and considering costs of sale and a \$90,000 homestead exemption, the Trustee calculates that the estate would receive \$22,964.82 for the Debtor's interest. The Trustee further testified that a sale of only the Debtor's interest in the Home would not yield similar proceeds, as the only potential buyers would be the Debtor's siblings. The Trustee received an offer of \$10,800 for the Debtor's interest, which the Trustee did not accept.

Applicable Law

The Trustee seeks to sell both the Debtor's estate's and the Debtors' siblings' interests in the Home, under 11 U.S.C. § 362(h), which provides:

[T]he trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (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; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

Here, the parties agree, and the Court finds, that partition of the Home is impracticable, sale of the estate's undivided interest in the Home would realize significantly less for the estate than sale of the Home free of the siblings' interests, and the Home is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. The only dispute is whether the benefit that the Debtor's estate would receive from a sale of the Home outweighs the detriment to the Debtor's siblings.

The balancing of benefit to the estate versus detriment to co-owners is a fact-sensitive analysis that is decided on a case by case basis. In cases where the benefit to the debtor's estate would be small or speculative, and the impact on the co-owner would be substantial, courts have denied a trustee's request to sell a personal residence. In other cases, where the financial benefit to the estate would be significant and the impact on the non-debtor co-owner would not be substantial, courts have permitted a sale under § 363(h). The Court will discuss representative cases below.

1. Cases Denying Sale

In *Berland v. Gauthreaux (In re Gauthreaux)*, 206 B.R. 502 (Bankr. N.D. Ill. 1997), the debtor did not live in the home. Her co-owner, who did live there, had contributed 100% of the

home's purchase price and had made all the mortgage payments. The co-owner was unable to qualify for a loan sufficient to exercise his right to credit bid. If the property had sold at the fair market value stipulated by the parties, the estate would have been able to make a 50 to 75% distribution to creditors, but because there were no outstanding offers to purchase, any value was speculative. The court held that the detriment to the co-owner outweighed the speculative benefit to the debtor's estate. *Id.* at 506-07.

In *Skiba v. Nelson (In re Nelson)*, 129 B.R. 427 (Bankr. W.D. Pa. 1991), the debtor and his former spouse owned a home. The parties' divorce decree provided that the debtor's former spouse could live in the home. The court held that the debtor's share of the sales proceeds would have to be reduced by the value of his former spouse's occupancy right, and any residual amount for the estate would be minimal. The significant detriment to the former spouse and children in being uprooted from their long-term family home outweighed the minimal benefit to the estate. *Id.* at 429.

Bakst v. Griffin (In re Griffin), 123 B.R. 933 (Bankr. S.D. Fla. 1991), is another case in which the debtor held joint title to the home but neither lived there nor made any of the mortgage payments. The home had only \$5,000 of equity, and the co-owner could not qualify for financing sufficient to credit bid. The court held that the substantial detriment to the co-owner, who had lived in the home for 14 years, outweighed the minimal return to the estate if the home were sold. *Id.* at 936.

In *Hunter v. Levesque (In re McCoy)*, 92 B.R. 750 (Bankr. N.D. Ohio 1988), the value of the property was only \$10,800, and the trustee had not obtained any offers to purchase it. The court held that the detriment to the co-owner, a mentally incompetent individual who would suffer psychological and emotional detriment if forced to move, outweighed the minimal benefit to the estate. *Id.* at 753.

In *Salem v. Coombs (In re Coombs)*, 86 B.R. 314 (Bankr. D. Mass. 1988), the non-debtor spouse suffered from multiple sclerosis, and their home was particularly suited to her, with a wheelchair-accessible entrance and a modified kitchen. The court held that the potential detriment to her, including physical and emotional stress that would aggravate her condition, outweighed the benefit to the estate, which was speculative given that then-applicable law would have required sale proceeds to be placed on deposit with interest during the joint lives of the debtor and co-owner. *Id.* at 318.

2. Cases Allowing Sale

In *Maiona v. Vassilowitch (In re Vassilowitch)*, 72 B.R. 803 (Bankr. D. Mass. 1987), the debtor and his former spouse were co-owners of a home. The parties' divorce decree provided for sale of the home and set the percentage of proceeds to be received by each party. The court found that even though the debtor was to receive only one-third of the proceeds, the debtor's interest in

the home was his only asset, and sale of the home was likely to produce a 100% dividend to creditors. The court therefore found that the detriment to the debtor's former spouse and children, in having to move from their home, was outweighed by the benefit to the estate. *Id.* at 807.

