

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

Will this opinion be published? NO

Bankruptcy Caption: In re Gerald Kosinski

Bankruptcy No.: 10 B 28949

Adversary Caption:

Adversary No.:

Date of Issuance: March 5, 2015

Judge: Carol A. Doyle

Appearance of Counsel: Mark D. Weisman

Attorney for Plaintiff:

Attorney for Defendant:

Trustee or Other Attorneys: Stewart A. Chapman

United States Bankruptcy Court, Northern District of Illinois

Name of Assigned Judge	Carol A. Doyle	Case No.	10 bk 28949
DATE	March 5, 2015	ADVERSARY NO.	
CASE TITLE	In re Gerald Kosinski		

DOCKET ENTRY TEXT

The motion for a hardship discharge is granted. The clerk is directed to issue a discharge.

[For further details see text below.]

STATEMENT

Gerald Kosinski, the chapter 13 debtor in this case, died after making all but the last five payments due under his five-year plan. His widow filed a motion requesting the court to grant him a hardship discharge under 11 U.S.C. § 1328(b). The trustee objected, arguing that Rule 1016 of the Federal Rules of Bankruptcy Procedure precludes a debtor from receiving a hardship discharge after his death. Most courts addressing this issue have rejected the trustee's argument and concluded that Rule 1016 permits the award of a hardship discharge after a debtor dies if the requirements of § 1328(b) are met. The court agrees with the majority view, and all the requirements for a hardship discharge under § 1328(b) are satisfied in this case. The motion is granted.

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1. Background

Kosinski filed this case in June 2010. His plan was confirmed in September 2010 and he made every plan payment for four and one-half years until his death in December 2014. The confirmed plan provided for a monthly payment of \$351 for 60 months, with general unsecured creditors to be paid at least 50% of their allowed claims. Kosinski's average monthly income after payroll deductions was \$3,217, while his wife's monthly income was \$1,221, making their combined income \$4,438. He met the best interests of creditors tests by paying unsecured creditors at least the amount of the nonexempt equity in the couple's home. Only five more payments are owed under the plan but Mrs. Kosinski cannot afford to make them. At Mrs. Kosinski's request, Kosinski's counsel filed a motion seeking a hardship discharge for Kosinski, arguing that the three requirements of § 1328(b) are met.

2. Hardship Discharge

Section 1328(b) of the Bankruptcy Code provides that a debtor may receive a hardship discharge even though he has not completed his plan payments if three requirements are met:

1. The failure to complete the plan is for reasons for which the debtor should not be held accountable;
2. The value of the property to be distributed under the plan is not less than the amount that would have been paid if the debtor had liquidated under chapter 7 on the confirmation date; and
3. Modification of the plan is not practicable.

11 U.S.C. § 1328(b).

Kosinski's counsel asserts that all three requirements of § 1328(b) are met: (1) Kosinski is unable to complete the plan because of his death, a reason for which he should not be held accountable; (2) he made payments worth more than the expected distribution in a chapter 7 liquidation; and (3) his death and his wife's much lower income prevent a modification of the plan. The trustee does not dispute that Kosinski meets the requirements for a hardship discharge if his death can be considered for purposes of § 1328(b). She argues, however, that Rule 1016 precludes a party from relying on the death of the debtor as a basis for meeting the requirements of § 1328(b). She also contends that Kosinski cannot receive a hardship discharge because no one other than a debtor can get a discharge. Neither argument has merit.

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Rule 1016 addresses the consequences of the death of a chapter 13 debtor as follows:

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.

Fed. R. Bankr. P. 1016.

Thus, the rule permits a chapter 13 case to proceed as though the debtor had not died, to the extent possible. The trustee argues that the phrase “as though the death had not occurred” precludes a debtor’s representative from relying on the debtor’s death as a basis for complying with any of the requirements for a hardship discharge in § 1328(b). The rule does not say, or even suggest, any such thing. To the contrary, it says that the case may “proceed and be concluded” as though the debtor had not died, with no limitation on how the representative of a debtor may “proceed” with the case. Thus, the rule leaves open all avenues that would have been available to the debtor if he had survived.

Almost all courts addressing this issue have reached the same conclusion, with some noting that a hardship discharge is not only available but is “the only reasonable alternative.” *In re Bevelot*, 2007 WL 4191926 at *1 (Bankr. S.D. Ill. Nov. 21, 2007); *In re Graham*, 63 B.R. 95, 96 (Bankr. E.D. Pa. 1986) (granting hardship discharge to deceased debtor). *See also In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984) (same); *In re Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001) (“A review of the few cases considering whether circumstances are beyond the debtor’s control discloses that hardship discharges are rarely granted other than in the case of a debtor’s death.”).

The trustee relies on only one case, *In re Hennessy*, 2013 WL 3939886 (Bankr. N.D. Cal. July 29, 2013), to support her argument that Rule 1016 makes a hardship discharge unavailable to a deceased debtor. In *Hennessy*, the court dismissed a chapter 13 case after the debtor died instead of granting the hardship discharge requested by her heirs. It stated that Rule 1016 permitted only two options: dismissal or proceeding as though the debtor had not died, and that the heirs sought a third option not permitted by the rule - a hardship discharge. The court did not refer to any particular language in the rule to support this interpretation or explain why a hardship discharge does not fall within the option of “proceeding” with the case. It also did not address any of the cases holding that a hardship discharge is available to a deceased debtor. The *Hennessy* court’s analysis of Rule 1016 is not persuasive.

The facts in this case are also distinguishable from those in *Hennessy*. After declaring that Rule 1016 does not permit a hardship discharge, the *Hennessy* court stated that it had discretion to

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grant or deny a hardship discharge and that it would exercise that discretion to deny the discharge. Its reasons included that the debtor's income may have been too high to qualify under the means test for a discharge in chapter 7, and that the heirs were "strangers to the court" who could be wealthy and receive a windfall if the discharge were granted. The facts in this case are far different. First, the trustee does not contest that Kosinski would have been eligible for a discharge in chapter 7 or that his creditors have received more than they would have in a chapter 7. Second, Mrs. Kosinski is not a stranger to the court who may be wealthy and receive a windfall if the discharge is granted. Her income was disclosed in Kosinski's Schedule I, and she contributed all of it toward their joint expenses and the plan payment. With an income of \$1,221 per month as a hair stylist, there is no danger that granting Kosinski a discharge will benefit a wealthy non-debtor. Instead, a spouse with a very modest income who cannot afford the few remaining plan payments will benefit from the discharge of debts owed to creditors who have already been paid more than the equity in the Kosinskis' home. Finally, the debtor in *Hennessey* had made payments for only one and one-half years, while Kosinski paid for four and one-half years. Thus, the facts in this case are far more compelling than those in *Hennessey* in any event.

The trustee also argues that the discharge must be denied because a discharge is personal to a debtor and cannot be granted to another entity, such as the debtor's estate. The trustee relies on one case, *In re Shepherd*, 490 B.R. 338 (Bankr. N.D. Ind. 2013), to support this argument. In *Shepherd*, the representative of the debtor's probate estate sought to modify the plan and complete it; he did not seek a hardship discharge. The court concluded that the heirs had no standing to seek a modification of the plan. It explained that § 1329(a) expressly limits the parties who may move to modify a confirmed plan to the debtor, the trustee, or an unsecured creditor, and the debtor's representative was not one of those prescribed parties. *Id.* at 339. It therefore held that the representative of the debtor's estate did not have standing to modify the confirmed plan. The court also denied the estate's motion to substitute into the case for the debtor. The court noted that neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure contain a specific procedure for substituting another entity for a debtor in a bankruptcy case, and that probate estates are not eligible to file a bankruptcy case on behalf of a decedent so an estate should not be able to substitute for a debtor either.

Shepherd is not persuasive authority for the trustee's argument for several reasons. First, the movant in *Shepherd* was seeking to modify the plan, not obtain a hardship discharge. The *Shepherd* court recognized that one of several options available to a deceased debtor under Rule 1016 is a hardship discharge. *Id.* at 340. The court expressly acknowledged that seeking a hardship discharge would not require a substitution of another party for the debtor. *Id.* Second, unlike § 1329(a), § 1328(b) does not limit who may seek a hardship discharge to any particular parties. It simply provides that, at any time after confirmation of the plan and after notice and a hearing, "the court may grant a discharge to a debtor" if the specified requirements are met. 11 U.S.C. § 1328(b). Thus, the *Shepherd* court's analysis of standing to bring a motion to modify a plan does not apply to a motion seeking a hardship discharge in any event.

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Third, although the *Shepherd* court stated that the Code and rules contain no formal mechanism for substituting another party for a deceased debtor, it does not explain why a formal substitution is required. Rule 1016 permits a case to continue despite the death of the debtor without the formal substitution of another party for the debtor. The case can only “continue” or “proceed” if someone is permitted to act in the bankruptcy case on behalf the deceased debtor. If 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. The only interpretation that gives meaning to these provisions in the rule is that no formal substitution is necessary, as the *Shepherd* court itself recognized when it noted that no substitution is required to seek a hardship discharge. 490 B.R. at 340. Under Rule 1016, an appropriate representative of the debtor may act on behalf of the debtor without a formal substitution.

Finally, the *Shepherd* court noted that a probate estate is not entitled to file a bankruptcy petition for a decedent because it is not a “person” eligible for relief under the Bankruptcy Code. The trustee relies on this analysis to suggest that Kosinski cannot receive a discharge because his estate could not file for bankruptcy and receive a discharge. This argument conflates two distinct questions: who can file a bankruptcy petition and who can receive a discharge. While many courts have held that probate estates are not “persons” eligible to file a bankruptcy petition under §§ 101(4) and 109(g) of the Bankruptcy Code, these cases do not support the trustee’s argument that a living person who was eligible to file a bankruptcy petition on the petition date cannot be granted a hardship discharge after he dies.

In fact, two of the cases cited in *Shepherd* for their holding that probate estates are not “persons” eligible to file for bankruptcy specifically recognize that a debtor who dies after filing for bankruptcy can receive a discharge that benefits his estate. The court in *In re Estate of Gray*, 2011 WL 3946729 (E.D. Mich. Sept. 6, 2011), held that a probate estate is not a “person” eligible to file a bankruptcy petition, and then distinguished cases in which a debtor dies after a filing a bankruptcy case. It noted that when a debtor dies after filing a petition, “there is a bankruptcy code [sic] provision that explicitly permits the debtor to proceed with the bankruptcy petition.” *Id.* at *3. Similarly, in *In re Walters*, 113 B.R. 602 (Bankr. D.S.D. 1990), the court held that while a decedent’s estate is not a “person” eligible to file for bankruptcy, Rule 1016 permitted the estate of a chapter 11 debtor who died in the middle of performing his plan to reopen his case to avoid a lien on his property. The trustee’s argument that a deceased debtor cannot receive a hardship discharge because a decedent’s estate is not eligible to file a bankruptcy case has no merit.

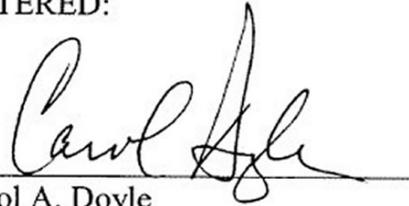
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Conclusion

Rule 1016 permits the court to grant a hardship discharge after the death of a debtor. Kosinski meets the requirements for a hardship discharge under § 1328(b). The motion for a hardship discharge is granted.

Dated: March 5, 2015

ENTERED:

A handwritten signature in cursive script, appearing to read "Carol A. Doyle", is written over a horizontal line.

Carol A. Doyle
United States Bankruptcy Judge