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Collier Family Law and the Bankruptcy Code

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CHAPTER 2 Property Interests of the Debtor and Other Family Members Affected by a Bankruptcy Case

1-2 Collier Family Law and the Bankruptcy Code P 2.06

P 2.06 Management, Control and Sale of Property of the Bankruptcy Estate.

[1] In General.

[a] Chapter 7.

In a chapter 7 bankruptcy case, the trustee is the representative of the bankruptcy estate and has the general duties of collecting and reducing to money the property of the estate as expeditiously as is compatible with the best interests of the parties in interest.ⁿ¹ The trustee is appointed by the United States trustee at the outset of the case as an interim trustee,ⁿ² who becomes the permanent trustee if no trustee is elected at the meeting of creditors.ⁿ³ However, exempt property is not liquidated for creditors and remains in the possession of the debtor.ⁿ⁴ As a practical matter, this means that, in most consumer bankruptcy cases, the trustee does not manage, control or sell any property, because no nonexempt property of any substantial value exists. However, the debtor's rights to dispose of significant items of property of the estate other than in the ordinary course of his or her affairs, at least until the property has been finally exempted or abandoned,ⁿ⁵ is limited by the potential avoidability of any such transfersⁿ⁶ and possibly the automatic stay.ⁿ⁷ If the debtor wishes to sell a significant asset, it is usually wise to seek court permission before doing so or wait until the case is closed and the property is no longer property of the estate.

The trustee's rights to use or sell property of the estate that does come into his or her control are generally governed by section 363.ⁿ⁸ This section permits the use, sale or lease of most estate property in the ordinary course of business without notice or a hearing,ⁿ⁹ but requires notice and a hearingⁿ¹⁰ before use, sale or lease of estate property other than in the ordinary course of business.ⁿ¹¹

[b] Chapters 11 and 12.

In chapter 11 and 12 cases, the debtor usually serves as a debtor in possession,ⁿ¹² vested with the powers of the trustee,ⁿ¹³ and continues to manage, control or sell the business or farm property involved. The debtor in possession is generally limited regarding use, sale or lease of estate property other than in the ordinary course of business by the same provisions that are applicable to a chapter 7 trustee.ⁿ¹⁴ While a trustee exists in every chapter 12 caseⁿ¹⁵ (usually a standing trustee who handles all chapter 12 cases in a locality) that trustee normally acts only as a disbursing agent; the trustee takes possession and control of property only as provided in the debtor's confirmed chapter 12 plan, typically the payments the debtor is making to creditors.ⁿ¹⁶

If sufficient cause exists, including fraud, dishonesty, incompetence or gross mismanagement, or if the appointment of a trustee is in the interest of creditors, any equity security holders and other interests of the estate, the court may order a

trustee appointed to take control of the affairs of a chapter 11 debtor.ⁿ¹⁷ Under a 1994 amendment to the Bankruptcy Code, if the court makes such an order, the United States trustee must, on request of a party in interest, convene a meeting of creditors at which the creditors may elect a trustee who would take the place of an appointed trustee.^{n17a}

The court may also take the lesser step of ordering appointment of an examiner,ⁿ¹⁸ who some courts have held may be vested with partial authority over the debtor's affairs.ⁿ¹⁹ In a chapter 12 case, the debtor in possession may also be removed for the same sorts of reasons, in which case the trustee will become responsible for management of the farm.ⁿ²⁰

[c] Chapter 13.

In chapter 13, the debtor remains in possession and control of all property of the estate, except to the extent provided in the debtor's planⁿ²¹ and to the extent the debtor makes payments to the chapter 13 trustee prior to confirmation of the plan.ⁿ²² After a plan is confirmed, the trustee disburses the funds according to the plan. The debtor is limited in the use, sale or lease of estate property in the same ways as a trustee or debtor in possession,ⁿ²³ and should obtain court permission for any significant transfer of property other than in the ordinary course of the debtor's affairs or a transfer specified in a confirmed plan.

Chapter 13 does not provide for the trustee to take over the debtor's property, other than pursuant to a confirmed plan similar to those in chapters 11 and 12. If the debtor does not act properly, the court may order various other remedies, however, including dismissal of the case,ⁿ²⁴ or conversion of the case to chapter 7,ⁿ²⁵ in which case a chapter 7 trustee is appointed to carry out the duties described above.ⁿ²⁶

[2] Management and Control of Co-Owned Property.

When the property of the debtor is co-owned by a nondebtor, the estate usually succeeds to the debtor's rights.ⁿ²⁷ Often the co-owner is the debtor's spouse or former spouse. In most consumer bankruptcy cases, and in many business cases, this causes few problems, since the estate's interest can be exempted or is abandoned, and the debtor typically remains in possession.ⁿ²⁸ Even in many individual chapter 11 cases, the debtor remains in possession of property of the estate,ⁿ²⁹ so issues of a third party trustee coming in to share management or control on behalf of the estate do not arise.

Occasionally, however a trustee may wish to take possession of the debtor's interest in co-owned property. When the property is a commercial or rental real property this may be relatively simple to arrange, with the trustee sharing income from the property. The most difficult issues are likely to arise in cases involving valuable residential property inhabited by the co-owner. Since these properties ordinarily are single family homes, the potential for renting a portion of the property to another party is usually nonexistent. However, the trustee may attempt to demand rental payments for the estate's share of the property. Under the laws of most jurisdictions, a co-tenant cannot demand rent from another co-tenant in possession of jointly held property, and the trustee would have no greater rights than his or her debtor predecessor in interest.ⁿ³⁰ However, the answer to this question will ultimately turn on the particular state property law which is applicable.

[3] Sale of Co-Owned Property.

Because the maximum value of the estate's interest in an asset co-owned with a nondebtorⁿ³¹ can often only be realized through a sale of the entire asset, the trustee or debtor will often seek to have the co-owned property sold in the bankruptcy case. To the extent that the only other interest in the property is a right of dower or curtesy,ⁿ³² the Bankruptcy Code simply permits the property to be sold free of that interest.ⁿ³³ Similarly, if a divorce decree has already provided for the sale of the property and some division of the proceeds, the trustee simply succeeds to the rights of the debtor to pursue the sale.^{n33a}

However, if the estate, as of the commencement of the case, had an undivided interest in property as a tenant in common, joint tenant or tenant by the entirety, the property may be sold only if certain requirements, set forth in section 363(h),ⁿ³⁴ are met.ⁿ³⁵

The first requirement is that partition in kind of the property among the estate and the co-owners is impracticable.ⁿ³⁶ If the property can be divided, the sale of the co-owner's interest is unnecessary. In other words, if the asset is a bank account, or a large amount of vacant land suitable for subdivision, the Code's preferred disposition would be to divide it in kind and sell only the estate's interest. The statute is silent, however, regarding whether the bankruptcy court may divide the property when state law would not permit the debtor to do so. It would seem that the court might be authorized to take this step, with its less drastic effect on the nondebtor party, rather than be compelled to choose only between sale of the entire property and no recovery for the estate, assuming the nondebtor party suffered no financial detriment to his or her interest.

The second requirement mandates a showing that sale of the estate's undivided interest would realize significantly less for the estate than sale of the property as a whole, free of the interests of co-owners.ⁿ³⁷ This requirement ensures that section 363(h) will come into play only when a significant return is to be gained for the estate. If the trustee would realize little from the property because the debtor's interest is wholly or mostly exempt, no point exists in forcing a sale.ⁿ³⁸ Similarly, if the proceeds of the sale would be largely consumed by payment of liens and administrative expenses, the sale would be of little benefit to the estate.ⁿ³⁹

This second requirement also compels a court to determine what the interest of the debtor would be if the property were sold. Those courts which have found that the debtor's only interest exclusive of the nondebtor's interest in entireties property is a right of survivorship have held that the value of that survivorship interest does not justify a sale.ⁿ⁴⁰ Along similar lines, the court in *In re Levenharn*⁴¹ found that, under New York law, the nondebtor would be entitled upon sale of the property to compensation for her life estate, which would consume most or all of the sale proceeds.^{n41a} And the court in *In re Coombs*,ⁿ⁴² interpreting Massachusetts law, held that nothing in section 363(h) would destroy the nondebtor wife's survivorship interest if a sale were authorized and, therefore, a sale was impractical because the trustee would be required to hold the proceeds until the debtor received his full interest, either upon Mrs. Coombs' death or divorce.

The Court of Appeals for the Second Circuit came to a slightly different conclusion in assessing the interests that would result from a sale of New York entireties property under section 363(h). In *In re Persky*,ⁿ⁴³ that court appeared to assume without discussion, perhaps because the parties had stipulated that each of the two cotenants involved had a stated amount of equity in their home, that the estate would realize the full amount of the debtor's equity upon a sale of the property, an amount far greater than the value given to the debtor's survivorship interest.ⁿ⁴⁴ However, the court then went on to state, citing *Coombs*, *In re Ray*,ⁿ⁴⁵ and other cases, that deciding the detriment to the nondebtor spouse, to be measured under the third section 363(h) requirement, would include valuing her survivorship interest as well as her present possessory interest.ⁿ⁴⁶ In other words, the value of the nondebtor's right to possession during her lifetime, plus her survivorship interest, would still be computed, but it would be applied, along with other factors, in the next step of the section 363(h) analysis, which is discussed below.

That third requirement permits a sale of the entire property only if "the benefit to the estate of a sale of such property free and clear of the interest of co-owners outweighs the detriment, if any, to such co-owners ..."ⁿ⁴⁷ In this step, *Persky* would apparently place a value on the nondebtor's life estate and survivorship interests, presumably using actuarial tables and similar evidence, and then compare the detriment to the nondebtor co-owner from losing that value to the benefit to the estate from a sale of the entire property under section 363(h). *Persky* also held that, in addition to that comparison, a bankruptcy court weighing benefit and detriment under this section must also consider the 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.ⁿ⁴⁸

It seems clear that these factors give considerable discretion to a trial court to justify a finding that the detriment to the nondebtor spouse would be greater than the benefit to the estate. Thus, when the nondebtor could not afford to obtain similar housing if the jointly owned property were sold, the court could refuse to order a sale even when the monetary benefit to the estate of a sale would be greater than the monetary value of the nondebtor's possessory and survivorship interests (as, for example, in a case in which the nondebtor spouse had a very short life expectancy).ⁿ⁴⁹

It is less certain whether any of these factors could ever be used to overcome a finding that the monetary benefit of a sale to the estate was less than the detriment to the nondebtor co-owner. For example, if the debtor had provided all of the purchase price, would that be sufficient justification for a sale? At a minimum, in considering this factor, a court would have to look also to the nonmonetary contributions of the nondebtor to the household. And would it be sufficient to justify a sale based upon the fact that the nondebtor owned another home he or she could easily use, even if the monetary detriment to the nondebtor from a sale was greater than the monetary benefit to the estate? In explaining its holding, the *Persky* court quoted a Supreme Court opinion which, in another context, stated that "we are not blind to the fact that in practical terms financial compensation may not always be a completely adequate substitute for a roof over one's head."ⁿ⁵⁰ This explanation may suggest that the factors other than monetary benefit or detriment are to be considered only as additional reasons why the property should not be sold, and not as reasons which could overcome the results of the basic financial analysis.

Other courts have also looked to nonfinancial factors in weighing the detriment to the nondebtor that would result from a sale under section 363(h). The court in *In re Coombs* further justified its refusal to order a sale by noting that a sale and consequent move would cause the nondebtor spouse "psychological stress that would operate upon a deteriorating mental condition" and "physical difficulties inherent in adapting to new surroundings suitable for one who depends upon a wheelchair."ⁿ⁵¹ Similar factors were considered important in *In re McCoy*,ⁿ⁵² in which the nondebtor was a mentally incompetent person who would have suffered psychological and emotional detriment if she had been forced to move. The consideration of such nonfinancial factors has varied among the lower courts.ⁿ⁵³

The final requirement for use of section 363(h) is that "the 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."ⁿ⁵⁴ This requirement, which according to the legislative history was meant to protect public utilities from being deprived of power sources because of the bankruptcy of a joint owner,ⁿ⁵⁵ is rarely applicable.

Despite all of the hurdles that must be overcome to sell co-owned property under section 363(h), cases have occurred in which such sales have been allowed. In *In re Grabowski* ^{n55a} the district court affirmed an order permitting the trustee to sell property because neither the debtor nor the nondebtor spouse offered any evidence to show detriment to the nondebtor co-owner that would result from a sale. The court held that once the trustee showed that the estate would benefit from a sale, the burden of production shifted to the party opposing the sale to show why the sale should not be approved.^{n55b}

Similarly, in *In re Bell* ^{n55c} a district court affirmed an order permitting the sale of property held by the debtor and his nine year old son as tenants in common. The court found it particularly significant that the son had sufficient other assets to purchase the debtor's interest in the property and avoid the hardship that the debtor argued the son would suffer.

In *In re Benyola* ⁿ⁵⁶ the court also approved the sale of a property in which the separated spouse of the debtor was residing in order to liquidate the debtor's share of the \$112,000 equity in the property. Although the nondebtor spouse had at times in the past rented out the property, the only justification offered by the court for its decision was that the nondebtor spouse would receive her share of the equity in the property, which she could apply to the purchase of another residence, and retain her right to collect nondischargeable alimony and support. Implicit in the court's decision was the assumption, which may have been supported by the record, that the nondebtor spouse had the financial ability

to purchase another residence.ⁿ⁵⁷ Otherwise, since the nondebtor spouse always has the right to receive her or his share of the sale proceeds, the rationale of the decision would leave few, if any, cases in which section 363(h) would prevent the sale of co-owned property.

Indeed, the debtor may wish to force a sale of a jointly owned property when the other co-owner either refuses to provide consent to a sale necessary under state law or simply cannot be found. In such cases, section 363(h) may be the only way the debtor can effectuate a sale of property and perhaps realize significant proceeds that can be exempted or are not necessary for full payment of creditors.^{n57a} Presumably, if the co-owner cannot be found, the court will not weigh heavily any detriment to that person, although issues may arise regarding service of process and arrangements would have to be made for proceeds due to the co-owner to be held in escrow for him or her.

The procedure for invocation of section 363(h) is for the trustee (or debtor in possession) to file a complaint initiating an adversary proceeding.ⁿ⁵⁸ (Section 363(h) may not be invoked by a nondebtor co-owner.)ⁿ⁵⁹ If the proceeding is brought as a contested matter initiated by a motion it should be dismissed.ⁿ⁶⁰ However, the Court of Appeals for the Eighth Circuit, in dicta, found that an adversary proceeding was not necessary in a case in which the debtor and the debtor's co-owner had previously consented to the sale, and that in that situation a motion for sale, with notice to the debtor and co-owner, was sufficient.ⁿ⁶¹ A creditor may bring a proceeding requesting an order that the trustee bring such a proceeding if the trustee declines to do so.ⁿ⁶² If a sale is allowed, the co-owner has a right of first refusal, which should be disclosed to any creditors or other potential purchasers.ⁿ⁶³ After sale of the property, each interest is charged with the costs of sale in accordance with its fractional interest, except that the trustee's fees are charged only to the estate's interest.ⁿ⁶⁴ The co-owner's share of the proceeds are then distributed to him or her.ⁿ⁶⁵

Occasionally, constitutional challenges to section 363(h) have been made, based upon a claim that the bankruptcy court does not have jurisdiction to order the sale of a nondebtor's property,ⁿ⁶⁶ and a claim that the section effectuates a taking of property without just compensation in violation of the *Fifth Amendment*.ⁿ⁶⁷ Such challenges, when they have been reached by the courts, have not been successful to date. However, if a court did permit a sale of a co-owner's possessory and survivorship interests without fully compensating him or her for those interests because it instead simply divided the value of the co-owned property in pro rata shares, a holding of unconstitutionality might well be warranted.

In addition, one bankruptcy court has held that section 363(h) is unconstitutional under the *takings clause of the Fifth Amendment*, at least as to entireties interests created before the enactment of the Bankruptcy Code. The court in *In re Persky* ⁿ⁶⁸ after examining Supreme Court precedents about when the government is permitted to take property, even with just compensation, found the section invalid because it does not effect a taking for a public purpose. According to that court, a taking to pay the creditors of only the debtor spouse, from a spouse who is neither a debtor or a creditor in a bankruptcy case, serves only a private purpose and, therefore, is not permitted by the Constitution.ⁿ⁶⁹

In cases in which the court permits a sale pursuant to section 363(g) or (h), or of community property that was property of the debtor and the debtor's spouse, section 363(i) grants to the debtor's spouse or other co-owner of the property a right of first refusal.ⁿ⁷⁰ The co-owner may purchase the property at the same price at which the sale is to be consummated.ⁿ⁷¹ Thus, in *In re Brollier*,ⁿ⁷² the court gave the debtor's spouse a right of first refusal prior to sale of the estate's interest in real estate. The court did so notwithstanding the fact that the property had been titled only in the debtor-husband's name, finding that the wife had an equitable interest and a possessory interest under Kansas law because the property was acquired with marital funds.ⁿ⁷³

In any event, if property owned jointly by a debtor and nondebtor is sold, the nondebtor must be paid the proceeds of his or her interest. These proceeds are not distributed by the trustee to unsecured creditors, since the nondebtor is not in bankruptcy. However, liens of secured creditors would be paid in order to sell the property or else would attach to the nondebtor's proceeds.ⁿ⁷⁴

FOOTNOTES:

(n1)Footnote 1. *11 U.S.C. § 704(A)(1)*, formerly § 704(1), as redesignated by Pub. L. No. 109-8 (2005), effective with respect to cases filed on or after October 17, 2005. *See 6 Collier on Bankruptcy, P 704.02[1]* (Matthew Bender 15th Ed. Revised).

(n2)Footnote 2. *11 U.S.C. § 701(a)*. *See 6 Collier on Bankruptcy, P 701.02* (Matthew Bender 15th Ed. Revised).

(n3)Footnote 3. *11 U.S.C. § 702(b)*. *See 6 Collier on Bankruptcy, P 702.06* (Matthew Bender 15th Ed. Revised).

(n4)Footnote 4. *See P 2.05[1] supra*.

(n5)Footnote 5. *See P 2.08 infra*.

(n6)Footnote 6. *11 U.S.C. § 549*. *See 5 Collier on Bankruptcy, ch. 549* (Matthew Bender 15th Ed. Revised).

(n7)Footnote 7. The stay bars the exercise of control over property of the estate. *11 U.S.C. § 362(a)(3)*. *See generally P 5.03[1] infra*.

(n8)Footnote 8. *11 U.S.C. § 363*. *See 3 Collier on Bankruptcy, ch. 363* (Matthew Bender 15th Ed. Revised).

(n9)Footnote 9. *11 U.S.C. § 363(c)*. *See 3 Collier on Bankruptcy, P 363.03* (Matthew Bender 15th Ed. Revised).

(n10)Footnote 10. The term "after notice and a hearing" does not always mean a hearing is required. *11 U.S.C. § 102(1)*. *See 2 Collier on Bankruptcy, P 102.02* (Matthew Bender 15th Ed. Revised).

(n11)Footnote 11. *11 U.S.C. § 363(b)*. *See In re Claywell, 341 B.R. 396 (Bankr. D. Conn. 2006)* (trustee could not sell property until disputes concerning the estate's ownership interest with debtor's former wife another party were resolved); *3 Collier on Bankruptcy, P 363.02* (Matthew Bender 15th Ed. Revised).

(n12)Footnote 12. *11 U.S.C. §§ 1101, 1107(a), 1203 and 1207(b)*. *See 7 Collier on Bankruptcy, PP 1101.01, 1107.02, 8 Collier on Bankruptcy PP 1203.01 and 1207.04* (Matthew Bender 15th Ed. Revised).

(n13)Footnote 13. *11 U.S.C. §§ 1107(a) and 1203*. *See 7 Collier on Bankruptcy, P 1107.02 and 8 Collier on Bankruptcy, P 1203.01* (Matthew Bender 15th Ed. Revised).

(n14)Footnote 14. *11 U.S.C. §§ 1107(a) and 1203*. *See 7 Collier on Bankruptcy, P 1107.02 and 8 Collier on Bankruptcy, P 1203.01* (Matthew Bender 15th Ed. Revised).

(n15)Footnote 15. *11 U.S.C. § 1202*. *See 8 Collier on Bankruptcy, P 1202.02* (Matthew Bender 15th Ed. Revised).

(n16)Footnote 16. *11 U.S.C. § 1207(b)*. *See 8 Collier on Bankruptcy, P 1207.04* (Matthew Bender 15th Ed. Revised).

(n17)Footnote 17. *11 U.S.C. § 1104(a)*. *See 7 Collier on Bankruptcy, P 1104.02* (Matthew Bender 15th Ed. Revised).

(n18)Footnote 17a. *11 U.S.C. § 1104(b)*, enacted by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394(effective with respect to cases commenced on or after October 22, 1994), *reprinted in Vol. E Collier on Bankruptcy, App. Pt. 9(a)* (Matthew Bender 15th Ed. Revised).

(n19)Footnote 18. *11 U.S.C. § 1104(c)*. This subsection, formerly designated as § 1104(b), was redesignated by the Bankruptcy Reform Act of 1994. *See 7 Collier on Bankruptcy, P 1104.03* (Matthew Bender 15th Ed. Revised).

(n20)Footnote 19. *See 7 Collier on Bankruptcy, P 1106.05* (Matthew Bender 15th Ed. Revised).

(n21)Footnote 20. *11 U.S.C. § 1204(a)*. See 8 *Collier on Bankruptcy*, P 1204.01 (Matthew Bender 15th Ed. Revised).

(n22)Footnote 21. *11 U.S.C. § 1306(b)*. See 8 *Collier on Bankruptcy*, P 1306.03 (Matthew Bender 15th Ed. Revised).

(n23)Footnote 22. *11 U.S.C. § 1326(a)*. See 8 *Collier on Bankruptcy*, P 1326.02 (Matthew Bender 15th Ed. Revised).

(n24)Footnote 23. *11 U.S.C. §§ 1303 and 1304*. See 8 *Collier on Bankruptcy*, PP 1303.01 and 1304.01 (Matthew Bender 15th Ed. Revised).

(n25)Footnote 24. *11 U.S.C. § 1307(c), (e)*, as amended and added by Pub. L. No. 109-8 (2005), effective with respect to cases filed on or after October 17, 2005. See 8 *Collier on Bankruptcy*, P 1307.04 (Matthew Bender 15th Ed. Revised).

(n26)Footnote 25. *11 U.S.C. § 1307(c), (e)*, as amended and added by Pub. L. No. 109-8 (2005), effective with respect to cases filed on or after October 17, 2005. See 8 *Collier on Bankruptcy*, P 1307.04 (Matthew Bender 15th Ed. Revised).

(n27)Footnote 26. See P 2.06[1][a] *supra*.

(n28)Footnote 27. See P 2.02[2] *supra*.

(n29)Footnote 28. See P 2.06[1][a], [c] *supra*.

(n30)Footnote 29. See P 2.06[1][b] *supra*.

(n31)Footnote 30. *In re Sontag*, 151 B.R. 664 (Bankr. E.D.N.Y. 1993) (trustee did not have a right to collect payment for use and occupancy of home by debtor's wife pending a sale). See P 2.01[3] *supra*.

(n32)Footnote 31. When two spouse co-owners file separate bankruptcy petitions or a joint petition, their estates can be consolidated, making possible a sale of the co-owned property. *11 U.S.C. § 302(b)*.

(n33)Footnote 32. See P 2.02[5][b] *supra*.

(n34)Footnote 33. *11 U.S.C. § 363(g)*. But see *In re Loeber*, 4 C.B.C.2d 448, 12 B.R. 669 (Bankr. D. N.J. 1981) (under applicable New Jersey law, the wife would have been entitled to compensation for her dower interest).

(n35)Footnote 33a. See *In re Sontag*, 151 B.R. 664 (Bankr. E.D.N.Y. 1993) (trustee entitled to recover from debtor's former wife for diminution in value of property due to failure to maintain property, but did not have a right to collect payment for her use and occupancy of home pending a sale).

(n36)Footnote 34. *11 U.S.C. § 363(h)*. See 3 *Collier on Bankruptcy*, P 363.08 (Matthew Bender 15th Ed. Revised).

(n37)Footnote 35. Section 363(h) applies only to these enumerated forms of ownership and no others. *Geddes v. Livingston (In re Livingston)*, 803 F.2d 1219, 16 C.B.C.2d 38 (11th Cir. 1986) (section 363(h) did not apply when debtor had interest as tenant in common for life with cross contingent remainder in survivorship); *Rushton v. Williams (In re Williams)*, 271 B.R. 663 (Bankr. D. Utah 2001) (right to an equitable lien arising out of debtor's use of joint funds to purchase property did not create a joint tenancy within scope of section 363(h)).

(n38)Footnote 36. *11 U.S.C. § 363(h)(1)*.

(n39)Footnote 37. *11 U.S.C. § 363(h)(2)*.

(n40)Footnote 38. *Lewis v. Harlin (In re Harlin)*, 325 B.R. 184 (Bankr. E.D. Mich. 2005) (sale not permitted when benefit to creditors was nonexistent due to small nonexempt amount and harm to co-owner was large); *In re Redmond*, 5 C.B.C.2d 742, 15 B.R. 437 (Bankr. E.D. Tenn. 1981) .

(n41)Footnote 39. *In re Haley*, 100 B.R. 13 (Bankr. N.D. Cal. 1989) ; *In re Spain*, 19 C.B.C.2d 29, 85 B.R. 874 (Bankr. N.D. Ala.) , *rev'd and remanded*, 103 B.R. 286 (N.D. Ala. 1988) (to recalculate amount available to estate).

(n42)Footnote 40. *In re Dawson*, 4 C.B.C.2d 615, 10 B.R. 680 (Bankr. E.D. Tenn. 1981) .

(n43)Footnote 41. *In re Levenhar*, 8 C.B.C.2d 1145, 30 B.R. 976 (Bankr. E.D.N.Y. 1983) .

(n44)Footnote 41a. *But see Gazes v. Roswick (In re Roswick)*, 231 B.R. 843 (Bankr. S.D.N.Y. 1999) (finding each joint tenant with right of survivorship to have a 50 percent interest).

(n45)Footnote 42. *In re Coombs*, 18 C.B.C.2d 1430, 86 B.R. 314 (Bankr. D. Mass. 1988) .

(n46)Footnote 43. *In re Persky*, 893 F.2d 15, 21 C.B.C.2d 1460 (2d Cir. 1989) .

(n47)Footnote 44. *In re Persky*, 893 F.2d 15, 16, 21 C.B.C.2d 1460, 1462 (2d Cir. 1989) . *See also In re Youmans*, 117 B.R. 113 (Bankr. D. N.J. 1990) (disagreeing with earlier unreported New Jersey district court decisions and holding that because under New Jersey law a right of survivorship disappears on sale of the property and does not attach to its proceeds, if property was sold under section 363(h), each tenant by the entireties would be entitled to one-half the proceeds).

(n48)Footnote 45. *In re Ray*, 73 B.R. 544 (Bankr. M.D. Ga. 1987) .

(n49)Footnote 46. *In re Persky*, 893 F.2d 15, 21, 21 C.B.C.2d 1460, 1467 (2d Cir. 1989) .

(n50)Footnote 47. *11 U.S.C. § 363(h)(3)*.

(n51)Footnote 48. *In re Persky*, 893 F.2d 15, 21, 21 C.B.C.2d 1460, 1467 (2d Cir. 1989) .

(n52)Footnote 49. *See In re McCoy*, 92 B.R. 750 (Bankr. N.D. Ohio 1988) (economic hardship of rental or mortgage payments nondebtor would have to make outweighed estate's benefit).