In *Neylon v. Addario (In re Addario)*, 53 B.R. 335 (Bankr. D. Mass. 1985), the co-owner of the home was the debtor's parent. Although he lived in the home, he testified that if the home were sold, he would be able to make other living arrangements. The court held that although the co-owner would suffer a detriment in having to move, that detriment was outweighed by the \$27,000 benefit to the estate, especially when the co-owner would also receive \$27,000. *Id.* at 338.

In *Morris v. Ivey (In re Ivey)*, 10 B.R. 230 (Bankr. N.D. Ga. 1981), where the estate would receive a minimum of \$4,100 above the amount of any exemptions and the debtor's ex-spouse had sufficient equity in the property to finance her right of first refusal under section 363(i), the court held that the benefit to the estate outweighed the detriment to the ex-spouse. *Id.* at 233.

Discussion

With the above cases in mind, the Court turns to the facts of this case. First, unlike some of the cases above, here it appears that a sale of the Home would provide a substantial benefit to the Debtor's estate. If the Home were sold at the price stated in the comparative market analysis obtained by the Trustee, \$217,898, the estate could receive \$22,964.82. While the Trustee has not obtained any offers to purchase at that price, most likely because he has not listed the Home for sale without first obtaining authority to sell it, the Court finds that the value is not speculative. Instead, the value is supported by sales of similar homes as noted in the comparative market analysis. As with some of the cases above, here it appears that a sale of the Home is the only source of funds for distribution to the Debtor's creditors. Although creditors have not yet been asked to file proofs of claim, the Debtor has scheduled claims of \$72,678. The sale of the Home could therefore result in a meaningful distribution to creditors. The potential benefit to the Debtor's estate supports a sale of the Home.

Several of the above cases considered whether the debtor had contributed to the purchase price of the home or had made any of the mortgage or maintenance payments. Here, neither the Debtor nor his siblings contributed to the purchase price of the Home or made any mortgage payments. The Debtor and the two siblings who live in the Home have made maintenance payments, but they have also had the benefit of living in the Home. The Court does not consider this factor relevant in this case.

The Court next considers the potential detriment to the Debtor's siblings if the Home is sold. As with any sale of a personal residence, those who must move will suffer a detriment. Here, Edith Ann Owen and Joseph M. Caravana, Jr. argue that they may have difficulty locating suitable housing, given their age, health conditions, and low income. But, each sibling would receive a distribution from the sale of the Home, which, combined with the \$300 per month that

each currently pays into the joint checking account for utilities and maintenance, could provide suitable substitute housing. Also, if the siblings are able to obtain financing, they will have the right to purchase the Home at the same price as that offered by a potential purchaser, under 11 U.S.C. § 363(i).

One factor in this case that is not present in any of the above cases is that there are five co-owners of the Home, and three of the five (the Trustee with the rights of the Debtor, Carl Jan Caravana, and Judith Ann Caldwell) support the sale of the Home. When considering the detriment to co-owners, the Court has considered that some of the co-owners in this case will actually receive a benefit, in the form of some of the value of the Home. This reduces the detriment to co-owners of a sale of the Home.

Considering each of the above factors, on balance, the benefits to the estate outweigh the detriment to the co-owners. The Court finds that the Trustee has met his burden of establishing each element of 11 U.S.C. § 363(h), and the Home may be sold.

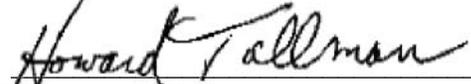
The parties have not agreed as to the applicable exemption amount or how the exemption proceeds should be distributed among the siblings. The Court finds that the \$90,000 homestead exemption is applicable. As to the distribution among the siblings, the Court concludes that the issue is beyond the scope of the Court's limited jurisdiction. The Trustee will be directed to issue a \$90,000 check payable jointly to the five co-owners, who may either reach agreement as to distribution or pursue litigation in another court of appropriate jurisdiction.

Conclusion

For the reasons discussed above, the Court will enter a separate judgment in favor of the Trustee, allowing the Home to be sold under 11 U.S.C. § 363(h).

Dated this 2nd day of November, 2009.

BY THE COURT:



Howard R. Tallman, Chief Judge
United States Bankruptcy Court