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CONTINUATION OF CHAPTER 13 POSTMORTEM: WHY COURTS SHOULD ALLOW DECEASED DEBTORS' CASES TO CONTINUE POST PLAN CONFIRMATION

ABSTRACT

A lack of direct guidance from Rule 1016 of the Federal Rules of Bankruptcy Procedure has created inconsistency among bankruptcy courts regarding whether to continue a chapter 13 case if the debtor dies post plan confirmation but before discharge. Rule 1016 allows a deceased debtor's chapter 13 case to continue if "further administration is possible" and it is "in the best interests of the parties." Although dismissal is appropriate if the debtor dies before plan confirmation, continuation after plan confirmation is possible and benefits all parties.

The benefits of continuation post plan confirmation stem from the certainty under federal bankruptcy law regarding what pre-petition creditors will receive and allows beneficiaries and post-petition creditors to have access to the decedent's assets in probate, rather than all three parties fighting over the decedent's assets in probate. Continuation of the bankruptcy case results in creditors receiving their expected distribution amount under the confirmed payment plan (through continued plan payments made by the decedent's beneficiaries) or unsecured creditors receiving at least as much as they would have received under chapter 7 (through conversion to chapter 7). A hardship discharge may also be warranted if the decedent's unsecured creditors have already received at least as much as they would have under chapter 7. Courts should permit continuation of the bankruptcy case and ultimately award a discharge if a chapter 13 debtor dies post plan confirmation because it will create uniformity among bankruptcy courts, equitable treatment among chapter 13 and chapter 7 debtors, and more certainty to both the decedent's beneficiaries and her creditors.

INTRODUCTION

Chapter 13 of the Bankruptcy Code provides an option for individual debtors to retain their property, restructure their finances, and repay their creditors over time.¹ To qualify for chapter 13, an individual debtor must have regular annual income and debts below a threshold amount.² This opens eligibility for chapter 13 to sole proprietorships³ and unemployed or retired individuals who have a regular source of income.⁴ Although a beneficial option for individual debtors, the majority of chapter 13 cases are dismissed by the bankruptcy court before the debtor receives a discharge,⁵ with only about one-third receiving a discharge.⁶ One reason for dismissal is the death of the debtor.

Courts look to Rule 1016 of the Federal Rules of Bankruptcy Procedure (“FRBP”) for guidance if a chapter 13 debtor dies after filing for bankruptcy. Rule 1016, however, provides little instruction and leaves much discretion to the court to interpret its application. These interpretations vary between and within jurisdictions. “[T]he confusion rendered by the death of a chapter 13 debtor alone decries the need for reform, and at the very least greater uniformity.”⁷ Under Rule 1016, if a chapter 13 debtor dies, “the case may be dismissed; or if further administration is possible and in the best interests of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death . . . had not occurred.”⁸ Variations by the courts center around determining what constitutes “further administration” and what is “in the best interests of the parties.” Courts consistently hold that dismissal is warranted if the debtor dies before plan confirmation.⁹ This is because the debtor’s

¹ See 11 U.S.C. § 1322(a) (2019).

² See *id.* § 109(e). Originally, chapter 13 was only an option for “wage earners,” which excluded individuals who now can file under chapter 13 including retired individuals. DAVID G. EPSTEIN ET AL., *BANKRUPTCY: DEALING WITH FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESSES* 237 (4th ed. 2006).

³ Chapter 13 provides another option separate from chapter 11 reorganization. See EPSTEIN ET AL., *supra* note 2, at 237.

⁴ This can include annuity payments or social security benefits. See EPSTEIN ET AL., *supra* note 2, at 237.

⁵ See EPSTEIN ET AL., *supra* note 2, at 237. This can be contrasted with a majority of individual chapter 7 cases that end in a discharge. Ed Flynn, *The Changing Profile of Chapter 7 Filers*, AM. BANKR. INS. (Sept. 2018) (“The vast majority of chapter 7 debtors successfully obtain a discharge. In fact, more than 70 percent have been discharged within five months of filing.”).

⁶ See Sara S. Green, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017); Ed Flynn, *Success Rates in Chapter 13*, AM. BANKR. INST. 1, 2 (2017).

⁷ John E. Pevy, *Few Things Are Certain in Life, Even Less Are Certain in Death and Bankruptcy*, 17 TENN. J. BUS. L. 309, 320 (2016).

⁸ FED R. BANKR. P. 1016

⁹ See *In re Waring*, 555 B.R. 754, 764 (Bankr. D. Colo. 2016) (dismissing case because the debtor died pre-plan confirmation); *In re Brown*, No. 12-07082-JW, 2013 Bankr. LEXIS 1300, at *12 (Bankr. D.S.C. Mar.

participation is necessary during the plan confirmation process.¹⁰ Courts, however, are very inconsistent in deciding whether to continue a case if a debtor dies after plan confirmation.¹¹

This Comment focuses on the divergent interpretations of Rule 1016 by bankruptcy courts. These interpretations demonstrate the various ways a chapter 13 case can continue after the debtor dies. First, Section I provides background on the differences between filing under chapter 7 and chapter 13 to provide context for the differences in the application of Rule 1016. Next, Parts A and B of Section I discuss the different interpretations of what constitutes “further administration” and how to determine what is “in the best interests of the parties.” Several policies underlie the varying interpretations, and they too will be examined. Section II will then examine the different ways a chapter 13 case can continue postmortem and how each option benefits debtors, creditors, and beneficiaries of the deceased debtor. This Comment concludes by contemplating policy considerations for continuing a chapter 13 case, including consistency and equitableness in comparison to the procedure followed in chapter 7 cases.

I. BACKGROUND

Bankruptcy courts look to Rule 1016 if a debtor dies during the pendency of her chapter 13 case. It states:

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.¹²

25, 2013) (denying grant of hardship discharge because debtor died pre-plan confirmation).

¹⁰ See *In re Waring*, 555 B.R. at 764; *In re Brown*, 2013 Bankr. LEXIS 1300 at *12.

¹¹ See *In re Moore*, No. 15-62639, 2017 Bankr. LEXIS 3385, at *2 (Bankr. N.D. Ohio Oct. 3, 2017) (stating that “case law [regarding dead debtors] looks like a seismograph needle in the middle of an earthquake”). Compare *In re Perkins*, 381 B.R. 530, 537 (Bankr. S.D. Ill. 2007) (continuing the case after plan confirmation) with *In re Shepherd*, 490 B.R. 338, 340 (Bankr. N.D. Ind. 2013) (dismissing the case after plan confirmation).

¹² FED. R. BANKR. P. 1016

According to the “Notes of Advisory Committee on Rules,” both chapter 11 and chapter 13 cases will likely be dismissed.¹³

The case law involving incompetency in bankruptcy is underdeveloped.¹⁴ Because there is no federal statute that sets forth the criteria to determine incompetency, bankruptcy courts either require the state court to determine incompetency or the bankruptcy court itself applies the law of the debtor’s domicile.¹⁵ “In common understanding, the term ‘incompetent’ refers to a person who lacks the mental competence or capacity to make decisions or conduct her own legal or business affairs.”¹⁶ Rule 1004.1 applies if an incompetent debtor files for bankruptcy.¹⁷ In such cases, the personal representative of an incompetent debtor “may file a voluntary petition”¹⁸ and a representative may be appointed by the court if the debtor doesn’t already have one.¹⁹

Rule 1016 also applies if the debtor becomes incompetent after filing for bankruptcy.²⁰ *In re Moss* followed a two-step process to determine if the debtor’s chapter 7 case could be continued.²¹ First, the court determined if the debtor was incompetent; in this case, incompetence had already been determined by another court.²² Second, the court determined if the case could be continued “in the same manner as if the incompetency had not occurred.”²³ The court reasoned that although the debtor’s incompetency prevented the case from being administered “as usual,”²⁴ the case did not need to be dismissed.²⁵ Rather, the appointment of a limited guardian was viable and necessary to continue the case.²⁶ The court

¹³ *Id.* (noting “In a chapter 11 reorganization case or chapter 13 individual’s debt adjustment case, the likelihood is that the case will be dismissed.”).

¹⁴ *See In re Moss*, 239 B.R. 537, 538 (Bankr. W.D. Miss. 1999) (addressing the question as an issue of first impression).

¹⁵ *See In re Sniff*, No. 15-18086, 2015 Bankr. LEXIS 3979, at *7–8 (Bank. D. Colo. Oct. 6, 2015); *In re Moss*, 239 B.R. at 539; *In re Moody*, 105 B.R. 368, 371 (S.D. Tex. 1989).

¹⁶ *In re Ford*, No. 08-4069, 2009 Bankr. LEXIS 801, at *1 (Bankr. N.D. Ga. Mar. 3, 2009).

¹⁷ *See In re Sniff*, 2015 Bankr. LEXIS 3979 at *9 (quoting FED. R. BANKR. P. 1004.1).

¹⁸ *Id.*; *see also In re Kjellsen*, 155 B.R. 1013, 1018 (Bankr. D.S.D. 1993) (reasoning that incompetent people are not barred from filing for bankruptcy because the Bankruptcy Code allows involuntary petitions to be filed against incompetent persons).

¹⁹ *See In re Sniff*, 2015 Bankr. LEXIS 3979 at *7.

²⁰ *See In re Moss*, 239 B.R. at 539; *In re Sniff*, 2015 Bankr. LEXIS 3979 at *5–6.

²¹ *See In re Moss*, 239 B.R. at 539.

²² *See id.* at 540–42 (adopting district court’s ruling that the debtor was incompetent to stand criminal trial); *see also In re Ivers*, 2019 Bankr. LEXIS 3504, at *35 (Bankr. E.D. Cal. Nov. 8, 2019) (referring competency determination to be made by the county adult protective services).

²³ *In re Moss*, 239 B.R. at 542–45 (internal citations omitted).

²⁴ *Id.* at 542 (reasoning that the case cannot be administered “as usual” because of the debtor’s rash behavior and her illness was likely to prevent her from focusing on her case and protect her rights).

²⁵ *See id.* at 545.

²⁶ *See id.* at 542 (“[T]he only questions the Court must address are whether it would be possible to proceed

opined that a limited guardian would protect the debtor's rights and ensure that the benefits of bankruptcy are available to debtors who become incompetent.²⁷

Although there appear to be no published cases involving a chapter 13 debtor who becomes incompetent after filing for bankruptcy, courts are likely to follow the same procedure that *In re Moss* did and appoint a limited guardian to represent the incompetent debtor in the administration of her case.²⁸ An issue may arise as to whether the incompetency restricts the debtor's access to employment and therefore affects her ability to contribute her disposable income. The court would have to evaluate whether any payments that the debtor is receiving—such as social security or other support payments—are sufficient to pay the creditors. If not, the court should conduct a similar analysis as if the debtor died, including determining if converting the case to chapter 7 is necessary to continue the administration of the case or if the debtor satisfies the hardship discharge requirements.²⁹

Continuation of a case after the death of a debtor stems from the Bankruptcy Act of 1898.³⁰ Section 8 of this act stated that “[t]he death . . . of a bankrupt shall not abate the proceedings but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died”³¹ Rule 1016 maintains the language of Section 8 on continuing the case, “as though he [the debtor] had not died” but does not specify how the chapter 13 case should continue.³² However, it does provide two parameters that can help guide courts in determining how to proceed: (1) further administration must be possible and (2) continuation must be in the best interests of the parties.³³

Additionally, if the bankruptcy case continues, the decedent's probate proceedings generally can continue.³⁴ “This stems from the fact that bankruptcy and probate jurisdictions are both fundamentally in rem.”³⁵ As such, the bankruptcy court and the probate court would administer the particular assets

in the same manner as if the incompetency had not occurred, and if not, whether the appointment of a limited guardian would be an appropriate measure.”)

²⁷ *See id.* at 543.

²⁸ *See id.* at 545.

²⁹ *See* 11 U.S.C. § 1328(b) (2019).

³⁰ *See In re Perkins*, 381 B.R. 530, 534 (Bankr. S.D. Ill. 2007).

³¹ Bankruptcy Act of 1898, Pub. L. 55-541, § 8, 30 Stat. 544, 549 (1898) (repealed 1978).

³² *Compare id.*, with FED. R. BANKR. P. 1016 (keeping the language “as though the death or incompetency had not occurred.”).

³³ FED. R. BANKR. P. 1016.

³⁴ *See* David B. Young, *The Intersection of Bankruptcy and Probate*, 49 S. TEX. L. REV. 351, 367 (2007) (stating that “a bankruptcy and a probate proceeding may go forward parallel to one another”).

³⁵ *Id.*

and address the particular claims subject to its jurisdiction if the bankruptcy case continues. This means that if a chapter 7 debtor dies before discharge, the bankruptcy court will continue to exercise jurisdiction over the assets and claims that are part of the bankruptcy estate while the probate court will have jurisdiction over post-petition assets and exempt property not included in the bankruptcy estate.³⁶ The property of the bankruptcy estate will continue to be liquidated and distributed among the remaining creditors.³⁷ In chapter 13, property of the bankruptcy estate will remain under the jurisdiction of the bankruptcy court until a discharge is awarded³⁸ while the probate court will have jurisdiction over property not included in the bankruptcy estate pursuant to section 522 of the Code.³⁹ However, the probate proceeding may be stalled in some instances. For example, in Georgia, the exemption amount for “household goods, furnishings, books” and other similar items is \$5,000.⁴⁰ If these items exceed the exemption amount, the trustee may sell these items to distribute the non-exempt amount to the bankruptcy creditors, and thus, stall the distribution of the exempt amount to the decedent’s beneficiaries or post-petition creditors. If the chapter 7 or chapter 13 bankruptcy case was dismissed, the probate court would acquire jurisdiction over the assets formerly in the bankruptcy estate.

Under chapter 7 of the Code, the debtor’s property is separated into two categories: exempt property and non-exempt property. Determining what property is exempt depends on state law.⁴¹ Congress created a set of exemptions included in the Code but allows each state to opt out of those provisions in favor of state law.⁴² For example, in Georgia, the debtor must use the state exemptions but also has access to certain federal exemptions (such as federal and military retirement accounts and disability benefits).⁴³ Federal bankruptcy law provides greater exemption amounts compared to Georgia, except for motor vehicles.⁴⁴ While the exemption amount for motor vehicles is up to \$5,000 in Georgia,⁴⁵ the federal bankruptcy exemption amount is \$4,000.⁴⁶ Furthermore, federal exemptions are adjusted for inflation under section 104.⁴⁷

³⁶ *Id.* at 367–68.

³⁷ *See id.* at 368.

³⁸ *See id.*

³⁹ *See* 11 U.S.C. § 522 (2019).

⁴⁰ Ga. Code Ann. § 44-13-100(a)(4).

⁴¹ *See* 11 U.S.C. § 522(b)(2).

⁴² *Id.*

⁴³ Ga. Code Ann. § 44-13-100(b).

⁴⁴ *Id.* § 44-13-100(a); 11 U.S.C. § 522(d).

⁴⁵ Ga. Code Ann. § 44-13-100(a)(3).

⁴⁶ 11 U.S.C. § 522(d)(2).

⁴⁷ *Id.* § 104.

The debtor must also satisfy domiciliary requirements to use the state's exemption laws.⁴⁸ The debtor must be domiciled in the state for 730 days before filing to satisfy the requirement.⁴⁹ If the debtor was not domiciled in one state during that period, then the state's exemption laws that the debtor was domiciled in for at least 180 days (or the state they resided in longest for the 180 day period) preceding the 730 days before filing would apply.⁵⁰ If the debtor fails to meet any of these domiciliary requirements, then the federal exemptions apply.⁵¹

Debtors who decide to pursue bankruptcy relief under chapter 7 must pass the “means test”⁵² if their debts are primarily consumer debts.⁵³ This test was added as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which sought to make the eligibility requirements to file under chapter 7 more strict.⁵⁴ “The means test creates a presumption of abuse for debtors who seek to liquidate their debt in a chapter 7 bankruptcy, but who appear capable of repaying at least a portion of their debt.”⁵⁵ If the debtor is unable to rebut this presumption, the debtor can seek bankruptcy relief through chapter 13.⁵⁶ The test requires a comparison of the debtor's current monthly income⁵⁷ with the median family income⁵⁸ in the state where the debtor filed for bankruptcy.⁵⁹ If the debtor's current monthly income is less than the median income for a similarly-sized household, the debtor passes the means test and can file under chapter 7.⁶⁰ If the current monthly income is above the median income, the test

⁴⁸ *Id.* § 522(b)(3).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* § 707(b); see Kathleen Murphy & Justin H. Dion, “Means Test” or “Just a Mean Test”: An Examination of the Requirement that Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(b), 16 AM. BANKR. INST. L. REV. 413, 435 (2008) (stating that “in order to facilitate the execution of the means test calculations, Official Form [22A] is completed by every debtor [filing under chapter 7] and [must be] filed along with his schedules.”) (alterations in original).

⁵³ See 11 U.S.C. § 101(8) (“The term ‘consumer debt’ means debt incurred by an individual primarily for a personal, family, or household purpose.”).

⁵⁴ See Murphy & Dion, *supra* note 52, at 413–14.

⁵⁵ Murphy & Dion, *supra* note 52, at 434.

⁵⁶ Murphy & Dion, *supra* note 52, at 431 (discusses the legislative history of the means test and its purpose of discouraging people with the ability to repay their debts from filing under chapter 7).

⁵⁷ Current monthly income is the average monthly income from all sources that the debtor receives during the six month period, “ending on the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income” or “the date on which the current income is determined by the court” 11 U.S.C. § 101(10A); see *id.* § 101(10A)(B) (excluding benefits received under the Social Security Act).

⁵⁸ *Id.* § 101(39A) (stating “the median family income both calculated and reported by the Bureau of the Census in the most recent year”).

⁵⁹ See Murphy & Dion, *supra* note 52, at 436.

⁶⁰ See Murphy & Dion, *supra* note 52, at 436.

then requires the debtor to deduct certain expenses to determine her monthly disposable income.⁶¹ If the debtor's monthly disposable income is equal to or greater than the amounts listed under section 707(b)(2)(A), the debtor is prevented from filing under chapter 7.⁶² However, the debtor can rebut this presumption of abuse by identifying special circumstances that support an adjustment to the calculation of her current monthly income,⁶³ and then reevaluating whether the adjusted income satisfies the means test.⁶⁴

The debtor's non-exempt property is turned over to the bankruptcy trustee and becomes the property of the bankruptcy estate, subject to exceptions.⁶⁵ One exception is contained in section 554, which provides that "after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."⁶⁶ Abandoned property is likely to be assets worth the value of a creditor's secured interest, leaving no remaining value for unsecured creditors.⁶⁷ After determining what property is part of the bankruptcy estate, the property is then liquidated and distributed among the debtor's creditors by the trustee.⁶⁸

Discharge under chapter 7 provides the debtor with a fresh start because she is no longer personally liable for the discharged debts.⁶⁹ Additionally, a discharge under chapter 7 occurs much earlier and is granted more frequently than in chapter 13 cases.⁷⁰ Chapter 7 debtors receive a discharge 60 days after the first meeting of the creditors,⁷¹ whereas chapter 13 debtors have payment plans that can range from three to five years.⁷² Also, the majority of chapter 7 cases are granted a discharge, with 84.3% of chapter 7 cases discharged in

⁶¹ Murphy & Dion, *supra* note 52, at 436.

⁶² See 11 U.S.C. § 707(b)(2)(A)(i) ("the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined . . . and multiplied by 60 is not less than the lesser of . . . 25 percent of the debtor's nonpriority unsecured claims in the case, or \$8,175, whichever is greater; or \$13,650.").

⁶³ See *id.* § 707(b)(2)(B); Murphy & Dion, *supra* note 52, at 438 ("The statute specifically names circumstances which are to be considered *special circumstances* including a serious medical condition or active military service.") (emphasis added).

⁶⁴ Murphy & Dion, *supra* note 52, at 438.

⁶⁵ See 11 U.S.C. § 722.

⁶⁶ *Id.* § 554(a).

⁶⁷ 2 Farm Income Tax Manual § 9.05(5)(b)(i) (Matthew Bender & Co., Inc., 2020).

⁶⁸ See 11 U.S.C. § 726.

⁶⁹ See *id.* § 727(b).

⁷⁰ See *Discharge in Bankruptcy—Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics> (last visited Jan. 13, 2021).

⁷¹ *Id.* (noting that discharge occurs sixty days after the first meeting of the creditors, which happens about four months after filing bankruptcy petition).

⁷² 11 U.S.C. § 1328(a) (discharge is not granted until "after completion by the debtor of all payments under the plan," and the plans are usually 3 to 5 years in total).

2016,⁷³ as opposed to only 38.8% of chapter 13 cases discharged between 2010 and 2016.⁷⁴ However, the consequences of filing under chapter 7 are significant because the debtor is likely to lose ownership of some of her property and the debtor will not be able to receive a discharge under this chapter again for eight years after commencement.⁷⁵ Furthermore, the scope of discharge under chapter 7 is more narrow than under chapter 13.⁷⁶ Thus, the chapter 7 debtor is still personally liable for the debts listed in section 523(a) even after the case has ended.⁷⁷

Alternatively, a debtor who files under chapter 13 must be an “individual with regular income”⁷⁸ and have debts that do not exceed the statutory limit set out in section 109(e).⁷⁹ The debtor is allowed to retain her property but must give up future income to pay creditors over a period of three to five years.⁸⁰ Thus, unlike in chapter 7, the property of the estate includes post-petition earnings.⁸¹ The debtor is also very involved in developing the payment plan and is given the opportunity to propose a plan that will be approved by her creditors.⁸² “The chapter 13 system was designed to allow the court, the debtor, and the creditors maximum flexibility to achieve the goals of fairness to creditors and a realistic fresh start for the debtor.”⁸³ Filing under chapter 13 provides the debtor with numerous benefits while living that she wouldn’t receive if she filed under chapter 7, such as receiving a broader discharge,⁸⁴ having the ability to modify certain secured debts,⁸⁵ the retention of her property,⁸⁶ an automatic stay

⁷³ Flynn, *supra* note 6, at 5.

⁷⁴ See Flynn, *supra* note 6, at 2.

⁷⁵ See 11 U.S.C. § 727(a)(8).

⁷⁶ See *Discharge in Bankruptcy—Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics> (last visited Jan. 13, 2021) (noting that there are debts dischargeable under chapter 13 that are not dischargeable under Chapter 7).

⁷⁷ 11 U.S.C. § 523(a). Nondischargeable debts include a tax or customs duty, fraudulent returns, willful and malicious injury by the debtor to another entity, and a fine that benefits a governmental unit. *Id.*

⁷⁸ *Id.* § 101(30) (“The term individual with regular income means an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title”); Young, *supra* note 34, at 365–66 (The Code defines an individual as a “person,” which a probate estate is not.).

⁷⁹ 11 U.S.C. § 109(e). The debtor must owe on the date of filing less than \$419,275 in noncontingent, liquidated, unsecured debts and less than \$1,257,850 of noncontingent, liquidated, secured debts. The dollar amounts are changed every three years. *Id.* § 104(a).

⁸⁰ See *id.* § 1322(a).

⁸¹ See *id.* § 1306(a)(2).

⁸² See FED. R. BANKR. P. 3015(b).

⁸³ Susan L. DeJarnatt, *Once Is Not Enough: Preserving Consumers’ Rights to Bankruptcy Protection*, 74 IND. L.J. 455, 460 (1999).

⁸⁴ See *id.* at 461.

⁸⁵ 11 U.S.C. § 1322(b).

⁸⁶ *Id.* § 1322(b).

applied to guarantors,⁸⁷ the ability to save her primary residence from foreclosure,⁸⁸ and experiencing less shame because she is making a concerted effort to repay her creditors.⁸⁹ Furthermore, the debtor is able to file and receive a discharge again in two years.⁹⁰ The fact that chapter 13 affords greater benefits to the debtor than she would receive under chapter 7 clearly evidences a policy of encouraging debtors to choose chapter 13 over chapter 7.

The procedure followed if a debtor dies during a chapter 7 case is more straightforward because the debtor no longer plays an active role in the proceedings and creditors can continue to be paid from the deceased debtor's property in the bankruptcy estate, which has been in the possession of the chapter 7 trustee since commencement of the case.⁹¹ Therefore, the deceased debtor's non-exempt assets continue to be liquidated and distributed by the trustee to the various creditors.⁹² However, in chapter 13 cases, the procedure followed if the debtor dies is not as straightforward because the debtor does not have the ability to contribute her future income.⁹³ As such, Rule 1016 posits two options: (1) the case may be dismissed, or (2) the case may proceed if further administration is possible and is in the best interest of the parties.

A. Further Administration

Courts generally find that further administration is only possible if a payment plan has been confirmed prior to the debtor's death.⁹⁴ Two main reasons justify this outcome. First, the debtor's involvement in the payment plan is necessary because the plan provides a roadmap of how the case should be further administered.⁹⁵ The plan confirmation process requires a significant amount of negotiation between the debtor and creditors to confirm a plan that meets all of the requirements under the Code.⁹⁶ This roadmap consists of a definitive amount

⁸⁷ *Id.* § 1301(a).

⁸⁸ *See* DeJarnatt, *supra* note 83, at 461.

⁸⁹ *See* DeJarnatt, *supra* note 83, at 459; Pamela Foohey et al., "No Money Down" *Bankruptcy*, 90 S. CAL. L. REV. 1055, 1064 (2017) ("because chapter 13 will allow them to pay their creditors more, people may decide that filing under chapter 13 is the moral and 'the right thing' to do.").

⁹⁰ 11 U.S.C. § 1328(f)(2).

⁹¹ *See In re Waring*, 555 B.R. 754, 761 (Bankr. D. Colo. 2016).

⁹² *See In re Perkins*, 381 B.R. 530, 534 (Bankr. S.D. Ill. 2007).

⁹³ *See In re Shorter*, 544 B.R. 654, 660–61 (Bankr. E.D. Ark. 2015).

⁹⁴ *In re Waring*, 555 B.R. at 764 (dismissing case because the debtor died pre-plan confirmation); *In re Brown*, No. 12-07082-JW, 2013 Bankr. LEXIS 1300, at *12–14 (Bankr. D.S.C. Mar. 25, 2013) (denying grant of hardship discharge because debtor died pre-plan confirmation).

⁹⁵ *See In re Waring*, 555 B.R. at 765 ("The debt adjustment plan is the key of the Chapter 13 process. It is the document that sets the terms making possible *further administration*." (emphasis added)).

⁹⁶ *See* 11 U.S.C. § 1325 (2019).

each creditor will receive, which allows further administration to be possible.⁹⁷ The lack of a confirmed plan gives courts a reasonable basis to dismiss the case and lets the creditors fight it out in probate court instead of bankruptcy court.⁹⁸ Because of the debtor's active involvement in chapter 13—through proposing the payment plan and contributing her disposable income—chapter 13 cases are more likely to be dismissed than chapter 7 cases.⁹⁹ Second, the debtor is the only one who can file a plan according to section 1321.¹⁰⁰

In re Fogel centered its holding on the confirmation of the plan, setting forth its analysis by considering whether further administration of *the plan* is possible and in the best interests of the parties.¹⁰¹ Furthermore, continuing a case before plan confirmation can be construed as a way for the debtor's personal representative or his beneficiaries to cheat the system and essentially get around the rule that a probate estate cannot file for bankruptcy. Only "persons" can file for bankruptcy, and an estate is not a person.¹⁰² However, once a plan has been confirmed that represents the debtor and creditors' interests, the process is far enough along that it is less susceptible to abuse, and further administration without the debtor's participation is possible.

Dismissing the chapter 13 case pre-plan confirmation can occur in jointly filed cases if one spouse dies.¹⁰³ Spouses can file jointly for bankruptcy pursuant to section 302(a), and the case will be jointly administered.¹⁰⁴ Generally, if the co-debtor's estates are of a separate nature, courts dismiss the deceased co-

⁹⁷ See *In re Levy*, No. 11-60130, 2014 Bankr. LEXIS 1229, at *6 (Bankr. N.D. Ohio Mar. 31, 2014) (reasoning that further administration was possible because a plan was confirmed prior to the debtor's death and co-debtor completed all the plan payments).

⁹⁸ See *In re Waring*, 555 B.R. at 765 (reasoning that because the debtor died shortly after filing for bankruptcy, it would be better for the issues involved in the case to be handled by probate).

⁹⁹ See *id.* at 764.

¹⁰⁰ See 9 COLLIER ON BANKRUPTCY ¶ 1016.04 (16th ed. 2020); *In re Martinez*, No. 13-50438-CAG, 2013 Bankr. LEXIS 4853, at *2-3 (Bankr. W.D. Tex. Nov. 15, 2013); *In re Waring*, 555 B.R. at 762.

¹⁰¹ *In re Fogel*, 550 B.R. 532, 535 (D. Colo. 2015).

¹⁰² See *In re Walters*, 113 B.R. 602, 604 (Bankr. D.S.D. 1990); *In re Moore*, 2017 Bankr. LEXIS 3385, at *3-4 (Bankr. N.D. Ohio Oct. 3, 2017); *In re Navarro*, No. 12-21062PM, 2012 Bankr. LEXIS 4929, at *4 (Bankr. D. Md. Oct. 18, 2012); *In re Roberts*, No. 05-26653 ESD, 2005 Bankr. LEXIS 2280, at *1-4 (Bankr. D. Md. Aug. 15, 2005).

¹⁰³ See *In re Waring*, 555 B.R. at 756; *In re Wilson*, 2016 Bankr. LEXIS 595, at *1-2 n.1 (Bankr. S.D. W. Va. Feb. 22, 2016).

¹⁰⁴ 11 U.S.C. § 302(a) (2019); *In re Roberts*, 570 B.R. 532, 542 (Bankr. S.D. Miss. 2017); *In re Waring*, 555 B.R. at 765-66 (reasoning that a joint petition is only procedural and commences two different bankruptcy cases with just one petition); *In re Estrada*, 224 B.R. 132, 135 (S.D. Cal. 1998) ("Section 302 is designed for the ease of administration and to permit the payment of one filing fee.")

debtor from the case, while giving the surviving co-debtor the option of amending the petition to continue the bankruptcy case.¹⁰⁵

Courts are inconsistent as to what further administration looks like if a debtor dies post plan confirmation. Courts that allow the case to be discharged postmortem have three options: (1) allow the debtor's beneficiaries to continue the plan payments, (2) convert the case to chapter 7, or (3) grant a hardship discharge. However, courts that decide to dismiss such cases strictly adhere to the "fresh start" principle and reason that Rule 1016 should be interpreted narrowly to only permit continuation if the debtor has done everything short of being awarded a discharge.

1. *Conversion to Chapter 7*

Whether a chapter 13 case can be converted to a chapter 7 case if the debtor dies is a question that yields inconsistent results.¹⁰⁶ In chapter 7 cases, the debtor's non-exempt assets are liquidated and distributed among creditors in order of priority according to section 726.¹⁰⁷ Converting the case to chapter 7 would increase the likelihood of discharging the debtor's debts because chapter 7 liquidation does not rely on the debtor's future income like chapter 13 plans do.¹⁰⁸ Additionally, conversion allows the unsecured creditors to receive distributions that they would be entitled to receive under chapter 7. This prevents uncertainty over what they would receive if the chapter 13 case was dismissed and their claims were handled in probate court.

Uncertainty arises because of the priority of the estate administration expenses over unsecured creditors' claims. In Georgia, expenses that exist in probate that come before unsecured creditors include a year's support for the family, funeral expenses, and reasonable expenses of the decedent's last illness.¹⁰⁹ These expenses diminish the funds available to unsecured creditors and may result in those creditors receiving less through probate than if the case was converted to chapter 7. While there are also administrative expenses in bankruptcy court, there are certain rules on how much certain creditors need to

¹⁰⁵ See *In re Levy*, No. 11-60130, 2014 Bankr. LEXIS 1229, at *6 (Bankr. N.D. Ohio Mar. 31, 2014); *In re Waring*, 555 B.R. at 756.

¹⁰⁶ Compare *In re Roberts*, 570 B.R. at 539-42 (holding conversion from chapter 13 to chapter 7 is permitted under rule 1016), with *In re Moore*, 2017 Bankr. LEXIS 3385 at *3-5 (holding conversion from chapter 13 to chapter 7 is not permitted).

¹⁰⁷ 11 U.S.C. § 726 (2019).

¹⁰⁸ See *In re Lucio*, 251 B.R. 705, 709 (Bankr. W.D. Tex. 2000).

¹⁰⁹ See, e.g., Ga. Code Ann. § 53-7-40.

be paid.¹¹⁰ For example, in chapter 13, unsecured creditors need to be paid at least as much as they would have under chapter 7.¹¹¹ However, the distributions to creditors may differ in probate because the amount distributed does not have to follow the plan payment amount and creditors can try to claim the full debt owed, leaving less money for lower priority creditors. Also, the added expenses involved in estate administration including attorneys' fees, accounting fees, probate representative compensation, and court costs all reduce the available source of repayment to creditors, which have already been reduced by the administrative costs that were incurred during the bankruptcy case.¹¹²

Courts that allow conversion to chapter 7 reason that the language of Rule 1016—particularly, “the estate shall be administered, and the case concluded in the same manner, so far as possible, as though the death . . . had not occurred”—allows actions that the debtor could have taken if still alive, which includes conversion to chapter 7.¹¹³ Following this logic, these courts consider the eligibility to convert to chapter 7 at the time the debtor filed the case.¹¹⁴ However, courts that do not allow conversion take a more constrained view of “further administration” to include only what is naturally involved in a chapter 13 case: completing plan payments and receiving a discharge, not conversion of the case.¹¹⁵ These courts rationalize this position by focusing on eligibility to file under chapter 7 at the time of conversion.¹¹⁶ According to section 109(b), only a “person” may be a debtor under chapter 7.¹¹⁷ A person is defined as an “individual, partnership, [or] corporation.”¹¹⁸ Finding that a decedent’s probate

¹¹⁰ See generally 11 U.S.C. § 503(b) (defining priority of payment); *id.* § 1325(a) (discussing how much each creditor must be paid for plan confirmation).

¹¹¹ See *id.* § 1325(a)(4).

¹¹² See Ga. Code Ann. § 53-5-26 (covering estate administration costs, including attorneys’ fees); *id.* § 53-6-60 (covering accounting fees and probate representation compensation); *id.* § 53-6-61 (covering reasonable expenses for representatives).

¹¹³ See *In re Roberts*, 570 B.R. 532, 539–41 (Bankr. S.D. Miss. 2017) (quoting FED. R. BANK. P. 1016); see also *Murphy & Dion*, *supra* note 52, at 419 (arguing that the means test should not be used when chapter 13 debtors convert to chapter 7 because “it does not serve any legitimate purpose for debtors who have already attempted a chapter 13 reorganization.”).

¹¹⁴ See *In re Roberts*, 570 B.R. at 539.

¹¹⁵ See *In re Moore*, No. 15-62639, 2017 Bankr. LEXIS 3385, at *3 (Bankr. N.D. Ohio Oct. 3, 2017); *In re Spiser*, 232 B.R. 669, 673 (Bankr. N.D. Tex. 1999) (“The term ‘further administration’ implies that the case would be carried to its normal conclusion with payments to the creditors as provided in the confirmed plan . . .”).

¹¹⁶ See *In re Moore*, 2017 Bankr. LEXIS 3385 at *4 (“Conversion results from a change in circumstances warranting alteration in the original tack of the case, facts which should not be ignored.”). *But see In re Perkins*, 381 B.R. 530, 535–36 (Bankr. S.D. Ill. 2007) (reasoning eligibility should be determined at the time of filing the bankruptcy petition and should not be affected by post-petition events).

¹¹⁷ See 11 U.S.C. § 109(b) (2019).

¹¹⁸ *Id.* § 101(41).

estate does not qualify as a “person” as required to file under chapter 7 leads these courts to determine that postmortem conversion from chapter 13 to chapter 7 is not permissible.¹¹⁹

Courts also hold that deceased debtors and personal representatives cannot be eligible to convert the case to chapter 7.¹²⁰ Because deceased debtors are not eligible for bankruptcy at the time of conversion, their existing case cannot be converted.¹²¹

If substitution of the debtor’s personal representative was an available option . . . [Rule 1016] is where that would be specified; yet, where parties are concerned the rule contemplates doing nothing. The case proceeds to some sort of ending without any change in the identity of the debtor and as though the debtor had never died.¹²²

Furthermore, some courts decline to permit conversion to chapter 7 solely on the basis that conversion does not comport with one of the twin aims of bankruptcy: to provide a fresh start to the debtor.¹²³ If the debtor is deceased, he no longer needs a fresh start and therefore cannot personally benefit from a discharge of his debts.¹²⁴

However, instead of focusing on the policy goal of a fresh start, *In re Inyard* focuses on the policy goal of not discouraging debtors from filing under chapter 13.¹²⁵ The chapter 13 debtor has voluntarily taken on greater responsibility to repay her debts rather than simply liquidating her assets under chapter 7. “It is important to consider the equities with respect to the debtor himself, because . . . despite his death, he remains eligible for further administration of his case, and he is an appropriate person for consideration when balancing the equities.”¹²⁶ Thus, by shifting the focus on achieving equity among chapter 7 and chapter 13

¹¹⁹ See *id.* § 101(41) (“The term *person* includes an individual, partnership, and corporation”) (emphasis added); *In re Shepherd*, 490 B.R. 338, 342 (Bankr. N.D. Ind. 2013); *In re Moore*, 2017 Bankr. LEXIS 3385 at *3–4; *In re Jarrett*, 19 B.R. 413, 414 (Bankr. M.D.N.C. 1982).

¹²⁰ See, e.g., *In re Moore*, 2017 Bankr. LEXIS 3385 at *3–4; *In re Shepherd*, 490 B.R. 338, 340–42 (Bankr. N.D. Ind. 2013). But see *In re Perkins*, 381 B.R. at 537.

¹²¹ See *In re Moore*, 2017 Bankr. LEXIS 3385 at *3–4; see also *In re Jarret*, 19 B.R. at 414 (extending application of the eligibility requirement to prevent the deceased debtor from continuing his or her case under chapter 13).

¹²² *In re Shepherd*, 490 B.R. at 340.

¹²³ See, e.g., *In re Moore*, 2017 Bankr. LEXIS 3385 at *4–5; *In re Shepherd*, 490 B.R. at 340–41.

¹²⁴ See *In re Moore*, 2017 Bankr. LEXIS 3385 at *4–5. But see *In re Inyard*, 532 B.R. at 372 (the “fresh start” still applies to a deceased debtor).

¹²⁵ See *In re Inyard*, 532 B.R. at 372.

¹²⁶ *Id.*

case outcomes, the court interpreted Rule 1016 to allow further administration.¹²⁷

2. *Who Can Act on the Debtor's Behalf?*

Rule 1016 contemplates that someone must act on the debtor's behalf to continue administration of the case.¹²⁸ If the debtor dies, the counsel for the debtor should notify the court and file a motion to designate an individual to act on the debtor's behalf, or risk dismissal of the case.¹²⁹

Courts are split on whether the personal representative of the debtor's probate estate can continue the case on the debtor's behalf.¹³⁰ *In re Shepherd* did not allow a personal representative of the debtor to be a substitute for the debtor in order to modify the payment plan even though there were no objections by the creditors or the trustee.¹³¹ The court reasoned that "[t]here is no mechanism in either the Bankruptcy Code or the rules of procedure for substituting another [individual] for the debtor in a bankruptcy case."¹³² Further, the court also pointed to the fact that "a debtor who has died has no need of a fresh start,"¹³³ and therefore such a case should be dismissed.¹³⁴ However, the court did not explain how any case in which a chapter 13 debtor dies could proceed as contemplated under Rule 1016.

In re Kosinski addressed this issue and came to a contrary result, reasoning that

[i]f no party could ever act on behalf of a deceased debtor because there is no separate rule specifically providing for formal substitution, the provisions in Rule 1016 allowing a case to continue after the debtor's death would be meaningless . . . Under Rule 1016, an appropriate representative of the debtor may act on behalf of the debtor without a formal substitution.¹³⁵

¹²⁷ *Id.* at 371–72.

¹²⁸ *See id.* at 368; *In re Kosinski*, No. 10-bk-28949, 2015 Bankr. LEXIS 779, at *3–4 (Bankr. N.D. Ill. Mar. 5, 2015); *In re Stewart*, No. 01-66434-fra13, 2004 Bankr. LEXIS 1042, at *2–4 (Bankr. D. Or. Mar. 2, 2004).

¹²⁹ *See In re Vetter*, No. 11-03988-dd, 2012 Bankr. LEXIS 2017, at *4–6 (Bankr. D.S.C. May 7, 2012).

¹³⁰ *Compare In re Quint*, No. 11-04296-jw, 2012 Bankr. LEXIS 2881, at *7 (Bankr. D.S.C. June 22, 2012) (allowing a special administrator to continue to administer the case on the debtor's behalf), *with In re Shepherd*, 490 B.R. 338, 340 (Bankr. N.D. Ind. 2013) (holding that the personal representative cannot represent the debtor).

¹³¹ *In re Shepherd*, 490 B.R. at 339–40.

¹³² *Id.* at 340.

¹³³ *Id.* at 341.

¹³⁴ *See In re Hennessy*, No. 11-13793, 2013 Bankr. LEXIS 3034, at *4 (Bankr. N.D. Cal. July 29, 2013).

¹³⁵ *In re Kosinski*, No. 10-bk-28949, 2015 Bankr. LEXIS 779, at *9 (Bankr. N.D. Ill. Mar. 5, 2015); *see*

Similarly, *In re Oliver* allowed the personal representative of the decedent's probate estate to stand in the shoes of the debtor because there was no evidence that the personal representative was not an adequate substitute or that he or she would negatively affect the administration of the bankruptcy case.¹³⁶

Some courts have steered away from imposing a hard and fast rule and determine eligibility to represent the debtor on a case-by-case basis; this accommodates debtors whose estates are not probated and allows a person who is knowledgeable about the financial affairs of the deceased debtor to represent the debtor in the bankruptcy case.¹³⁷ Specifically, *In re Shorter* reasoned that Rule 1016 does not restrict who may represent a deceased debtor in bankruptcy court.¹³⁸ As such, bankruptcy courts should not impose their own limits that would unnecessarily hinder further administration by an individual who is fully able to represent a deceased debtor.¹³⁹

3. *Hardship Discharge*

A hardship discharge is another option that can be pursued if a chapter 13 debtor dies before she has completed the plan payments. Under section 1328(b):

at any time after the confirmation of the plan and after notice and a hearing, a court may grant a discharge to a debtor [who] has not completed payments under the plan only if— (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 value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 . . . and (3) modification of the plan . . . is not practicable."¹⁴⁰

The scope of the hardship discharge is not as broad as a regular discharge under chapter 13.¹⁴¹ Instead, it contains similar exceptions to discharge as chapter 7

also *In re Quint*, 2012 Bankr. LEXIS 2881 at *4; *In re Lucio*, 251 B.R. 705, 709 (Bankr. W.D. Tex. 2000) (allowing the personal representative to represent the debtor at the first meeting of creditors in a chapter 7 case).

¹³⁶ *In re Oliver*, 279 B.R. 69, 71 (Bankr. W.D.N.Y. 2002).

¹³⁷ See, e.g., *In re Shorter*, 544 B.R. 654, 661–62 (Bankr. E.D. Ark. 2015); see also *In re Levy*, No. 11-60130, 2014 Bankr. LEXIS 1229, at *2–5 (Bankr. N.D. Ohio Mar. 31, 2014).

¹³⁸ *In re Shorter*, 544 B.R. at 661 (stating that “Rule 1016, legislative history and intent, and case law authorize or give standing to *someone* to pursue further administration”) (emphasis added).

¹³⁹ *Id.* at 661–62.

¹⁴⁰ 11 U.S.C. § 1328(b) (2019); *In re Shorter*, 544 B.R. at 667.

¹⁴¹ See 11 U.S.C. § 1328(c); see also *Discharge in Bankruptcy—Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy->

does, including marital property settlement debts and willful and malicious injury by the debtor to another entity or its property,¹⁴² as well as additional exceptions including that it only applies to unsecured debts.¹⁴³

The hardship discharge requirements were liberalized in the Bankruptcy Reform Act of 1978.¹⁴⁴ Specifically, Congress eliminated prior restrictions “requiring the debtor himself to apply for the discharge and by eliminating a time-in-plan requirement”¹⁴⁵ Thus, these changes broadened the scope of who could obtain a hardship discharge and opened the door for judges to grant hardship discharges in cases involving the death of the debtor.

Granting a hardship discharge has been allowed upon the death of a debtor in a majority of courts because the death of a debtor is an unforeseen circumstance that should not prevent the debtor and his beneficiaries from reaping the benefits of a discharge.¹⁴⁶ Generally, these cases involve debtors who have completed most of their plan payments because they have to satisfy the second element of the statute: unsecured claimants have received at least as much as they would have under chapter 7.¹⁴⁷

However, several courts that did not award a hardship discharge justify their decisions based on statutory interpretation.¹⁴⁸ *In re Miller* interpreted the language of Rule 1016, specifically “the case may proceed and be concluded in the same manner, so far as possible, as though the death . . . had not occurred”

basics (last visited Jan. 13, 2021) (noting that the scope of a hardship discharge contains similar exceptions to discharge under chapter 7, and thus is not as broad as a discharge under chapter 13).

¹⁴² See 11 U.S.C. § 523(a).

¹⁴³ See 11 U.S.C. § 1328(c).

¹⁴⁴ See *In re Inyard*, 532 B.R. 364, 370 (Bankr. D. Kan. 2015).

¹⁴⁵ *Id.*; see Alan M. Ahart, *Whether to Grant a Hardship Discharge in Chapter 13*, 87 AM. BANKR. L.J. 559, 562 (2013) (stating that “the three-year term period was deleted, enabling the court to grant a hardship discharge at any time after confirmation of the plan”).

¹⁴⁶ See *In re Shorter*, 544 B.R. 654, 662–63 (Bankr. E.D. Ark. 2015) (granting hardship discharge in accordance with Rule 1016); *In re Graham*, 63 B.R. 95, 96 (Bankr. E.D. Pa. 1986) (reasoning that a hardship discharge is warranted because the deceased debtor cannot be held accountable for his failure to complete the payments); *In re McNealy*, 31 B.R. 932, 934–35 (Bankr. S.D. Ohio 1983) (awarding hardship discharge because the value of the payments made under the plan to the unsecured creditors was more than they would have received under chapter 7); *In re Bond*, 36 B.R. 49, 51–52 (Bankr. E.D.N.C. 1983); *In re Inyard*, 532 B.R. at 372–73; 3A Debtor-Creditor Law § 34.14[3][b][i] (2020) (“The death of the debtor is one circumstance which courts have found to justify a hardship discharge.”).

¹⁴⁷ See *In re Shorter*, 544 B.R. at 658 (“[The] death occurred between six and seven months prior to plan completion.”); *In re Graham*, 63 B.R. at 96 (debtor owed \$425.32 out of \$5,600 at the time of death); *In re Inyard*, 532 B.R. at 371–73 (debtor owed \$575 out of \$20,673 at the time of death).

¹⁴⁸ See *In re Miller*, 526 B.R. 857, 861 (D. Colo. 2014); *In re Shepherd*, 490 B.R. 338, 342–43 (Bankr. N.D. Ind. 2013); *In re Hennessy*, No. 11-13793, 2013 Bankr. LEXIS 3034, at *1–4 (Bankr. N.D. Cal. July 29, 2013). *But see In re Lizzi*, No. 10-13875, 2015 Bankr. LEXIS 1098, at *11–14 (Bankr. N.D.N.Y. Apr. 3, 2015).

to only contemplate continued plan payments or dismissal, not a hardship discharge.¹⁴⁹ The court reasoned that it is not possible for the case to “be concluded in the same manner” because the deceased debtor cannot continue making the plan payments.¹⁵⁰ Additionally, the use of the phrase “the court may grant” in the hardship discharge statute gives the court discretion on whether to award one.¹⁵¹ Also, the phrase “as though the death had not occurred” is interpreted by some courts to prohibit using the death of a debtor as a factor in support of a hardship discharge.¹⁵²

Furthermore, courts that did not grant hardship discharges focused on the policy of a “fresh start.”¹⁵³ A deceased debtor clearly is unable to obtain a “fresh start” because death extinguishes the debtor’s need to benefit from removing the burden of debt, and therefore the decedent in such cases is not eligible for a hardship discharge.¹⁵⁴ In contrast, *In re Lizzi* posited that “entry of a discharge is the normal conclusion for a chapter 13 case” because the debtor could have received a hardship discharge if the debtor was still alive.¹⁵⁵ The court further reasoned that the statute governing a hardship discharge does not restrict who can apply, so preventing a hardship discharge to be sought “impinges on a debtor’s substantive right under § 1328(b).”¹⁵⁶

4. *Waiver of Financial Management Course and Domestic Support Obligation Certificate*

Chapter 13 debtors are required to complete a financial management course and submit a domestic support obligation certificate to obtain a discharge in bankruptcy.¹⁵⁷ Under section 1328(g)(1), the court “shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.”¹⁵⁸ Under section 1328(a), a debtor who is required to pay a domestic support obligation (DSO)¹⁵⁹ must “certif[y] that all amounts

¹⁴⁹ See *In re Miller*, 526 B.R. at 861.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*; *In re Hennessy*, 2013 Bankr. LEXIS 3034 at *2–4.

¹⁵³ See *In re Shepherd*, 490 B.R. at 342–43; *In re Hennessy*, 2013 Bankr. LEXIS 3034 at *2.

¹⁵⁴ See *In re Shepherd*, 490 B.R. at 342–43; *In re Hennessy*, 2013 Bankr. LEXIS 3034 at *4.

¹⁵⁵ *In re Lizzi*, No. 10-13875, 2015 Bankr. LEXIS 1098, at *11–12 (Bankr. N.D.N.Y. Apr. 3, 2015).

¹⁵⁶ *Id.* at *13.

¹⁵⁷ See 11 U.S.C. § 1328(g)(1) (2019) (financial management course); *id.* § 1328(a) (Domestic Support Obligation certificate).

¹⁵⁸ *Id.* § 1328(g)(1); see *In re Levy*, No. 11-60130, 2014 Bankr. LEXIS 1229, at *3 (Bankr. N.D. Ohio Mar. 31, 2014).

¹⁵⁹ The Code defines a DSO as:

payable under such order or such statute that are due on or before the date of certification . . . have been paid . . .”¹⁶⁰ The DSO certification serves to confirm that the debtor pays claims that are considered domestic support obligations and assures that the court can award a discharge.¹⁶¹

Courts have consistently allowed the deceased debtor’s case to be discharged if the debtor completed all of the plan payments but not the required financial management course or the DSO certificate.¹⁶² The financial management course requirement does not apply to debtors “whom the court determines, after notice and hearing, is unable to complete [the personal financial management course] because of . . . disability . . .”¹⁶³ Courts reason that death qualifies as a disability under section 109(h)(4)¹⁶⁴ and therefore a deceased debtor is excluded from completing the course.¹⁶⁵ Furthermore, the purpose of the financial management course is to prevent the debtor from incurring financial trouble in the future, which becomes moot if the debtor dies.¹⁶⁶

This DSO certification neither alters the liability of the debtor nor prevents further administration of the case.¹⁶⁷ This is because DSOs are not dischargeable in bankruptcy and “if not paid, a DSO is not affected by entry of a discharge.”¹⁶⁸ Thus, any outstanding DSO payments on the decedent’s death would be paid by her probate estate. Therefore, individuals with knowledge of the debtor’s

[A] debt that accrues before, on, or after the date of the order for relief in a case under this title . . . that is owed to or recoverable by a spouse, former spouse, or child of the debtor . . . or governmental unit; in the nature of alimony, maintenance, or support of such spouse, former spouse, or child of the debtor . . .

11 U.S.C. § 101(14A).

¹⁶⁰ *In re Bouton*, No. 10-40989-EJC, 2013 Bankr. LEXIS 4231, at *4 (Bankr. S.D. Ga. Oct. 7, 2013) (quoting 11 U.S.C. 1328(a)).

¹⁶¹ *In re Levy*, 2014 Bankr. LEXIS 1229 at *6–7.

¹⁶² *See, e.g., In re Bouton*, 2013 Bankr. LEXIS 4231 at *4–6; *In re Levy*, 2014 Bankr. LEXIS 1229 at *5 (stating that “further administration can mean entry of a discharge even if the debtor does not comply with end-of-the-case requirements”) (internal citations omitted).

¹⁶³ 11 U.S.C. § 109(h)(4); *In re Fogel*, 550 B.R. 532, 537 (D. Colo. 2015).

¹⁶⁴ *See* 11 U.S.C. § 109(h)(4) (stating that “disability means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate . . .”).

¹⁶⁵ *See, e.g., In re Bouton*, 2013 Bankr. LEXIS 4231 at *5–6 (citing *White v. Glenville Bank*, No. 6:11-cv-82, 2011 U.S. Dist. LEXIS 157772, at *8 (S.D. Ga. Aug. 16, 2011) (“Death is a disability, and a debtor’s inability to complete an instructional course does not preclude a posthumous discharge.”)); *cf. In re Fogel*, 550 B.R. at 537 (finding that “death constitutes ‘incapacity’ for the purpose of Section 109(h)(4).”).

¹⁶⁶ *See In re Trembulak*, 362 B.R. 205, 207 (Bankr. D.N.J. 2007); *In re Lizzi*, No. 10-13875, 2015 Bankr. LEXIS 1098, at *22 (Bankr. N.D.N.Y. Apr. 3, 2015).

¹⁶⁷ *See In re Levy*, 2014 Bankr. LEXIS 1229 at *8.

¹⁶⁸ *See* 11 U.S.C. § 1328(a); *In re Levy*, 2014 Bankr. LEXIS 1229 at *8 (stating that “a DSO certification is more form than substance.”).

finances have been deemed allowed to complete the certifications on the debtor's behalf.¹⁶⁹

B. Best Interests of the Parties

Another split among courts exists over whose interests the court should consider in determining what is in the "best interests of the parties."¹⁷⁰ Some courts go beyond the typical parties to the case (the debtor, creditors, and trustee) and consider the interests of all who are affected by the bankruptcy administration, including the spouse of a deceased debtor.¹⁷¹ Courts have also considered the debtor's estate in determining the best interests of the parties,¹⁷² as well as the interests of the debtor's heirs' and beneficiaries.¹⁷³

In re Oliver specifically considered the interests of the decedent's beneficiaries.¹⁷⁴ The court noted that the debtor's beneficiaries had an interest in avoiding dismissal because there were several exempt assets that they would be eligible to receive if the case was continued until discharge.¹⁷⁵ *In re Lucio* also considered the beneficiaries of the debtor, noting that they will benefit from the debtor's discharge by taking any excess assets after the bankruptcy case concludes.¹⁷⁶ Furthermore, the beneficiaries are vested with beneficial rights to the decedent's assets upon the decedent's death.¹⁷⁷ Although creditors have greater rights to the non-exempt property, the beneficiaries still have a strong interest in maximizing their potential inheritance and seeing the decedent's pre-

¹⁶⁹ See *In re Levy*, 2014 Bankr. LEXIS 1229 at *10 (finding that "a person with specific knowledge of the deceased debtor's finances may act on behalf of the debtor in completing the § 1328(a) and (h) certifications" and "the person must file an affidavit outlining sufficient factual foundation in order to establish a fitting record" to establish knowledge); *In re Chaffer*, No. 6:12-bk-23201, 2017 Bankr. LEXIS 1621, at *6 (Bankr. C.D. Cal. May 15, 2017) (stating that "[t]he Court will not outright waive a requirement imposed by the Bankruptcy Code, but will allow the requirement to be satisfied by an individual with 'specific knowledge of the deceased debtor's finances.'").

¹⁷⁰ *In re Shorter*, 544 B.R. 654, 664 (Bankr. E.D. Ark. 2015) ("Courts are divided on which parties must benefit from further administration under Rule 1016.").

¹⁷¹ See, e.g., *id.* at 664–65 (Reasoning that the wife's interests should be considered because she is the surviving spouse, enabled her husband to fulfill his plan obligations, and has a stake in seeing the discharge granted); *In re Conn*, No. 13-62278, 2015 Bankr. LEXIS 1925, at *5 (Bankr. N.D. Ohio June 12, 2015) ("Since a discharge will be of little benefit to a deceased debtor, the real inquiry in this case will be what is in the best interest of the creditors and Debtor's surviving spouse.").

¹⁷² See, e.g., *In re Sales*, No. 03-60861, 2006 Bankr. LEXIS 2373, at *8 (Bankr. N.D. Ohio Sep. 15, 1006) (considering the debtor's estate in determining whether to grant a hardship discharge).

¹⁷³ See, e.g., *In re Inyard*, 532 B.R. 364, 372 (Bankr. D. Kan. 2015) (considering heirs); *In re Lucio*, 251 B.R. 705, 708 (Bankr. W.D. Tex. 2000) (same).

¹⁷⁴ See *In re Oliver*, 279 B.R. 69, 70 (Bankr. W.D.N.Y. 2002).

¹⁷⁵ *Id.*

¹⁷⁶ *In re Lucio*, 251 B.R. at 708.

¹⁷⁷ Young, *supra* note 34, at 381–82.

petition debts discharged under bankruptcy.¹⁷⁸ In considering the interests of a deceased debtor, it is “appropriate to consider the equities with respect to the Debtor himself, because . . . despite his death, he remains eligible for further administration of his case, and he is an appropriate person for consideration when balancing the equities.”¹⁷⁹ Courts have also characterized the decedent’s personal representative as an “interested party” regarding the exempt property and having an interest in seeking the “*in personam* relief of liability for dischargeable debts.”¹⁸⁰

Creditors’ interests are always considered by the bankruptcy court in determining whether to continue a deceased debtor’s case. Some courts also consider the interests of the post-petition creditors.¹⁸¹ Courts will consider how to evaluate the creditors’ interests depending on the facts and circumstances of each case.¹⁸² *In re Stewart* acknowledged that if the case did not continue, the decedent’s heirs would no longer fund the secured creditors claims. In response, the secured creditors would then foreclose on their secured asset, leaving no equity left for the unsecured creditors in probate.¹⁸³ Alternatively, *In re Spiser* considered the value of the decedent’s homestead, which would be sufficient to pay off creditors in probate court, and thus dismissed the case.¹⁸⁴ Furthermore, if only unsecured non-priority creditors have not received their full distribution, the court will likely evaluate whether they received at least as much as they would have under chapter 7, and award a hardship discharge under these circumstances.¹⁸⁵

Additionally, in determining what is in the best interests of the parties, courts consider the amount that creditors have already received and how many payments the debtor made premortem.¹⁸⁶ For example, cases that are early in the

¹⁷⁸ Young, *supra* note 34, at 381–82.

¹⁷⁹ *In re Inyard*, 532 B.R. 364, 372 (Bankr. D. Kan. 2015); see *In re Shorter*, 544 B.R. 654, 665 (Bankr. E.D. Ark. 2015) (“Case law, legislative history, Section 1328(b), and Rule 1016 support the finding that a deceased debtor is still a party to an open and ongoing bankruptcy.”).

¹⁸⁰ *In re McNealy*, 31 B.R. 932, 935 (Bankr. S.D. Ohio 1983) (*italics in original*). When a debtor’s bankruptcy case is discharged, the debtor is relieved from personal liability on the debts as differentiated from in rem liability that still remains if there is a lien on their property. Thus, the lien can still be enforced despite discharge. *Id.*; see Young, *supra* note 34, at 368 (“and the discharge [if granted] will apply in persona to relieve the debtor, and this his probate representative, of liability for dischargeable debts.”) (*alterations in original*).

¹⁸¹ See, e.g., *In re Inyard*, 532 B.R. at 371–72.

¹⁸² See, e.g., *In re Perkins*, 381 B.R. 530, 537 (Bankr. S.D. Ill. 2007).

¹⁸³ *In re Stewart*, No. 01-66434-fra13, 2004 Bankr. LEXIS 1042, at *3 (Bankr. D. Or. Mar. 2, 2004).

¹⁸⁴ *In re Spiser*, 232 B.R. 669, 673–74 (Bankr. N.D. Tex. 1999).

¹⁸⁵ See *In re Inyard*, 532 B.R. at 371–72.

¹⁸⁶ See, e.g., *In re Shorter*, 544 B.R. 654, 663 (Bankr. E.D. Ark. 2015) (considering the decedent’s profession and ability to pay).

process such that the debtor had only made a few plan payments premortem are not likely to be eligible for a hardship discharge. This is because the unsecured creditors probably would not have received as much as they would have under chapter 7. Consideration of the creditors' interests would strongly support another option such as converting to chapter 7 rather than granting a hardship discharge.

II. ANALYSIS

As shown below, allowing continuation of a chapter 13 bankruptcy case postmortem is in the best interests of the deceased debtor, creditors, and the deceased debtor's beneficiaries. The debtor is rewarded posthumously for her time and effort in developing a payment plan and attempting to pay creditors back. Continuation of the case will also encourage debtors who have an option of seeking chapter 7 or chapter 13 relief to choose chapter 13, which is the favored chapter pursuant to the rules set forth in the Code.¹⁸⁷ This serves a public interest of encouraging people to allocate their disposable income to pay back their debts. Creditors as a whole are better off in bankruptcy cases than they are in probate proceedings because of how their claims are treated in bankruptcy court. Handling the creditors' claims in probate can be risky because the assets subject to their claims are also subjected to claims by post-petition creditors. Beneficiaries also fare better if the case continues in bankruptcy court because the exempt assets, and possibly assets in the bankruptcy estate, can be distributed to them according to the decedent's will or intestate distribution.

Furthermore, the underlying motivation behind Rule 1016 is that continuation of bankruptcy cases should be pursued despite the challenges that come from the death of the debtor. The language "so far as possible" in Rule 1016:

contemplates that a bankruptcy court may need to take extraordinary steps in order to administer the estate of a debtor who has died or is incompetent. A contrary reading would render the language "so far as possible" superfluous, and the statute would simply require that the case proceed as normal, without making allowances for the unique issues that would undoubtedly arise if a debtor died or became incompetent.¹⁸⁸

¹⁸⁷ See DeJarnatt, *supra* note 83, at 605 ("Reorganizations are to be encouraged.").

¹⁸⁸ *In re Moss*, 239 B.R. 537, 541 (Bankr. W.D. Mo. 1999).

A. Debtors

An individual debtor who is eligible to file under chapter 7 or chapter 13 has an important decision to make when faced with the prospect of bankruptcy. Chapter 13 requires much more time and effort from the debtor, because it forces the debtor to live on a tight budget for three to five years and dedicate all disposable income to creditors.¹⁸⁹ However, there are benefits to filing under chapter 13. First, the debtor will be able to retain her assets, which will then be potentially available to pass to her beneficiaries upon her death. Second, the creditors are likely to receive more than they would have received under chapter 7. The creditors' only available payment is from liquidating the debtor's assets in chapter 7. However, under chapter 13, the creditors are able to access the debtor's disposable income, which can yield greater payment potential. As such, the outcome of a bankruptcy case of a chapter 13 debtor who dies post plan confirmation should not be worse than if the debtor originally filed under chapter 7.

Rule 1016 allows a chapter 7 case to continue without any limitations if the debtor dies during the case. This different treatment from the deceased chapter 13 debtor is valid because the bankruptcy estate was completely and unilaterally controlled by the chapter 7 trustee while the debtor was alive. Thus, the debtor had little to no involvement in the case premortem.¹⁹⁰ Similarly, if the chapter 13 case is converted to chapter 7, the trustee will take complete and sole control of the bankruptcy estate and have no interaction with the decedent's personal representative or the beneficiaries. As such, the chapter 7 case can continue easily without the debtor.

A chapter 13 debtor, on the other hand, is actively involved in the bankruptcy case because she maintains control over the property of the bankruptcy estate and sends installments of her disposable income to the trustee, who distributes the payments to the creditors.¹⁹¹ This active involvement could inform a rule that would discontinue the case after the debtor's death, or permit continuation only if the debtor completed all the required payments premortem and did not complete the required courses to obtain a discharge.¹⁹² However, Rule 1016 does not contain such parameters. It was written to be very broad and thus encompasses circumstances in which the debtor did not complete all of the plan

¹⁸⁹ See 11 U.S.C. § 1322(a) (2019).

¹⁹⁰ See *In re Waring*, 555 B.R. 754, 761 (Bankr. D. Colo. 2016).

¹⁹¹ See 11 U.S.C. § 1322(a).

¹⁹² See *id.* §§ 1328(g)(1), 111(b) (lists the qualifications for a course to be approved by the United States trustee).

payments before death. Therefore, continuation of the case—especially if the debtor dies post plan confirmation—should satisfy Rule 1016’s limitations.

A confirmed payment plan provides a clear roadmap of how much each creditor will receive and allows the debtor’s beneficiaries to determine if they want to continue payments on the debtor’s behalf. If the debtor’s beneficiaries are willing to make the plan payments, there are no barriers to continuing the case, and inequitable treatment among chapter 13 and chapter 7 debtors is avoided. Potential dismissal of a chapter 13 case could discourage individuals from filing under chapter 13 for fear that their hard work to obtain a discharge will not be rewarded.¹⁹³

The dismissal may also affect the distribution of assets that the debtor intended to be passed on to her family. Not only can creditors reach probate assets but they can also reach some nonprobate assets.¹⁹⁴ For example, creditors can reach “Totten Trusts”—“savings accounts in the name of the settlor ‘as trustee’ for the settlor for life, remainder to another”¹⁹⁵—and *inter vivos* revocable trust assets postmortem because they could have done so while the settlor was alive.¹⁹⁶ Furthermore, creditors can go after an insurance trust if the estate is a beneficiary, but not if a testamentary trust is the beneficiary.¹⁹⁷ These assets are also subjected to claims from post-petition creditors, which further reduces the amount available for distribution and makes it less likely for the beneficiaries to receive their expected distribution. As such, the benefits of continuing the bankruptcy case should not abate if the two criteria contained in Rule 1016 are met.

B. Creditors

Each state has a statute that mandates the priority of claims in probate. The priority of claims in Georgia is as follows: a year’s worth of expenses for the family; funeral expenses; other necessary expenses of administration, including fees incurred by personal representatives and by attorneys for the estate; reasonable expenses of the decedent’s last illness; unpaid taxes or other debts due to the state or the United States; judgments, secured interests, and other liens

¹⁹³ See *In re Perkins*, 381 B.R. 530, 536 (Bankr. S.D. Ill. 2007).

¹⁹⁴ See JEFFREY N. PENNELL & ALAN NEWMAN, QUICK REVIEW: WILLS, TRUSTS & ESTATES 186–92 (5th ed. 2016).

¹⁹⁵ *Id.* at 189; see Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 861 (2007).

¹⁹⁶ See PENNELL & NEWMAN, *supra* note 194, at 186–87 (citing *State St. Bank & Tr. Co. v. Reiser*, 7 Mass. App. Ct. 633, 638–39 (1979)); Gagliardi, *supra* note 195, at 856.

¹⁹⁷ See PENNELL & NEWMAN, *supra* note 194, at 195; Gagliardi, *supra* note 195, at 864.

created during the lifetime of the decedent, to be paid according to their priority lien;¹⁹⁸ and all other claims.¹⁹⁹ Thus, depending on where a creditor's claim falls in the order of priority will determine the amount, if any, she will be paid.

In chapter 13, the payment plan must provide for the full payment of all priority unsecured claims listed under section 507, unless the creditor agrees otherwise.²⁰⁰ A confirmed payment plan must also meet certain criteria that protect general unsecured creditors. The plan must satisfy two tests: the “best interests test” and the “disposable income requirement.”²⁰¹ Under the best interests test, unsecured creditors must receive at least as much as they would have if the debtor filed under chapter 7.²⁰² Under the disposable income requirement, the debtor is required to provide all projected disposable income for the full commitment period if the unsecured creditors are not paid in full.²⁰³ This is because disposable income is the only source of an unsecured creditor's repayment.²⁰⁴ Calculating the projected disposable income requires a determination of whether the debtor's current monthly income is above or below the state median of similar households.²⁰⁵ If the debtor's current monthly income is below the state's median, the court deducts “amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor” using the debtor's actual expenses in the calculation.²⁰⁶ However, if the debtor's current monthly income is above the state median, the court uses the same expenses that are used in the chapter 7 means test.²⁰⁷ “Generally speaking, the means test calculates projected disposable income by permitting the deduction from income of four distinct types of expenses: (1) living

¹⁹⁸ See Ga. Code Ann. § 11-9-333 (list of priority liens in order of what type should be paid first).

¹⁹⁹ *Id.* § 53-7-40(1)-(7).

²⁰⁰ See 11 U.S.C. § 1322(a)(2) (2019). Creditors might agree otherwise because they want to maintain a relationship with the debtor.

²⁰¹ See *id.* § 1325.

²⁰² See *id.* § 1325(a)(4).

²⁰³ See *id.* § 1325(b)(2) (Defining disposable income as current monthly income reduced by reasonable expenses for the maintenance or support of the debtor or dependents of the debtor and for charitable contributions); *id.* § 1322(d) (Determines the commitment period. If the projected disposable income is above the median of the state, the plan will be 5 years. If the income is below median, the plan will be at least 3 years long.); *id.* § 1325(b); see also Jean M. Radler, *What Constitutes “Disposable Income” Under § 1325(b) of the Bankruptcy Code of 1978 (11 U.S.C.A. § 1325(b)), Providing That All Disposable Income for Specified Period Must be Applied to Plan for Payment of Creditors*, 138 A.L.R. FED. 547, at *2a (1997) (“The disposable income requirement applies only if there is an objection to confirmation by the trustee or by the holder of an allowed unsecured claim.”).

²⁰⁴ See Radler, *supra* note 203, at *2a.

²⁰⁵ See EPSTEIN ET AL., *supra* note 2, at 256 (The court has more or less discretion in determining the reasonably necessary expenses that will be deducted to calculate the projected disposable income of the debtor).

²⁰⁶ See 11 U.S.C. § 1325(b)(2)(A)(i).

²⁰⁷ See *id.* §§ 707(b)(2), 1325(b)(3).

expenses, as determined by . . . IRS standards; (2) monthly secured debt payments; (3) amounts required to pay priority debts in full; and (4) other administrative and special purpose expenses.”²⁰⁸

There are three alternatives that can satisfy secured creditor claims. First, the creditor can accept the proposed payment plan.²⁰⁹ Second, the debtor can surrender property securing a claim to the claimholder.²¹⁰ Third, secured creditors must accept a plan that provides as much value as the amount of their allowed claim.²¹¹ If the case was dismissed and handled under probate, creditors would not be provided with this degree of fairness or certainty in determining the value that they will receive. For example, administrative costs—such as taxes against the estate and attorney and accountant fees—are a priority claim in bankruptcy and, like all priority claims under chapter 13, are required to be paid in full.²¹² There will be less money available to pay creditors if the bankruptcy case is dismissed and creditors must assert their claims in probate because estate administration expenses must be paid before satisfying creditors’ unsecured claims.²¹³ Thus, the confirmed payment plan gives creditors certainty on the amount that they will be paid if the chapter 13 case is continued, whereas it is not clear how much they will receive if their claim is addressed in probate. Of equal importance to creditors is the saving of time and money that they would expend if they must assert their claims in probate.

C. *The Interests of the Deceased Debtor’s Beneficiaries*

The deceased debtor’s beneficiaries have been considered “interested parties” to the bankruptcy case in a few cases because they reap the benefits of any discharge of the deceased debtor’s debts.²¹⁴ “The ultimate beneficiaries of the discharge will, of course, be the beneficiaries, who will take any excess assets (and all exempt property) free of bankruptcy claims.”²¹⁵ Chapter 13 preserves the debtor’s property, including property in the bankruptcy estate.²¹⁶

²⁰⁸ EPSTEIN ET AL., *supra* note 2, at 256.

²⁰⁹ 11 U.S.C. § 1325(a)(5)(A).

²¹⁰ *Id.* § 1325(a)(5)(C).

²¹¹ *Id.* § 1325(a)(5)(B)(ii). This is referred to as the “cram down exception”, which allows the debtor to reduce the creditor’s claim to the value of the collateral securing the claim without consent of the creditors, but subject to certain restraints. *Id.*

²¹² *Id.* § 1322(a)(2).

²¹³ See Ga. Code Ann. § 53-6-61 (including executor fees, attorneys’ fees, accounting fees, appraisal fees, and court costs).

²¹⁴ 9 COLLIER ON BANKRUPTCY ¶ 1016.04 (16th ed. 2020) (outlines three options if a debtor in a chapter 13 case dies, one of which is allowing the case to continue for the benefit of the debtor’s estate).

²¹⁵ *In re Lucio*, 251 B.R. 705, 710 (Bankr. W.D. Tex. 2000).

²¹⁶ 11 U.S.C. § 1306(b).

Preservation of this property benefits the debtor while alive, and the debtor's beneficiaries who receive that property after the debtor's death.²¹⁷ Although the debtor's heirs are not personally liable for the decedent's debts, the decedent's probate estate is liable.²¹⁸ Thus, this interferes with the expected distribution to the beneficiaries. Therefore, the interests of the debtor's beneficiaries are the same as those of the debtor and courts properly consider those beneficiaries in determining whether to proceed with the chapter 13 case.²¹⁹

Beneficiaries are also parties who may be willing to complete plan payments for the deceased debtor "as though the [debtor's] death . . . had not occurred."²²⁰ At least one court has allowed the debtor's children to make the remaining payments under the plan, because completing those payments was in the best interests of the creditors and the beneficiaries.²²¹ *In re Stewart* provided two reasons for permitting the beneficiaries to continue the case through making the plan payments.²²² First, if the case was instead dismissed, the secured creditors would foreclose because they would no longer be receiving any payments, and there would be no equity left for unsecured creditors.²²³ Second, the debtor followed the plan requirements and her "family should not be deprived of the benefits of these efforts: to do so would effectively penalize the debtor for having elected to reorganize."²²⁴

Following the logic of Rule 1016—which explicitly permits a chapter 13 case to continue after a debtor dies—allowing beneficiaries to continue the plan payments provides the most straightforward resolution of the case and ultimate discharge, "as though the death [of the debtor] . . . did not occur."²²⁵ This provides creditors with the expected payments and allows the beneficiaries to receive the assets they would have received if the debtor did not die and the case continued to discharge. Additionally, it encourages debtors to file under Chapter 13, because their families will be able to continue the plan payments, receive a

²¹⁷ See PENNELL & NEWMAN, *supra* note 194, at 20 (If the decedent dies intestate, the probate court still has responsibility over distribution of the assets. Personal property is distributed pursuant to the law of the state the decedent was domiciled in, whereas real property is distributed pursuant to the state in which the real property is located).

²¹⁸ See *In re Lizzi*, No. 10-13875, 2015 Bankr. LEXIS 1098, at *14 (Bankr. N.D.N.Y. Apr. 3, 2015) ("Liability transfers to the decedent's probate estate.")

²¹⁹ See *In re Oliver*, 279 B.R. 69, 70 (Bankr. W.D.N.Y. 2002).

²²⁰ FED. R. BANK. P. 1016.

²²¹ *In re Stewart*, No. 01-66434-fra13, 2004 Bankr. LEXIS 1042, at *1-5 (Bankr. D. Or. Mar. 2, 2004).

²²² *Id.*

²²³ *Id.* at *3.

²²⁴ *Id.*

²²⁵ FED. R. BANKR. P. 1016.

discharge, and not be worse off than if the debtor filed under chapter 7.²²⁶ Disallowing the beneficiaries or the personal representative to continue plan payments would negate the beneficial impact of applying Rule 1016 and prevent all parties from receiving their expected distributions. Furthermore, Georgia's Probate Code recognizes the right of heirs, beneficiaries, or any other person to assume the deceased debtor's debt with the creditor's agreement.²²⁷ In both bankruptcy and probate, the debtor's heirs are not personally liable for the decedent's debts,²²⁸ but the assets that would be passed down to the debtor's beneficiaries—that are classified as non-exempt under state probate law—are subject to creditors.²²⁹ Thus, like in the probate context, heirs should be able to complete the payments for a deceased debtor in bankruptcy.

D. Continuation of the Case by the Deceased Debtor's Personal Representative

The language in Rule 1016 points to continuation of the case in the absence of the debtor, and thus contemplates the need for a representative.²³⁰ The decedent's personal representative has been permitted to represent the debtor by many courts.²³¹ However, part of the reasoning behind disallowing a personal representative from stepping in the debtor's shoes is that it sidesteps the restriction on probate estates from filing for bankruptcy.²³² The fact that a decedent's personal representative cannot initially file for bankruptcy should not prevent the representative from taking the place of the decedent in an ongoing bankruptcy case. The personal representative cannot file for chapter 13 bankruptcy because only "individuals" qualify for chapter 13 and an estate is not an individual.²³³ However, allowing a personal representative to *continue* the

²²⁶ See *In re Oliver*, 279 B.R. 69, 71 (Bankr. W.D.N.Y. 2002).

²²⁷ Ga. Code. Ann. § 53-7-44(3).

²²⁸ *In re Shepherd*, 490 B.R. 338, 342-43 (Bankr. N.D. Ind. 2013).

²²⁹ See PENNELL & NEWMAN, *supra* note 194, at 17-18.

²³⁰ See *In re Vetter*, No. 11-03988-dd, 2012 Bankr. LEXIS 2017, at *5 (Bankr. D.S.C. May 7, 2012) ("[U]pon the death of a debtor, counsel for a deceased debtor should ordinarily promptly notify the Court of the debtor's death and file a motion for designation of an appropriate person to act on the debtor's behalf.>").

²³¹ See *In re Kosinski*, No. 10-bk-28949, 2015 Bankr. LEXIS 779, at *9 (Bankr. N.D. Ill. Mar. 5, 2015); *In re Quint*, No. 11-04296-jw, 2012 Bankr. LEXIS 2881, at *3-4 (Bankr. D.S.C. June 22, 2012); *In re Lucio*, 251 B.R. 705, 709 (Bankr. W.D. Tex. 2000).

²³² *In re Shepherd*, 490 B.R. at 342-43 ("Since a probate estate cannot file for bankruptcy directly, it should not be permitted to do so indirectly by using a mechanism that does not exist. It cannot be substituted for the debtor.>").

²³³ *In re Walters*, 113 B.R. 602, 604 (Bankr. D.S.D. 1990) ("Courts have uniformly supported the contention that the Bankruptcy Code's definitions of 'person' and 'debtor' exclude insolvent decedents' estates."); 2 COLLIER ON BANKRUPTCY ¶ 101.41 (16th ed. 2020) (stating that probate estate is not included in the definition of "person" under the Bankruptcy Code and therefore it cannot file for bankruptcy).

bankruptcy case would not violate eligibility requirements that were met premortem. The personal representative is further distanced from her role in probate by the fact that the probate assets are kept separate from the assets in the bankruptcy estate.²³⁴

Instead, the personal representative is representing a debtor who has died after filing for chapter 13 and already has a confirmed payment plan in place. Because the debtor met the requirements to file under chapter 13 premortem, the personal representative steps in to continue the bankruptcy case, which is consistent with Rule 1016 by allowing the case to continue as though the debtor did not die.²³⁵ If eligibility must be reassessed after a debtor dies, then no case could continue because a deceased individual can never qualify to be a debtor under chapter 13.²³⁶ For these reasons, Rule 1016 must permit the case to continue if the debtor dies, and the personal representative is in the best position to represent the debtor's interests in bankruptcy.²³⁷

E. Recharacterization of the Fresh Start Principle

The fresh start principle is one of the main policy goals of bankruptcy law, with some courts citing it as the purpose of a bankruptcy case.²³⁸ This principle is defined as “the opportunity for an individual debtor to obtain relief from indebtedness and begin anew as a productive member of society.”²³⁹ It is also embodied in the exemption and discharge provisions of the Code.²⁴⁰ Imposing strict adherence to the fresh start principle can yield negative and illogical outcomes, as illustrated in *In re Langley*.²⁴¹ In this case, spouses who filed jointly under chapter 13 passed away before completing their plan payments.²⁴² Their daughter sought to convert the case to chapter 7 or to complete the plan payments

²³⁴ See Young, *supra* note 34, at 368.

²³⁵ See Young, *supra* note 34, at 368 (“The bankruptcy proceeding [may] continue in rem with respect to the property of the [bankruptcy] estate, and the discharge [if granted] will apply in personam to relieve the debtor, and this his probate representative, of liability for dischargeable debts.”) (internal citations omitted).

²³⁶ See *In re Perkins*, 381 B.R. 530, 535 (Bankr. S.D. Ill. 2007).

²³⁷ *In re Vetter*, No. 11-03988-dd, 2012 Bankr. LEXIS 2017, at *2 n.2 (Bankr. D.S.C. May 7, 2012) (stating a probate representative “may most often be the appropriate party to perform the debtor’s duties.”).

²³⁸ See, e.g., *In re Langley*, No. 05-61279, 2009 Bankr. LEXIS 4219, at *3 (Bankr. S.D. Ga. Sept. 28, 2009).

²³⁹ Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 136 U. PA. L. REV. 59, 60 (1986).

²⁴⁰ *Id.* at 62.

²⁴¹ *In re Langley*, 2009 Bankr. LEXIS 4219 at *1–3 (dismissing bankruptcy petition after death since there would be no fresh start).

²⁴² *Id.* at *1–2.

herself.²⁴³ The court reasoned that the best interest of the parties would not be served through further administration because the deceased debtors could not benefit from the discharge, even though payments under chapter 13 would yield a dividend to unsecured creditors.²⁴⁴ Furthermore, the court's sole focus on the fresh start principle led the court to decline to speculate whether the creditors' claims would even be improved in probate.²⁴⁵ This lack of interest on the effects of dismissal on the debtor, the beneficiaries, and the creditors reflects the harm that can stem from solely focusing on the fresh start principle. "This rigid adherence to procedure, without adequate consideration given to the practical implications or alternatives to that procedure, illustrates a serious problem in the administration of some chapter 13 plans."²⁴⁶

Furthermore, courts are inconsistent in applying the fresh start principle between chapter 7 and chapter 13 cases. Following Rule 1016, chapter 7 cases are continued to discharge, with no option for dismissal if the debtor dies post-filing.²⁴⁷ If courts define a fresh start as freeing the debtor from her debt so she can begin anew, then a deceased chapter 7 debtor, like a deceased chapter 13 debtor, cannot benefit from the fresh start. Thus, following that logic, chapter 7 cases that involve a deceased debtor should be dismissed. However, Rule 1016 is not structured that way and thus, this principle should not determine whether a chapter 13 case is dismissed. Strictly applying the fresh start principle to deceased chapter 13 debtors and not deceased chapter 7 debtors leads to inequitable results. Additionally, *In re Shorter* interpreted Rule 1016 to display "[c]ongressional intent that a deceased debtor without need of a fresh start may nevertheless receive a discharge posthumously."²⁴⁸ The fresh start principle is meant to reflect Congress's sentiment that it is better to reward debtors who file for bankruptcy with a discharge of some debts, rather than letting creditors fight it out with the possibility of never collecting any payments. This also comports with the second aim of bankruptcy: "providing for efficient debt collection."²⁴⁹ "As a debt collection device, bankruptcy provides equitable treatment for creditors and avoids the race between creditors to collection that often results under state insolvency laws."²⁵⁰ Although court opinions regarding a deceased

²⁴³ *Id.*

²⁴⁴ *Id.* at *2-3.

²⁴⁵ *Id.*

²⁴⁶ Pevy, *supra* note 7, at 314.

²⁴⁷ FED. R. BANKR. P. 1016.

²⁴⁸ *In re Shorter*, 544 B.R. 654, 660 (Bankr. E.D. Ark. 2015).

²⁴⁹ Ann Habermel, *A Reexamination of the Non-Dischargeability of Criminal Restitutive Obligations in Chapter 13 Bankruptcies*, 43 HASTINGS L.J. 1517, 1532 (1992).

²⁵⁰ *Id.*

debtor lack discussion of this goal of bankruptcy, allowing the case to continue after plan confirmation achieves this goal. Therefore, courts should avoid focusing on whether a deceased debtor can obtain a fresh start in deciding whether to continue her case.

Instead, courts should broaden the fresh start principle in cases that involve a deceased debtor. Rather than interpreting fresh start to only benefit a living debtor, courts should extend it to the people who realize the benefits in her place: the debtor's beneficiaries. Recognizing that the benefit of the fresh start can be appreciated by the debtor's beneficiaries would allow the case to continue if the debtor dies and Rule 1016 would not be null because there would be a purpose in continuing the case. Also, prior courts that consider the deceased debtor's interest reason that a goal of bankruptcy is to give "deserving" debtors a fresh start, and the debtor's death doesn't make her any less deserving.²⁵¹

Furthermore, the timing of the debtor's death after plan confirmation should not make the debtor any less deserving of discharge. A strict adherence to the fresh start principle treats a debtor who dies the day after discharge as more deserving than a debtor who dies a day before discharge. In both situations, the debtor would not reap the benefit of the traditional view of the fresh start; the benefit would be reaped by her beneficiaries. Recognizing that the beneficiaries can benefit from the fresh start of the debtor comports "with the long-standing general principle that the death of the debtor does not abate a bankruptcy proceeding."²⁵² Therefore, an inability to point to the fresh start a deceased debtor could receive should not prevent courts from continuing a case.

F. Conversion to Chapter 7

The inability of the debtor's beneficiaries to complete payments under the confirmed plan supports the alternative option of converting the case to chapter 7. The language of Rule 1016—specifically, "the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death . . . had not occurred"²⁵³—contemplates conversion because the debtor could have converted the case to chapter 7 if she was still alive and unable to continue making payments under the repayment plan.²⁵⁴ Additionally, not allowing conversion under chapter 13 would impose an eligibility requirement

²⁵¹ *In re Inyard*, 532 B.R. 364, 372 (Bankr. D. Kan. 2015).

²⁵² *In re Perkins*, 381 B.R. 530, 533 (Bankr. S.D. Ill. 2007).

²⁵³ FED. R. BANKR. P. 1016.

²⁵⁴ See *In re Roberts*, 570 B.R. 532, 539–41 (Bankr. S.D. Miss. 2017).

after filing that is not imposed on a deceased chapter 7 debtor.²⁵⁵ Chapter 7 cases continue to be administered even though the deceased debtor is no longer a “person” under section 109(b) “and the deceased debtor’s estate may receive a discharge.”²⁵⁶ Thus, preventing a deceased debtor’s chapter 13 case from being converted to chapter 7 and receiving a discharge would be inequitable and would punish debtors for choosing to file under chapter 13 instead of chapter 7.²⁵⁷

Furthermore, if eligibility to convert the case is determined at the time of conversion, it would eliminate any type of continuation.²⁵⁸ Because a debtor under chapter 13 must be an individual with regular income, a deceased debtor does not satisfy this definition and there would be no continuation as contemplated under Rule 1016.²⁵⁹ Therefore, following the language of Rule 1016, courts should allow conversion if the debtor dies.

Conversion to chapter 7 will liquidate non-exempt assets in the bankruptcy estate and pay the proceeds to the remaining creditors.²⁶⁰ This procedure benefits unsecured creditors who might not receive anything if the case was taken out of bankruptcy and their claims were handled in probate court. This is because there are a number of priority claims that can take precedence over claims of unsecured creditors in probate.²⁶¹ The debtor’s beneficiaries would also benefit from conversion because the debtor’s exempt and post-petition assets would remain untouched by pre-petition creditors. Those assets can then be used to pay any post-petition creditors and administration costs,²⁶² increasing the chance that there will be assets left over for the beneficiaries.²⁶³

²⁵⁵ See *In re Perkins*, 381 B.R. at 536.

²⁵⁶ *Id.*; see *In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984).

²⁵⁷ *In re Perkins*, 381 B.R. at 536.

²⁵⁸ See *In re Jarrett*, 19 B.R. 413, 414 (Bankr. M.D.N.C. 1982) (“In that the debtor is deceased, it is evident that he does not meet the necessary prerequisites to be a chapter 13 debtor.”).

²⁵⁹ *In re Perkins*, 381 B.R. at 535.

²⁶⁰ See *In re Roberts*, 570 B.R. 532, 541 (Bankr. S.D. Miss. 2017) (reasoning conversion was permitted and benefitted unsecured creditors that would have received nothing in the chapter 13 case).

²⁶¹ Ga. Code. Ann. § 53-7-40.

²⁶² See *id.* § 53-6-61 (“Personal representatives shall be allowed reasonable expenses incurred in the administration of the estate . . .”).

²⁶³ *In re Oliver*, 279 B.R. 69, 71 (Bankr. W.D.N.Y. 2002).

The following chart displays the different parties' access to the decedent's assets under each circumstance that can occur in the bankruptcy case postmortem.

	Access to Bankruptcy Estate Assets (nonexempt under 11 U.S.C. § 522(b)(2))			Access to Post-petition assets (nonexempt under probate law)			Access to Post-petition assets (exempt under probate law)		
	Pre-petition creditors	Post-petition creditors	Beneficiaries	Pre-petition creditors	Post-petition creditors	Beneficiaries	Pre-petition creditors	Post-petition creditors	Beneficiaries
Continuation via plan payments		✓	✓		✓	✓			✓
Conversion to Chapter 7	✓				✓	✓			✓
Hardship Discharge		✓	✓		✓	✓			✓
Dismissal	✓	✓	✓	✓	✓	✓			✓

G. Hardship Discharge

A hardship discharge is an option in cases in which the unsecured creditors have already received an amount at least equal to what they would have received under chapter 7 and if the personal representative or the estate's beneficiaries are unwilling to complete the plan payments. Section 1328(b) provides that:

at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if – (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 value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 . . . ; and (3) modification of the plan . . . is not practicable.²⁶⁴

The debtor dying post plan confirmation often satisfies all the elements required to grant a hardship discharge. First, the debtor cannot be held accountable for her own death.²⁶⁵ Second, ensuring that allowed unsecured claims receive at least as much as they would have received under chapter 7 obviates the need to

²⁶⁴ 11 U.S.C. § 1328(b) (2019).

²⁶⁵ *In re Lizzi*, No. 10-13875, 2015 Bankr. LEXIS 1098, at *15 (Bankr. N.D.N.Y. Apr. 3, 2015). Although there are no cases that involve a debtor committing suicide, it would be interesting to see how a court would rule on this. If suicide is viewed as a choice by the debtor, then this element of a hardship discharge would not be satisfied. However, if suicide is viewed as a result of severe mental illness, then this element may be satisfied.

convert the case to chapter 7. Third, courts find that the plan is not modifiable because the debtor is deceased, which ends the regular source of income.²⁶⁶

A hardship discharge benefits the interests of the deceased debtor by preventing her from receiving worse treatment because she tried to repay her creditors by filing under chapter 13 instead of filing under chapter 7.²⁶⁷ Because the statute requires that the debtor pay unsecured creditors at least as much as they would have received under chapter 7, the debtor should receive a discharge as if she filed under chapter 7. Furthermore, a hardship discharge has little impact on creditors if the debtor meets all the elements of the statute.²⁶⁸ The statute protects unsecured creditors via the second element needed to grant a hardship discharge requiring that creditors have received at least as much as they would have received under chapter 7.²⁶⁹ Secured and priority unsecured creditors are paid in full before non-priority unsecured creditors have received any payment, so to meet the second element, secured creditors and priority unsecured creditors likely would have already been paid in full.²⁷⁰ Additionally, secured creditors also have the option of exercising their lien if they are not paid the full allowed amount of their claim, further protecting their interests.²⁷¹

A hardship discharge also benefits the deceased debtor's beneficiaries by allowing them to keep property devised to them without being subject to claims from pre-petition creditors because these debts will be discharged.²⁷² This option offers an even greater benefit for debtors who have minimal assets that can be used to help the family pay necessary expenses.²⁷³ For example, *In re Shorter* demonstrated that the benefit to the debtor and his spouse in using his assets toward his funeral expenses and avoiding probate outweighed the unsecured creditors' interest in possibly receiving the balance of their claims in probate.²⁷⁴ Thus, a hardship discharge is a viable option in cases in which a debtor dies far enough along in the case that all of the elements to grant a hardship discharge are met, especially if the debtor has only minimal assets that can be used to pay off necessary expenses.

²⁶⁶ *Id.*; see *In re Shorter*, 544 B.R. 654, 663 (Bankr. E.D. Ark. 2015).

²⁶⁷ See *In re Perkins*, 381 B.R. 530, 536 (Bankr. S.D. Ill. 2007).

²⁶⁸ See 11 U.S.C. § 1328(b).

²⁶⁹ See *id.* § 1328(b)(2).

²⁷⁰ See *Chapter 13—Bankruptcy Basics*, U.S. STATES COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> (last visited Jan. 13, 2021).

²⁷¹ See 11 U.S.C. § 1325(a)(5)(B); 3A Debtor-Creditor Law § 34.14 (2020) (“Secured debts . . . are not discharged unless the allowed secured claim held by the creditor has been paid in full.”).

²⁷² See *In re McNealy*, 31 B.R. 932, 934 (Bankr. S.D. Ohio 1983).

²⁷³ See *In re Shorter*, 544 B.R. 654, 666 (Bankr. E.D. Ark. 2015).

²⁷⁴ *Id.*

CONCLUSION

Rule 1016 leaves much discretion to judges to decide how to proceed in cases if a chapter 13 debtor dies post plan confirmation but before discharge. This discretion has led to inconsistent decisions among the various bankruptcy courts. The best approach is for courts to consider the circumstances of each case and to either allow the beneficiaries of the debtor to continue plan payments, convert to chapter 7, or award a hardship discharge.

Courts that dismiss a bankruptcy case postmortem reason that the debtor cannot benefit from the fresh start that a discharge under bankruptcy law offers. Although the debtor receiving a fresh start is an important principle of bankruptcy law, to solely rely on this principle to disallow a chapter 13 case to continue postmortem negates the time and effort spent by the creditors and the debtor in confirming and carrying out a repayment plan. If courts enforce this principle against chapter 13 debtors but not chapter 7 debtors, courts would be punishing the chapter 13 debtors and their beneficiaries for choosing to file under chapter 13.²⁷⁵

While the option for dismissal under chapter 13 is reasonable in circumstances where the debtor dies before plan confirmation, the plain language of Rule 1016 should be construed to permit continuation post plan confirmation, either through payments by the debtor's beneficiaries or conversion to chapter 7. Alternatively, if the debtor's case satisfies the elements to grant a hardship discharge, courts should strongly consider the hardship discharge to be a useful option instead of simply dismissing the chapter 13 case. Resolution of this issue is important because it will create uniformity among bankruptcy courts and more certainty to both beneficiaries of the decedent and her creditors.

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²⁷⁵ See *In re Perkins*, 381 B.R. 530, 536 (Bankr. S.D. Ill. 2007); *In re Bond*, 36 B.R. 49, 51–52 (Bankr. E.D.N.C. 1984).

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