(n53)Footnote 50. *In re Persky*, 893 F.2d 15, 21, 21 C.B.C.2d 1460, 1467 (2d Cir. 1989) , *quoting U.S. v. Rogers*, 461 U.S. 677, 704-05, 103 S. Ct. 2132, 2148, 76 L. Ed. 2d 236, 260 (1983) .

(n54)Footnote 51. *In re Coombs*, 18 C.B.C.2d 1430, 1435, 86 B.R. 314, 318 (Bankr. D. Mass. 1988) .

(n55)Footnote 52. *In re McCoy*, 92 B.R. 750 (Bankr. N.D. Ohio 1988) .

(n56)Footnote 53. *See, e.g., In re Bell*, 80 B.R. 104 (M.D. Tenn. 1987) (sale permitted when co-owner would receive one-half of the proceeds and had sufficient assets to purchase the property if he wished); *Gazes v. Roswick (In re Roswick)*, 231 B.R. 843 (Bankr. S.D.N.Y. 1999) (spouse's attachment to neighborhood and emotional distress about moving not sufficient to overcome benefit to estate of over \$300,000 from sale when spouse could afford comparable apartment, albeit in different neighborhood, and could not afford to live in current apartment); *In re Gauthreaux*, 206 B.R. 502 (Bankr. N.D. Ill. 1997) (detriment to nondebtor spouse outweighed benefits of sale when nondebtor had been sole contributor to purchase and maintenance of property and would suffer hardship in being displaced, including capital gains liability); *In re Trout*, 28 C.B.C.2d 19, 146 B.R. 823 (Bankr. D. N.D. 1992) (benefits of sale did not outweigh likely harm to 77 year old former wife who would likely suffer severe emotional and psychological harm if

forced to move and who might well be unable to find financing for another home or to exercise right of first refusal); *In re Waxman*, 24 C.B.C.2d 2103, 128 B.R. 49 (Bankr. E.D.N.Y. 1991) (economic and emotional consequences of sale for 60 year old co-owner, including tax loss of \$20,000 and likely inability to obtain another home in her Orthodox Jewish Community within walking distance of synagogue, outweighed benefits of sale); *In re Griffin*, 123 B.R. 933 (Bankr. S.D. Fla. 1991) (emotional and economic impact upon nondebtor outweighed "minimal" benefits a sale would produce when property almost totally encumbered); *In the Matter of Ray* 73 B.R. 544 (Bankr. M.D. Ga. 1987) ; *In re Vassilowitch*, 16 C.B.C.2d 1039, 7 B.R. 803 (Bankr. D. Mass. 1987) ; *In re Addario*, 53 B.R. 335 (Bankr. D. Mass. 1985) (sale permitted when co-owner was able to purchase from the trustee at the proposed sale price).

(n57)Footnote 54. 11 U.S.C. § 363(h)(4).

(n58)Footnote 55. 124 Cong. Rec. H11093 (Sept. 28, 1978) (remarks of Rep. Edwards), *reprinted in* Vol. D Collier on Bankruptcy, App. Pt. 4(f)(i) (Matthew Bender 15th Ed. Revised).

(n59)Footnote 55a. *In re Grabowski*, 137 B.R. 1 (S.D.N.Y. 1992) , *aff'd without opinion*, 970 F.2d 896 (2nd Cir. 1992) . *Accord Sapir v. Sartorius*, 230 B.R. 650 (S.D.N.Y. 1999) .

(n60)Footnote 55b. *In re Grabowski*, 137 B.R. 1, 3 . *See also In re Prakope*, 317 B.R. 593 (Bankr. E.D.N.Y. 2004) (when debtor and spouse had entered into prepetition sale agreement, and only benefit of denying trustee's motion to sell might be a few additional months pf occupancy, that benefit did not outweigh benefit to estate); *Mostoller v. Kelley* (*In re Kelley*), 304 B.R. 331 (Bankr. E.D. Tenn. 2003) (burden on nondebtor and nondebtor did not meet burden when he offered only his statement that he would realize no benefit from the sale after paying moving costs).

(n61)Footnote 55c. *In re Bell*, 80 B.R. 104 (M.D. Tenn. 1987) .

(n62)Footnote 56. *In re Benyola*, 136 B.R. 646, 4 4th Cir. & D.C. Bankr. Ct. Rep. 551 (Bankr. E.D. Va. 1992) .

(n63)Footnote 57. *See, e.g., In re Tibbetts*, 186 B.R. 140 (Bankr. S.D. Ala. 1995) (nondebtor spouse lived alone in four bedroom home and was able to afford alternative housing).

(n64)Footnote 57a. *See In re Belyea*, 43 C.B.C.2d 229, 253 B.R. 312 (Bankr. D. N.H. 1999) (permitting partition of jointly owned property through chapter 13 plan over opposition of co-owner); *Rishel v. Rishel*, 166 B.R. 276, 278 (Bankr. W.D. Pa. 1994) ; *In re Janoff*, 54 B.R. 741, 742 (Bankr. D. N.J. 1985) ; *In re Yakubessin*, 83 B.R. 462, 466-68 (Bankr. S.D. Ohio 1988) . *But see Wrublik v. Wrublik* (*In re Wrublik*), 312 B.R. 284 (Bankr. D. Md. 2004) (chapter 13 debtor could not invoke § 363(h)).

(n65)Footnote 58. *Fed. R. Bankr. P. 7001*; *In re Wickham*, 127 B.R. 9, 3 4th Cir. & D.C. Bankr. Ct. Rep. 436 (Bankr. E.D. Va. 1990) . *But see In re Belyea*, 43 C.B.C.2d 229, 253 B.R. 312 (Bankr. D. N.H. 1999) (permitting partition of jointly owned property through chapter 13 plan).

(n66)Footnote 59. *In re Lowery*, 203 B.R. 587, 9 4th Cir. & D.C. Bankr. Ct. Rep. 22 (Bankr. D. Md. 1996) .

(n67)Footnote 60. *In re Lyons*, 995 F.2d 923 (9th Cir. 1993) .

(n68)Footnote 61. *Veltman v. Whetzal*, 93 F.3d 517, 36 C.B.C.2d 853 (8th Cir. 1996) .

(n69)Footnote 62. *In re Persky*, 893 F.2d 15, 17-18, 21 C.B.C.2d 1460, 1463 (2d Cir. 1989) .

(n70)Footnote 63. 11 U.S.C. § 363(i). *See 3 Collier on Bankruptcy*, P 363.08 (Matthew Bender 15th Ed. Revised). *See also In re Fehl*, 6 C.B.C.2d 533, 19 B.R. 310 (Bankr. N.D. Cal. 1982) .

(n71)Footnote 64. 11 U.S.C. § 363(j). *See Stine v. Diamond* (*In re Flynn*), 418 F.3d 1005 (9th Cir. 2005) (trustee's attorney's fees could not be charged to nondebtor's share); 3 *Collier on Bankruptcy*, P 363.08[6] (Matthew Bender 15th

Ed. Revised).

(n72)Footnote 65. *11 U.S.C. § 363(j)*. See *Stine v. Diamond (In re Flynn)*, 418 F.3d 1005 (9th Cir. 2005) (language of the statute directs the trustee immediately to distribute proceeds after the sale); 3 *Collier on Bankruptcy*, P 363.08[6] (Matthew Bender 15th Ed. Revised). See also P 4.03[5] *infra* regarding rights of a spouse to community property in the estate. *But see In re Van der Heide*, 219 B.R. 830 (B.A.P. 8th Cir. 1998) (proceeds of entireties property, including nondebtor's share, distributed to joint creditors.)

(n73)Footnote 66. *In re Spain*, 103 B.R. 286 (N.D. Ala. 1988) .

(n74)Footnote 67. *In re Persky*, 893 F.2d 15, 21, 21 C.B.C.2d 1460, 1467 (2d Cir. 1989) .

(n75)Footnote 68. *In re Persky*, 134 B.R. 81 (Bankr. E.D.N.Y. 1991) .

(n76)Footnote 69. *134 B.R. 81, 100-05* . Compare *In re Bernier*, 32 C.B.C.2d 1747, 176 B.R. 976, 32 O.&G.R. 1747 (Bankr. D. Conn. 1995) (use of *11 U.S.C. § 363(h)* against joint tenant in Connecticut property did not effect a taking because the debtor cotenant's interest could have been executed upon by creditors who could then have forced sale by way of partition; even if there was a taking, it was for a public purpose and for fair compensation and, therefore, not unconstitutional).

(n77)Footnote 70. *11 U.S.C. § 363(i)*.

(n78)Footnote 71. *11 U.S.C. § 363(i)*. See also *In re Rivera*, 214 B.R. 50 (D.P.R. 1997) (when nondebtor spouse failed to make firm offer for property after debtor in possession met requirements of section 363(h), debtor in possession was properly authorized to sell property).

(n79)Footnote 72. *In re Brollier*, 30 C.B.C.2d 1338, 165 B.R. 286 (Bankr. W.D. Okla. 1994) .

(n80)Footnote 73. *In re Brollier*, 30 C.B.C.2d 1338, 1343-1345, 165 B.R. 286, 291-92 .

(n81)Footnote 74. See *In re Meyer*, 187 B.R. 650 (Bankr. W.D. Mo. 1995) (United States trustee fees in chapter 11 case could not be charged on disbursements to secured creditors from sale of nondebtor wife's share of property).