2022 Consumer Practice Extravaganza

Bankruptcy for the Deceased: Procedural Nubbins

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CONCURRENT SESSION

2022

ISSUES WITH DECEASED DEBTORS

FRBP 1016:
Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

CHAPTER 7

1. Did Debtor take financial management class? If not, need a motion to waive.
2. Did Debtor pass away prior to 341? If no, then case continues as if debtor did not die, subject to # 1 above. If yes, then need motion to excuse attendance at 341.If a joint case, typically surviving spouse can testify for both at 341. If individual case, trustee may want someone familiar with debtor's finances to testify if possible. Check with both interim trustee and US Trustee prior to the meeting.
3. If Debtor signed petition but passed away before it was actually filed, they are not eligible to be a debtor.
    a. 11 USC 109(a) says only a person can be a debtor
    b. 11 USC 101(41) says the term "person" includes individuals, partnerships and corporations
    c. 11 USC 101(15) says the term "entity" includes person, estate, trust, governmental unit and the United States Trustee.
    d. Upon death (before filing) debtor ceases being a person and becomes an entity (estate) and is therefore ineligible. Check with US Trustee if you should file a motion to strike the petition or likely just file a motion to dismiss.

CHAPTER 13

1. Did Debtor take financial management class? If not, need a motion to waive.
2. Did Debtor pass away prior to 341? If no, then case continues as if debtor did not die, subject to # 1 above. If yes, then may need motion to excuse attendance at 341. Check with Chapter 13 trustee. If a joint case, typically surviving spouse can testify for both at 341. If individual case, trustee will likely file motion to dismiss unless there is a good reason not to

COLLECTION OF CASES ON DECEASED DEBTORS

1. **In re Estate of Brown, 16 B.R. 128 (Bankr. Dist of Columbia 1981)**

Probate estate is not permitted to be a debtor under the bankruptcy code.

2. **Matter of Jarrett, 19 B.R. 413, 6 C.B.C.2d 496 (Bankr. M.D.N.C. 1982)**

Debtor in confirmed chapter 13 plan died. Administrator of the probate estate tried to convert the case to a chapter 7 so a trustee could liquidate the assets. The probate estate was not a person therefore the case could not be converted to chapter 7.

3. **In re Estate of Whiteside by Whiteside, 64 B.R. 99 (Bankr. E.D. Cal. 1986)**

Decedents estate filed chapter 7. Case dismissed. Not eligible to be a debtor.

4. **In re Spiser, 232 B.R. 669 (Bankr. N.D. Tex. 1999)**

Joint debtors file chapter 13. Both debtors died prior to confirmation. Attorney converted case to a chapter 7. Six months later the case was reconverted to a chapter 13 and dismissed. Hardship discharge not available since no plan had been confirmed.

5. **In re Goerg, 844 F. 2d 1562 (11th Cir. 1988)**

In a Section 304 proceeding for foreign insolvency proceedings, the Debtor need not be a person but may be a Decedent's estate.

6. **In re Hamilton, 274 B.R. 266 (Bankr. W.D. Tex. 2001)**

Debtor died. Case converted to chapter 7. Court ordered that only the P.R. can appear at the 341 meeting and sign documents for the Debtor.

7. **In re Perkins, 381 B.R. 530 (Bankr. S.D. Ill. 2007)**

Debtor in confirmed chapter 7 case died. Court found debtor's case could continue. Appears in the opinion that Debtor's plan was modified after the Debtor died – not addressed in the opinion.

8. **In re Hancock, Case No. 08-11867-R (Bankr. N.D.Okla. 8/10/2009) (Bankr. N.D. Okla. 2009**

Debtor in confirmed chapter 13 plan died. Her attorney filed a notice of conversion to chapter 7 (after her death). Chapter 7 Trustee objected. Court did not address whether the case could be converted but found that conversion was not in the best interest of the creditors. It was only in the best interest of Debtors heirs. Conversion was stricken and the case was dismissed.

9. **In re Fuller, Case No. 05-18831 HRT (Bankr.Colo. 3/11/2010) (Bankr. Colo. 2010)**

Debtor in joint chapter 13 case with spouse died. Husband continued to make the plan payments and completed the plan. Deceased debtor granted a discharge under Rule 1016 as that is consistent with the further administration f the case.

10. In re Evans (Bankr. E.D. Mich. 2011)

Joint chapter 13 case with a confirmed plan. Husband died. Wife tried to convert the case to chapter 7 on behalf of both debtors. Court denied the conversion of the deceased debtor and dismissed him from the case.

11. Estate of Gray v. McDermott (In re Estate of Gray) (E.D. Mich. 2011)

Probate estate filed chapter 11. Probate estate is not permitted to be a debtor under the bankruptcy code. Case dismissed.

12. In re Quint, Not Reported in B.R. (2012) 2012 WL 2370095 South Carolina

Chapter 13 debtor in confirmed plan died. Court allowed Special Administrator to appear on behalf of the Debtor but had not decided whether the Special Administrator could convert the case to a chapter 7.

13. In re Shepherd, 490 B.R. 338 (Bankr. N.D. Ind. 2013)

Chapter 13 Debtor with confirmed plan dies. P.R. moves to substitute in and modify the plan. Both motions denied. Only a debtor, trustee, or unsecured creditor may seek to modify a confirmed plan. Debtor not in need of a fresh start.

Motion to substitute personal representative denied.

Deceased debtor does not need a fresh start, P.R not permitted to substitute in and could not modify the plan.

14. In re Harris (Bankr. E.D. Mich. 2013)

Joint chapter 13 case with confirmed plan. Husband died. Abut 8 months later a notice of conversion filed and a motion to excuse debtor's appearance at 341 meeting. Court found that deceased debtor could not convert to chapter 7. Dismissed deceased debtor from case. Case remined in chapter 7. For spouse.

15. In re Inyard, 532 B.R. 364 (Bankr. Kan. 2015)

Chapter 13 debtor died after plan nearly completed. Motion for hardship discharge was filed by the administrator of the probate estate. All elements satisfied and hardship discharge granted.

16. In re Kosinski, Slip Copy (2015) 2015 WL 1177691 N.D. Illinois

Chapter 13 debtor died after chapter 13 plan substantially completed. Motion for hardship discharge allowed. Motion was filed by Debtor's Counsel. Debtor's non filing spouse financially unable to complete the plan.

17. In re Fogel, 550 B.R. 532 (D. Colo. 2015)

Chapter 13 Debtor died 3 months after case filed, just after case confirmed. Debtor's wife made the remaining payments on the plan. The PR requested a waiver of the financial management course so a discharge could be granted. Bankruptcy court dismissed the case. P.R. filed an appeal. Case remanded on issue as to whether further administration pursuant to bankruptcy Rule 1016 is possible and in the interest of the parties.

18. In re Shorter, 544 B.R. 654 (Bankr. E.D. Ark. 2015)

Chapter 13 debtor died when chapter 13 plan was nearly completed. Case met requirements for hardship discharge. Hardship discharge granted. The Motion for the hardship discharge was filed by debtor's attorney and the non-debtor spouse.

19. In re Waring, 555 B.R. 754 (Bankr. Colo. 2016)

Debtor filed joint chapter 13 case with his spouse but died 26 days later. Court dismissed the case as to the deceased debtor only. No need for a fresh start for a deceased debtor. Also, because he died before a plan was confirmed, "further administration" of the case was not possible.

20. In re Moore, Not Reported in B.R. Rptr. (2017) 2017 WL 4417582 N.D. Ohio

Joint chapter 13 case. Plan confirmed. One debtor died. Spouse converted case for both debtors. Court severed the case, reconverted deceased debtor to chapter 13 and dismissed case. Deceased debtor cannot convert case to chapter 7.

21. In re Marks, 595 B.R. 881 (Bankr. E.D. Mich. 2019)

Debtor in chapter 13 case died. P.R. filed motion to appear to represent the debtor in all bankruptcy proceedings. Two creditors objected. The motion was withdrawn and the case was dismissed.

22. In re Sanford, 619 B.R. 380 (Bankr. E.D. Mich. 2020)

Debtor died during a chapter 13 case with a confirmed plan substantially completed. Personal Representative requested hardship discharge. Hardship discharge granted.

23. In re Smith, 629 B.R. 934 (Bankr. S.D. Fla. 2021)

Debtor in chapter 11 case died. Debtor's son and presumably P.R. filed a motion to convert to Chapter 13. Although Motion to convert to chapter 13 was granted, Chapter 13 Trustee filed motion to vacate since only a debtor can file a plan. Conversion vacated and case went back to Chapter 11.

24. In re Landau (Bankr. Kan. 2022) No. 20-21114-11

Debtor passed away while in a subchapter V. Case converted to Chapter 7.

FEATURE

Death or Incompetency of a Chapter 13 Debtor: Can the Case Survive if the Debtor Does Not?

Marie-Ann Greenberg has been the Standing Trustee in the Newark Vicinage of the District of New Jersey since 2004. Prior to her appointment she represented institutional lenders and debtors in bankruptcy and other actions. She lectures and moderates panels on a local and national level. Ms. Greenberg also sits on the Board of Directors of the National Data Center.

Although not often discussed, the death or incompetency of a debtor can bring a quick end to a Chapter 13 bankruptcy case. Debtor attorneys are usually among the last to find out when it comes to death. Whether you represent a debtor, creditor or a Chapter 13 Standing Trustee, it is important to establish protocol for addressing the issues of death or incompetency of a debtor. The timing of the death or incompetency may impact the choices going forward as will the position of the parties after a death or incompetency finding in a state court action versus the bankruptcy case.

Before going down any path, establishing familiarity with the state law regarding estates and incompetency is important. Typically, after a death an estate is established as an entity through surrogate's court where there is a will. Whether or not there is a will is an important factor. One must determine the impact of a death where there is a will versus intestacy. With a will there may be more clarity as an executor or executrix is appointed through the will. Without a will, there may be an administration of the estate, but this is based on assets of the decedent's estate. Query whether a home with no equity is an asset and who would be interested in serving as an administrator? Also, usually a bond is required to be posted in the case of intestacy; another expense.

A finding of incompetency, in New Jersey and very many other states, is a declaration established through a proceeding in state court. There must be certifications of doctors filed to support the declaration; usually a medical doctor and a mental health professional. A personal representative may be appointed to meet with the alleged incompetent and conduct interviews. In short, this is a process that must be given its due consideration and time and should be established in a court of competent jurisdiction outside of the bankruptcy court.

A review of the relevant authority provides a basis for decision making and explaining the options to the remaining parties in interest vis a vis the bankruptcy. Rule 1016 states in relevant part:

> Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code……If…an individual's debt adjustment case is pending under chapter 11, 12 or 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

In many instances, the death of a debtor results in dismissal simply because of the financial reality. There is now no one who is able or willing to make the plan payments. However, in some instances it behooves the decedent's estate to continue with the bankruptcy plan and attempt to complete the plan. However, it is clear that an estate may not file the bankruptcy as it is not an individual and may not be a debtor under the Code. Specifically, pursuant to Section 109, a debtor must be an individual and an estate is certainly not an individual.

However, where the debtor filed the petition and then died, there are many cases, rules and code sections to consider. The following are some of the code sections, rules and a few of the many cases which should be considered, in conjunction with state law. As the case law evolves, specific and updated research is always required.

Note that modification of a plan is a right which is limited and can only be exercised by the debtor, trustee or holder of an allowed unsecured claim.

Further, pursuant to Sections 101 and 109, a decedent's estate is not an eligible debtor.

a. SECTION 1329

Note that modification of a plan is a right which is limited and can only be exercised by the debtor, trustee or holder of an allowed unsecured claim. Further, pursuant to Sections 101 and 109, a decedent's estate is not an eligible debtor.

b. SECTION 1328(b)
Hardship Discharge requirements include: (1) "the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;" (2) the Chapter 7 liquidation test is satisfied; and (3) modification of the plan is not "practicable."

c. Bankruptcy Rule 1016
Rule 1016 addresses the death and incompetency of a debtor. The Rule is permissive and indicates that where there is a Chapter 13, the case may be dismissed. However, it also indicates that if further administration is possible and in the best interest of the parties the case may continue.

d. *In re Querner*[1] addresses the issue where the legal guardian of the debtor commenced the Chapter 13 petition on the debtor's behalf. The debtor died prior to confirmation. The Fifth Circuit held that the bankruptcy court properly exercised jurisdiction under Rule 1016 to allow continued administration of the case even though the debtor died prior to confirmation. There were, however, disputes over probate of the estate, and the bankruptcy court and bankruptcy case were not the proper forum to resolve those disputes.

e. Continuation of the case may be possible where the Chapter 13 debtor has died, but to make such a decision, the Court must evaluate best interests of the parties. The person seeking to sign end-of-case documents on behalf of a deceased debtor must file a motion setting forth the following: (1) whether the creation of a probate estate is expected; (2) the identification of the party seeking to act, his or her relationship to the debtor; and (3) acceptable proof of death.[2]

f. The non-debtor spouse made payments to complete case of the decedent in order to gain the benefits of the debtor's strip off of a second mortgage against property the spouse would inherit. Thereafter, she moved to waive the personal financial management requirement of the debtor due to the death. The Motion was not filed until three years after the death. Without such a waiver, the discharge would not be entered. The court denied the Motion and dismissed the case.[3]

g. Where both joint debtors died, the court dismissed the case even though the daughter wanted to continue it. While allowing the case to proceed might be in the daughter's best interest because she was the sole heir and lived in the debtors' home, she was not a party in this case. The state probate court would govern the debtors' assets instead.[4]

It is clear that the case law varies greatly. However, in addition to researching case law and the applicable code sections and rules, an attorney should also consider his or her ethical obligations. There may be a contested proceeding as to the estate which results in the debtor's bankruptcy attorney, who now has no client, to move to withdraw as counsel in the bankruptcy. Alternatively, there may be an uncontested administration of the estate and the debtor's attorney may be able to effectively represent the decedent's estate within the confines of the bankruptcy case and move to continue with the underlying bankruptcy case. Under any scenario, counsel should take into consideration all ethical concerns including who the "client" is; whether there are any limitations on communicating with the family or estate representative; are there attorney-client privileges or confidential issues which exist even after the death; how will the attorney be compensated. Regardless of the specifics, it is always good practice to immediately file an application or motion before the bankruptcy court which clarifies that the debtor is deceased and seeks guidance on the continuation of the bankruptcy case, where practicable.

From the perspective of a Chapter 13 Standing Trustee, my duty is established under Section 1302. That speaks directly to a trustee's relationship with the debtor, the debtor's payments, assisting the debtor other than with legal advice and the like. There is no extension to permit a trustee to deal directly with the estate of a debtor or a representative. Further, it is possible that any or all of these parties may be at odds with the debtor or with each other. There are other available options for the parties to resolve these matters and often surrogate's court is the proper venue.

Consider a filing made by a debtor who then dies prior to the 341(a) meeting of creditors. Pursuant to Section 343 the debtor shall appear. What should a trustee do in this situation? The best practice may be to adjourn the hearing and have the estate of the debtor file a motion to allow for the continued administration of the estate and to allow for the personal representative or executor of the estate to appear at the meeting of creditors. Once there is full disclosure to the court, a trustee is in a better position to analyze the matter and take a position, one way or the other. Without a debtor, someone else must be bound by the confirmation, to make payments under a plan and to be a proponent of the plan. See, *In re Martinez*,[5], where the court noted

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that the benefits of a Chapter 13 plan are personal to the debtor rather than to his heirs. Accordingly, the deceased debtor could not confirm a plan.

As with the death of a debtor, the incompetency of a debtor will provide additional hurdles for the professionals involved in a Chapter 13 proceeding. As provided by Bankruptcy Rule 1004.1, where an incompetent individual has a representative, by way of guardian ad litem, conservator or the like, the representative may file a voluntary petition on behalf of that person. One without a duly appointed representative may file a petition by next friend. In this instance, the court would appoint the representative for an incompetent debtor who is not otherwise represented.

A trustee reviewing such a case or motion should be alerted to the fact that elderly, hearing disabled or other ailments are not the same as incompetency. Often, we may require additional details or medical information which may be reviewed *in camera* and which should not be docketed. A distinction must be made between incompetent for purposes of providing information under oath and understanding the implications of a bankruptcy case versus disabled where there is no incapacity in terms of reviewing necessary documents, testifying and actively participating in one's own bankruptcy case.

When a case is filed by a representative of the incompetent debtor, the signature on the petition must clearly indicate same. In addition, it is a best practice to require that a motion be filed to allow for the representative to proceed in lieu of the debtor; to testify at the 341a hearing; to obtain credit counseling; to execute other certifications; to make payments electronically; to be served with motions and other pleadings on behalf of the incompetent debtor.

In addition, there should be some discussion or testimony about the representative and his or her qualifications. Usually, it is a family member who becomes the personal representative. However, if a representative has been the conservator or guardian for a number of years, and if the financial issues started after that period of time, further investigation may be necessary. Elder or other forms of abuse may be in play and a co-guardian who is not related to the case may have to also be appointed.

While the trustee must be mindful of these issues and aware of the possible pitfalls, counsel for debtor must be equally proactive. He or she must also consider exemptions to Section 109(h) credit counseling requirements or certifications in support of discharge. It may be that monthly or quarterly income reports should be filed by the guardian. The guardian or conservator must be intrinsically involved in the case as if he or she were the debtor. There must also be consideration to any additional cost this may impose on the debtor's estate and the bankruptcy case itself. A risk reward review should be undertaken by the parties and all expenses and costs must be discussed in the beginning and disclosed to the court. Proper vetting is key.

In closing, it is clear that death or incompetency of the debtor during the pendency of a Chapter 13 plan will have a major impact on the case. Counsel for the debtor and trustee must consider many factors in determining whether the case can or even should continue. Hopefully this article has shed light on what issues must be considered and their possible resolution. ◉

Footnotes

1 *In re Querner*, 7 F.3d 1199 (5th Cir. 1993).

2 *In re Levy*, 2014 WL 1323165 (Bankr. N.D. Ohio, March 31, 2014).

3 *In re Fogel*, 507 B.R. 734 (Bankr. D. Colo., April 1, 2014), *reconsideration denied*, 512 B.R. 659 (Bankr. D. Colo., June 20, 2014), *rev'd*, 2015 WL 5032055 (D. Colo., August 26, 2015).

4 *In re Langley*, 2009 WL 5227665 (Bankr. S.D. Ga., Sept. 28, 2009).

5 *In re Martinez*, 2013 WL 6051203 (Bankr. W.D. Tex., Nov. 15, 2013).

Faculty

Nathan E. Curtis is a supervising attorney at Geraci Law L.L.C. in Chicago and has filed or reviewed more than 10,000 consumer bankruptcy cases. His duties include detailed review of complicated chapter 7 and 13 matters, including litigation and appeals. Mr. Curtis is a member of the Illinois State Bar Association and ABI. After serving a two-year term as a member of the Northern District of Illinois Bankruptcy Court Liaison Committee, he served a four-year term on the Executive Committee for the Chicago Bar Association's Bankruptcy and Reorganization Committee, including as chair in his final year. Mr. Curtis is a member of the advisory board for the ABI's Hon. Eugene R. Wedoff Chicago Consumer Bankruptcy Conference. He has also spoken at the Chicago Bar Association's monthly meetings, as well as at its annual Consumer Seminar. Mr. Curtis received his undergraduate degree from the University of Illinois and his J.D. from the John Marshall Law School.

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Hon. David M. Warren is Chief U.S. Bankruptcy Judge for the Eastern District of North Carolina in Raleigh, initially appointed on Oct. 4, 2013. He also serves as an adjunct professor at the Norman A. Wiggins School of Law at Campbell University and as a guest lecturer at the Wake Forest University School of Law. Before taking the bench, Judge Warren was a partner at Poyner Spruill LLP in Raleigh and Rocky Mount, N.C., for over 27 years and concentrated his practice in the areas of bankruptcy and commercial law. He also served on the Panel of Chapter 7 Bankruptcy Trustees for the Eastern District of North Carolina for 24 years and is a past chair of the Bankruptcy Law Section of the North Carolina Bar Association. Judge Warren served on the Local Rules Committee for the U.S. Bankruptcy Court for the Eastern District of North Carolina for more than 10 years and served as chair for more than seven years. Judge Warren is Board Certified in Business and Consumer Bankruptcy Law by the North Carolina State Bar Board of Legal Specialization and the American Board of Certification. He received his B.A. *cum laude* from Wake Forest University and his J.D. from the Wake Forest University School of Law, after which he clerked for the late Hon. Thomas M. Moore, who co-drafted legislation that became chapter 12.