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Consumer Potpourri: Representing the Consumer Debtor

CONSUMER SESSION

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CONSUMER POTPOURRI:
REPRESENTING THE CONSUMER DEBTOR

HOW TO SURVIVE YOUR CLIENT'S 341 MEETING

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I. Historical Basis for Meetings of Creditors.

A. In ancient Rome, when a merchant could not pay his bills, his market place bench was either figuratively or actually broken by his creditors.

B. This was a declaration of his bankruptcy and a person was appointed to manage the property who was supposed to be "competent and able". He was called by the Romans a "Curator". The full title was "Curator Bonorum", meaning protector and caretaker of the possessions.[1]

C. The Bankruptcy Act of 1867 first designated title "Trustee". Previous Acts, including the 1800 and 1841 Act, called bankruptcy "Assignees" as persons who examined the debtor and administered the cases.

D. The modern Bankruptcy Code in Section 341, provides for a Meeting of Creditors within a reasonable time after the debtor is granted relief. The United States Trustee is directed to convene and preside at the meeting and delegates that to the Panel Trustees. The Court may not attend the 341 Meeting. The "Meeting of Creditors" or "the 341 Meetings" is the only time when most debtors go in front of an official to be examined. Ninety-five percent of the debtors will never see a Judge, but one hundred percent of the debtors will always see a Trustee.

II. Statute of Limitations Relating To The 341 Meeting.

A. A meeting of Creditors pursuant to Section 341 triggers the beginning of certain statutes of limitations. First, the creditors have 30 days after the conclusion of the 341 Meeting to

[1] The Office of Bankruptcy Trustee, Joseph Patchan, NABTalk Vol. 16. No.4. 2002

object to the debtor's claim of exemptions. Note that the Rule provides for 30 days after the **conclusion** of the Meeting. Frequently Trustees will continue the Meeting and not conclude the Meeting and that extends out that 30 day period until the Meeting is finally concluded. It is practice in some parts of the country for the Trustee to routinely continue to extend out the conclusion of the Meeting in order to preserve the Statute of Limitations. Depending upon your local practice, it may be the thing to do, but be aware that once the Meeting is concluded, the Statute period begins to run. The Trustee cannot arbitrarily continue the Meeting out forever as the Court may well hold that without the debtor's consent, the Statute has expired. It is much better practice for the Trustee or creditors to obtain an extension of the 30 day Statute of Limitation to object to exemptions and therefore memorializing the extended deadline so there is no question.

B. The deadline for filing a complaint pursuant to Section 523 or 727 to determine dischargeability of a debt or to object to discharge is sixty days after the 341 Meeting is commenced. Rule 4004(a) provides that a complaint objecting to the debtor's discharge "shall be filed no later than sixty days after the **first** date set for the Meeting of Creditor under Section 341(a). The same applies to most 523 actions. Rule 4007(c). Thus we have the distinction between the **conclusion** of the 341 Meeting for purposes of objecting to exemptions and the **beginning** of the commencement of the 341 Meeting for the purposes of 523 and 727 deadlines.

III. Election of a Trustee at the Meeting.

A. In rare cases, the creditors may call for the election of a Trustee at a 341 Meeting.

B. Every Chapter 7 Trustee is initially an Interim Trustee. 11 U.S.C. § 303(g) and 701(a). Once the 341 Meeting is concluded without anyone asking for the election of a Trustee, the Interim Trustee becomes a permanent Trustee. Rule 2003(b) states that the United States

Trustee shall preside at the Meeting of Creditors during which there is a vote taken for the election of a Trustee.

C. When someone requests the election of a Trustee, the Panel Trustee sitting as Interim Trustee should adjourn the meeting, call the U.S. Trustee's office, tell them of the request for an Election and reset the Meeting of Creditors. During that period of time procedures will go into effect that would be monitored by the U.S. Trustee's office to insure the election procedures are followed. That is all subject of an entire lecture.

IV. The Trustee as the Presiding Officer.

A. The Trustee is the presiding officer at the 341 Meeting and initially starts out as Interim Trustee and becomes a Permanent Trustee at the end. The Trustee will conclude the Meeting by announcing that "this meeting is concluded", and that constitutes a conclusion.

B. The Trustee has a right to schedule and set continuances.

C. Media and Recording: The Trustee is required to make a record of the Meeting of Creditors and record same. The media is not allowed to bring television cameras, though they are allowed to be present as anyone in the audience could in a Federal Court. No one is allowed to record the Meeting other than the Panel Trustee.

D. Appearances can be made by attorneys and non-attorneys to question the debtor. Section 341 specifically provides so.

E. Verification of Debtor Identity and Social Security Numbers. It is required that the Trustee verify the debtor's identity and Social Security by an original document such as government license and Social Security Card.

F. Interpreters. There is an interpretation program so that the Trustees have access to a number of languages and can usually dial the interpreter on the phone to interpret the 341

Meeting. If there is going to be some sort of very complicated Meeting and a longer record is required, it is suggested that you contact the Trustee ahead of time and arrange to bring a private interpreter with the U.S. Trustee's permission, to interpret the Meeting as it may be more accurate than the telephone interpretation services currently used.

G. Disabled Debtor. The Trustee has an obligation to provide for the 341 Meeting of a Debtor who is disabled. If there is problem with access to the 341 Meeting room, the Panel Trustee will provide access for the disabled debtor by either conducting the Meeting in a different place or doing something else to make sure that the disabled person has a right to attend.

