UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	Case No. 86-832-W H
Raymond N. Kenkel,	:	
Evelyn Kenkel,	:	Chapter 7
	:	
Debtors.	:	
	:	

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ORDER--MOTION TO REOPEN CASE AND MOTION FOR RECUSAL

A telephonic hearing was held on January 5, 1994. The Court heard counsels' arguments on Debtors' Motion to Reopen Case and Objection thereto, as well as the Creditor, INNK Land and Cattle Company, Inc.'s (INNK), Motion for Recusal. Debtors, Raymond N. and Evelyn Kenkel were represented by their attorney, C.R. Hannan. INNK was represented by attorney, Thomas C. McGowan; John Waters appeared on behalf of the U.S. Trustee. At the conclusion of the hearing, the Court took this matter under advisement.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The Court, upon a review of the pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Debtors filed the petition for bankruptcy relief under Chapter 7 on March 26, 1986.

2. A Chapter 7 trustee was appointed on March 26, 1986 and the final appointment of David A. Erickson as the Chapter 7 trustee was entered on April 29, 1986.

3. INNK was scheduled as an unsecured creditor having obtained a judgment against the Debtors for $954,857.86 in the United States District Court for the District of Colorado on November 27, 1985.

4. On May 22, 1986, INNK filed an Objection to the Debtors' claim of homestead exemption and on June 25, 1986, filed a Complaint to Determine Dischargeability of Debt.

5. On July, 27, 1987, INNK filed a Motion for Substantive Consolidation.

6. On July 11, 1988, this Court entered an order overruling the Motion for Substantive Consolidation on the basis of the record established as of the date of the hearing on March 9, 1988.

7. On November 15, 1988, INNK began an Iowa state court action in the Iowa District Court, Pottawattami County, against Thomas R. Kenkel, Raylyn Ag., Inc., Manawa Implement & Service, Inc., Gail Kenkel, Matthew Kenkel, Jeffrey L. Garrett, Linda Garrett, Mary Pfantz and Ryan D. Pfantz. The action sought to set aside fraudulent transfers allegedly made by Debtors to Defendants, all of whom are either closely held corporations or family members of the Debtors. The Debtors, themselves, are not Defendants in the action.

8. On October 30, 1989, this Court entered an order finding the INNK debt nondischargeable and denying Debtors' homestead exemption. The Court found that the Debtor had fraudulently appropriated INNK funds from the sale of the Hart ranch, which was used in part to pay off the balance of the mortgage due on the Debtors' personal residence. Further, the Court found that such action was willful and malicious.

9. On November 17, 1989, the Debtors' bankruptcy case was closed.

10. Subsequently, the trial court in the state court proceeding granted summary judgment in favor of Defendants on the grounds that the action was barred by 11 U.S.C. § 546 and Iowa Code § 614.1(4).

11. On December 23, 1992, the Iowa Supreme Court reversed the lower court's decision, holding that summary judgment was improper where a genuine issue of material fact existed as to the knowledge of INNK.

12. The case was remanded back to the trial court and is presently scheduled to come on for trial on January 11, 1994.

13. On October 12, 1993, the Defendants in the state court litigation by and through their counsel, C. R. Hannan, deposed the undersigned. On that date, I gave testimony concerning legal conclusions regarding the Debtors' chapter 7 bankruptcy case. Specifically, my deposition included reference to an Order denying a Motion for Substantive

Consolidation of Debtors' estates, the Order entered October 30, 1989 regarding dischargeability of INNK's debt, and the Iowa Supreme Court decision.

14. Three brief conversations were also held between the counsel for Debtors, C. R. Hannan, and myself. The first, occurring in early August, 1993, consisted of Mr. Hannan notifying me of the possibility of a request for a deposition and of the Iowa Supreme Court reversal. The second conversation occurred on September 23rd or 24th, 1993, and consisted of a discussion concerning scheduling an appointment for my deposition. The final conversation occurred the morning of the deposition wherein Mr. Hannan informed me that the deposition would involve the Iowa Supreme Court decision and the Order for the Motion for Substantive Consolidation. Mr. Hannan also provided me copies of the Order on Substantive Consolidation, the Iowa Supreme Court decision, and other documents filed in the Iowa Supreme Court.

15. On December 13, 1993, the Debtors filed a Motion to Reopen this case. The Creditor, INNK, objects and has filed a Motion for Recusal.

DISCUSSION

Motion For Recusal

INNK moves for my recusal in this case on the grounds that the deposition given in connection with the pending state

court litigation has made the me a material witness in this proceeding and that certain communications with counsel for the Debtors are ex parte and raise the appearance of impropriety.

Fed.R.Bankr.P. 5004(a) provides as follows:

> **Disqualification of Judge.** A bankruptcy judge shall be governed by 28 U.S,C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.

