NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-05-1343-KRyB
JACQUELINE C. MELCHER,	BK. No. 01-53251
Debtor.	
ESTATE OF TERRENCE P. MELCHER,	
Appellant,	
v.	**M E M O R A N D U M**
JACQUELINE C. MELCHER; UNSECURED CREDITORS' COMMITTEE; UNITED STATES TRUSTEE; WELLS FARGO BANK, N.A.,	
Appellees.	

Argued and Submitted on March 24, 2006
at San Francisco, California

Filed - May 31, 2006

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

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Before: KLEIN, RYAN* and BRANDT, Bankruptcy Judges.

*Hon. John E. Ryan, Bankruptcy Judge for the Central District of California, sitting by designation.

This appeal is from an order confirming a chapter 11 plan for an individual debtor who filed the case for the main purpose of thwarting a state-court order requiring sale of a beach house to effect a division of community property in a nasty divorce.

The net result of the plan – confirmed after four years in chapter 11, $1.5 million in professional fees, and the death of the debtor's former spouse – is to create an indefinite stay of the state court sale order until the divorce litigation and all possible collateral litigation (the debtor is pursuing multiple actions) finally ends. Since all other creditors were either paid in full with interest or are unimpaired, the case remains what it always has been — a two-party divorce dispute.

We agree with the appellant that the plan did not satisfy the essential elements specified by 11 U.S.C. § 1129 for plan confirmation and REVERSE and REMAND.

FACTS

The debtor-appellee, Jacqueline Melcher, filed this chapter 11 case on June 28, 2001, the day before close of escrow on a court-ordered sale of a 3.75 acre property ("Stonewall Beach") on the island of Martha's Vineyard, Massachusetts.

The Monterey County (California) Superior Court had ordered the Stonewall Beach property sold in a November 2000 judgment determining and dividing community property in the marital dissolution action filed by Terrence Melcher in 1997. A complicating factor in that property-division litigation had been that each spouse owned substantial separate property when they married, some of which acquired California community property

status during the marriage, the determination of which entailed a complex, fact-intensive calculus under California law.

Stonewall Beach was owned by Jacqueline before marriage but was determined by the state court to have become community property.[1] Because the estimated $7,000,000 equity in Stonewall Beach was necessary for division of community property, the state court ordered its sale. Jacqueline, however, was determined that Stonewall Beach not be sold.[2]

In February 2001, the state court ordered that an offer of $12,000,000 for Stonewall Beach be accepted. Since Jacqueline had appealed the November 2000 judgment and the sale order (which have now been affirmed on all counts), the state court granted her request for a supersedeas bond, which it fixed at $7,240,000, to be posted within five days. Jacqueline did not post the bond.

Instead, Jacqueline filed a lis pendens on Stonewall Beach in February and, in April, recorded a document designed to cloud title. The state court ordered her to reverse these actions.[3]

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[1]The state court also determined that the family residence in Carmel, California, was community property valued at $1,240,000 to be awarded to Jacqueline after Terrence received his one-half community property interest and that Jacqueline's separate property included four other houses, one on Martha's Vineyard and three in Carmel, valued at $5,765,000.

[2]Four years later, the bankruptcy court summed up her determination: "She will only sell Stonewall if she absolutely has to at the end of her life; you know that. She doesn't want to sell Stonewall. She'll sell everything else before she has to sell Stonewall." Tr. Confirmation Hr'g, May 27, 2005, at p. 361.

[3]As the California Sixth District Court of Appeal noted:

> Meanwhile, in February 2001, wife filed a lis pendens on the Stonewall Beach property. In April 2001, she recorded the handwritten agreement, which represented an apparent attempt

(continued...)

In addition, the Melchers' minor son, Ryan, with the support of his mother, sued his parents in a Massachusetts court to block the sale on the theory that they had promised to hold Stonewall Beach in trust for him. A lis pendens was recorded.[4]

When Ryan's lis pendens led the title insurer to refuse to issue a policy on Stonewall Beach without an indemnification backed by an $8,000,000 deposit, the state court modified its sale order on June 22, 2001, to require that $8,000,000 of net sale proceeds be deposited with the title company, instead of being placed in the blocked account required by the order.

