

1 detriment to the co-owner. The other issues under § 363(h) were
2 resolved in the trustee's favor by way of summary adjudication.

3 The Court has subject matter jurisdiction over this
4 proceeding pursuant to 28 U.S.C. § 1334 and General Order
5 No. 312-D of the United States District Court for the Southern
6 District of California. This is a core proceeding under
7 28 U.S.C. § 157(b) (2) (N), (O).

8
9 Discussion

10 Debtors Randy and Laurie Schisler filed their Chapter 7
11 petition on September 17 2002. On their original Schedule A they
12 listed an "Equitable Interest" in a single family residence in
13 Ramona, California. Schedule A indicated it was Randy's interest
14 only, and valued the interest at \$150,000, with a secured claim
15 for an identical amount. Schedule D indicated the total debt on
16 the property was in excess of \$159,000.

17 About five weeks later, debtors amended their schedules to
18 reflect that Randy had a "2/5 Equitable Interest" in the
19 property, a claim of a homestead exemption of \$75,000, and that
20 there was a \$57,000 second mortgage on the property. Schedule H
21 disclosed that Glenna Ann Beckett, of the same address, was a co-
22 debtor on the mortgages.

23 The trustee's initial report indicated that the meeting of
24 creditors was concluded and she was investigating possible non-
25 exempt assets. The debtors received their discharge on December
26 19, 2002. In January, 2003 the trustee gave notice of her intent

1 to sell some personal property, which she subsequently did. In
2 March, 2003 she obtained a Claims Bar Date from the Court and
3 notice was given setting a June 11, 2003 deadline. In October,
4 2003 the trustee filed a single claim objection, which was
5 sustained.

6 In April, 2004 the trustee filed and noticed out her First
7 and Final fee application. At the trial in this matter, she
8 testified that as she was wrapping up matters she had a broker
9 give her an opinion as to market value of the home. The broker
10 told her sale of the house should close at around \$575,000. The
11 trustee wrote debtors' attorney, explained her position and that
12 the total amount of claims in the case - including administrative
13 claims at that point - was about \$25,000. She offered to allow
14 the debtors to refinance the property to pay the estate
15 approximately that amount. Debtors did not accept.

16 Sometime thereafter, the trustee learned that the debtors,
17 post-petition, had transferred the 40% interest and received
18 \$45,000 for it. The trustee again wrote their attorney,
19 explained it was a serious matter, and demanded turnover and an
20 accounting of the transaction. Meanwhile, Ms. Beckett learned of
21 the trustee's claim of an interest in the property. She hired
22 her own attorney who explained her position to the trustee in a
23 letter. Thereafter, the trustee sought to employ counsel for the
24 estate. In January, 2005 the trustee filed and served her
25 complaint to avoid the post-petition transfer of the estate's 40%
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1 interest in the property. In August, 2005 she was successful on
2 summary judgment in recovering the 40% interest.

3 In October, 2005 the trustee filed the instant complaint for
4 authority to sell the property under § 363(h). The following day
5 the trustee also filed a motion for turnover against the debtors.
6 Turnover was ordered the following month, but required contempt
7 proceedings, and even a complaint to revoke discharge, and in
8 May, 2006 the parties finally reached agreement that included a
9 stipulation for judgment for turnover and payment of \$45,000 to
10 the estate.

11 Debtor Randy Schisler had been Ms. Beckett's son-in-law,
12 having married her daughter. Earlier, the Schisler family was
13 living with Ms. Beckett in the South Bay area. The Schislars had
14 a baby girl, and when she was about 2 they found the Ramona
15 property. Ms. Beckett testified it was her dream home. It is
16 large, on about .95 acre, with over 3300 square feet of living
17 space.

18 Ms. Beckett testified the Schislars had no money, so she
19 paid the 20% down payment and closing costs. Ms. Beckett was a
20 registered nurse and making "good money". At some point around
21 1995 or 1996 the Ramona property was refinanced to draw down
22 equity to pay off a line of credit Randy had taken out and used.

23 At some point, Randy and Ms. Beckett's daughter divorced.
24 When the Ramona house was purchased, Ms. Beckett set up title
25 with 60% in her name, 20% in her daughter's, and 20% in Randy's.
26 As part of the divorce, the daughter transferred her 20% interest

1 to Randy in lieu of paying child support. It appears Randy
2 continued to reside at the Ramona property with Ms. Beckett.

3 Subsequently, Randy's next wife, Laurie, and her children
4 moved into the Ramona property while she was getting her divorce.
5 At some point, Ms. Beckett agreed to allow Randy to put a second
6 mortgage on the property of about \$60,000, which was to be his
7 sole responsibility.

8 As already noted, the Schisler bankruptcy was filed in 2002
9 and the debtors received their discharge in December, 2002.
10 Almost a year later, Randy Schisler signed over to Ms. Beckett
11 the estate's 40% interest in the Ramona property, without trustee
12 consent or court authorization. In return, he received \$45,000
13 in cash, payoff of the second trust deed (almost \$60,000), and
14 payoff of the first trust deed (roughly \$153,000). To finance
15 the transaction, Ms. Beckett refinanced with a \$300,000 loan in
16 her name, alone. Ms. Beckett received net loan proceeds of about
17 \$37,000 which she testified she used to make repairs to the
18 property.

19 Turning to the present, Ms. Beckett still resides at the
20 Ramona property, as she has for over 22 years. She is 65 and due
21 to commence receiving Social Security payments in January, 2008.
22 She asserts she is disabled and unable to work any longer. She
23 testified she had had a series of medical problems, including
24 heart bypass surgery, a cracked pelvis and broken femur. She was
25 off work for over one year in 2003, then returned to work in
26 2004. In March, 2005 she slipped in some mud, fell and broke her

1 back. She said the doctors were considering implanting a
2 morphine pump to help manage her pain. She is also extremely
3 hard of hearing, even with the assistance of special equipment.
4 She applied once for Social Security disability, representing
5 herself, but the application was denied. She has since consulted
6 with an attorney and intends to refile.

7 Until Social Security kicked in, Ms. Beckett's only income
8 was from drawing down on her retirement. She rents out much of
9 the space at the house and has five tenants. The renters pay
10 about \$2,400 per month. The monthly mortgage payment is about
11 \$2,050, and property taxes are about \$4,200 per year. She
12 testified she gets to live essentially rent-free because of the
13 renters.

14 She testified the renters are much more than just
15 co-occupants. They have become something like a family - at
16 least as to some - and the renters help out around the place.
17 Ms. Beckett has personal ties to the property, as well, from her
18 more than 22 years there. Her granddaughter was two when they
19 moved in, and her grandson was born while the family lived there
20 with her. She has raised generations of pets there, and still
21 keeps an aging mare on the property which she rides occasionally
22 for short stretches with her doctor's permission.

23 The trustee's argument has been that Ms. Beckett would be at
24 least as well off if the property were sold, she could put the
25 bulk of her share of the proceeds to work, and she could rent an
26 apartment, or even a small house nearby for \$600 - \$950 per

1 month. She could also board the horse at a stable, which
2 Ms. Beckett testified would cost \$200 - \$350 per month depending
3 on the level of care and feed. The trustee says the house is
4 much too big, and the lot is, also. It was a fall in the corral
5 area that broke her back. Ms. Beckett's attorney acknowledged
6 that the property may be too large for her to manage, and it
7 might be safer for her to move. The Court notes that may be
8 true, but Ms. Beckett would also be alone, with both her hearing
9 and physical impairments if she were moved. As her attorney
10 noted, those may be "value judgments".

11 For as long as § 363(h) has been on the statute books,
12 relatively few published decisions have been rendered. In
13 In re Persky, 893 F.2d 15 (2nd Cir. 1989), the court grappled
14 with the benefit versus the detriment in terms of what a court
15 may properly consider. There, the lender contended:

16 . . . that consideration of emotional,
17 psychological, or physical detriment is
18 improper under § 363(h). The Bank insists
19 that in many cases a non-debtor co-owner will
20 not be ousted from the marital property
because he can re-purchase it rather easily
considering the amount of equity he already
has in it.

21 The court responded:

22 Adopting the Bank's proposition would
23 mean that there is never any detriment to a
24 co-owner resulting from a forced sale because
25 §§ 363(I) and (j) provide that the co-owner
26 will receive his share of the equity from the
proceeds of the sale, and in addition must be
given a right of first refusal once a final
bid is made on the property. (Citation
omitted.) This analysis has little rhyme or

1 reason because, if it is correct, Congress'
2 direction in § 363(h) requiring a balancing
3 of detriment and benefit would be
4 meaningless. Since first refusal rights, a
5 co-owner's right to her share of the
6 proceeds, and the balancing test are all
7 included in the statute, it is obvious that
8 Congress was acutely concerned with the
9 potential harshness that § 363(h) might
10 create. (Citation omitted.) Hence, it seems
11 evident that in valuing detriment to the co-
12 owner, § 363(h)'s balancing test should
13 include non-economic factors.

14 898 F.2d at 20-21.

15 In the instant case, the analysis under § 363(h)(3) is made
16 more complicated by the circumstances in which it arises. As
17 noted, in May, 2004, as she was winding up the bankruptcy case,
18 the trustee obtained a broker price opinion that indicated
19 substantial non-exempt equity in the property. She quite
20 appropriately wrote debtors' counsel and offered to allow the
21 debtors to pay off the creditors of the estate through a
22 refinance. We'll never know what might have happened if the
23 trustee had sent a copy of that letter to Ms. Beckett,
24 particularly since Ms. Beckett thought she had bought out the
25 debtors' interest in the property six months previously.
26 Regardless, as of May, 2004 the trustee testified the claims
register showed total claims filed of \$20,985.76. Moreover, the
trustee had gotten about \$4,500 from sale of personal property.
As the trustee estimated, total claims, including her own
probably were no more than \$25,000. No one responded to the
trustee's reasonable proposal.

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1 Then the trustee learned of the post-petition transfer of
2 the 40% interest in the property. Again, she wrote to debtors'
3 counsel, and she demanded both turnover of the \$45,000 and an
4 accounting. No copy was sent to Ms. Beckett, but about six weeks
5 later Ms. Beckett's attorney wrote to the trustee asserting Ms.
6 Beckett's position. It is indeed unfortunate that Randy Schisler
7 did not promptly turnover the \$45,000 to the trustee. It appears
8 those funds, alone, would have paid off all administrative
9 expenses and creditor claims, and probably returned some monies
10 to Mr. Schisler.

11 The sequence of events that followed is somewhat puzzling,
12 for promptly after hiring counsel, the trustee filed her
13 complaint against Ms. Beckett to avoid and recover the
14 unauthorized post-petition transfer of the real property. For
15 some reason, she did not pursue a turnover motion at that time to
16 recover the \$45,000 which again, might have obviated the need to
17 pursue the first or second adversaries against Ms. Beckett. In
18 any event, as already noted, the trustee was successful on
19 summary judgment in avoiding the transfer. Then she filed the
20 instant adversary for authority to sell, and the next day finally
21 filed the turnover motion.

22 The turnover motion proves to be the most puzzling piece,
23 because it is not at all clear what claim the trustee has to the
24 \$45,000 once she avoided the unauthorized transfer. She had
25 recovered the 40% interest in the property, which is all the
26 estate ever owned. The \$45,000 was the cash consideration which

1 Ms. Beckett paid for the now-avoided transfer. If anyone had a
2 claim to the money, it was she, not the trustee. But, of course,
3 she was not a party to the trustee's turnover proceeding against
4 Randy Schisler. As noted, the trustee ultimately did recover the
5 \$45,000 from Mr. Schisler, after expensive litigation, and the
6 trustee has held on to it ever since.

7 By this stage of the proceedings, with the litigation
8 against Mr. Schisler and the sequential adversaries filed against
9 Ms. Beckett, the administrative claims of the trustee's counsel
10 probably had exceeded the funds available plus the \$45,000. So,
11 in effect, Ms. Beckett is being sued to recover the trustee's
12 administrative expenses in litigating with Mr. Schisler, and
13 herself, at least in part because the trustee did not first
14 pursue the turnover proceeding.

15 The only issue pending before the Court is whether the
16 trustee has carried her burden of establishing that the benefit
17 to the estate of a sale of the Ramona property outweighs the
18 detriment to Ms. Beckett if the property is sold out from under
19 her after more than 22 years, and relegating her to go off on her
20 own, with her disabilities. It is a given that economically the
21 estate will benefit by payment of all reasonable claims. To
22 their credit, trustee's counsel has stated that it will
23 subordinate its administrative claim to ensure full payment of
24 all creditors. When non-economic circumstances are considered,
25 however, the Court concludes that the trustee has not met her
26 burden that the benefit outweighs the detriment. To the

1 contrary, the Court is persuaded that the detriment outweighs the
2 benefit at the present time.

3 An issue that is not before the Court at the present time is
4 whether, having recovered by turnover the \$45,000 which was the
5 consideration for the transfer of Mr. Schisler's and the estate's
6 40% interest in the property, the trustee has thereby adopted in
7 some way the transfer such that the estate has the \$45,000 and
8 Ms. Beckett has the benefit of her bargain. While it is hard to
9 see how the trustee gets to keep both, the Court expresses no
10 opinion on the merits of such an argument because neither side
11 has had any opportunity to address it, nor is it necessary to
12 resolution of the instant adversary proceeding.

13 Conclusion

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15 For the reasons set out above, the Court finds and concludes
16 that the trustee has failed to satisfy one element of the
17 elements required for this court to authorize sale of a non-
18 debtor's interest in property pursuant to 11 U.S.C. § 363(h).
19 Accordingly, judgment shall be entered in favor of Ms. Beckett's
20 Trust and against the trustee. Counsel for Ms. Beckett shall
21 prepare and lodge a separate form of judgment consistent with
22 this Memorandum Decision within thirty (30) days of the date of
23 service of this Decision.

24 IT IS SO ORDERED.

25 DATED: APR -1 2008

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PETER W. BOWIE, Chief Judge
United States Bankruptcy Court