IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: HARVEY J. GLENN,	**IN PROCEEDINGS UNDER CHAPTER 7**
Debtor.	**CASE NO: 05-20445**
	JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a motion to voluntarily dismiss the above-styled Chapter 7 case, filed by counsel for the Debtor Harvey Glenn (Counsel). Counsel seeks dismissal of the case based on the fact that the Debtor is now deceased. The Chapter 7 Trustee (Trustee) objects to the motion. Core Jurisdiction is acquired and under provisions of 28 U.S.C. § 157 (a) and (b), 28 U.S.C. § 1334(b), and General Order No. 84 of this District. Based upon the following findings and conclusions of law, the motion is hereby denied:

Debtor filed for voluntary relief under Chapter 7 proceedings on July 18, 2005. Prior to the 341 meeting of creditors, the debtor died. It is undisputed that the Chapter 7 Trustee did not have an opportunity to examine the Debtor. Herein, Counsel for the deceased debtor seeks dismissal of the Debtor's case and contends that the Debtor's assets can be administered and distributed in the probate court. Counsel contends that the best interests of the Debtor and his creditors are better served by dismissal of the bankruptcy case.

The Trustee objects to dismissal of the case on the grounds that, based on information he obtained prepetition from Debtor's counsel, Debtor withdrew certain funds from a 401k account and transferred those funds to his wife. The Trustee contends that, following withdrawal of any and all funds from the Debtor's 401k account, the funds lost their exempt status under Ohio law. He also

contends that he is investigating claims to avoid the transfer (to Debtor's wife) and recover the funds for the benefit of the Debtor's estate.[1] The record reveals that the Trustee has scheduled a Rule 2004 exam of Debtor's wife (a non-debtor).

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The dispositive issue before the Court is whether the case should be dismissed because of the debtor's death or whether it should proceed as if the death had not occurred.

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Section 707 of the Bankruptcy Code provides in pertinent part:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including–
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> > (1) unreasonable delay by the debtor that is prejudicial to creditors;
> > (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> > (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

11 U.S.C. § 707(a). Although not specifically provided in §707 of the Code, the case law is clear that the debtor can move for dismissal of a voluntarily filed case. *See In re Sheets*, B.R. 254, 255 (Bankr. N.D. Ohio 1994). However, under this section a debtor does not have an absolute right to voluntarily dismiss a chapter 7 bankruptcy case. *In re Cohara*, 324 B.R. 24, 27 (6th Cir. B.A.P. 2005). Rather, a debtor must show why a dismissal is justified. *In re Sheets*, at 255. As the movant,

[1]The schedules reflect that the Debtor had a 401k with a former employer in the amount of $100,000.00. (Schedule B). Debtor claimed the entire amount as exempt. (Schedule C). Unsecured claims subject to discharge total $47,628.47.

Counsel for the deceased debtor has the burden of showing cause for dismissal by a preponderance of the evidence. *Id. citing In re Horan,* 304 B.R. 42 (Bankr. D. Conn.2004).

When determining the propriety of a motion for voluntary dismissal, the court may consider numerous factors. Among those factors to be considered are the following: (1) Did the debtor attend the meeting of creditors required under §341; (2) Did the debtor attend all requested examinations under Rule 2004; (3) Are any adversary proceedings pending against the debtor; (4) Does the record reflect any wilful nondisclosure by the debtor; (5) Is there any evidence of fraud; (6) Has the trustee or any creditor articulated a sound basis for objecting to the voluntary dismissal motion; (7) Is there any evidence that the debtor committed any of the proscribed activities mentioned in §707(a); (8) Has the debtor performed all statutory duties required under §521 of the Code; (9) Does the debtor's dismissal motion comply with all procedural rules, including local rules; (10) Will creditors be prejudiced by a dismissal?

Indeed, "[A] debtor's ability to repay her debts will not, on its own, constitute 'cause' for dismissal." *In re Cohara*, 324 B.R. at 27 *citing In re Horan*, at 42. "If dismissal would prejudice the creditors, then it will ordinarily be denied." *In re Cohara*, 324 B.R. 24 at 28 *citing Peterson v. Atlas Supply Corp. (In re Atlas Supply Corp.),* 857 F.2d 1061, 1063 (5th Cir. 1988) *and In re Harker,* 181 B.R. 326, 328 (Bankr. E.D. Tenn.1995) ("[I]f creditors are prejudiced in any respect by the dismissal or if the trustee has acquired funds for distribution, a request by the debtor for dismissal will be denied."). "Prejudice exists where assets which would be available for distribution are lost as a result of the dismissal." *In re Cohara*, 324 B.R. at 28 (citations omitted).