With escrow scheduled to close the next day, Jacqueline filed this chapter 11 case on June 28, 2001.

Terrence filed a motion for relief from the automatic stay and a request for adequate protection on July 18, 2001. The bankruptcy court held a hearing on the motion on December 4, 2001, and did not enter its order denying stay relief and ordering

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[3](...continued)
to further cloud title on the property. The same month, the court found wife responsible for placing the two liens on the property, and it ordered her to remove them.

In re Marriage of Melcher, Nos. H022141, H022603, H022935 & H023475, at p. 31 (Cal. Ct. App. Jan. 13, 2006), petition for review denied, No. S141344 (Cal. Mar. 29, 2006).

[4]The Sixth District Court of Appeal noted:

> In addition, a suit was filed by the parties' minor son Ryan, who also filed a lis pendens. Wife was nominally a defendant in her son's lawsuit, but apparently she supported his position in that action. Husband's attempts to expunge his son's lis pendens in Massachusetts were unsuccessful.

In re Marriage of Melcher, Nos. H022141, H022603, H022935 & H023475, at p. 32 (Cal. Ct. App. Jan. 13, 2006), petition for review denied, S141344 (Cal. Mar. 29, 2006).

adequate protection until October 8, 2002.

Stalemate prevailed during the first three years of the chapter 11 case, as plans of reorganization were variously filed by Terrence, Jacqueline, and the creditors' committee, none of which was confirmed.[5] Then, in November 2004, Terrence died.

Three months after Terrence's death, Jacqueline and the creditors' committee filed a "joint" plan of reorganization that was confirmed August 11, 2005, over objection of Terrence's decedent's estate ("appellant"). That confirmation order is the subject of this appeal.

The plan designated fourteen classes, of which ten were secured and unimpaired. Unsecured claims were in four classes: general unsecured (about $323,000), Monterey County Bank ($90,000), Terrence (who claimed $168,839.05 as his share of rent), and Ryan. All unsecured debt would be paid in full, and the general unsecured class would receive 5 percent interest.

According to the debtor's pre-confirmation motion for authority to pay the $273,604.86 undisputed portion of the claims in the general unsecured class, at least $1,085,663.00 was in an impound account available to pay creditors. Professional fees paid from the estate were approximately $1,500,000.

As to Terrence, the Plan provided that Stonewall Beach and

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[5]Terrence filed disclosure statements and plans on March 1 and 27, 2002. PACER, dkt nos. 194 & 207.

Jacqueline filed disclosure statements and plans on March 29, 2002, February 3, August 1, and November 14, 2003, and August 26, 2004. PACER, dkt nos. 218, 317, 457, 582 & 756.

The creditors' committee filed disclosure statements and plans on May 30, 2003, and March 8, August 26, and September 16, 2004. PACER, dkt nos. 412, 616, 751 & 795.

the family residence in Carmel remain property of the estate under 11 U.S.C. § 541 and remain subject to the automatic stay of 11 U.S.C. § 362(a) until "all of the issues in the Dissolution Proceeding have been determined by final and non-appealable orders, except those involving child or spousal support." At oral argument of this appeal, it was conceded that the phrase "all of the issues" reaches beyond the state-court orders that were on appeal when the plan was confirmed and extends to future litigation Jacqueline might pursue.

Terrence's claim was designated as Class 10:

> a. To the extent this claim arises out of the Family Law Judgment, or out of any orders made in the Dissolution Proceeding, it shall be treated as follows:
>
> i. Debtor shall prosecute the appeals of the Family Law Judgment as well as appeals of other orders entered in the Dissolution Proceeding which are now pending before the California Court of Appeal.
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> ii. Both Terrence P. Melcher and Jacqueline shall be bound by the terms of any final non-appealable orders made and entered in the Dissolution Proceeding whether at the appellate level or at the trial court level, provided however, that Debtor reserves the right to object to the allowance of any proof of claim or request for payment of an expense of administration claim filed by Terrence P. Melcher in this Chapter 11 case.
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> iii. Notwithstanding the above, both the Stonewall Beach Property and the Family Residence shall remain 11 U.S.C. § 541 property of Debtor's Chapter 11 bankruptcy case after confirmation of the Plan and shall be subject to the stay imposed by 11 U.S.C. 362(a). Such property will no longer be § 541 property and subject to the 362(a) stay at such time as all of the issues in the Dissolution Proceeding have been determined by final and non-appealable orders, except those involving child or spousal support.
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> b. To the extent the claims arises from the Adequate Protection Order provided Terrence P. Melcher by an order of the Bankruptcy Court the Plan shall leave unaltered the legal, equitable, and contractual rights to which Terrence P. Melcher is entitled on account of the Adequate Protection Order. The Bankruptcy Court

> shall retain jurisdiction to determine any damage claim Terrence P. Melcher may have pursuant to the Adequate Protection Order.
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> c. To the extent Terrence P. Melcher asserts a claim not related to the Dissolution Proceeding or the Adequate Protection Order his claim shall be given the same treatment provided for the Class 12 Allowed Unsecured Claims.
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> d. Notwithstanding anything to the contrary above or in the Plan Debtor shall have the right to bring any proceeding she might have against Terrence P. Melcher in any court of competent jurisdiction pursuant to any applicable State law. Debtor shall also have the right to prosecute any litigation wherein she and Terrence P. Melcher are parties. Among the claims that Debtor retains and reserves the right to pursue following confirmation are each and every one of the claims set forth in the Debtor's Statement of Claims against Terrence P. Melcher and the Estate of Terrence P. Melcher To Be Retained By Debtor Following Confirmation of Plan of Reorganization filed in this case on May 2, 2005.

Joint Plan at 10-11; Order Confirming Plan at 3.

The plan does not directly deal with the rights of Terrence as a co-owner of property.

Appellant objected to confirmation, asserting that the plan: (1) incorrectly treated him as an "unimpaired" creditor; (2) did not satisfy the good faith requirement of § 1129(a)(3) because the resolution of "all of the issues in the Dissolution Proceeding," in context, amounted to indefinite imposition of the automatic stay and improper preemption of state-court orders by having the bankruptcy court retain jurisdiction for allowance of claims previously adjudicated by the state court; (3) was not feasible pursuant to 11 U.S.C. § 1129(a)(11); (4) did not satisfy the best interest of creditors test pursuant to § 1129(a)(7); and (5) did not satisfy § 1129(b) because it unfairly discriminated against him and violated the absolute priority rule.

Jacqueline responded that she did not file the chapter 11 case solely to block the family law judgment and the sale of Stonewall Beach. She claimed to have had a cash flow problem because of a missed $40,000 rental payment on Stonewall Beach and because Terrence did not pay various expenses and child support.

The court entered and published its findings regarding confirmation on July 25, 2005. In re Melcher, 329 B.R. 865 (Bankr. N.D. Cal. 2005). The order confirming the plan was entered on August 11, 2005. This timely appeal ensued.

Subsequent to confirmation, the California Sixth District Court of Appeal affirmed the Monterey County Superior Court in all respects, and the California Supreme Court denied a petition for review. In re Marriage of Melcher, Nos. H022141, H022603, H022935 & H023475 (Cal. Ct. App. Jan. 13, 2006), petition for review denied, No. S141344 (Cal. Mar. 29, 2006).

On November 25, 2005, Jacqueline commenced a civil action in Los Angeles County Superior Court seeking to set aside the Monterey County Superior Court's judgment. Jacqueline Melcher v. Terese Melcher as Executor for Estate of Terrence P. Melcher, Los Angeles County Super. Ct., No. SC087704 (filed Nov. 25, 2005).

It was conceded to us at oral argument that Jacqueline's post-confirmation action is within the plan's "all-of-the-issues-in-the-Dissolution-Proceeding" provision and must be finally resolved before appellant is paid on its claim or receives its share of co-owned property as awarded by the state court, as will any similar future action that she files.

ISSUES

1. Whether the plan complied with the essential elements for confirmation under 11 U.S.C. § 1129(a).

2. Whether the plan complied with 11 U.S.C. § 1129(b).

STANDARD OF REVIEW

Findings regarding good faith, feasibility, equality of treatment, and unfair discrimination under § 1129 are reviewed for clear error. Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003) (cataloging cases). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been committed. Id. The ultimate decision to confirm a reorganization plan is reviewed for an abuse of discretion. Id.

DISCUSSION

Three salient points drive the analysis of this appeal. First, the animating principle of this chapter 11 case, as described by the court during the confirmation hearing, is: "She will only sell Stonewall [Beach] if she absolutely has to at the end of her life; you know that. She doesn't want to sell Stonewall. She'll sell everything else before she has to sell Stonewall."[6] Second, Terrence is a co-owner of property, in addition to being a creditor. Third, the chapter 11 case has resolved itself into a two-party dispute.

[6]Tr. Confirmation Hr'g, May 27, 2005, at p. 361.

I

The confirmation issues under § 1129(a) relate to good faith and feasibility.

A

A chapter 11 plan cannot be confirmed if it has not been proposed in good faith. 11 U.S.C. § 1129(a)(3).

The § 1129(a)(3) good faith question is determined on a case-by-case basis taking into account the totality of the circumstances with a view to whether the plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Platinum Capital, Inc. v. Sylmar Plaza, Ltd. P'ship (In re Sylmar Plaza, Ltd. P'ship), 314 F.3d 1070, 1074-75 (9th Cir. 2002), cert. denied, 538 U.S. 1035 (2003); Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.), 84 B.R. 167, 171-72 (9th Cir. BAP 1988).

The court concluded that the plan was proposed in good faith, reasoning that it had a definite termination, that it legitimately operated as a substitute for an appeal bond that permitted the debtor to preserve her rental business, that it did not preempt state court orders, and that it was sufficient recourse for the appellant to be able to seek relief from the automatic stay. Melcher, 329 B.R. at 876-77. All of these conclusions are flawed in material respects that leave us with a definite and firm conviction that a mistake was made.

1

First, the court reasoned that there was a definite

termination to the plan based on its assumption that the phrase "at such time as all issues in the Dissolution Proceeding have been determined by final and non-appealable orders" equated with the end of the appeals then pending in the California Sixth District Court of Appeal. The appellant argued that the concept of "all issues" had a considerably larger scope that was too indefinite to be credited.

The appellant's view was accurate. At the time of confirmation, it was apparent that Jacqueline would leave no stone unturned in her quest to retain Stonewall Beach. She had established a pattern of multiple litigation stratagems in multiple forums, including recording lis pendens and permitting a transparently collusive lawsuit by her minor son. The court had no reason to expect that she was ready to throw in the towel, as is evident from its own candid observation made during the confirmation hearing: "She will only sell Stonewall if she absolutely has to at the end of her life; you know that." In short, it was apparent at the time of confirmation that, in context, the phrase "all issues in the Dissolution Proceeding" was much broader than one ordinarily would assume.

Subsequent developments demonstrate the indefinite duration of the plan. At the time of oral argument of this appeal, it was conceded that the civil action that Jacqueline filed post-confirmation in the Los Angeles County Superior Court seeking to vacate the judgment of the Monterey County Superior Court was within the plan's provisions requiring that "all issues in the Dissolution Proceeding" be determined by final and non-appealable orders before the automatic stay perpetuated by the plan would

cease to apply.

Thus, even though the Sixth District Court of Appeal had affirmed the Monterey County Superior Court on all counts by the time of oral argument (the California Supreme Court denied the petition for review five days after our oral argument), the end is nowhere in sight. Even if the new Los Angeles County Superior Court action is promptly dismissed, it will take a considerable period for that dismissal to work its way through the state's appellate system, at which time, as suggested by Jacqueline's history, it will be time for her to play her next litigation card that will operate to extend the duration of the plan.

2

Next, the court applied a disruption-of-business analysis to reason that the plan was a legitimate substitute for an appeal bond. Accepting that sometimes a plan can properly serve as substitute for an appeal bond, the analysis is nonetheless on a case-by-case basis and, in this case, is not consistent with the objectives and purposes of the Bankruptcy Code. There are two problems.

a

First, the appeal bond argument smacks of pretext. As the court recognized, the real agenda is that: "She will only sell Stonewall if she absolutely has to at the end of her life; you know that."

The record does not demonstrate that she was actually unable to obtain an appeal bond. The court appears to have merely

assumed that the full amount would have to be posted in cash. California law, however, provides a variety of methods other than cash deposit for preserving a status quo pending appeal. CAL. CODE CIV. PROC. §§ 916 - 936.1 & 995.010 - 996.560.

Launching a chapter 11 case that visits some $1.5 million in professional fee expenses on the property of the estate is not, in context, an economically rational substitute for a bond. Rather, our reading of the record suggests that lamentation regarding an appeal bond was a red herring.

b

The next problem is that the court's rationale that Jacqueline "supports herself in large part from the rental income of her properties and so selling those properties would eliminate that rental income" (329 B.R. at 876) is flawed. It begs the question by assuming that the rental income is necessary to her support. That assumption is contradicted by the court's findings that she would net $4,542,950 after taxes and expenses of sale of the four rental properties (329 B.R. at 871) and that she had "over $3,350,000 in equity in her separate properties" (329 B.R. at 877). Resources of that magnitude are generally regarded as adequate for support of a single person. Moreover, the rationale proves too much because it presumes that the debtor has a right to remain in the rental business in such circumstances.

Moreover, the court's assertion that the objectives and purposes of the Bankruptcy Code are served by paying unsecured creditors in full, but keeping the real estate in the bankruptcy estate pending completion of the marital dissolution proceeding

(329 B.R. at 876), is a highly debatable non sequitur. It amounts to an assertion that paying all creditors in full and thereby reducing the reorganization to a two-party divorce action that functions to modify and frustrate the implementation of state-court orders is an objective and purpose of the Bankruptcy Code.

No special import follows from the payment of unsecured creditors in full in this particular case. Regardless of whether there may have been some cash flow issues at the outset of the case, the unsecured creditors were owed comparatively modest sums and always stood to be paid in full. According to Jacqueline's motion for authority to pay the $273,604.86 undisputed portion of all general unsecured claims before confirmation of the plan, at least $1,085,663 was in an impound account available to pay creditors. The only reason she needed to refinance one of her separate properties in connection with plan confirmation was that professional fees for the chapter 11 case that were payable as expenses of administration were approximately $1,500,000.

Although we accept that it is sometimes legitimate to use chapter 11 to deal with two-party disputes, including two-party disputes in the family law arena, the analysis necessarily must be on a case-by-case basis. The court grounded its reasoning on this count on the proposition that Jacqueline "merely seeks to complete the California State Court litigation and receive a determination of the parties' respective legal rights." 329 B.R. at 876. The seemingly innocuous nature of the debtor's purpose implied by that statement is belied by her litigation history from 1997 through the time of confirmation and continues to be belied by her litigation activity, especially her initiation of the Los Angeles

County Superior Court action, following confirmation.

3

The court's assertion that the plan does not preempt state court orders is similarly clearly erroneous.

The plan provision that the parties are bound by the "terms of any final non-appealable orders made" in the state-court dissolution proceeding, 329 B.R. at 877, is mere window dressing.

The plan also provides that the debtor reserves the right to object to the allowance of any proof of claim or to the allowance of any expense of administration. Assuming that the bankruptcy court will not entertain relitigation of the California state-court proceedings, there is nevertheless considerable room for future litigation in light of pending bankruptcy claim disputes (e.g., there is a proof of claim for $168,839.05 for appellant's share of rent); as co-owner of certain properties, appellant may also be entitled to assert administrative expenses. This leaves fertile ground for litigation of indefinite duration, even after "all issues in the Dissolution Proceeding" are resolved.

The key is that the appellant's hands are tied by a related provision that requires prior resolution of "all issues in the Dissolution Proceeding," which, it is conceded, continues to be effective even now that the Monterey County Superior Court judgment has been affirmed by the Sixth District Court of Appeal, with a subsequent petition for review denied by the California Supreme Court, because of the pendency of the post-confirmation Los Angeles County Superior Court action.

It is, thus, beyond cavil that the Monterey County Superior

Court judgment and related orders will not be able to be enforced for a substantial period after they would have been able to be enforced under applicable nonbankruptcy law, even if an appeal bond had been posted.

4

Nor does the potential for relief from the automatic stay provide appropriate protection for the appellant.

The ability of appellant, as stated by the bankruptcy court, "to file a motion to lift the automatic stay at anytime" (329 B.R. at 877) and obtain appellate review, does not, in the context of this case, constitute a safety valve that would rescue good faith for this plan.

First, Jacqueline's litigation history warrants a prediction that any motion for relief from stay would be litigated to the maximum extent possible and that all possible appeals would be pursued: "She will only sell Stonewall if she absolutely has to at the end of her life; you know that." Hence, even if the bankruptcy court acted with all deliberate speed to resolve a motion for relief from stay, the likelihood of appeals would enable Jacqueline to keep title clouded for a substantial period.

Second, the history of this chapter 11 provides further ground for discomfort about the efficacy of stay relief as a safety valve. Terrence filed a motion for relief from stay on July 18, 2001. The court did not hold the hearing until December 4, 2001, at which time it took the matter under submission. It did not decide the submitted matter until October 8, 2002.

In sum, none of the reasons mentioned by the court in support

of § 1129(a)(3) good faith actually, under the totality of the circumstances, support a conclusion that the plan was proposed in good faith. Thus, we are left with the definite and firm conviction that a mistake regarding good faith was made and conclude that the court's finding that the plan was proposed in good faith was clearly erroneous.

B

Another essential element for plan confirmation is the so-called "feasibility" test, which requires that confirmation is not likely to be followed by liquidation, or need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. 11 U.S.C. § 1129(a)(11).

The question of feasibility is reviewed for clear error. Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985); Brotby, 303 B.R. at 184. The plan proponent's burden is merely to demonstrate a reasonable probability of success, not that success is inevitable. Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1358 (9th Cir. 1986); Brotby, 303 B.R. at 191-92.

The core of the court's reasoning regarding feasibility was that there was sufficient equity in Stonewall Beach, which it concluded was worth between $13,000,000 and $16,000,000, to assure performance under the plan.

The first difficulty is that the plan does not provide a precise mechanism, with appropriate deadlines, for liquidating Stonewall Beach. Indeed, the plan is carefully drafted to exclude

any provision directly providing for sale of Stonewall Beach, albeit that full enforcement of the Monterey County Superior Court judgment and related orders after resolution of "all issues in the Dissolution Proceeding" eventually would lead to such sale. As indicated in our analysis of § 1129(a)(3) good faith, the performance of this aspect of the plan may reasonably be predicted not to occur in the foreseeable future.

The greater difficulty, however, is that Jacqueline has no intention of selling Stonewall Beach. The record of her crusade to save Stonewall Beach compels the conclusion that when the day comes that Jacqueline is backed into a corner such that she would have to permit sale of Stonewall Beach, she would need to (and would) pursue further financial reorganization: "She will only sell Stonewall if she absolutely has to at the end of her life; you know that."

We have the definite and firm conviction that a mistake was made in concluding that confirmation would not be likely to be followed by liquidation or need for further reorganization and that the court clearly erred in concluding that the plan was feasible under § 1129(a)(11).

II

The confirmation issues under § 1129(b) relate to whether the plan unfairly discriminates or is otherwise not fair and equitable in its treatment of appellant.

We consider § 1129(b) because appellant, despite the assertion of the plan proponents, is impaired under the plan. The appellant's legal or equitable interests are altered under the

treatment of Class 10, which provides a mechanism for the disputed claim to become an allowed claim and be paid substantially after the effective date of the plan. Moreover, the Class 10 treatment provides that certain claims appellant may make will be treated in the same fashion as Class 12, which class is designated as impaired.

One aspect of the § 1129(b) issue, however, the lack of provision for payment of interest on appellant's unsecured claim, was obviated by a provision in the order confirming the plan that provided for payment of interest if and when appellant prevails on the disputed claim.

In context, the plan imposes a fundamental unfairness that has several facets. First, the plan operates to withhold from appellant the co-ownership rights that are incident to ownership of property for a period longer than that which would be permitted under applicable nonbankruptcy law, even if the state court judgment had been stayed pending appeal. The state-court appeal ended with the denial of Jacqueline's petition for review by the California Supreme Court, yet the bankruptcy stay provided by the plan will continue for the indefinite future. There is no compensation whatsoever proposed for this interference with the rights of the appellant as co-owner of property.

Moreover, the nature of the interference, when coupled with the market risks of diminution of value, operate as an unfair and unreasonable shifting of risk from one co-owner to the other. See generally 7 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1129.04[4][b] (15th ed. rev. 2006).

The unfair risk-shifting problem is exacerbated by the

selective vesting provision of the plan according to which all property other than the Stonewall Beach and family residence community property interests has revested in Jacqueline. Hence, the plan gives her greater degrees of freedom than appellant.

Thus, we have the firm and definite conviction that a mistake was made in concluding that the plan was fair and equitable and did not discriminate unfairly and conclude that the determination that the plan complied with § 1129(b) was clearly erroneous.

III

Having concluded that the order confirming the plan must be reversed, the question of appellate remedy arises.

It appears that all creditors (other than appellant) whose rights were impaired under the plan have been paid. It would be inequitable for the reversal of the order confirming the plan to drag those creditors back into the bankruptcy court. There is no dispute that they were entitled to be paid and that sufficient resources were available to pay them under the bankruptcy distribution scheme. Accordingly, we will direct that the reversal of the confirmation shall not affect the rights of the creditors who have been paid.

The dispute remaining at this juncture is the two-party marital property dispute between Jacqueline and appellant, the subsequent Mrs. Melcher in her capacity as executor of Terrence's decedent's estate. That is a matter peculiarly within the competence of nonbankruptcy courts to resolve. It is also apparent that there is no viable prospect for an effective reorganization.

CONCLUSION

Having found clear error in the conclusions that the plan was proposed in good faith under § 1129(a)(3), was feasible under § 1129(a)(11), and satisfied § 1129(b), the order confirming the chapter 11 plan of reorganization is REVERSED and REMANDED for further proceedings consistent with this decision. The reversal of the confirmation shall not affect the rights of the creditors who have been paid.

Brandt, Bankruptcy Judge, CONCURRING:

I join in the forgoing analysis, but respectfully differ on disposition. Since there is no viable prospect of reorganization, the remaining dispute is peculiarly within the competence of state courts, and conversion to chapter 7 would not be practical for resolving that dispute, I see no reason why the administrative expenses should not promptly be dealt with and the case dismissed. Accordingly, I would remand with those instructions. In any event, the bankruptcy court should consider whether conversion or dismissal is in the best interest of creditors and the estate. 11 U.S.C. § 1112; In re Henson, 289 B.R. 741, 752-53 (Bankr. N.D. Cal. 2003).