

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
ROBERT DENNIS RAVER, )  
JAN J. RAVER, ) CASE NO. BK95-80812  
 )  
 )  
DEBTOR ) CH. 13

MEMORANDUM

Hearing was held on March 25, 1996, on the Second Amended Plan filed by the debtors. Appearances: Raymond Aranza for the debtors and John Sutton for Jackie Wheeler. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b) (2) (A), (L), (N).

**Background**

The debtors, Robert and Jan Raver, filed a voluntary petition for Chapter 13 relief on May 30, 1995. The debtors' schedules listed Jan Raver's undivided half interest as a tenant in common in farmland located in Burt County, Nebraska (the farm property). The co-tenant of the farm property is Jan Raver's sister, Jackie Wheeler (Wheeler). The sisters inherited the farm property prepetition from their mother. At some point pre petition, Wheeler also acquired an arguably unperfected secured claim against Jan Raver's undivided half interest.

The debtors have moved for approval of their Second Amended Chapter 13 Plan (the Plan), for authorization to sell the farm property, and for approval of an application to employ an appraiser/auctioneer to conduct an auction sale of the farm property. The debtors propose to use the estate's interest in the proceeds from the sale of the farm property to pay all of the creditors of the estate and then have their Chapter 13 case dismissed.

Wheeler has withdrawn any pending objections to the Plan. The remaining issue is whether the court should approve the sale of the farm property in its entirety (partition by sale) or whether Wheeler is entitled to have the farm property divided before the debtors are permitted to sell the estate's interest (partition in kind).

After the hearing on March 25, 1996, the parties made a good faith effort to settle this dispute, but notified the court on April 15, 1996 that a satisfactory settlement could not be reached.

### **Decision**

1. The portion of the motion seeking to sell the estate's interest in the farm property is granted.

2. The portion of the motion seeking to sell Wheeler's interest in the farm property is denied.

3. The debtors and Wheeler are granted relief from the automatic stay to proceed with a partition action in state court and to proceed with a sale/auction of the farm property in conformance with the state court's ruling.

4. The debtors may amend the Plan to provide for the distribution of the proceeds from the sale of the estate's interest in the farm property. Notice may be limited to the Chapter 13 trustee and Wheeler.

5. The debtors are granted permission employ Petersen Land Company and Auctioneers, Inc. to sell the estate's interest in the farm property or to sell the entire parcel of farm property if such sale is authorized by the state court.

### **Discussion**

The debtors have requested authorization to sell "the property" pursuant to Section 363(b) of the Bankruptcy Code. 11 U.S.C. § 363(b) (1994). At the hearing, the debtors' made clear that by "the property" they intended to sell the entire parcel of the farm property and divide the proceeds between Wheeler and the estate. Section 363(b) only permits the sale of estate property. Authorization to sell a co-owner's interest in property must be raised pursuant to Section 363(h) of the Bankruptcy Code, which provides:

Notwithstanding subsection (f) of this section, the 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, ... 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) [property is not used to produce heat, light or power for sale].

11 U.S.C. § 363(h) (1994).

A Section 363(h) action is properly raised by filing an adversary proceeding, not through a motion. FED. R. BANKR. P. 7001 (1995). The debtors have failed to plead Section 363(h) and have failed to bring an adversary proceeding and are, therefore, not entitled to have Jackie Wheeler's interest in the property sold at the proposed auction, along with the estate's interest.

Even if Section 363(h) had been raised, the debtors did not submit any evidence which would support selling Wheeler's interest in the farm property. The debtors argued that the property must be sold before the new planting season for 1996 began to get the best price, but, at the hearing, it was admitted that the farm property is currently leased and that the lessee was not given notice pursuant to state law to vacate the property for the 1996 growing season. Therefore, any new purchasers would not be entitled to plant crops until, at the earliest, next spring.

The most important missing evidence bears on the issue of why selling all of the farm property is more beneficial than dividing the property prior to the sale. The debtors assert that the benefit to the estate by selling the farm property is greater than the benefit to "one creditor." However, the debtors do not explain why the benefit to the estate by selling the whole parcel is greater than the benefit to the estate if the property is partitioned prior to the proposed auction. Instead, the argument appears to center on the fact that Wheeler has a security interest in the estate's property. Wheeler's status as a creditor of the estate is not related to her status as co-owner of the farm property.

In Wheeler's resistance to the debtors' motion, Wheeler states that she does not wish to sell her interest in the farm property because the property was previously the property of her parents and because she wants to preserve the property as an investment for her future. Wheeler also stated that she was interested in purchasing the estate's interest in the property, and therefore, if the court lacks jurisdiction to order a partition in kind, Wheeler wants

permission to proceed in state court to have the property partitioned prior to sale.

### Conclusion

The debtors' motion for authorization to sell the farm property is denied in part and granted in part. To the extent that the debtors have requested permission to sell Jackie Wheeler's co-ownership interest in the farm property, the debtors have failed to bring an adversary proceeding pursuant to Section 363(h) and Bankruptcy Rule 7001, and therefore, the request to sell the co-owner's interest is denied. To the extent that the debtors want to limit the auction to the estate's interest in the farm property, such a sale is authorized pursuant to Section 363(b).

If the debtor properly files an adversary proceeding pursuant to Section 363(h), a trial will be scheduled, but given the interests that each party is seeking to protect, the parties should consider, if they have not already done so, the fact that Section 363(i) grants the co-tenant a right of first refusal in an auction pursuant to Section 363(h). See 11 U.S.C. § 363(i) (1994). Wheeler is willing to sell her interest if the auction price is as high as the debtors predict and is willing to buy the estate's interest if the price offered is as low as she predicts.

State court is the most appropriate forum to determine whether the farm property should be partitioned before the sale, and a decision by a state court would provide the clearest title to the property, as a ruling by the bankruptcy court concerning state property issues may not necessarily be followed by the Nebraska courts and could, thus, create title problems and more litigation in the future. Compare In re Ballentine Bros., Inc., 86 B.R. 198 (Bankr. D. Neb. 1988) (holding that because of the automatic stay of Section 362 the tax liens of Nebraska taxing authorities could not attach to real property post petition) with Alliance R.R. Community Credit Union v. County of Box Butte, Nebraska, 243 Neb. 840, 503 N.W.2d 191 (1993) (holding that the automatic stay does not prohibit the attachment of such a tax lien post petition under certain circumstances, and with Bankruptcy Reform Act § 116, 11 U.S.C. § 362(b) (9) (1994) (expanding tax exception to automatic stay to include assessment, deficiency notice, and demand, but not the attachment of tax liens). Section 363(h) requirements overlap the state law procedure for partitioning property, and the state court would, therefore, be the most efficient forum to partition property. NEB. REV. STAT. §§25-2170-25-21, 112 (Reissue 1995).

Even though the debtors are not authorized to sell the entire parcel of the farm property, the debtor's are allowed to proceed in state court to request that the state court permit the farm property to be sold in its entirety, and to enforce any order or judgment by the state court regarding the disposition of the farm property. In addition, Wheeler is granted relief from the

automatic stay to bring a partition action in state court.

The debtors are granted permission to employ Petersen Land Company and Auctioneers, Inc. to sell the estate's interest in the farm property or to sell the entire parcel of farm property if authorized by the state court. The Plan is confirmable if it is amended to accurately reflect the sale of the farm property and the distribution of the proceeds to the creditors of the estate. However, the debtor may limit notice of the amendment to the Plan to the Chapter 13 trustee and Wheeler, as no other interested parties' rights are affected.

Separate journal entry to be filed.

DATED: June 5, 1996

BY THE COURT:

Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

ARANZA, RAYMOND 492-9336

Copies mailed by the Court to:

John Sutton, 400 Oakland Ave., Council Bluffs, IA 51503  
Kathleen Laughlin, Trustee  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
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ROBERT DENNIS RAVER,	)	
JAN J. RAVER,	)	CASE NO. BK95-80812
<u>DEBTOR(S)</u>	)	
	)	CH. 13
	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: June 5, 1996
<u>Defendant(s)</u>	)	HEARING DATE: March 25, 1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Second Amended Plan filed by the debtors.

APPEARANCES

Raymond Aranza, Attorney for debtors  
John Sutton, Attorney for Jackie Wheeler

IT IS ORDERED:

1. The portion of the motion seeking to sell the estate's interest in the farm property is granted.
2. The portion of the motion seeking to sell Wheeler's interest in the farm property is denied.
3. The debtors and Wheeler are granted relief from the automatic stay to proceed with a partition action in state court and to proceed with a sale/auction of the farm property in conformance with the state court's ruling.
4. The debtors may amend the Plan to provide for the distribution of the proceeds from the sale of the estate's interest in the farm property. Notice may be limited to the Chapter 13 trustee and Wheeler.
5. The debtors are granted permission employ Petersen Land Company and Auctioneers, Inc. to sell the estate's interest in the farm property or to sell the entire parcel of farm property if such sale is authorized by the state court.

See memorandum entered this date.

BY THE COURT:

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Chief Judge

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United States Trustee

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