

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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January 11, 2000

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Subject: ***In re Debra J. Otten***
Chapter 12; Bankr. No. 96-40513

Dear Counsel:

The matter before the Court is the Rule 2016(a) Application for Final Compensation and Reimbursement filed by Konold Appraisal Service. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Konold Appraisal Service is entitled to an award of \$1,202.24, representing the full amount sought by its application, as compensation for professional services rendered and reimbursement of expenses incurred herein.¹

Summary of facts. Debtor Debra J. Otten filed a petition for relief under chapter 12 of title 11 on July 5, 1996. Debtor filed a chapter 12 plan of reorganization on October 24, 1996. The chapter 12 trustee and several creditors, including Farm Service Agency, objected to confirmation of this plan. Following a hearing on December 17, 1996, the Court denied confirmation of Debtor's plan.

At the January 4, 2000 hearing on this matter, Attorney Dougherty asked the Court to permit Konold Appraisal Service to submit a final application that would include the attorney fees and costs it incurred in connection with preparing and defending its application. Konold Appraisal Service may file such a final application within 10 days of the date of this letter decision.

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Debtor filed a second chapter 12 plan on February 19, 1997. Farm Service Agency also objected to confirmation of this plan, alleging, among other things, that Debtor had undervalued certain real property that secured its claim. The confirmation hearing, which was originally scheduled for March 18, 1997, was continued to April 22, 1997, so that Debtor and Farm Service Agency could schedule a valuation hearing on March 26, 1997. That valuation hearing was never scheduled. The confirmation hearing was again continued, first to May 20, 1997, so that Debtor and Farm Service Agency could complete their appraisals, and then to June 10, 1997.

On May 22, 1997, Attorney Grunewaldt asked Claire Konold, the owner of Konold Appraisal Service of Watertown, South Dakota, to appraise Debtor's real estate. Attorney Grunewaldt told Mr. Konold that she needed the appraisal in one week and that she would need him to testify at a hearing on June 10, 1997. Mr. Konold initially declined, because he planned to be on vacation on June 10. However, later that same day, after Attorney Grunewaldt was unable to find another appraiser, he agreed to do the appraisal. Mr. Konold recalls explaining to Attorney Grunewaldt that because of his vacation plans, Don Roe, an employee of Konold Appraisal Service, would have to assist with the appraisal and appear in his stead at the June 10 hearing. Attorney Grunewaldt's recollection differs.²

On May 27, 1997, following a status conference on the valuation issue, the Court entered an order providing that the valuation issue would be heard in conjunction with the confirmation hearing on June 10, 1997. Debtor and Farm Service Agency were directed to file their appraisals and exchange witness and exhibit lists on or before June 5, 1997.

Konold Appraisal completed the appraisal and prepared a written report, signed by Mr. Konold, which Attorney Grunewaldt filed with the Court on June 5, 1997. Attorney Grunewaldt prepared, and Debtor signed, an Application for Employment of Appraiser. In her application, Debtor asked the Court to approve

²In a May 22, 1997 letter to Mr. Konold, Ms. Grunewaldt confirmed that Mr. Konold "and [his] employee Don Rowe [sic] [would] complete an appraisal on the Deb Otten land in Brookings County at [their] earliest opportunity." The letter did not address the question of who would testify at the June 10 hearing.

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her employment of Konold Appraisal. Debtor's application was supported by Mr. Roe's affidavit. Debtor's application and Mr. Roe's affidavit were filed with the Court on June 10, 1997. The Court approved Debtor's employment of Konold Appraisal, retroactive to May 1, 1997, by order dated June 25, 1997.

At the June 10 hearing, in response to questioning by Attorney Grunewaldt, Mr. Roe testified regarding his qualifications, the methodology used in completing the appraisal, and his opinion that Debtor's real estate was worth \$158,700.00, the value stated in the appraisal. Over the objection of the attorney for Farm Service Agency, the Court admitted the appraisal into evidence. Farm Service Agency offered its own appraisal, which valued the subject property at \$200,000.00. Both Attorney Grunewaldt and the attorney for Farm Service Agency spent a good deal of time pointing out the perceived deficiencies in the other's appraisal. At the conclusion of the hearing, the Court determined the value of the property to be \$176,685.00, representing its assessed value.

Konold Appraisal filed a Rule 2016(a) Application for Final Compensation and Reimbursement on November 5, 1999. In its application, Konold Appraisal requested \$1,202.24 for the services it had rendered and the expenses it had incurred on Debtor's behalf. On November 29, 1999, Debtor filed an Objection to Application for Compensation and Reimbursement of Appraiser. In her objection, Debtor argued that Konold Appraisal's application should be denied because: (1) Konold Appraisal breached an agreement with Attorney Grunewaldt that Mr. Konold would appear at the June 10, 1997 hearing; and (2) Mr. Roe was not a qualified appraiser. Following a hearing on January 4, 2000, the matter was taken under advisement.

Discussion. A professional employed by a chapter 12 debtor is entitled to "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). In determining whether the compensation requested by such a professional is reasonable,

the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including --

- (A) the time spent on such services;
- (B) the rates charged for such services;

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- (C) whether the services were necessary to the administration of or beneficial at the time at which the service was rendered toward completion of, a case under [title 11];
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under [title 11].

11 U.S.C. § 330(a)(3). The services must benefit the estate. See *In re Reed*, 890 F.2d 104, 105-06 (8th Cir. 1989). The benefit, however, need not be measurable in monetary terms. See *In re Brandenburger*, 145 B.R. 624, 628-29 (Bankr. D.S.D. 1992). An appraiser's services may benefit the estate, even if the Court does not adopt her opinion regarding the value of the property being appraised. See *In re Lane*, 82 B.R. 544, 547 (Bankr. D. Haw. 1988).

In this case, Debtor's argument that Konold Appraisal breached an agreement with Attorney Grunewaldt that Mr. Konold would appear at the June 10, 1997 hearing is not supported by the record. The Court approved Debtor's employment of Konold Appraisal on the terms set forth in Debtor's application for employment. Conspicuously absent from those terms is any mention of such an agreement.

Debtor's application clearly contemplates that both Messrs. Konold and Roe would participate in the preparation of the appraisal. It does not identify which of them would appear at the June 10 hearing. It would be reasonable to conclude that Mr. Roe was to testify, since the hourly rate for the court appearance (\$50.00) is the same as Mr. Roe's hourly rate for field time and \$10.00 less than Mr. Konold's hourly rate for field time. If that was not her intent, Debtor could (and should) have avoided any uncertainty or ambiguity by specifically providing that Mr. Konold would appear. She did not do so. As a result, under the terms of employment approved by the Court, Mr. Roe was permitted to appear at the June 10 hearing.

Debtor's argument that Mr. Roe is not a qualified appraiser likewise fails, for two reasons. First, it directly contradicts the statement in Debtor's application to employ that "the

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appraisers of Konold Appraisal Service are familiar with the valuation of property in the area and are qualified and licensed to appraise Debtor's property." Debtor did not limit her representation regarding Konold Appraisal's appraisers to Mr. Konold. Nor did she exclude Mr. Roe from it. Having relied upon Debtor's representation in approving her employment of Konold Appraisal, the Court is not persuaded that it should now relieve Debtor from the consequences of having made it.

Second, Debtor's argument in this regard is untimely. If Debtor truly believed that Mr. Roe was not a qualified appraiser, she should not have proffered him as an expert witness in support of Konold Appraisal's appraisal.³ By doing so, Debtor effectively represented to the Court that Mr. Roe was a qualified appraiser and a competent witness. See F.R.Bankr.P. 9011(b). Were the Court to accept Debtor's argument, it would necessarily follow that Debtor intentionally misled the Court regarding Mr. Roe's qualifications at the June 10 hearing.

The Court does not need to reach that conclusion, however, because Debtor was not harmed by Mr. Roe's appearance. Mr. Roe was both competent and credible. His explanation of the methodology used in completing the appraisal was clear and succinct. He withstood vigorous and extensive cross-examination by the attorney for Farm Service Agency. In short, he was a much better witness than Debtor describes in her objection.

In deciding not to accept Mr. Roe's valuation of Debtor's real estate, the Court was troubled more by the comparables selected by Konold Appraisal than by Mr. Roe's credentials or testimony. The Court disagreed with Mr. Roe (and by implication, Mr. Konold and Konold Appraisal). However, the Court did not find that Mr. Roe was "absolutely wrong" or that Farm Service Agency's appraiser was "absolutely correct."

Appraisal is not an exact science. It is a matter of opinion based upon the education and training of the appraiser. Thus, two qualified expert appraisers, using the same method of appraisal, may arrive at extreme ends in appraising the same parcel of land. Appraiser A may

³Debtor could have requested, but did not request, a continuance.

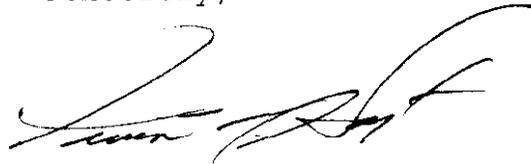
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appraise Whiteacre at \$100,000.00; Appraiser B may appraise it at \$500,000.00. Thus, it is the trier of facts who must determine which testimony is more reliable. It cannot be said that A is absolutely correct or that B is absolutely wrong.

Lane, supra, 82 B.R. at 546 (cites omitted). Debtor has not shown, and the Court does not find, that Mr. Konold would have been any better able to explain the methodology for selecting Konold Appraisal's comparables or any more successful in persuading the Court to accept a lower value than the assessed value.

Konold Appraisal Service is awarded \$1,202.24, which represents reasonable compensation for actual, necessary services rendered, and reimbursement for actual, necessary expenses incurred, by it in this matter. Attorney Dougherty shall prepare an appropriate order.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; serve copies on counsel for each party and U.S. Trustee)

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

JAN 11 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By 

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JAN 11 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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Total notices mailed: 8

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