

SEP 14 2005

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	OR-04-1596-MoRK
	)		
WAYNE S. RIVERA,	)	Bk. No.	04-61370-fra7
	)		
Debtor.	)		
_____	)		
RONALD R. STICKA,	)		
Chapter 7 Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
KATHLEEN A. RIVERA; WAYNE S.	)		
RIVERA,	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on May 20, 2005  
at Eugene, Oregon

Filed - September 14, 2005

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MONTALI, RIEGLE<sup>2</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Linda B. Rieggle, Bankruptcy Judge for the District of Nevada, sitting by designation.

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1 Chapter 7 trustee Ronald R. Sticka ("Trustee") appeals from  
2 the bankruptcy court's order granting relief from the automatic  
3 stay to permit a state divorce court to determine "any legal  
4 issue" concerning the respective property rights of Trustee,  
5 debtor Wayne S. Rivera ("Debtor"), and his wife Kathleen A. Rivera  
6 ("Wife") and enter a decree distributing the marital assets. The  
7 bankruptcy court conditioned its relief on Trustee receiving  
8 notice of property division matters and being permitted to  
9 intervene to protect the interests of creditors. Trustee contends  
10 that these conditions are inadequate and that the estate's  
11 interests in property should be resolved by the bankruptcy court,  
12 leaving custody and support issues for the state court.

13 We hold that the bankruptcy court, which acted sua sponte,  
14 did not articulate sufficient cause to warrant the relief it  
15 granted from the automatic stay. Accordingly, we REVERSE and  
16 REMAND for further proceedings.

17 **I. FACTS**

18 Debtor filed a Chapter 13 petition on February 27, 2004 (the  
19 "Petition Date").<sup>3</sup> The case was converted to Chapter 7 on May 26,  
20 2004. Meanwhile, on April 20, 2004, without seeking relief from  
21 the automatic stay, Wife filed a petition to dissolve her marriage  
22 to Debtor in the Circuit Court for Marion County, Oregon (Case No.  
23 04C-31098) (the "Divorce Proceedings"). After the bankruptcy  
24 court learned of the Divorce Proceedings it sua sponte issued an  
25 order to show cause ("OSC") why it should not lift the automatic  
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27 <sup>3</sup> Unless otherwise indicated, all chapter, section and  
28 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,  
and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 stay to let those proceedings proceed. At a hearing on July 29,  
2 2004, the bankruptcy court stated:

3 My view . . . is that state and federal law don't  
4 match up particularly well here. . . . [T]his court  
5 has jurisdiction over all the property, and has no  
6 authority to dissolve the parties' marriage, to  
7 decide issues of support or custody. The circuit  
8 court is admonished or required, really, by state law  
9 to dissolve the marriage, determine custody issues  
10 . . . of minor children, child support, spousal  
11 support, property division. And Oregon case law says  
12 that the Court has to balance all these factors, and  
13 it can't isolate them. So, if a federal court says  
14 you can dissolve and provide for custody but you  
15 can't do the property, then we're telling the state  
16 court that you can't carry out the duties that state  
17 law mandates.

18 Transcript 7/29/04 pp. 7:23 - 8:15 (emphasis added).

19 The bankruptcy court proposed to issue an order (the "R/S  
20 Order") that would modify the automatic stay "with respect to all  
21 property of the [D]ebtor, for the purpose of allowing  
22 determination by the [state] Court of the distribution of marital  
23 assets required by state law." It would authorize the state court  
24 to enter a decree of dissolution of marriage "distributing the  
25 assets of the parties," and in so doing to "determine any legal  
26 issue arising between the parties, or either party and the  
27 Trustee, concerning the parties' respective property rights."  
28 That relief would be conditioned on Trustee being served with all  
pleadings and any proposed settlement or stipulated decree in the  
Divorce Proceedings, and being given leave to intervene in the  
Divorce Proceedings "to the extent necessary to protect the  
estate's interest in marital assets."

Trustee objected that "no one has asked for that relief,"  
that he probably would have to pay a fee to intervene in the  
Divorce Proceedings, and that "many cases" involve divorce

1 proceedings -- "sometimes in jurisdictions that are far from here"  
2 -- and he was concerned about the "precedent." Transcript 7/29/04  
3 pp. 9:21 - 10:9. According to Trustee, the common solution in  
4 Oregon is for the divorce proceedings go forward on matters of  
5 custody, support, and dissolving the marriage itself, whereas on  
6 "matters related to creditors" the Chapter 7 trustee typically  
7 will agree that the parties to the divorce proceedings can  
8 "resolve those issues among themselves, but it's not binding on  
9 the creditors." Id. pp. 10:18 - 11:5.

10 Debtor's attorney appeared ambivalent about which court would  
11 decide property rights issues, provided that this was without  
12 prejudice to remedies for past or ongoing violations of the  
13 automatic stay. He alleged that Wife was "still exercising  
14 dominion and control" over "almost all assets of [Debtor], even  
15 those acquired prior to marriage." Id. p. 5:20-23.

16 The bankruptcy court acknowledged "it's a tough question"  
17 because "what we're used to here" is thinking "in terms of  
18 creditors' interest" whereas the circuit court "is going to be  
19 thinking of the minor child first." Id. p. 10:10-15. It  
20 expressed two concerns with Trustee's approach. First, if  
21 custody, support, and property division are interdependent under  
22 Oregon law, then resolving property rights in bankruptcy court  
23 would mean that the divorce "just stops until the bankruptcy is  
24 completed," which might prejudice someone "trying to get out of a  
25 bad marriage" quickly. Id. pp. 10:16-17, 13:8-12. Second, "under  
26 Oregon law, which I'm bound by, all the property is a species of  
27 joint property" until it is divided in divorce proceedings, and  
28 given the interdependence of such property division with custody

1 and support issues, "what criteria would [the bankruptcy court]  
2 follow?" Id. p. 12:19-24.

3 The bankruptcy court decided to issue a second OSC to give  
4 all interested parties an opportunity to brief the matter. The  
5 bankruptcy court invited Trustee to retain counsel, and Wife to  
6 have her state court attorney appear.

7 Trustee retained counsel, who filed a response to the second  
8 OSC arguing that the state court has no jurisdiction over property  
9 of the estate, no party in interest has requested the relief  
10 proposed by the bankruptcy court, and Trustee has the rights of a  
11 lien creditor under 11 U.S.C. § 544(a)(1). The matter came on for  
12 hearing on August 26, 2004, and counsel for Trustee, Debtor, and  
13 Wife all confirmed that they were not seeking the remedy suggested  
14 by the court. Transcript 8/26/04 p. 6:4-5 (Trustee's attorney:  
15 "there's no party here that is seeking the remedy that the Court  
16 is suggesting imposing here"), p. 5:7 (Debtor's attorney: "That's  
17 correct, your Honor."), p. 8:23-24 (Wife's attorney: "I don't see  
18 the bankruptcy court giving up jurisdiction over the physical  
19 assets").

20 The bankruptcy court asked, "What law do I apply if I'm the  
21 one who divides the property up?" and "If the law is the same" in  
22 either forum then "why shouldn't it be done by the same state  
23 court judge who's got to determine all the other issues attendant  
24 to a divorce such as custody and support?" Transcript 8/26/04  
25 pp. 12:6-8, 13:5-8. Debtor's attorney responded that he thought  
26 property division would be faster in the bankruptcy court than in  
27 state court (id. p. 13:9-15) and that Oregon cases in which  
28 property division issues were interdependent with support issues

1 would not be applicable because Wife is not seeking spousal  
2 support, just child support, and there is a statutory formula for  
3 child support. Id. p. 13:16-22. Wife's attorney confirmed that  
4 Wife, who earns more than Debtor, has not requested spousal  
5 support and that the statutory formula for child support is  
6 entirely "income and expense driven," although the state court  
7 could depart from the formula based on unusual circumstances such  
8 as a medical expense or maybe college education. Id. pp. 15:21-  
9 22, 16:9-19.

10 On October 4, 2004, the bankruptcy court entered its R/S  
11 Order. A supporting Memorandum Opinion states that although the  
12 Oregon court's "entry of a judgment which actually purports to  
13 distribute property of the estate" would violate the stay,  
14 nevertheless commencement of the Divorce Proceedings did not by  
15 itself violate the automatic stay. The bankruptcy court reasoned  
16 that O.R.S. § 107.105, governing the Divorce Proceedings,

17 does not actually alter any pre-existing rights;  
18 what it does is establish an analytical framework for  
19 implementing rights that existed from the outset of  
20 the marriage. . . . In other words, commencement of  
21 the dissolution proceeding does not modify the  
22 property rights of either party, or create new ones:  
23 it simply puts into play the right of a spouse to an  
24 equitable distribution in the event the marriage  
25 fails.

26 The Memorandum Opinion quotes from O.R.S. § 107.105,  
27 including the following:

28 (1) Whenever the court renders a judgment of marital  
annulment, dissolution or separation, the court may  
provide in the judgment:

\* \* \*

(f) For the division or other disposition between the  
parties of the real or personal property, or both, of  
either or both of the parties as may be just and

1 proper in all the circumstances. . . . Subsequent  
2 to the filing of a petition for annulment or  
3 dissolution of marriage or separation, the rights of  
4 the parties in the marital assets shall be considered  
5 a species of coownership, and a transfer of marital  
6 assets under a judgment of annulment or dissolution  
7 of marriage or of separation entered on or after  
8 October 4, 1977, shall be considered a partitioning  
9 of jointly owned property. . . .

10 O.R.S. § 107.105(1) (f) (emphasis added by bankruptcy court).

11 The bankruptcy court rejected Trustee's proposed solution of  
12 proceeding simultaneously in the Oregon court and the bankruptcy  
13 court for two reasons:

14 First, [the Oregon divorce court] must take  
15 property distribution into account, and therefore  
16 necessarily would have to wait until the Bankruptcy  
17 Court effects a distribution of the marital property.  
18 This in turn means that the Bankruptcy Court will  
19 have an undue influence on issues of custody and  
20 support. Moreover, the Bankruptcy Court may be hard  
21 pressed to distribute the property if it is required  
22 by state law to consider the custody of children in  
23 determining the fate of a marital residence.

24 Second, there is a well settled doctrine that  
25 federal courts should not involve themselves in  
26 domestic relations cases. . . .

27 . . . There is no reason to believe that the  
28 Circuit Court would not give creditors whatever  
consideration the law requires, as would this court.  
The point is that the law governing such  
determinations is the same in either forum.

. . . Oregon law requires that the debtor's and  
his spouse's property be equitably divided, and the  
Trustee takes subject to that law. . . .

Trustee timely appealed. There is no appellee.

**II. ISSUE**

Did the bankruptcy court articulate sufficient cause to lift  
the automatic stay sua sponte as provided in the R/S Order?

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**III. STANDARDS OF REVIEW**

We review the decision whether to grant relief from the automatic stay, on a given set of facts, for an abuse of discretion. Moldo v. Matsco, Inc. (In re Cybernetic Servs., Inc.), 252 F.3d 1039, 1045 (9th Cir. 2001), cert. denied, 534 U.S. 1130 (2002). A bankruptcy court necessarily abuses its discretion if it bases its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence. The panel also finds an abuse of discretion if it has a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. Beatty v. Traub (In re Beatty), 162 B.R. 853, 855 (9th Cir. BAP 1994).

The nature of a debtor's interest in property, although largely a question of fact, is based on the interpretation of legal principles. Keller v. Keller (In re Keller), 185 B.R. 796, 798 (9th Cir. BAP 1995). Mixed questions of law and fact are generally reviewed de novo. Id. Whether a particular interest in property is included in the estate is a question of law which we review de novo. Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th Cir. BAP 2001).

**IV. DISCUSSION**

Section 362(d) provides that the bankruptcy court may grant relief from the automatic stay for "cause," such as by terminating, annulling, modifying, or conditioning such stay. 11 U.S.C. § 362(d). Cause is not defined. What constitutes sufficient cause and what specific type of relief to grant is left to the bankruptcy court's sound discretion. Cybernetic Servs., 252 F.3d at 1045; Schwartz v. United States (In re Schwartz), 954



1 F.2d 569, 572 (9th Cir. 1992).

2 The R/S Order grants broad relief: it lifts the automatic  
3 stay for the state court to (a) "determine any legal issue"  
4 arising between Trustee, Wife and Debtor concerning "the parties'  
5 respective property rights" (emphasis added) and then (b) enter a  
6 decree of dissolution of marriage "distributing" the assets  
7 (emphasis added). The bankruptcy court's reasons for issuing the  
8 R/S Order can be summarized as likely prejudice to the children,  
9 and implicitly Wife and Debtor as well, if the stay is not lifted;  
10 and lack of prejudice to creditors if it is lifted because,  
11 according to the bankruptcy court, the law is the same in either  
12 forum.

13 1. Prejudice to the children, Wife, and Debtor

14 The Memorandum Opinion speaks of property "division" between  
15 the spouses, "distribut[ion]" of that property, and an "undue  
16 influence" on issues of child custody and support. The bankruptcy  
17 court was concerned that it would need to "consider the custody of  
18 children in determining the fate of a marital residence." We are  
19 not persuaded that the bankruptcy court will have to consider any  
20 of these things.

21 Before awarding property to one or another spouse the first  
22 step analytically is to determine who owns it prior to division  
23 and distribution. Such property interests are determined from  
24 historical facts that are independent of issues such as child  
25 custody, support, or how to divide and distribute property in a  
26 divorce.

27 Debtor's amended bankruptcy schedules state that he is the  
28 sole owner of some personal property, that the marital residence

1 was "surrendered post-petition," and that Wife is the sole owner  
2 of a different residence under the laws of Oregon, which is not a  
3 community property state. These and other property interests are  
4 determinable facts, or perhaps mixed questions of fact and law if  
5 there is any dispute over ownership.

6 After property interests are determined they might be subject  
7 to alteration by the Bankruptcy Code. If Wife obtained her  
8 residence through an avoidable transfer then Trustee might be able  
9 to recover an interest in that residence. See, e.g., 11 U.S.C.  
10 §§ 548 and 550. That would alter the parties' property interests.  
11 However, neither child custody and support payments nor property  
12 divisions in divorce proceedings are factors in determining  
13 whether a transfer is avoidable.

14 Outside of bankruptcy the Divorce Proceedings could also  
15 alter property rights by distributing one spouse's interest in  
16 marital property to the other spouse. We agree with the  
17 bankruptcy court that in practice the financial aspects of the  
18 Divorce Proceedings are interrelated and, moreover, property  
19 division and distribution between the spouses could affect child  
20 custody or vice versa. Marriage of Vanderzanden, 51 Or. App. 757,  
21 761-62; 627 P.2d 18, 21 (1981) (because husband received all  
22 retirement benefits and because wife needed to retain the family  
23 home to raise and care for five children, home was properly  
24 awarded to her subject to judgment in favor of husband payable  
25 only after children reached majority or house was sold); Marriage  
26 of Grove, 280 Or. 341, 344; 571 P.2d 477, 481 (1977). The  
27 question is whether the same is true of the Divorce Proceedings,  
28 which were commenced after the Petition Date.

1           The Memorandum Opinion can be read to mean that Wife has pre-  
2 existing interests dating from the start of the marriage in  
3 whatever property ultimately would be distributed to her in the  
4 Divorce Proceedings, and therefore her interests could be said to  
5 arise prior to the Petition Date and be superior to Trustee's  
6 strongarm powers. First, we question whether this is so. Second,  
7 even if that were the ultimate conclusion, it is a complex matter  
8 involving the intersection of bankruptcy law and Oregon law that  
9 the bankruptcy court is uniquely empowered and qualified to  
10 address. These topics are treated separately below. For now we  
11 simply note that the state court would have to face these issues  
12 even if the bankruptcy court did not, it cannot divide and  
13 distribute any property interests that the parties do not have,  
14 and Debtor's counsel suggested without opposition that property  
15 rights might be determined more quickly in the bankruptcy court  
16 than in state court. Therefore, the existence of these complex  
17 issues is not a basis to defer to the state court.

18           If there are urgent matters in the Divorce Proceedings, such  
19 as child custody or support, and if those matters depend on  
20 property interests, then perhaps the state court will have to make  
21 its best determinations based on the available information. That  
22 would be so regardless of which court is determining the property  
23 interests.

24           We are aware of no reason why the common solution, proposed  
25 by Trustee, would not work in this case. The state court can  
26 proceed with the Divorce Proceedings without prejudice to the  
27 bankruptcy court's determination of matters involving creditors,  
28 including decisions on what is property of the estate. There is

1 authority for such bifurcated proceedings in other jurisdictions.  
2 See, e.g., Willard v. Willard (In re Willard), 15 B.R. 898 (9th  
3 Cir. BAP 1981); In re Howell, 311 B.R. 173, 176-180 (Bankr. D.N.J.  
4 2004).

5 This case might be particularly amenable to a bifurcated  
6 approach because spousal support is not at issue and child support  
7 may be entirely formulaic. Finally, as Trustee noted, nobody  
8 (including Wife's attorney) asked for the relief that the  
9 bankruptcy court granted.

10 For these reasons the excerpts of record do not support the  
11 bankruptcy court's determination that the Divorce Proceedings will  
12 "just stop[]" until the bankruptcy case is finished, or other  
13 prejudice to the children, Wife, and Debtor. The R/S Order cannot  
14 be sustained on these grounds.

15 2. Prejudice to creditors

16 The most obvious form of prejudice to creditors would be a  
17 collusive marital settlement or decree of dissolution that  
18 distributed marital property to Wife at the expense of Debtor's  
19 creditors. The Memorandum Opinion states that there is no  
20 evidence of any such collusion and that under the R/S Order  
21 Trustee can protect the interests of creditors. Trustee's ability  
22 to appear in state court ameliorates but does not eliminate the  
23 problem because collusion can be hard to detect. Cf. Thomas v.  
24 Namba (In re Thomas), 287 B.R. 782, 785 (9th Cir. BAP 2002) (good  
25 faith finding not required at time of sale because "interesting  
26 facts" may not emerge until later); T.C. Investors v. Joseph (In  
27 re M Capital Corp.), 290 B.R. 743, 748-49 (9th Cir. BAP 2003)

28

1 (same).<sup>4</sup>

2 Creditors' interests also could be prejudiced if the state  
3 court were to make distributions without according Trustee  
4 whatever rights and interests he may have under bankruptcy law.  
5 Trustee objected that the R/S Order would do just that, by  
6 contravening his strongarm powers.

7 a. Trustee's strongarm powers

8 Trustee's strongarm powers are set forth in Section 544(a):

9 § 544. Trustee as lien creditor and as successor to  
10 certain creditors and purchasers

11 (a) The trustee shall have, as of the commencement of  
12 the case, and without regard to any knowledge of the  
13 trustee or of any creditor, the rights and powers of,  
or may avoid any transfer of property of the debtor  
or any obligation incurred by the debtor that is  
voidable by --

14 (1) a creditor that extends credit to the debtor  
15 at the time of the commencement of the case, and  
16 that obtains, at such time and with respect to  
17 such credit, a judicial lien on all property on  
which a creditor on a simple contract could have  
obtained such a judicial lien, whether or not such  
a creditor exists;

18 (2) a creditor that extends credit to the debtor  
19 at the time of the commencement of the case, and  
20 obtains, at such time and with respect to such  
21 credit, an execution against the debtor that is  
returned unsatisfied at such time, whether or not  
such a creditor exists; or

22 (3) a bona fide purchaser of real property, other  
23 than fixtures, from the debtor, against whom  
applicable law permits such transfer to be  
perfected, that obtains the status of a bona fide

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25 <sup>4</sup> The Memorandum Opinion does not address Trustee's  
26 concern that he might have to pay a fee to intervene in the  
27 Divorce Proceedings, or how Trustee would pay this fee if the  
28 estate has no liquid assets, or the added costs if the Divorce  
Proceedings are conducted in a distant location. Trustee did not  
produce any evidence that such concerns are actually present in  
this case so the bankruptcy court was not required to address  
them.

1 purchaser and has perfected such transfer at the  
2 time of the commencement of the case, whether or  
not such a purchaser exists.

3 11 U.S.C. § 544(a) (emphasis added).

4 The issue is what rights such a judicial lien creditor,  
5 execution creditor, or bona fide purchaser would have under Oregon  
6 law as against Wife's rights or interests in any property under  
7 the post-petition Divorce Proceeding. See Butner v. United  
8 States, 440 U.S. 48, 55 (1979) (property rights generally defined  
9 by state law). That issue is determined as of the Petition Date.  
10 See 11 U.S.C. § 544(a). See also Dumas v. Mantle (In re Mantle),  
11 153 F.3d 1082, 1081-85 (9th Cir. 1998).

12 Both real and personal property appear to be at issue,<sup>5</sup> but  
13 most of the reported cases concern real property. Debtor's  
14 schedule A lists a timeshare as "joint" property, without  
15 describing the precise form of ownership. For purposes of  
16 discussion we will suppose that the timeshare is held as a tenancy  
17 by the entirety, which is one typical form of ownership in Oregon.  
18 See Sanderson v. Heffington, 92 Or. App. 145, 147 n.2; 757 P.2d  
19 866, 867 n.2 (1988) (land conveyed to husband and wife by one  
20 instrument presumed to be tenancy by entirety). Oregon's form of

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21  
22 <sup>5</sup> At oral argument we asked Trustee's counsel what assets  
23 might be available to be administered. He wrote to us that there  
24 may be personal property with a value of more than \$60,000.00  
25 above Debtor's claimed exemptions. Debtor's bankruptcy schedule A  
26 lists six real property interests including a "[p]ossible marital  
27 interest" in Wife's residence which is listed with a current  
28 market value of \$140,000 encumbered by secured claims of \$112,000.  
Debtor's bankruptcy schedule C claims both real and personal  
property exemptions. We confirmed at oral argument that the  
Divorce Proceedings have not concluded and Trustee's counsel  
stated that his investigation is ongoing and that Wife may have  
converted or taken control of property of the estate. In sum, it  
appears that Debtor, Wife, and Trustee each have potential  
interests in both real and personal property.

1 tenancy by the entirety has been described as a tenancy in common  
2 with an indestructible right of survivorship. Brownley v. Lincoln  
3 County, 218 Or. 7, 10; 343 P.2d 529, 531 (1959).

4 Under Oregon law it has been held that one spouse can convey  
5 or encumber his own interest in a tenancy by the entirety prior to  
6 divorce. Sanderson, 92 Or.App. at 147; 757 P.2d at 867. Each  
7 spouse is "regarded as the separate owner of one half the rents  
8 and profits and each spouse has the power to convey or encumber  
9 the whole title subject to the right of survivorship in the other  
10 spouse" but "if one spouse conveys or encumbers his interest in  
11 the estate the grantee or encumbrancer has a right during  
12 coverture only to the grantor's share of the rents and profits."  
13 Brownley, 218 Or. at 11; 343 P.2d at 531 (citations omitted). A  
14 later divorce destroys the tenancy by the entirety but not the  
15 conveyance or encumbrance, even if the spouse who did not join in  
16 the conveyance or encumbrance is later awarded the entire interest  
17 in the property. Id., 218 Or. 7; 343 P.2d 529 (involuntary  
18 encumbrance); Sanderson, 92 Or. App. at 148; 757 P.2d at 868  
19 (voluntary encumbrance). See also Akins v. Vermast, 150 Or. App.  
20 236, 242; 945 P.2d 640, 643 (1997) (holders of voluntary  
21 encumbrances treated as purchasers for purposes of the statutory  
22 priority determination); Michael A. Grassmueck, Inc. v.  
23 Clearwater-Thompson (In re Clearwater), 1997 WL 101975 (Bankr. D.  
24 Or. 1997) (husband's bankruptcy trustee as hypothetical bona fide  
25 purchaser had interest in receivable arising from land sale  
26 contract superior to interest of wife, even though wife's interest  
27 had been conveyed to her in dissolution judgment prior to  
28 bankruptcy petition, because that judgment was unrecorded).

1 In Brownley, the Supreme Court of Oregon specifically  
2 rejected the argument that the nondebtor spouse's interest in  
3 marital property should be viewed as pre-dating the judgment  
4 creditor's lien and therefore should be entitled to priority over  
5 that lien. Id., 218 Or. at 12-18, 343 P.2d at 531-34 ("sole  
6 question" was whether wife's or judgment creditor's interest was  
7 "prior in time").

8 Oregon law was amended in 1981 to state that the rights of  
9 the parties to a divorce proceeding "shall be considered a species  
10 of co-ownership," but by the statute's terms that language applies  
11 only "[s]ubsequent to the filing of a petition for annulment or  
12 dissolution of marriage or separation." O.R.S. § 107.105(1)(f)  
13 (emphasis added). See Sanderson, 92 Or. App. at 148; 757 P.2d at  
14 867-68 (decided after amendment to statute, but still describing  
15 Brownley as controlling). The Divorce Petition was not filed  
16 until after the Petition Date, so Trustee's strongarm powers  
17 appear to be prior in time. Based on the above cases it may be  
18 that the estate's interest in the timeshare is superior to Wife's  
19 interest.

20 We express no opinion whether that is actually true in this  
21 case because we do not know the actual state of title to the  
22 timeshare, or any other marital property, and the issue has not  
23 been fully briefed as there is no appellee to defend the  
24 bankruptcy court's sua sponte decision. Our point is only that  
25 the Memorandum Opinion does not analyze these issues, so if it and  
26 the R/S Order are read as permitting property distribution by the  
27 state court without regard to Trustee's strongarm powers then they  
28 have not articulated sufficient cause for that relief.



1           b. Prejudice from the choice of forum

2           The R/S Order and Memorandum Opinion could be read in another  
3 way. Rather than implying any substantive outcome, they might  
4 contemplate that the state court will address the above issues and  
5 then make a property division and distribution consistent with  
6 whatever rights and interests Trustee has. In theory the state  
7 court forum might not prejudice creditors because if Trustee's  
8 strongarm powers are actually superior to Wife's then the first  
9 "distribution" would be to the bankruptcy estate, with Debtor and  
10 Wife only receiving distributions from non-estate property.  
11 Conversely, if Trustee's strongarm powers are not superior to  
12 Wife's then in theory the estate is not prejudiced because it is  
13 only entitled to whatever distributions of non-exempt property  
14 would be made to Debtor in the Divorce Proceedings.

15           In practice, there are several problems with this approach.  
16 Congress has given the bankruptcy court exclusive jurisdiction to  
17 determine what is property of the estate. 11 U.S.C. § 1334(e);  
18 Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447-451  
19 (2004) (bankruptcy courts' exclusive jurisdiction makes discharge  
20 order binding on states, whether or not they choose to participate  
21 in case). Trustee's strongarm powers are not simply matters of  
22 state law but involve the intersection of federal and state law in  
23 ways that draw on the bankruptcy court's unique expertise. See In  
24 re Becker, 136 B.R. 113, 116 (Bankr. D.N.J. 1992) (property of  
25 estate is federal question, partly because Bankruptcy Code gives  
26 trustee rights that do not exist outside of bankruptcy).

27           As Trustee points out, the bankruptcy court has special  
28 powers to force a sale of property and division of proceeds where

1 there are co-owners, notwithstanding other law that might  
2 otherwise prevent partition. See 11 U.S.C. § 363(h) - (j). What  
3 constitutes property of the estate often involves issues of  
4 avoidable transfers, constructive trusts, and other questions of  
5 bankruptcy law or mixed state law and bankruptcy law. See In re  
6 Lawrence, 237 B.R. 61, 86-87 (Bankr. D.N.J. 1999) (analyzing  
7 constructive trust and other theories). The state court would be  
8 hard pressed to resolve these bankruptcy-related issues in the  
9 Divorce Proceedings, assuming without deciding that it would have  
10 jurisdiction to make binding rulings on relevant aspects of  
11 bankruptcy law. Cf. Gruntz v. County of Los Angeles (In re  
12 Gruntz), 202 F.3d 1074, 1083-88 (9th Cir. 2000) (state court  
13 rulings regarding automatic stay not binding on bankruptcy  
14 courts).

15       The choice of forum affects not only substantive rights but  
16 also who may be heard. Unsecured creditors have standing to  
17 appear before the bankruptcy court and oppose positions taken by  
18 Trustee, but might not have such standing in the Divorce  
19 Proceedings.

20       For all of these reasons creditors may be prejudiced by the  
21 relief granted in the R/S Order. As stated by a leading  
22 bankruptcy treatise, "the divorce or dissolution court is a wholly  
23 inadequate forum for resolving creditor claims." 5 Collier  
24 ¶ 541.13[4] at p. 541-84.1 (citations omitted). Therefore, even  
25 if the R/S Order only determines the forum, and not the relative  
26 priority of rights and interests as between Trustee and Wife, the  
27 Memorandum Opinion does not articulate sufficient cause for such  
28 relief from the automatic stay.

1           3. Narrowness of the issue on appeal

2           We emphasize that our holding is very limited. We do not  
3 have all the facts before us, the issues are complex, and courts  
4 in other jurisdictions have struggled with the interaction of  
5 divorce proceedings and bankruptcy. Compare, e.g., Howell, 311  
6 B.R. 173 ("trustee as a lien judgment creditor has a superior  
7 right to property of the debtor's estate over a spouse's equitable  
8 distribution claim where bankruptcy precedes the divorce  
9 judgment"); Sirtos v. Moreno (In re Sirtos), 56 F.3d 1007, 1009  
10 (9th Cir. 1994) ("Under California law, a divorce decree transfers  
11 property only subject to the parties' existing liabilities to  
12 creditors"); and In re Roberge, 188 B.R. 366, 372 (E.D. Va. 1995)  
13 (ruling, based in part on husband's "inequitable actions," that  
14 his bankruptcy case should not "prejudice the vesting of [wife's]  
15 right to an equitable distribution," even though she did not file  
16 her petition for equitable distribution in the divorce proceeding  
17 until after the bankruptcy case commenced).

18           We do not mean to imply that no form of relief from the  
19 automatic stay is appropriate. The automatic stay is often  
20 modified to enable the state court to determine matters like child  
21 custody, support, and even aspects of property division, provided  
22 that the estate's interests are adequately protected. See Robbins  
23 v. Robbins (In re Robbins), 964 F.2d 342, 344 (4th Cir. 1992)  
24 (relief from automatic stay to proceed with property distribution,  
25 but wife required to "get in line with the other unsecured  
26 creditors in the bankruptcy court for determination of the amount  
27 of her claim to which she is entitled"); White v. White (In re  
28 White), 851 F.2d 170, 174 (6th Cir. 1988) (husband filed

1 bankruptcy petition after divorce court had ordered temporary  
2 alimony payments and wife had moved for appointment of receiver,  
3 and bankruptcy court acted within its discretion to permit  
4 property division while retaining "exclusive jurisdiction over  
5 property of the Debtor"); Willard, 15 B.R. 898 (9th Cir. BAP 1981)  
6 (state court dissolution of marriage not void by reason of  
7 automatic stay, but as to property it was only valid as between  
8 spouses and not against bankruptcy estate); Howell, 311 B.R. 173,  
9 176-180 & n.6 (automatic stay did not preclude nondebtor spouse  
10 from seeking equitable distribution of non-estate property such as  
11 exempt property and postpetition earnings, but property of estate  
12 was protected by stay and subject to superior rights of trustee as  
13 hypothetical judgment lien creditor).

14 Nor do we express any opinion whether the bankruptcy court  
15 should decline to lift the automatic stay in every instance where  
16 creditors may be prejudiced. At least one bankruptcy court  
17 appears to have taken this view, and as a result has involved  
18 itself in matters of equitable distribution between the spouses.  
19 Lawrence, 237 B.R. 61.

20 Finally, we recognize that the line between awarding property  
21 in divorce proceedings and determining property interests may be  
22 blurred in some instances. For example, Trustee's strongarm  
23 powers may give the estate no rights in Wife's separate property,  
24 but if Debtor contributed to the value of Wife's property then he  
25 might be entitled to compensation from Wife and perhaps that  
26 compensation will go to the estate. See Marriage of Smith, 168  
27 Or. App. 349, 356; 7 P.3d 559, 563 (2000) ("wife received credit  
28 in the property division for her contribution to the value of the

1 [husband's] business"). On the other hand, Debtor might be  
2 awarded a judgment against Wife payable only after the children  
3 reach majority, or property that turns out to be exempt and not  
4 reachable by creditors, or no property at all because of some  
5 misconduct or other consideration, all of which could prejudice  
6 creditors. See Marriage of Vanderzanden, 51 Or. App. at 761-62;  
7 627 P.2d at 21 (home awarded to wife subject to judgment in favor  
8 of husband payable only after children reached majority or house  
9 was sold); Marriage of Grove, 280 Or. at 344; 571 P.2d at 481  
10 ("[i]n practice, the financial portions of a dissolution decree  
11 are worked out together, and none can be considered in  
12 isolation"). We express no opinion what effect, if any, such  
13 prejudice would have on the decision whether and how to grant  
14 relief from the automatic stay.

#### 15 **V. CONCLUSION**

16 The bankruptcy court was understandably reluctant to become  
17 embroiled in divorce matters, but we are not persuaded that it  
18 would have to do so. Property interests will have to be  
19 determined regardless of the forum. As we interpret the  
20 bankruptcy court's statements, it was concerned that determining  
21 property interests might involve issues of property division and  
22 distribution and thereby have an undue influence on custody and  
23 support. The bankruptcy court also suggested that creditors would  
24 not be prejudiced by deferring to the state court. These  
25 conclusions are not adequately supported.

26 Congress gave the bankruptcy court exclusive jurisdiction  
27 over property of the estate, and the bankruptcy court has unique  
28 expertise on debtor-creditor matters. The bankruptcy court did

1 not articulate sufficient cause to grant a form of relief no party  
2 had requested, viz. deferring to the state court to determine any  
3 legal issue concerning property rights and to distribute property  
4 in the Divorce Proceedings. Accordingly, the R/S Order is  
5 REVERSED and REMANDED.

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