UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 13
	)	
DESSIE SALES, JR.,	)	CASE NO. 03-60861
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
	)	
	)	**MEMORANDUM OF DECISION**
	)	**(WRITTEN OPINION)**

On February 27, 2006, Morris H. Laatsch, counsel for debtor Dessie Sales, Jr. (hereafter "Debtor") filed a suggestion of death indicating Debtor passed away on February 8, 2006. Subsequently, on March 22, 2006, counsel filed a motion for hardship discharge pursuant to 11 U.S.C. § 1328(b). Toby L. Rosen, Chapter 13 Trustee, filed an objection to the hardship motion, and a motion to dismiss, which precipitated a response on Debtor's behalf. At a hearing on the motion, the court established a briefing schedule. Both parties have filed memoranda of law and the matter is now before the court for decision.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A) and (J). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409(a).

FACTS

The facts are not in dispute. Debtor filed a chapter 13 petition on March 4, 2003. The plan, confirmed on May 22, 2003, provided for payments of $825.00 per month for thirty-six months, resulting in an estimated dividend of ten percent. No chapter 7 liquidation value was established. In May 2005, a modification increased Debtor's payments to $1,030.00 per month in order to maintain feasibility. Debtor passed away on February 8, 2006.

ARGUMENTS

The motion for hardship discharge is premised on the following facts: Debtor's death renders him unable to make payments, a reason for which he cannot justly be held accountable; since there would not have been a distribution in a chapter 7 proceeding, the amount of money the unsecured creditors have received under the plan is more than they

would have received in a chapter 7 liquidation case; and modification of the plan is impractical because of Debtor's death. Further, the motion urges the court to grant a hardship discharge because it will allow Debtor's estranged spouse to pursue a release of administration, rather than full administration, in the probate court.

It is the trustee's position that Federal Rule of Bankruptcy Procedure 1016 provides, only two options following a debtor's death: the case will be dismissed or subject to further administration. Trustee's interpretation of "further administration" does not include a hardship discharge, but rather references the continued payment of monies due under the plan through a surviving joint debtor or decedent's estate. According to the trustee, if a case is subject to further administration, the creditors will be entitled to the same return as if the death had not occurred. If the case is dismissed, the creditors will be able to pursue their claims through probate proceedings. A hardship discharge, however, may leave creditors at a distinct disadvantage: assets which may be available to pay creditors in probate court will, upon the granting of a discharge, pass to the decedent's heirs. Finally, the trustee points out that no probate representative has been appointed and therefore this action may not be authorized, nor in the best interest of the probate estate. Accordingly, the use of the term "Debtor" is with great reservation.

LAW AND ANALYSIS

There is a surprising paucity of case law on the issues raised on these facts. Debtor cites three cases, two of which support entry of a hardship discharge and one which is inapposite. *See* In re Graham, 63 B.R. 95 (Bankr. E.D. Penn. 1986); In re Bond, 36 B.R. 49 (Bankr. E.D.N.C. 1984); In re McNealy, 31 B.R. 932 (Bankr. S.D. Ohio 1983). As Debtor recognized, the McNealy case is factually distinguishable because it involved a motion for hardship by the surviving joint debtor and the court specifically stated the issues in the case applied only to the survivor. Although Graham and Bond resulted in the granting of a hardship discharge, neither case addressed the issues raised by trustee in this case. Trustee, however, provides no case law support for her arguments.

Federal Rule of Bankruptcy Procedure 1016 contains the following guidance:

> If a reorganization 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.

Unlike the trustee's position, Collier's suggests that three options are available upon the death of a debtor:

> [N]ormally the debtor's death will often lead to dismissal of the case because the debtor will likely have no future income. Alternatively, the court may enter a hardship discharge under section 1328(b), which would preserve the benefits of the discharge for the debtor's estate . . . . However, if a debtor has proposed a confirmable plan

> that is still feasible after the death of the debtor, the court may allow the case to continue for the benefit of the debtor's estate.

15 Lawrence P. King, Collier on Bankruptcy ¶ 1016.04 (15th ed. 2006).

In light of trustee's absence of support for her proposition that "further administration" is limited to completion of plan payments, the court is disinclined toward adopting this view. Collier's and the sparse case law indicate that administration can include a hardship discharge in appropriate circumstances. If the drafters intended the language to be so limited, they could have easily created plain language in the statute to accomplish that goal.[1] Further, Rule 1016 also uses "administered" in connection with chapter 7 cases, which are distinctly not subject to abatement under the rule and the great majority of which include no assets subject to administration as defined by the trustee. It would be absurd to first declare that death does not abate a chapter 7 liquidation case, but then limit that understanding to the smallest handful of chapter 7 cases.

Although the court is not willing to accept the trustee's definition of "administration," Rule 1016 provides that further administration must not only be possible, but also must be "in the best interest of the parties." The motion suggests that the "best interest" of the parties requirement is met because nothing would have been realized from liquidation of the only non-exempt asset, Debtor's house. The court does not agree that a liquidation analysis is the sole litmus test for determining whether further administration is in the best interest of the parties.

Upon review, the trustee has enunciated a sound argument why the grant of a hardship discharge is not in the best interest of the creditors. A hardship discharge will preclude a prepetition creditor from exercising any rights it may have under probate law in exempt or post-petition assets. As proposed in this case, the creditors stand to lose a significant benefit through further administration. If the case is allowed to proceed to further administration, Debtor clearly intends that creditors will not receive further distribution, but rather will be subject to a hardship discharge. Thus, the best interest of the creditors is to dismiss the case and allow creditors to exercise their rights under probate law.

Obviously, Debtor's estate would benefit from the discharge of debts through a hardship discharge. However, in this case the court notes, according to the motion, this case was filed to stave off a foreclosure proceeding and the case involves a "relatively" small amount of unsecured debt. At this point, the probate estate will not benefit from a hardship discharge, as it relates to the real estate, because Debtor had not made sufficient payments to cure the mortgage and the mortgage remains in default. Based on the value of the property and the mortgage, there is no equity in the property to require distribution by the probate court. Therefore, Debtor's estate stands to gain little from further administration.

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[1] The court does note, however, that some courts have determined that "further administration" does not include the option of conversion to chapter 7. *See, eg.*, In re Spiser, 232 B.R. 669 (Bankr. N.D. Tex. 1999); Burner v. Security State Bank (In re Burner), 109 B.R. 216 (Bankr. W.D. Tex. 1989); In re Jarrett, 19 B.R. 413 (Bankr. N.C. 1982).

Debtor's motion for hardship discharge does, in detail, explain the position of Debtor's estranged wife as it relates to the main asset, Debtor's house. Based on the representations in the motion,[2] it appears that it is in her best interest to grant the motion for hardship discharge in order to avoid full administration in the probate court. Debtor's estranged wife was not a co-debtor, nor is she a party.

Considering the trustee's position, the interest of the creditors, and the interest of Debtor's estate, and rejecting the interest of Debtor's wife, the court finds that it is not in the best interest of the parties to continue with further administration of this case.

CONCLUSION

Following Debtor's death, Federal Rule of Bankruptcy Procedure 1016 provides that a case can proceed to further administration, if possible, if it is in the best interest of the parties. In this case, the further administration is obtaining a hardship discharge. Although hardship discharge would result in a benefit to Debtor's estate, the benefit is minimal compared to the benefit creditors would have in pursuing claims in probate court. While there may be nothing to recover from the probate estate, the benefit to the creditors in having this avenue open is greater than the benefit to the estate in having a discharge for a deceased debtor with few assets, little unsecured debt, and an undersecured mortgage in default. The court finds that further administration, under these facts, is not in the best interest of the parties.

An order in accordance with this decision shall be entered immediately.

/s/ Russ Kendig SEP 15 2006
RUSS KENDIG
U.S. BANKRUPTCY JUDGE

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[2] This raises another issue arising following the death of the Debtor. Since Debtor has passed away, and a personal representative has not been appointed, there is no way to verify any facts which cannot be proved by extrinsic evidence. Thus, many courts require the appointment of a personal representative, a party which can speak for and bind the probate estate, following Debtor's death. *See, e.g.,* In re Hamilton, 274 B.R. 266 (Bankr. W.D. Tex. 2001); In re Lucio, 251 B.R. 705 (Bankr. W.D. Tex. 2000); In re Stewart, 2004 WL 3310532 (Bankr. D. Or. 2004).

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