H. Oath of the Debtor. The Debtor is required to testify under oath and also be sworn in and his testimony is under oath.

V. Conducting the Meeting.

A. The Trustee conducts the Meeting and controls the Meeting and controls the questioning. The Trustee will normally ask the first round of questions and there are a certain number of standard questions which he or she is required to ask.. As I stated earlier, bankruptcy judges cannot attend, but anyone else can.

B. Creditors have a right to question and that right is tempered by the amount of time the Trustee has available for creditors to do so.

VI. Who can appear for a Corporate Debtor.

A. A Corporate Debtor appears at the meeting of creditors through a representative who should have knowledge about the debtor's affairs. Most trustees like to have someone testify who signed the Schedules and Statement of Financial Affairs and who has specific knowledge of the finances of the debtor and the history in the filing of the bankruptcy. Most

Trustees require that the person signing the Schedules be the one that appears at the Meeting of Creditors, though that is not always the case.

B. The Debtors can appear by telephone under certain circumstances, such as if they are in prison or otherwise cannot attend. It is usually required that an officer be next to them to administer an oath and identify them on the record. A Notary Public could do that.

C. Waiver of Debtor's presence. In certain occasions a spouse may be ill or a Debtor may incapacitated and unable to attend. In those circumstances it is common practice for someone to have the Power of Attorney to act for this particular debtor and appear and testify for that debtor as long as that person has specific information regarding the affairs and finances. It requires a Court Order, which is commonly obtained, to waive the personal appearance of a debtor.

a. If Debtor's counsel fails to appear, the Trustee is required to adjourn the meeting to a future date when the debtor's counsel can be there.

VII. §727 Discharge Issues that arise at a 341 Meeting.

A. Section 727 provides that a Court will not grant the debtor a Discharge if "the debtor knowingly and fraudulent made a false oath or account". 727(a)(4)(A)

B. However, 727(a)(2)(A) provides for the denial of a Discharge if the Debtor with the intent to hinder delay or defraud a creditor or an officer of the estate, transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the estate within one year before the date of the filing of the Petition or property of the estate after the date of the filing. Further, 727(a) (5) provides that the debtor shall not receive a discharge if he has failed to satisfactorily explain loss of assets or deficiency of assets to meet his liabilities.

C. Thus, in a bankruptcy 341 Meeting of Creditors, your client can give grounds to the existence of a 727 reason to object to discharge by making a false oath or otherwise lying to the Trustee.

VIII. Announcing Amendments.

A. It is not unusual to find that you need to amend the debtor's Schedules. It is a good practice to carefully go over the Schedules after they are filed and send your client a letter asking to do so and to let you know if any amendments or changes to the information needs to be made. If prior to or at the time of the Meeting you find that amendments need to be made and you do not have time to make them (and this frequently happens), at the beginning of the Meeting, before the Trustee has had a chance to ask your client's questions, announce that there are amendments to be made and tell the Trustee the basis of the amendment so that Trustee can ask the debtor about that. That solves the argument that the Trustee could make later that you failed to schedule an asset or transfer, or whatever, and takes away a reason to object to your client's discharge. It is also very good practice, of course, to promptly follow up on that amendment after the Meeting of Creditors.

IX. Bankruptcy Crimes and the 341 Meeting.

A. "Throughout the course of American history and a series of Bankruptcy reform measures, some bankruptcy crimes have changed little. Concealment in a bankruptcy has been a crime for four and a half centuries; perjury, for almost four centuries. Certain patterns of conduct seem to recur decade after decade (if not century after century)." New schemes, and new crimes, develop, but the old ones, particularly asset concealment and perjury, are still common.[2]

B. Fifth Amendment. The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. Only an individual has a

[2] Bankruptcy Crimes, 3rd Edition, Stephanie Wickouski.

privilege against self-incrimination. A corporation has no such privilege. If your client has committed a bankruptcy crime including concealment of assets, and is questioned at the 341 Meeting, the issue of perjury and the continuation of a crime is a serious one.

C. The information on the Petition itself can be incriminating, as could be the Schedules and Statement of Financial Affairs. At the 341 Meeting the debtor has to testify. Therefore, the potential for self-incrimination.

D. If you think your client is in a situation where he may be incriminating himself or herself, you need to instruct them not to answer the question and take the Fifth Amendment.

E. Document production can also be the subject of Fifth Amendment Privileges and is whole issue in and of itself.

F. Immunity. If the debtor invokes the Fifth Amendment Privilege, the Meeting is likely to be adjourned and an order compelling testimony will be sought. The Court may grant immunity for the examination 11 U.S.C. § 344. This is complicated process and you need to check with the U.S. Trustee's office if this is an issue in one of your cases. If the debtor has been ordered to testify, he receives what is called derivative use Immunity. It is also called Use Immunity. This type of immunity prohibits only the use, in a later criminal prosecution of the witness, of information derived from the witness's testimony.

G. Criminal Consequences. My best advice to you is that if a criminal matter comes up, that you consult a competent criminal attorney to give your client advice. It is highly unlikely that you are going to be competent as a bankruptcy attorney to give criminal advice to your client.

H. Criminal Statutes: 18 U.S.C. 152 Concealment of Assets; False Oaths and Claims; Bribery.

I. 18 USC 157 Bankruptcy Fraud.

J. 18 U.S.C. 1032 Concealment of Assets.

K. 18 U.S.C. 1519 Destruction, Alteration, or falsification of records in Federal Investigations and Bankruptcy.

L. 18 U.S.C. 3284 Concealment of Bankrupt's Assets. 18 U.S.C. 1621-23 Perjury.

X. A lot can happen at a 341 Meeting.

A. Most Meetings of Creditors are quick, to the point and over. But there are times when they get complicated and times when the Trustee finds something wrong, times when the creditor shows up and asks questions. You need to think ahead of time if your case is going to be like that or a simple case that goes through quickly. Sometimes it is hard to tell and you get caught in a difficult situation. Understand the Bankruptcy Code, understand your States' exemptions and you will be much more successful at the 341 Meeting.

B. Make sure your client is well prepared and do not create a situation where the trustee has reason to object to the discharge.

C. Cooperation with the Trustee. It is amazing how people do not cooperate with a Trustee. Trustees are in a position of authority can make your life good or bad depending on what they do. Establish a good relationship with the Trustee and his or her staff and provide all requested and required documents timely, and that will go a long way to help you achieve your client's goal – a successful bankruptcy.

D. To begin with, you must understand the debtor's duties and obligations. Know how the Trustee's request the documents and respond when documents are requested by the Trustee, either before the 341 Meeting or after a 341 Meeting. I usually give debtors ten days to produce documents after a 341 Meeting or turnover property to me. It is amazing how many times we just never hear from debtors' lawyers. A good debtor's lawyer is going to be responsive

to the Trustee and do whatever he or she can to make sure the Trustee receives all information and documentation in a timely manner.

E. Open your eyes. Look at your client before the Meeting of Creditors and see how they are dressed. If there are wearing a diamond ring or Rolex watch and these items are not on the Schedules, there will be a problem Look at your client when they are in your office and think about this in advance. Tell your client to be open and honest with the Trustee. I always tell clients to be willing to turn over non-exempt property rather than transfer it, because that is the cost of getting your discharge.

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THE ELDERLY OR INCAPACITATED DEBTOR

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I. ELDER FINANCIAL ABUSE

A. What Constitutes Elder Financial Abuse or Exploitation

Elder abuse can take many forms. One of the more prevalent today, especially in states like Florida with a large elderly population, is elder financial abuse or exploitation. The Department of Elder Affairs for the State of Florida explains financial exploitation is "the illegal or improper use of another's individual resources for personal profit or gain. This type of exploitation encompasses a broad range of conduct, from deception to intimidation."[4] In 2014, the Legislature for the State of Florida passed *Florida Statute* 825.103, entitled "Exploitation of an elderly person or disabled adult." This statute makes it easier for prosecutors to pursue people who prey on elders and increases penalties for crimes against elders, whether it involves wrongful taking of money or property, through fraud, scams, predatory caretakers, family or others. In short, elder financial abuse and exploitation is a crime, and it takes many forms.

- Investment fraud
- Abuse of power of attorney authorization (one of the fastest growing forms)
- Fake charities
- Tele-marketing and sweepstakes scams
- Forgery
- Mail theft
- Filing for bankruptcy under the victim's name to avoid paying debts uncured under that name or avoid eviction[5]

B. Statistical Information

- An estimated $2.9 billion is stolen from the elderly annually. In the majority of financial elder abuse cases, the perpetrators are family, friends, neighbors, and caregivers.[6]
- Approximately one in ten seniors is abused each year.[7]

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[3] A portion of these materials have been borrowed from Hon. Roberta A. Colton, with her permission.
[4] Department of Elder Affairs, State of Florida http://elderaffairs.state.fl.us/doea/abuse_prevention.php
[5] *National Center for Victim of Crime, Aug. 25, 2015 Webinar "Financial Fraud in Indian County."*
[6] *National Center for Victim of Crime, Aug. 25, 2015 Webinar "Financial Fraud in Indian County."*
[7] Acierno, R., Hernandez, M. A., Amstadter, A. B., Resnick, H. S., Steve, K., Muzzy, W., & Kilpatrick, D. G. (2010). Prevalence and correlates of emotional, physical, sexual, and financial abuse and potential neglect in the United States: The national elder mistreatment study. American Journal of Public Health, 100(2), 292-297.

- Elder abuse is dramatically underreported. Only 1 in every 23 cases is reported to Adult Protective Services.[8]
- Cognitive decline is a risk factor for elder abuse, including financial exploitation.[9]

C. Warning Signs

- Recent will when elder appears incapable of preparing one.
- Recent power of attorney given to caregiver; caregiver is added to bank account.
- Frequent and expensive gifts from elder to caregiver.
- Elder's bills unpaid even though he/she appears to have the wherewithal to pay.
- Elder receives care significantly below the level he/she is able to afford.
- The elder's bank account shows unusual activity.
- Elder is unaware of his/her financial condition, monthly income or expenses.
- Irregularities on elder's tax return.
- Impractical spending by elder, for items elder cannot or would not use.
- Elder's personal property, paperwork, or credit cards are missing.
- Caregiver refuses to spend money on elder.
- Elder is afraid to speak in front of caregiver; isolation of the elder from family or friends by caregiver.
- Credit transactions with forged signature of elder.

D. Elder Abuse Resources

- State of Florida, Department of Elder Affairs; Florida Abuse Hotline 1-800-96-ABUSE
- National Center on Elder Abuse, Program of the U.S. Administration on Aging; https://ncea.acl.gov

II. RULES RELATING TO ELDERLY OR INCAPACITATED DEBTORS

A. Federal Rule of Bankruptcy Procedure 1004.1

Petition for an Infant or Incompetent Person

[8] Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University & New York City Department for the Aging. (2011). Under the Radar: New York State Elder Abuse Prevalence Study. Rochester, NY: Authors.

[9] Dong, X. Q., Simon, M. A., Rajan, K., & Evans, D. A. (2011). Association of cognitive function and risk for elder abuse in a community-dwelling population. Dementia and Geriatric Cognitive Disorders, 32(3), 209-215.

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

- Legislative history of the Rule is sparse; derived from FRCP 17(c).
- Effective December 1, 2002 and has not been amended since enactment.
- *In re Matthews*, 516 B.R. 99 (Bankr. N.D. Tx. 2014) ("Significantly, Rule 1004.1 suggests that the bankruptcy court has authority and shall be proactive in making sure an incompetent debtor has representation to act for him or her and is protected.")

B. Federal Rule of Civil Procedure 17(c)

Plaintiff and Defendant; Capacity; Public Officers

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;
(B) a committee;
(C) a conservator; or
(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

- *In re McGlohon*, 2016 WL 552332 (Bankr. E.D. N.C. February 10, 2016) (Rule 1004.1 incorporates and tracks FRCP 17(c)).
- *In re Zawisza*, 73 B.R. 929 (Bankr. E.D. Pa. 1987) (decided before Rule 100.41 was enacted; upheld the filing of a chapter 13 petition by a next friend relying on FRCP17(c)).

C. Federal Rule of Bankruptcy Procedure 1016

Death or Incompetency of Debtor

> 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.

D. 11 U.S.C. § 109(h)

> (4) The requirements of paragraph (1) [credit counseling] shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

- Provides a definition of incapacity and disability to aid the bankruptcy court in deciding whether to waive pre-petition credit counseling on the basis of incapacity or disability.

III. DETERMINATION OF INCOMPETENCY

A. Which Court Makes the Determination?

- *In re Petrano*, 2013 WL 6503672 (Bankr. N.D. Fla. April 16, 2013) ("The Bankruptcy Code does not define 'incompetent person,' so bankruptcy courts must look to state law.")
- *In re Zawisza*, 73 B.R. 929 (Bankr. E.D. Pa. 1987) ("F.R.Civ.P. 17(c) has been interpreted to mean that, if an incompetent does not have a validly-appointed representative, the federal court in which the suit is brought may name a guardian ad litem or next friend to represent him, regardless of state law," noting the court has wide authority to fashion orders necessary to protect the incompetent).
- *Fla. Stat.* § 744.331, titled "Procedures to determine incapacity" outlined the procedure to be employed in determining whether a person is

incapacitated so as to require the appointment of a guardian. Under the statute, an examining committee consisting of three members is to be appointed by the court, consisting of a psychiatrist or other physician, as well as a "psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion." These members must examine the allegedly incapacitated person and provide a detailed report to the court. The court then conducts an adjudicatory hearing and makes a determination on incapacity.

B. Concerns When Debtor is Not Adjudicated Incompetent Pre-Petition

When a debtor is not adjudicated incompetent pre-petition, and arrives in bankruptcy court, the Court must balance the need to ensure the incompetent is properly represented with the need to act expeditiously to protect the interests of the incompetent. The state court procedure of appointment of a guardian can be quite lengthy.

i. Is the proposed representative the proper party to serve?

- *In re McGlohon*, 2016 WL 552332 (Bankr. E.D. N.C. February 10, 2016) ("An overarching concern throughout these cases is that the individual serving as next friend act in the debtor's best interest during the bankruptcy case and that the next friend maintain a working knowledge of the debtor's financial situation.")

ii. Do circumstances militate in favor or against a resort to state court procedures?

- *In re Zawisza*, 73 B.R. 929 (Bankr. E.D. Pa. 1987) (The incompetent's representative should act expeditiously, especially when a guardian has not been appointed, to protect the incompetent's interests.)
- *In re Petrano*, 2013 WL 6503672 (Bankr. N.D. Fla. April 16, 2013) (Staying the bankruptcy case (but not related adversary proceedings) to allow for the appointment of a guardian in state court

IV. USE OF A POWER OF ATTORNEY

A. State Law

State statutes govern the extent to which one may accept or rely upon a power of attorney and the manner in which such power of attorney should be prepared.

- *Fla. Stat.* § 709.2119

B. Appropriate Usage in Bankruptcy Court

In 2011, the Fifth Circuit found "that a general power of attorney may be used to file a bankruptcy on another's behalf." *United States v. Spurlin*, 664 F.3d 954, 959 (5th Cir. 2011). In rendering this decision the Fifth Circuit acknowledged the split of case law regarding this issue. The court concluded that general powers of attorney allow one to manage the affairs of the other, but cautioned that a "failsafe to prevent abuse" should be employed as well. *Id*. at 958. Additionally, evidence that the debtor was informed and believed that the bankruptcy filing was improper is needed. *Id*.

C. Limitations

Use of a power of attorney to file a bankruptcy case may or may not be appropriate under the circumstances of the case, but it cannot likely be used to prosecute a bankruptcy case on a debtor's behalf.

- *In re Matthews*, 516 B.R. 99 (Bankr. N.D. Tex. 2014) (denying motion to waive appearance by debtor at section 341 meeting, discussing issues related to use of a power of attorney).

V. SEEKING APPOINTMENT OF A NEXT FRIEND UNDER RULE 1004.1

Where no guardian is appointed in state court pre-petition, it is appropriate for a debtor to seek appointment of a guardian or next friend pursuant to Federal Rule of Bankruptcy Procedure 1004.1.

A. Timing

Because appointment of a next friend is a threshold issue, the motion to appoint the same should be filed contemporaneously with the bankruptcy petition. Contrast this with Rule 1016, which is triggered only when incompetency arises during the course of the case.

- *In re Lane*, 2012 WL 5296122 (Bankr. D. Or. Oct. 25, 2012) (requiring that a petition filed by a next friend be accompanied by a motion for appointment).

- *In re McGlohon*, 2016 WL 552332 (Bankr. E.D. N.C. February 10, 2016) (issues regarding a debtor's competency and validity of a next friend executing the petition are threshold issues.)
- See LBR 1002.1(d) of US Bankruptcy Court for the District of Idaho, which requires a statement explaining how the petition complies with Rule 1004.1 where someone other than the debtor signs the petition where no documentation exists demonstrating the signor's authority to do so.

B. Evidentiary Showing

In order to make a determination under Rule 1004.1, the court must be supplied with an evidentiary basis. Courts differ as to the extent of the evidence required for such a showing. Some examples of acceptable evidence include an affidavit of the proposed next friend, medical testimony, independent assessments, as well as a court's own observations at a hearing. It is clear, however, that the burden of proof rests with the debtor and next friend. *In re Lane*, 2012 WL 5296122 (Bankr. D. Or. Oct. 25, 2012). The court should determine appointment of the proposed next friend is in the debtor's best interests, and act as a failsafe to prevent abuse.

- *In re Cuellar*, Case No. 8:16-bk-05222-RCT, Ch. 13, Bankr. M.D. Fla. 2016) (evidence as to incompetency included declarations of debtor's primary care physician, and debtor's counsel intake paralegal)
- *In re McGlohon*, 2016 WL 552332 (Bankr. E.D. N.C. February 10, 2016) (requiring an evidentiary hearing for the proposed next friend to show that debtor was incompetent and next friend would and could act in the debtor's best interests).
- *In re Myers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006) (appointing a next friend without a specific hearing where an evidentiary hearing was held on prior application for waiver of credit counseling).

C. Scope of Appointment

The court can tailor the scope of the appointment of a next friend to fit the needs of the bankruptcy case. In some cases the next friend's appointment can be limited to only filing the petition, schedules, and plan. In some cases it will require attendance and testimony at the 341 meeting of creditors. However,

i. Section 341 Meeting of Creditors

- *In re Matthews*, 516 B.R. 99 (Bankr. N.D. Tex. 2014) (suggesting a properly appointed next friend could testify at the 341 meeting of creditors on the debtor's behalf).

ii. Bankruptcy Case Regarding Debtor's Affairs

- *In re Benson*, 2010 WL 2016891 (Bankr. N.D. Ga. Apr. 30, 2010)(appointing a guardian ad litem and providing specific authority to request information from any entity regarding the debtor's affairs).

iii. Adversary Proceedings

- *In re Myers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006) (appointing next friend for purposes of the main bankruptcy case but not as to related adversary proceedings).

D. Notice and Opportunity to Object

Because the issue of competency is a threshold one, the U.S. Trustee's office, and the panel trustee should be vigilant and move to dismiss the case if appropriate. The U.S. Trustee's office in *In re Lane* objected to the next friend's motion under Rule 1004.1. Additionally, at least one court has suggested creditors and other parties in interest may have the right to be heard and object on this issue. *In re Matthews*, 516 B.R. at 106.

VI. OPTIONS WHEN NO APPROPRIATE VOLUNTARY REPRESENTATIVE EXISTS

Should a court find that a proposed representative of the debtor is not qualified or appropriate, the court may consider the appointment of an independent representative.

VII. LOCAL RULE EXEMPLARS

A. Local Rule 1004.1 – U.S. Bankruptcy Court, District of Oregon

Rule 1004.1-1. Petition–Infant or Incompetent Person.

(a) Prepetition Appointment of Representative. If, before the petition date, a representative has been appointed by a court under nonbankruptcy law for a debtor who is an infant or incompetent person, then a copy of the appointment instrument must be filed with a voluntary petition or with the alleged debtor's first pleading responding to an involuntary petition.

(b) No Prepetition Appointment of Representative. If, before the petition date, no representative has been appointed by a court under nonbankruptcy law for a debtor who is an infant or incompetent person, then a motion for the court to appoint a next friend or guardian ad litem ("movant") for the debtor must be filed with a voluntary petition or with the alleged debtor's first pleading responding to an involuntary petition.

(1) The motion must be accompanied by the movant's declaration under penalty of perjury with the following information:

(A) the movant's name, address, and relationship to the debtor (the movant's relationship to the debtor as spouse or other close relative who might have an interest in the debtor's financial affairs will not necessarily preclude granting the motion);

(B) whether a representative was appointed for the debtor under nonbankruptcy law before the petition was filed;

(C) why appointment of the movant as next friend or guardian ad litem is necessary;

(D) why appointment of the movant would be in the debtor's best interest;

(E) the fee, if any, that the movant would charge the debtor for serving as next friend or guardian ad litem;

(F) the movant's criminal, financial, and professional history;

(G) the movant's competence to handle the debtor's financial affairs, including the movant's knowledge of debtor's financial affairs;

(H) whether the movant has any current or potential future interest in the debtor's financial affairs; and

(I) whether any of the debtor's debts were incurred for the benefit of the movant.

(2) In cases where appointment is sought on behalf of an incompetent person, the declaration must be accompanied by the following documents:

(A) a letter from the debtor's physician regarding the debtor's ability to conduct the debtor's own financial affairs;

(B) a letter from the debtor's caregiver regarding the debtor's ability to conduct the debtor's own affairs; and

(C) a copy of any power of attorney or other document giving the movant authority to act for the debtor.

(3) The motion and declaration must be served under FRBP 7004 on the debtor, and notice thereof must be provided to the trustee, all creditors, the UST, any governmental entity from which the debtor is receiving funds, the debtor's closest relative, if known, and all persons to whom notice must be given under ORS 125.060.

(4) The court will hear the motion before the meeting of creditors under § 341(a), if possible. The movant must appear to testify at the hearing, either in person or by telephone.

B. Local Rule 1002.1 – U.S. Bankruptcy Court; District of Idaho

PETITIONS

(c) Petition filed by a corporation, partnership, or other entity

Although a corporation, general partnership, limited partnership, limited liability company or other entity may file a voluntary petition, it must be executed by an authorized corporate officer, general partner, or designated manager and must include a resolution or other evidence of entity authorization for the petition. Further, an attorney shall represent these entities, and such attorney shall also sign the petition.

(d) Voluntary petition and other documents signed by a representative on behalf of an individual debtor

If a voluntary petition for an individual debtor or other document is signed on behalf of the debtor by someone other than the debtor, the name and capacity of the person signing on behalf of the debtor must be clearly stated under the signature line. An attorney must also sign and file such a petition. In addition, a copy of documentation evidencing authority of the signer to act on behalf of the debtor must be filed at the same time as the petition. If there is no such documentation, then a statement explaining how the petition complies with Fed. R. Bankr. P. 1004.1 must be filed with the petition. A certificate of service showing service on the non-signing debtor of a copy of the filed petition and the notice of the bankruptcy case meeting of creditors and deadlines shall be filed with the court no later than 14 days after the case has commenced.

EXEMPTION ISSUES – A FEW THINGS TO CONSIDER

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I. Exempt Property Generally

A. Property of the Estate. "The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held . . . (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (2016).

1. Of course, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 917, 59 L. Ed. 2d 136 (1979).

B. Exemptions.

1. A debtor may use either the applicable state or federal exemption scheme. 11 U.S.C. § 522(b)(1) (2016).

a. A debtor may claim exemptions available under applicable state or local law and exemptions under other non-bankruptcy federal statutes. 11 U.S.C. § 522(b)(3) (2016).

b. However, a state may "opt out" of the federal exemptions and prevent its citizens from using them. Thirty-two (32) states have opted out of the federal exemptions. 11 U.S.C. § 522(b)(2) (2016).

C. Procedure.

1. A debtor is required to list property claimed as exempt on Schedule C. Fed. R. Bankr. P. 1007(b)(1) & 4003(a) (2016).

2. Any objections to a debtor's claim of exemption must be filed within thirty (30) days after conclusion of the meeting of creditors is concluded or within thirty (30) days after any amendment or supplement to the list of property claimed as exempt. Fed. R. Bankr. P. 4003(b)(1) (2016).

a. The court may extend the time for objections for cause. Fed. R. Bankr. P. 4003(b)(1) & 9006(b)(2) (2016).

b. Notwithstanding, the trustee may file an objection to a "fraudulently asserted" claim of exemption at any time prior to one year after the closing of the case. Fed. R. Bankr. P. 4003(b)(2) (2016).

3. A debtor generally may amend her list of property claimed as exempt at any time before the case is closed. Fed. R. Bankr. P. 1009(a) (2016).

II. Tenancy by Entireties Property – Things to Watch Out For . . . .

A. Generally

1. Tenancy by the entirety is a unique type of shared property ownership available only to married persons. *United States v. Craft*, 535 U.S. 274, 280-281, 122 S. Ct. 1414, 1421, 152 L.Ed.2d 437 (2002).

a. When an estate by the entireties is created, the husband and wife, by reason of their legal unity by marriage, own the whole estate as a single person with the right of survivorship. *Id.* *See also* 41 Am. Jur. 2d *Husband & Wife* § 18 (2016). "Neither spouse [is] considered to own any individual interest in the estate; rather, it belong[s] to the couple." *Craft*, 535 U.S. at 281, 122 S. Ct. at 281.

b. The tenancy by the entirety form of ownership is recognized in roughly half of the states, including the State of Florida. Barry A. Nelson, *Tenancy by the Entireties*, 16th Annual Heckerling Institute on Estate Planning, *available at* http://www.actec.org/assets/1/6/Nelson_Tenancy_by_the_Entireties.pdf (last visited Dec. 21, 2016).

2. In **Florida**, property titled in the name of both spouses is presumptively considered to be a tenancy by the entirety. *See generally Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45 (Fla. 2001). However, the following six unities are required to create a tenancy by the entirety:

a. unity of possession (joint ownership and control);

b. unity of interest (the interests in the account must be identical);

c. unity of title (the interests must have originated in the same instrument);

d. unity of time (the interests must have commenced simultaneously);

e. survivorship; and

f. unity of marriage (the parties must be married at the time the property became titled in their joint names).

Id. at 52.

B. Recent Cases

1. Ensure all of the unities required to create a tenancy by the entirety are met.

a. In ***In re Benzaquen*, 555 B.R. 63 (Bankr. S.D. Fla. 2016) (Isicoff, J)**, the Court was asked to consider whether the unity of time needed to create a tenancy by entirety was satisfied where the debtor's wife alone completed the on-line process to create the bank account and then, two days later, debtor and wife went to brick and mortar office of bank and signed signature cards. 555 B.R. at 65.

b. In *Benzaquen*, the debtor and his non-filing spouse claimed a savings account that had been garnished by a creditor as exempt tenant by the entireties property. *Id.* at 64. The creditor, citing *Aranda v. Seacoast Nat'l Bank*, Adv. No. 08-01768-BKC-PGH-A, 2011 WL 87237 (Bankr. S.D. Fla. Jan 10, 2011), argued the account could not be tenant by the entireties property because the required unity of time was not satisfied when the account was first opened. *Id.* at 67-68.

(i) At an evidentiary hearing conducted by the Court, it was established that the debtor's wife alone had opened the savings account online and, at that time, electronically deposited $20,000. *Id.* at 65. The debtor's name had not been added to the account until two days later when the debtor and his wife went to a brick and mortar branch and signed the signature card. *Id.*

c. Fortunately for the debtors, the Court did not need to decide whether the unity of time had or had not been satisfied because the court found the funds were the exempt proceeds of an earlier sale of the debtor and his wife's homestead.

2. Tenancy by the entireties property may not be invaded to pay administrative expenses.

a. The United States Court of Appeals for the Sixth Circuit recently held that tenancy by the entireties property may not be charged for administrative expenses. ***In re Holley*, ___ Fed. Appx. ___, No. 16-1081, 2016 WL 6211975 (6th Cir. Oct. 25, 2016)**.

b. In *Holley*, the Sixth Circuit considered whether the bankruptcy court erred in concluding that the debtors realized the full benefit of their claimed exemption through a reduction in the sale amount to their desired third-party purchaser, which allowed them retain possession of the property. *Id.* at *2. The Court also considered the bankruptcy court's alternate conclusion that the proceeds of the sale of the entireties property could be charged for administrative expenses under the doctrine of laches and the bankruptcy court's authority under Section 105(a).

c. After considering the scope of Michigan's tenancy by entireties exemption, the Court concluded that Michigan law insulates *all* of the proceeds of the sale of entireties property and a debtor does *not* realize the benefit of the exemption through an accommodation such as a reduced sales price. *Id.* at *3.

d. Relying upon the holding of *Law v. Siegel*, ___ U.S. ___, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), the Court held that the bankruptcy court could not lawfully award *any* of the exempt property's equity to pay administrative expenses. *Id.* at *4. In doing so, the Court noted that, with limited exceptions, Section 522 provides that exempt property is not liable for the payment of any prepetition debt or any administrative expense claim. *Id. at *2* (citing *Law v. Siegel*, 134 S. Ct. at 1195, and 11 U.S.C. § 522(c) & (k)).

3. Where the original transfer into entireties status is not fraudulent, a subsequent transfer of exempt entireties property to one spouse is not avoidable.

a. In *In re Anderson*, ___ B.R. ___, Adv. Pro. No. 9:15-bk-990-FMD, 2016 WL 5846215 (Bankr. M.D. Fla. Oct. 6, 2016), the Bankruptcy Court recently considered whether a transfer of a transfer of entireties property to the debtor's non-filing spouse was an avoidable fraudulent transfer under Florida's version of the Uniform Fraudulent Transfer Act.

b. Noting that entireties property is unreachable by the creditors of only one of the tenants, the Court held that a transfer of entireties property to one of the tenants Is not subject to avoidance as a fraudulent transfer. *Id.* at *8.

III. Limitations on Exemptions

A. Section 522(o) provides that a claim of exemption in the debtor's homestead shall be reduced to the extent that "such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay or defraud a creditor . . . . 11 U.S.C. § 522(o) (2016).

1. In ***In re Roberts*, 527 B.R. 461 (Bankr. N.D. Fla. 2015)**, Judge Specie found that the debtors acted with intent to hinder, delay or defraud creditors, warranting reduction of homestead exemption, where, four years prior to the petition, debtors liquidates substantial non-exempt assets to fund construction of their so-called dream home.

B. Likewise, **Section 522(p)** places a cap of $155,675 upon "any amount of interest [in a homestead] that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition". 11 U.S.C. § 522(p) (2016). This cap is irrespective of any "bad acts" of the debtor.

C. Similarly, **Section 522(n)** provides a cap of $1,245,475 on the aggregate value of assets in certain individual retirement accounts (IRAs), "without regard to amounts attributable to rollover contributions . . . and earnings thereon." 11 U.S.C. § 522(n) (2016). However, the Code expressly provides that the Court may increase such amount "if the interests of justice so require." *Id.*

IV. Amended Claims of Exemption

A. Do Amendments Reopen the Time to Object to Claims of Exemptions Not Affected by the Amendment?

1. As noted above, a debtor generally may amend her list of property claimed as exempt at any time before the case is closed. Fed. R. Bankr. P. 1009(a) (2016).

2. But, does amendment reopen the time for the trustee, creditors and parties in interest to object to claims of exemption not affected by the amendment? Courts are split.

a. Relying upon the plain language of Rule 4003(b), some courts have held the objection need not be limited to the amended claims of exemption. *See In re Woerner*, 483 B.R. 106 (Bankr. W.D. Tex. 2012), *In re Larson*, Bankruptcy No. 12-30913, 2013 WL 4525214 (Bankr. D. N.D. Aug. 27, 2013). Rule 4003(b) plainly provides that "a party in interest may file an objection to the property claims as exempt within thirty (30) days after the meeting of creditors held under § 341(a) is concluded *or within thirty (30) days after any amendment to the list or supplemental schedules is filed, whichever is later.*" Fed. R. Bankr. P. 4003(b) (2016).

b. However, the majority of the courts to consider the issue have "concluded that the filing of an amendment does not reopen the time to object to original exemptions not affected by the amendment." *In re Larson*, 2013 WL 4525214, at *4 (citing *In re Grueneich*, 400 B.R. 680, 684 (B.A.P. 8th Cir. 2009); *Bernard v. Coyne (In re Bernard)*, 40 F.3d 1028, 1032 (9th Cir. 1994), cert. denied, 514 U.S. 1065 (1995); *In re Kazi*, 985 F.2d 318, 323 (7th Cir. 1993); *In re Payton*, 73 B.R. 31, 33 (Bankr. W.D. Tex. 1987); *In re Gullickson*, 39 B.R. 922, 923 (Bankr. W.D. Wis. 1984), and 9 Collier on Bankruptcy ¶ 4003.03(1)(a) (16th ed. 2013)). These courts generally emphasize the finality of the previously claimed exemption. *See, e.g. In re Kazi*, 985 F.2d at 323 (holding that, "if exemptions previously claimed have become final by the lack of a successful objection prior to the amendment, the objection may go only to those exemptions affected by the amendment").

B. Equitable Bases for Disallowance of an Exemption

1. Relying upon the Supreme Court's holding in *Law v. Siegel*, ___ U.S. ___, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), a number of bankruptcy courts have held that courts "lack the authority to disallow a debtor's claimed homestead exemption based on section 105(a), whether indirectly by denying leave to amend or directly by disallowing the exemption." *In re Lua*, 529 B.R. 766, 773-74 (Bankr. C.D. Cal. 2015) (citing *Elliott v. Weil (In re Elliott)*, 523 B.R. 188 (9th Cir. BAP 2014); *In re Bogan*, No. 12–16624, 2015 WL 1598056, at *3 (Bankr. W.D. Wis. Apr. 7, 2015); *In re Mateer*, 525 B.R. 559, 564 (Bankr. D. Mass. 2015); *In re Zarubin*, No. 13–56511–ASW, 2014 WL 7212955, at *2 (Bankr. N.D. Cal. Dec. 17, 2014); *In re Arellano*, 517 B.R. 228, 231 (Bankr. S.D. Cal. 2014); *In re Gress*, 517 B.R. 543, 547–48 (Bankr. M.D. Pa. 2014); *In re Scotchel*, No. 12–09, 2014 WL 4327947, at *4 (Bankr. N.D. W.Va. Aug. 28, 2014); *In re Pipkins*, No. 13–30087DM, 2014 WL 2756552, at *7 (Bankr. N.D. Cal. June 17, 2014); *In re Gutierrez*, No. 12–60444–B–7, 2014 WL 2712503, at *6 (Bankr. E.D. Cal. June 12, 2014); *In re Franklin*, 506 B.R. 765, 771 (Bankr. C.D. Ill. 2014)).

2. However, **in *In re Lua*, 529 BR 766 (Bankr. C.D. Cal. 2015), *aff'd,* 551 B.R. 448 (C.D. Cal. 2015)**, the Court disallowed a debtor's late-filed homestead exemption on the basis of equitable estoppel. *Id.* at 779. In doing so, the Court noted that, "[w]here, as here, a debtor claims a state-created exemption, the scope of the exemption—and any basis for denial of the exemption—must be found in state law." *Id.* at 774. The Court also emphasized that support for this proposition is found in *Law v. Siegel* itself. *Id.* (noting that "It is of course true that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption." (quoting *Law*, 134 S. Ct. at 1196-97). The *Lua* decision is on appeal to the U.S. Court of Appeals for the Ninth Circuit. *In re Lua*, Case No. 15-15684 (9th Cir. Filed Nov. 25, 2015).

3. Additionally, at least one court has concluded post-*Law v. Siegel* that, if the exemptions are asserted after much time and considerable reliance on the pre-amended exemptions by the trustee, the trustee and professionals must be compensated as sanctions. *See* ***In re Saldano*, 531 B.R. 141 (Bankr. N.D. Tex. 2015)**.

V. Non-Dischargeable Tax Debts & Domestic Supports Obligations

A. Section 522(c)

1. With limited exceptions, Section 522 provides that exempt property is not liable for the payment of any prepetition debt. 11 U.S.C. § 522(c) (2016).

2. However, amongst the exceptions are debts for certain nondischargeable tax obligations and nondischargeable "domestic support obligations."

a. Among other things, Section 522(c) provides that "property exempted under this section is not liable . . . for any debt of the debtor that arose . . . before the commencement of the case, except – (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) . . . . 11 U.S.C. § 522(c)(1) (2016).

b. In turn, Section 523(a)(1) and (5) except from discharge any debts for specified taxes or customs duties and domestic support obligations. 11 U.S.C. § 523(a)(1) & (5) (2016).

3. As a result, if there are tax or domestic support claims, a trustee may nonetheless be able to administer the asset, notwithstanding the debtor's claim of exemption. Likewise, in the event of debtor misconduct that has increased administrative expenses and thereby reduced the amount of distribution that a tax or domestic support claimant would otherwise have received, a trustee may be able to surcharge the property for the tax or domestic support claimant's benefit because, pursuant to Section 522(c), the exemption is not enforceable against these claims.