28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
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> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> . . .
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> . . .
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Judges are statutorily required to disqualify themselves in certain cases of apparent or actual bias or prejudice. U.S. v. Walker, 920 F.2d 513, 516 (8th Cir. 1990). However, the

judge's impartiality is presumed and the movant bears the substantial burden of proving otherwise. Id. at 517. The judge must probe any motion to disqualify for legal sufficiency and to avoid unnecessary disqualification. Davis v. Commissioner, 734 F.2d 1302, 1303 (8th Cir. 1984). It is not necessary that there be actual bias or prejudice. A judge should "take into consideration all circumstances both public and private to determine if a reasonable uninvolved observer would question the judge's impartiality". Gilbert v. City of Little Rock., 722 F.2d 1390, 1399 (8th Cir.1983).

First, the Court shall consider the effect of the deposition given in connection with the pending state court litigation. My deposition testimony concerned legal conclusions given in connection with orders entered by this Court in the bankruptcy case and the Iowa Supreme Court opinion reversing the lower court decision granting summary judgment. No testimony was offered regarding disputed factual issues, nor do I possess any such personal knowledge thereof, outside the record established in the bankruptcy cases and adversary proceeding.

Looking at the totality of the circumstances in this case for evidence that my impartiality in regards to the Debtors might be reasonably questioned, I must note that I have in different matters found both for INNK and the Debtors, respectively, as the law required. In fact, the order entered

by this Court on October 30, 1989 found the Debtors guilty of fraudulent conduct and held INNK's debt to be nondischargeable under bankruptcy law. Therefore, the Court finds that under these circumstances, my conduct would not cause a reasonable observer to doubt my impartiality. Further, the Court finds that the prior deposition testimony in the state court litigation in which Debtors are not parties does not serve to make me a material witness in this bankruptcy proceeding.

Second, this Court must consider the allegations by INNK that ex parte contacts between the undersigned and counsel for the Debtors leads to the appearance of impropriety. Ex parte contacts in and of themselves are not grounds for recusal under either 28 U.S.C. sections 144, 455(a) and (b)(1), the due process clause of the Fifth Amendment or the Code of Judicial Conduct. In re Parr Meadows Racing Ass'n, Inc., 5 B.R. 564, 566 (Bankr. E.D.N.Y. 1980) (citations omitted). For example, ex parte communications are not grounds for disqualification when there is a practical necessity for those contacts. Glynn v. Donnelly, 485 F.2d 592 (1st Cir.1973). Additionally, ex parte contacts are not grounds for recusal when they do not involve discussions of either disputed issues or trial strategy. Bradley v. Milliken, 426 F.Supp. 929, 941 (E.D.Mich.1977). However, some ex parte contacts are such that they are especially likely to create an appearance of impartiality. See U.S. v. Kelly, 888 F.2d 732 (11th Cir.

1989).

In this case, the communications between Mr. Hannan and myself were administrative in nature. The conversations were limited to discussion regarding the request for and scheduling of my deposition for the pending state court litigation to which the Debtors are not a party. No communications were made concerning trial strategy or evidentiary issues. The only documents exchanged were a copy of this Court's own order regarding substantive consolidation, the Iowa Supreme Court decision dated December 23, 1992, and documents filed with the Iowa Supreme Court. Therefore, the Court finds that the communications between Mr. Hannan and myself are not such that my recusal is required. Further, the Court finds that such communications would not create a question of impartiality in the mind of a reasonable person with knowledge of the circumstances of the contacts.

Accordingly, the Court holds that disqualification is unnecessary and INNK's Motion for Recusal should be denied.

Motion to Reopen

Debtors move to reopen this case. 11 U.S.C. § 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause". Motions to reopen may be denied when the recovery of unadministered assets appears too

remote to justify the reopening of a case. In re Herzig, 96 B.R. 264, 267 (9th Cir.BAP 1989).

11 U.S.C. § 548 provides that the trustee may avoid certain fraudulent transfers. Further, 11 U.S.C. § 546(a) limits actions brought by the trustee to two years following appointment of the trustee. Property which has been fraudulently transferred is not property of the estate under 11 U.S.C. § 541(a)(1) until a judicial determination is made that the fraudulent transfer has occurred and the trustee has recovered the property. In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir.1992).

In this case, the Chapter 7 trustee never brought an action to recover fraudulently transferred property under § 548. The two year statute of limitations period provided by § 546(a) clearly expired in 1988. The subject property was never recovered, is not property of the estate, and cannot now be recovered by the estate. Accordingly, the Court finds that the possibility of recovering unadministered assets on behalf of the estate is nonexistent. No relief can be given to the Debtors under bankruptcy law and no cause has been shown which would allow this Court to reopen the case.

Furthermore, this Court will not intervene in the pending state court litigation. Such action concerns factual issues of intent and the state court statute of limitations under Iowa law. Accordingly, the Court finds that the Debtors' Motion To

Reopen should be denied.

ORDER

IT IS THEREFORE ORDERED that INNK's Motion for Recusal is denied.

IT IS FURTHER ORDERED that the Debtors' Motion To Reopen is denied.

Dated this ___10th______ day of January, 1994.

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RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE