

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

William Edward Gardner and  
Hazel Ann Gardner,

Debtor(s).

C/A No. 11-05561-JW

Chapter 13

**ORDER DENYING MOTION TO  
RECONSIDER AND MOTION TO  
CONVERT**

This matter comes before the Court upon the Motion to Reconsider Order Denying Motion to Continue Administration, and the Motion to Convert Case from Chapter 13 to 7, filed by William Edward Gardner and Hazel Ann Gardner. This Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Pursuant to Fed. R. Civ. P. 52, which is made applicable to contested matters by Fed. R. Bankr. P. 7052 and 9014(c), the Court makes the following findings of fact and conclusions of law:<sup>1</sup>

**FINDINGS OF FACT**

1. William Edward Gardner and Hazel Ann Gardner (the “Debtors”) filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on September 7, 2011 (“Petition Date”). The Debtors filed their Chapter 13 plan on the same date and subsequently amended the Chapter 13 plan on October 27, 2011 (as amended, the “Plan”).

2. The Plan was confirmed on November 2, 2011.

3. The Schedules filed by the Debtors with the petition indicated that, as of the Petition Date, they had regular income from their Social Security benefits and rental

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<sup>1</sup> To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any conclusions of law constitute findings of fact, they are so adopted.

income.

4. The Debtors listed all of their debts and assets as joint.
5. According to their Schedules, the Debtors jointly owned real property located at 20 Academy Street, Hampton, South Carolina. As of the Petition Date, the Debtors valued the real property located in Hampton at \$30,000.00 and listed Wells Fargo Home Mortgage as holding a claim of \$34,940.71.
6. According to the claims register, claims totaling \$68,844.51 were filed against the Debtors, including secured claims of \$49,793.52.
7. Mr. Gardner passed away on January 25, 2013. Mrs. Gardner is the personal representative of Mr. Gardner's probate estate.
8. On October 8, 2013, counsel for the Debtors filed a Notice of Death of Debtor, Motion to Continue Administration of Chapter 13 Case and Motion to Waive Financial Management Course (the "Motion"). The Motion was served on all creditors and the Trustee, and no objections were filed.
9. According to the Motion, Mrs. Gardner does not have an adequate source of funding to allow the continuation of the payments pursuant to the Gardner Plan. Instead, Ms. Gardner intends to file a motion to convert the case to a case under Chapter 7.
10. A hearing on the Motion was scheduled for November 13, 2013. Counsel for the Debtors failed to appear at the hearing. The Motion was subsequently denied without prejudice for failure to prosecute.
11. On November 21, 2013, the Debtors filed a motion to reconsider the Court's order denying the Motion. On the same date, the Debtors also filed a Motion to

Convert, seeking to convert the Chapter 13 case to a case under Chapter 7.<sup>2</sup>

12. On November 25, 2013, the Court held a hearing on the Debtors' motion to reconsider and the Motion to Convert. At the hearing, counsel for the Debtors indicated that it was his intention to convert the Chapter 13 cases of both debtors to Chapter 7, not just that of the surviving joint debtor, Ms. Gardner.

### **CONCLUSIONS OF LAW**

Debtors seek reconsideration of the order denying the Motion pursuant to Fed. R. Civ. P. 60(b)(6), which is made applicable to this proceeding by Fed. R. Bankr. P. 9024. Fed. R. Civ. P. 60(b)(6) permits a court to vacate a judgment "for any other reason that justifies relief." Fed. R. Civ. P. 60(b) requires the Court to engage in a two-pronged process. The moving party must first satisfy the following threshold conditions: (1) the motion must be timely filed; (2) the moving party must have a meritorious defense to the action; and (3) the setting aside of the judgment must not unfairly prejudice the nonmoving party. Nat'l Credit Union v. Gray, 1 F.3d 262, 264 (4th Cir. 1993). Once the three threshold conditions have been met, the moving party must then demonstrate grounds for relief under one of the subsections of Rule 60(b). Id. at 266. "Relief under Rule 60(b)(6) is warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." Orlando Residence, Ltd. v. Hilton Head Hotel Investors, Civil No. 9:89-cv-0662-DCN, 2013 WL 1103027, at \*7 (D.S.C. Mar. 15, 2013).

Even if the three threshold conditions are satisfied in this case, the Court finds

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<sup>2</sup> Counsel for the Debtors was advised that, if the conversion request was for the case of the deceased debtor, the conversion would be delayed for consideration of the Motion. However, the Court also advised counsel for the Gardner Debtors that he could separate the cases and convert Ms. Gardner's case immediately, but he declined to do so.

that relief pursuant to Rule 60 must be denied because, under the circumstances of this case, there is no substantial danger that the underlying judgment was unjust. Although the Motion was denied without considering the merits of the Motion due to the Debtor's failure to prosecute, the denial of the Motion would nevertheless be required because the relief requested by the Debtors through that Motion—authorization to continue the administration of the case to pursue conversion of the Chapter 13 cases of both Mr. and Mrs. Gardner to Chapter 7—is not permitted under the Bankruptcy Code due to the death of Mr. Gardner.

When a chapter 13 debtor dies, Fed. R. Bankr. P. 1016 provides that the “case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.” In re Quint, C/A No. 11-04296-jw, slip op. at 3 (Bankr. D.S.C. Jun. 22, 2012). Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure provide any additional guidance regarding what constitutes the “further administration” of the estate. Instead, as the Court noted in In re Brown, C/A No. 12-07082-jw, slip op. at 5 (Bankr. D.S.C. Mar. 25, 2013), “[t]he rule merely provides that further administration must be ‘possible’ and ‘in the best interest of the parties.’”

Under the circumstances of this joint case, further administration in the manner proposed by the surviving joint debtor is not possible. The surviving joint debtor, Mrs. Gardner, is unable to continue making payments pursuant to the confirmed plan. For this reason, the Debtors filed the Motion to Convert the joint Chapter 13 case to a case under Chapter 7. While 11 U.S.C. § 1307 provides that “[t]he debtor may convert a case under

this chapter to a case under chapter 7 of this title at any time,” 11 U.S.C. § 1307(g) provides that, “[n]otwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title *unless the debtor may be a debtor under such chapter.*” (emphasis added). In Quint, this Court was similarly presented with a request to convert the Chapter 13 case of a deceased debtor and recognized that other courts have held such requests to be impermissible, but denied the conversion request based upon an insufficient record without deciding the issue of whether such a conversion would be permissible under the Bankruptcy Code. C/A No. 11-04296-jw, slip op. at 3. Another judge of this Court has also denied a request to convert a deceased debtor’s case on other grounds without resolving this issue. See In re Vetter, C/A No. 11-03988-dd, slip op. at 5 (Bankr. D.S.C. May 7, 2012) (denying a deceased debtor’s request to convert case based on failure to provide adequate notice of debtor’s death).

To allow the conversion of Mr. Gardner’s Chapter 13 case to one under Chapter 7, would, in effect, allow Mr. Gardner’s probate estate to file a case under Chapter 7, which is something a probate estate cannot do. A probate estate is not included within the definition of “person” under section 101(41) of the Bankruptcy Code and, thus, is not eligible to be a debtor under Chapter 7 or Chapter 13. See 11 U.S.C. § 109(a) (“Notwithstanding any other provision of this section, only a person ... may be a debtor under this title”); see also In re Shepherd, 490 B.R. 338, 342 (Bankr. N.D.Ind. 2013) (“[I]t is universally held that a probate estate may not be a debtor.”); In re Navarro, No. 12-21062PM, 2012 WL 5193743, at \*2 (Bankr. D.Md. Oct. 19, 2012) (“A probate estate may not file a petition.”); In re Spiser, 232 B.R. 669, 673 (Bankr. N.D.Tex. 1999) (“A probate estate is not a ‘debtor’ eligible to convert the case to Chapter 7 under

§ 1307(a).”); In re Jarrett, 19 B.R. 413 (Bankr. M.D.N.C.1982) (finding that conversion of a deceased debtor’s Chapter 13 case to a Chapter 7 case by a debtor’s probate estate is prohibited); In re Estate of Roberts, No. 05-26653 ESD, 2005 WL 3108224, at \*1 (Bankr. D. Md. Aug. 15, 2005) (“A decedent's estate, even when represented by a[n] individual fiduciary, is not a person that may be a debtor under the Bankruptcy Code. Only a person may be a debtor.”); In re Seegers, C/A No. 09-00641, 2009 WL 2883019, at \*1 (Bankr. D.D.C. July 30, 2009)(same). Since the right to convert is a legal right possessed only by a debtor who is a “person” as defined by § 101(41) and a probate estate cannot qualify as a debtor under either Chapter 7 or Chapter 13, the Court concludes that a probate estate does not inherit the deceased debtor’s personal right to convert his or her Chapter 13 case to one under Chapter 7. See Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 372 (U.S. 2007) (“The words ‘unless the debtor may be a debtor under such chapter’ expressly conditioned Marrama’s right to convert on his ability to qualify as a ‘debtor’ under Chapter 13.”)

Furthermore, further administration for purposes of Rule 1016 does not include conversion of a deceased Chapter 13 debtor’s case following the death of a debtor because conversion would change the nature of the case from reorganization to liquidation. As the bankruptcy court noted in In re Spiser, “[t]he 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, rather than conversion of the case to Chapter 7.” 232 B.R. at 673. Instead of maintaining the “status quo” of the Chapter 13 case, conversion to a Chapter 7 case would constitute a complete diversion

from the original intention of Mr. Gardner's bankruptcy case, which was reorganization, not liquidation.

In addition, at least one bankruptcy court has denied conversion without considering the issue of authority or eligibility on the basis that conversion was not in the best interests of the parties, particularly because the deceased debtor could no longer enjoy the fresh start. In re Hancock, No. 08-11867-R, 2009 WL 2461167, at \*3 (Bankr. N.D. Okla. Aug. 10, 2009) (concluding that it would be "inequitable" to a debtor's creditors, and "contrary to bankruptcy policy," to condone conversion solely in order to allow a deceased debtor's husband and other heirs, legatees, or beneficiaries to acquire a debtor's assets free of a deceased debtor's creditors' claims).

As the surviving joint debtor, Ms. Gardner may seek to convert her case to Chapter 7 if she can no longer afford the plan payments following her husband's death. However, conversion is only allowed with respect to her case, not Mr. Gardner's. Therefore, if Ms. Gardner maintains a desire to convert her case, she must first file a motion to divide the joint case. Once the joint case is divided, Ms. Gardner may proceed with the conversion of her bankruptcy case. Mr. Gardner's case will subsequently be dismissed.

### **CONCLUSION**

For the foregoing reasons, the Debtors' Motion to Reconsider Order Denying Motion to Continue Administration and Motion to Convert Case from Chapter 13 to 7 are denied. Mrs. Gardner should file a motion to divide the joint case within ten (10) days of the entry of this Order and file a motion to convert her individual case if she wishes to seek relief under Chapter 7. Following the entry of an order dividing the joint case, the

Trustee should seek dismissal of Mr. Gardner's case.

**AND IT IS SO ORDERED.**

**FILED BY THE COURT  
12/31/2013**



*John E. Waites*

US Bankruptcy Judge  
District of South Carolina

Entered: 12/31/2013