Considering the above-referenced factors, a voluntary dismissal motion is usually denied where there is found to exist a plain legal prejudice to the bankruptcy estate. An application of the

"plain legal prejudice" standard necessarily requires a balancing of harm between the debtor and the debtor's estate. Plain legal prejudice is usually found to exist where assets which would otherwise be available to the creditors are lost where insufficient cause has been demonstrated for a voluntary dismissal. *See e.g., In re Komyathy*, 142 B.R. 755, 757 (Bankr. E. D.Va. 1992); *In re Higbee*, 58 B.R. 71, 72 (Bankr C.D. Ill. 1986).

Also, Federal Rules of Bankruptcy Procedure 1016 provides, in part, that:

> [d]eath or insanity 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 insanity had not occurred.

Fed. R. Bankr. P. 1016; *In re Gee*, 204 F.3d 1115 (5th Cir. 1999). There are few cases which construe Rule 1016. Of those few, the courts have concluded that where a debtor has passed away, his case may, like any other case, be dismissed "for cause" pursuant to § 707(a). *See e.g. In re Abrahams*, 163 B.R. 606, 606 (Bankr. S.D. Fla. 1993), citing *In re Cleland*, 150 B.R. 63 (Bankr. D. Kan. 1993). *See also In re Gridley*, 131 B.R. 447 (Bankr. D.S.D. 1991)(The commencement of a Chapter 7 case creates a bankruptcy estate as of the time of the filing, and the death of the debtor does not abate the proceedings used to complete the liquidation process).

It is clear from Rule 1016 that a Chapter 7 case *shall not abate* solely because of the death of the debtor. In addition to the plain meaning of the text of Rule 1016, the Advisory Committee Notes to the rule provide an inference that Chapter 7 proceedings continue after a debtor's death. As the bankruptcy court in *In re Gridley* noted:

> The inference is made by noting that Chapter 11 and 13 cases are distinct from Chapter 7 cases in that there is a strong chance they will not continue after a debtor's death for the simple reason that it may be more practical to dismiss these types of reorganization efforts. The Note to Rule 1016 states, "In a chapter 11 reorganization case or chapter 13 individual's debt adjustment case, the likelihood is that the case

> will be dismissed." This likelihood of dismissal is not found with Chapter 7 cases. Since a Chapter 7 liquidation case is not an effort to reorganize the debtor's affairs, the inference, then, is that a Chapter 7 case will continue, and there is no other reason why it would not continue, unlike Chapter 11 and 13 cases.

In re Gridley, 131 B.R. 447 at 451. Examining the unambiguous language of Rule 1016, the Court has discretion in a Chapter 13 proceeding under Rule 1016 to dismiss the case, but no such discretion was given in a Chapter 7 context without a proper showing of "cause" pursuant to § 707(a).

In this Chapter 7 case, Counsel for the deceased debtor provided no sound basis for dismissal of the case in his pleading nor during his oral argument before the Court. Counsel simply contends, in a conclusory manner, that the probate court can administer the assets. No detailed plan of repayment to creditors was provided, as addressed in *Cohara, supra*. Nor did counsel suggest that it is impossible to proceed without the deceased debtor actively involved in the case or that the Trustee could not proceed with the administration of the case without the deceased debtor. *See* Fed. R. Bankr. P. 1016. Moreover, the motion fails to cite to any relevant authority to support the relief sought. *See* LBR 9013-1 (a)(a motion for filing shall be accompanied by a memorandum in support....).

Accordingly, for the above reasons, the motion for voluntary dismissal is hereby denied, and the objection of the Trustee is sustained. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated this 6th day of January, 2006

/s/ Randolph Baxter

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

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JUDGE RANDOLPH BAXTER

JUDGMENT

At Cleveland, in said District, on this 6th day of January, 2006.

A Memorandum Of Opinion And Order having been rendered by the Court in this matter,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion for voluntary dismissal is hereby denied, and the objection of the Trustee is sustained. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter
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RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT