

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

UNITED STATES BANKRUPTCY COURT
WESTERN DIVISION
FILED

MAR 26 1998

JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

IN RE
CHALLICE ALEXANDER HARSSON, JR..
Debtor.

Chapter 7

Case No. 96-28675-B

**MEMORANDUM OPINION AND ORDER ON ELIZABETH UPCHURCH HARSSON'S
MOTION TO SET ASIDE ORDER APPROVING SALE OF LAND AND MOTION TO
SET ASIDE THE ORDER APPROVING THE COMPROMISE SETTLEMENT WITH
ELIZABETH UPCHURCH HARSSON AND CHALLICE ALEXANDER HARSSON
AND ORDER ON TRUSTEE'S MOTION TO PAY ALLOWED CLAIMS**

Pending before this Court are the Motions of Elizabeth Upchurch Harsson to Set Aside the Court's Order Approving the Sale of Land and to Set Aside the Court's Order Approving the Compromise and Settlement Agreement between Ms. Harsson, the debtor, Challice Alexander Harsson, and the chapter 7 trustee. At issue is whether the parties' Marital Dissolution Agreement (MDA), to which the trustee was a party, should be rescinded based on a mutual mistake of fact regarding the value of real property in the marital estate. For the reasons stated herein the Court finds that there has been no mutual mistake of fact sufficient to rescind the parties' agreement in toto, but there was an inequitable partition of the 60.89 acre tract, which contributed to Ms. Harsson receiving less than the agreed upon 55% of the net marital estate, and other equitable considerations mandate relief to Ms. Harsson. Ms. Harsson's Motions are denied in part but granted in part. The following

constitutes the Court's findings of fact and conclusions of law.

FACTUAL SUMMARY

This proceeding arises from a divorce action in Tipton County, Tennessee, involving the debtor, Challice Alexander Harsson, Jr., and the movant, Elizabeth Upchurch Harsson. The parties were married on September 6, 1980, and owned jointly approximately 152 acres of real property located in Tipton County, Tennessee, during the course of their marriage. The property included three (3) parcels or tracts, known as Tract I, consisting of 60.89 acres, Tract II, consisting of 47.10 acres, and Tract III, consisting of 44.05 acres. Tract I, the 60.89 acre tract was partitioned pursuant to the MDA. The discrepancy between the appraised values on all tracts and the actual sales values, as well as the partition of Tract I, are at issue.

The debtor instituted divorce proceedings in Tipton County, Tennessee on September 12, 1994. The divorce was still pending at the time the debtor filed a voluntary petition in bankruptcy under chapter 7 on July 16, 1996. Pursuant to this Court's order, the bankruptcy trustee intervened in the divorce action to represent the interests of the bankruptcy estate, and he began settlement negotiations with the parties and their attorneys in an attempt to reach an agreement regarding division of the marital real estate. At all times pertinent to the negotiations, all parties were represented by counsel. The parties agreed that Ms. Harsson was to receive a fifty-five percent (55%) share of the net marital property, and Mr. Harsson and the trustee were to receive a forty-five percent (45%) share. The Trustee's Post-trial Memorandum points out that the MDA does not contain a reference to these percentages; however, exhibits introduced make it clear that this was the foundation of the agreement, and the Trustee's Motion to Approve the Compromise (docket entry 54) states: "The proposed Agreement contemplates a division of property which results in Mrs.

Harsson receiving an estimated 55% of the marital estate and the Trustee receiving an estimated 45% of the estate.” The same motion does refer to that division as being “based on appraised value of the marital estate,” but the fact remains the parties were at that point dividing *the marital estate* and not *the bankruptcy estate*.

It appears that at the inception of the negotiations, the trustee proposed to sell the property, but Ms. Harsson refused, instead desiring to receive some of the real property as part of her portion of the marital estate, rather than the cash proceeds of a sale. The trustee subsequently engaged the services of Mr. James Murdaugh, a licensed real estate appraiser, to appraise the property. Mr. Murdaugh appraised the 60.89 acre tract at \$200,000.00, the 47.10 acre tract at \$52,800.00 and the 44.05 acre tract at \$163,125.00.¹

Subsequent to receipt of Mr. Murdaugh’s appraisals, the parties entered into the MDA, which provides, in pertinent part:

8. Voluntary Execution. Each party acknowledges that this Agreement has been entered into of his or her own volition with full knowledge and information including tax consequences. In some instances, it represents a compromise of disputed issues. Each believes the terms and conditions to be fair and reasonable under the circumstances. No coercion or undue influence has been used by or against any party in making this Agreement. Each Party acknowledges that no representations of any kind have been made to him or her as an inducement to enter into this Agreement, other than the representations set forth herein.

14. Real Estate Conveyance. Trustee agrees to convey from Debtor/Husband’s estate, and by signing this document does convey, to Wife the 41 acres by Quit Claim Deed to the property at Tract No. 1 description of 60.89 acres on the south side of Brighton-

¹ On the cover sheet of the appraisal, Tract II’s value is shown as \$52,800.00, but on its summary sheet the value is \$46,000.00. \$52,800.00 is the value used in Exhibit 2.

Clopton Road. Wife agrees to convey, and by signing this document does convey, to Husband and Trustee the 19.89 acres by Quit Claim Deed to property at Tract No. 1 description of 60.89 acres on the south side of Brighton-Clopton Road. Trustee and Husband shall retain 19.89 acres of the 60.89 acre tract. Trustee shall **draft** the Quit Claim Deeds to all of the parcels of property. The Trustee and Wife shall split evenly the surveying fee to divide the 60.89 acres into two (2) tracts consisting of 41 acres and 19.89 acres and agree that James Murdaugh shall have sole discretion to determine how such division should be accomplished. The parties agree that the property shall be divided in such manner so as to maximize the value to all parties.. . .

Mr. Murdaugh divided the real property between the parties, designating 41 acres of Tract I to Ms. Harsson, and 19.89 acres of Tract I to the bankruptcy trustee. There is a dispute as to whether Ms. Harsson or her attorney saw the proposed divisions before the execution of the MDA or entry of the divorce, but this dispute is not determinative of the issues before the Court. It is significant that Mr. Murdaugh's division did not in fact "maximize the value to all parties." Within two months of this Court's approval of the MDA, the trustee marketed and sold the bankruptcy estate's portion of the real property for a total sum of \$460,000.00 • an amount significantly higher than the appraised \$415,925.00 amount for all three (3) parcels combined. The 19.89 acres allotted to the bankruptcy estate from Tract I alone sold for \$90,000.00, and Ms. Harsson's 41.00 acre portion of Tract I has now sold for \$91,250.00.

Ms. Harsson now seeks to have the sale of the trustee's property set aside and the MDA rescinded, alleging that, because the sale price of the property conveyed to the trustee pursuant to the MDA was greater than the property's appraised value, there has been a mutual mistake of fact which resulted in a windfall to the trustee, thus rendering the MDA voidable. Ms. Harsson also alleges that the portion of Tract I allocated to her by Mr. Murdaugh is **inferior** to the trustee's portion

because of its undesirable topography, the quality of her road frontage, and the existence of a utility easement across her portion of the property. In support of her argument, Ms. Harsson has presented an offer in the amount of \$91,250.00 that she has accepted for her 41 acre portion of Tract I, as well as evidence of the trustee's realization of more than 45% of the martial estate.

DISCUSSION

As a general rule of law in Tennessee, in order to rescind an agreement based upon the parties' mutual mistake of fact, the mistake (1) must have been mutual; (2) must have been material; (3) must not have been due to the complainant's own negligence; and (4) the complainant must show injury. *Robinson v. Brooks*, 577 S.W.2d 207,208 (Tenn. Ct. App. 1978), *cert. denied*, (1979).

Further, the character of the mistake includes a mistake stemming from the parties' unconscious ignorance of the existence or nonexistence of a material fact. *Id.*, quoting 17 C.J.S. *Contracts* § 135. The materiality of the mistake depends upon the facts and circumstances of each case. *Id.*

There is an impediment to Ms. Harsson's establishment of the existence of a mutual mistake of fact. At the time the parties entered into the MDA, Ms. Harsson had sufficient opportunity to obtain an independent appraisal of the property, or to make an independent inquiry as to its fair market value. She had within her reach the opportunity for knowledge, yet she chose to enter into her agreement with a "conscious ignorance," uncertain of the sales value of the property, or how Mr. Murdaugh would allocate the parties' portions. The sales value and the division of the property were uncertainties of which the parties were aware. The parties were dealing at arms-length, on equal footing, and each party was represented by competent counsel.

Ms. Harsson was aware at the time the contract was made that she had only limited

knowledge with respect to the fair market value and the subsequent division of the property, but she treated her limited knowledge as sufficient, thereby assuming a risk of mistake as to the final outcome. RESTATEMENT (SECOND) OF CONTRACTS § 154 (1979). As the trustee noted, if the trustee had received less for the estate's share of the real property than its appraised value, it is doubtful that Mrs. Harsson would now be before this Court. Both parties were aware of the uncertainties inherent in their bargain, and both parties assumed the risks of the outcome of the actual sales. For these reasons, the Court is not persuaded that a **recission in toto** of the **MDA** or of the trustee's sales is appropriate.

Moreover, it does not appear that Ms. Harsson actually seeks to set aside the order approving the trustee's sales. Ms. Harsson, in fact, has now contracted to sell her 41 acre tract; thus, the parties' real dispute is one of division of the sales' proceeds.

While there is legal authority to hold Ms. Harsson absolutely to her bargain, the Court is persuaded that this is not an appropriate equitable result. To a significant extent, this bankruptcy Court must function in this case as a chancery court would in Tennessee. In addition to the parties' basic agreement for a 55/45% split of the marital estate, a part of the parties' agreement was that Ms. Harsson "shall receive a greater equitable distribution of the marital assets than does the Husband." MDA ¶ 13. A rationale for the latter statement was that this debtor's creditors might make claims against Ms. Harsson, which may or may not be correct. If the trustee's inflexible argument prevailed, nevertheless, there would be excess assets in the bankruptcy estate, after payment in full of allowed creditors' claims, taxes, and administrative expenses, with the excess returned to Mr. Harsson. 11 U.S.C. § 726(a)(6). Such a result is a windfall to Mr. Harsson that this Court, as one of equity, must address.

Mr. Harsson is a chapter 7 debtor, whose creditors are entitled to be paid before he receives more than allowed exemptions. The trustee focuses upon the interests of creditors of this estate, as he should, but Ms. Harsson is a creditor as well. She has filed a claim, and her claim, or a portion thereof, may be entitled to priority status. 11 U.S.C. § 507(a)(7). Mr. Harsson's creditors, if not paid in full in this bankruptcy case and if they have a basis to make a separate claim against Ms. Harsson, may proceed against her in a nonbankruptcy forum; however, that would not have provided a basis for them to be paid ahead of Ms. Harsson in the divorce and property division action. Those creditors should not be presumed to entitlement to benefit ahead of Ms. Harsson merely because they have allowed claims in the bankruptcy estate. Moreover, in light of Tennessee authority, a court dividing marital property must consider the statutory factors of Tennessee Code Annotated § 36-4-121(c)(1), while recognizing that "an equitable property division is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case." *Batson v. Batson*, 769 S.W.2d 849, 859 (Term. App. 1988), *appeal denied* (1989).

This Court does not have before it the evidence required to dictate the terms of an equitable property division, but I am persuaded by the following factors that an equitable division did not occur:

- The three (3) parties, Mr. Harsson, Ms. Harsson and the bankruptcy trustee agreed upon a split of the martial estate - 45% to the trustee and 55% to Ms. Harsson. Whether their lack of touch with the true market value of the realty amounts to a mutual mistake of fact is not controlling on the equitable realization that such a split did not occur.

- The division of the 60.89 acre tract was not in fact “divided in such a manner so as to maximize the value to all parties,” as was agreed in the MDA.
- The trustee’s role in the MDA was to realize the highest return for the bankruptcy estate, but the estate should not benefit at the expense of Ms. Harsson’s failure to receive an equitable division of marital assets, as the Tennessee law on marital property division requires.
- The Court’s order approving the trustee entering into the MDA was based upon a finding that the settlement was “fair and reasonable” and “in the best interest of the [bankruptcy] estate, ” but the order should not be used to give a disproportionate benefit to creditors other than Ms. Harsson or to the debtor.
- It is unlikely that any significant change in the fair market value of the property occurred in the brief interim between the date the agreement was signed or approved and the date of the sale. This short span is significant in the Court’s decision that the property division was too far below the parties’ anticipation of a 55-45% split.

After considering the MDA and all of the facts and circumstances of this case, the Court finds that the parties’ intention to provide Ms. Harsson with an equitable division of marital property has been frustrated, due to no fault of the parties or their counsel. Neither is Mr. Murdaugh at fault for not anticipating what the true market value of the realty would be. The Court rejects Ms. Harsson’s argument that the trustee somehow misrepresented facts to her or somehow did not act in good faith. There is no such evidence. The trustee and his counsel did an excellent job of

maximizing this estate.

CONCLUSION AND ORDER

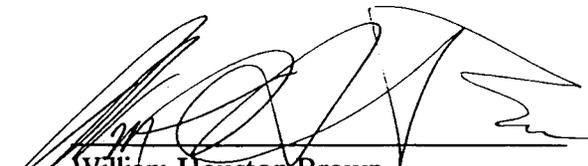
Based on the analysis above, Ms. Harsson's Motion To Set Aside Order Approving Sale of Land and Motion To Set Aside the Order Approving the Compromise Settlement with Elizabeth Upchurch Harsson and Challice Alexander Harsson will be denied insofar as the Motions seek a total rescission. However, because the transaction failed to accomplish an equitable division of marital property and the division of Tract I failed to accomplish a maximum value for all parties, the Court concludes that a monetary adjustment of Ms. Harsson's division is required. The Court lacks all of the necessary evidence to make an equitable division for the parties; thus

It is therefore **ORDERED** that:

1. The trustee's motion to pay allowed unsecured claims is held in abeyance until a further hearing consistent with this Order.
2. Prior to the next hearing, the trustee is to calculate, estimate and file the following:
 - a. The amount needed to pay allowed claims, other than Ms. Harsson's claim, in full but without interest;
 - b. The amount of approved administrative expenses that have not been paid (such expenses that have been approved previously may be paid if payment has not been made);
 - c. The estimated amount of the trustee's commission;

- d. The estimation of administrative expenses not yet applied for nor approved (a reasonable but safe estimate should be made, as the Court may, at the next hearing, approve a disbursement to creditors, including Ms. Harsson);
- e. The estimated remaining tax obligations of the estate, and
- f. The estimated reserve for the potential claim of Tennessee Farmers Mutual Insurance Company, which has filed adversary proceeding 97-1 505.
3. The parties' counsel, those representing the trustee, Mr. Harsson and Ms. Harsson, are to meet face to face and explore settlement. The Court is confident that a settlement is possible, but in the absence of a settlement, the Court will be prepared at the next hearing to make an adjustment in the division of marital property at such a hearing. It **will** be necessary for the parties at that time to be prepared to produce proof concerning an appropriate equitable division, and such proof could favor a division other than the 55% - 45% split previously agreed. A further hearing to determine the appropriate division will be conducted on Monday, April 27, 1998, at 10:30 a.m., in Courtroom 680,200 Jefferson Avenue, Memphis, Tennessee.

IT IS SO ORDERED this the 26th day of March, 1998.



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United States Bankruptcy Judge

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Mailed on 3/26/98 to:
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