BANKRUPTCY—PROBATE . . . AND THE TWAIN SHALL MEET

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I. INTRODUCTION

The Bankruptcy Code[1] and the Probate Code both deal with distribution of assets. Until recent times, however, few practitioners have been faced with the interrelationship of the two. In light of the

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1. 11 U.S.C. §§ 101-151326 (1982 & Supp. II 1984), *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

depressed agricultural economy and prevalence of bankruptcy in Nebraska in recent years, the interrelationship raises issues that must be addressed.

Bankruptcy and probate interrelate in various ways, including the following:

(1) The personal representative may wish to file a bankruptcy petition and reorganize the decedent's estate under the Bankruptcy Code.
(2) Upon death of the bankruptcy debtor, the personal representative may wish to proceed with the existing bankruptcy case.
(3) When property is jointly owned by a bankruptcy debtor and a decedent's estate, questions arise concerning liquidation and apportionment of property.
(4) A personal representative must take care in distributing assets when the beneficiary of the decedent's estate is a bankruptcy debtor.
(5) The probate estate may be a creditor in a bankruptcy case.

This Article addresses briefly the foregoing matters pertaining to the interrelationship of bankruptcy and probate.

II. DECEDENT'S ESTATE AS BANKRUPTCY PETITIONER

A. Reasons to File

There would be little or no reason for a decedent's estate to ever file a Chapter 7 liquidation bankruptcy. The effect of filing would simply be to substitute the bankruptcy trustee for the personal representative. Both the Chapter 7 trustee and the decedent's personal representative have the same general function: to distribute estate assets first to creditors of the estate and then to the debtor or the debtor's heirs.

Good reason, however, may exist for a probate estate to seek the protection of a Chapter 11 or Chapter 13 reorganization proceeding under the Bankruptcy Code. The reasons for attempting to reorganize under the Bankruptcy Code vary with each factual situation that arises. One reason, for example, may be to protect the interests of a guarantor of the decedent's obligations. A guarantor might be greatly injured if the decedent's estate were promptly liquidated at the behest of creditors. A second reason to seek reorganization may involve a depressed economy, a depressed value of estate assets, and a reasonable hope that circumstances will improve markedly in the future. In such a situation, the decedent's beneficiaries might realize substantial benefit from liquidation after a bankruptcy-imposed delay. A third reason to seek reorganization might be to assure the

continuation of a small business, for example, a farm, by the beneficiaries after the death of the proprietor.

B. General Rule

As a general rule, a personal representative may not file a bankruptcy petition for a decedent's estate. The Bankruptcy Code provides that only a "person" may be a debtor under the Bankruptcy Code,[2] and the Bankruptcy Code defines a "person" as including an individual, a partnership or a corporation.[3] Legislative history clearly indicates that the definition of "person" in the Bankruptcy code does not include a decedent's estate.[4] Further, case law has been explicit in its provision that a decedent's personal representative does not have capacity to file a voluntary bankruptcy petition on behalf of the decedent's estate.[5]

C. Exception to General Rule

In the context of a Chapter 13 consumer reorganization, no basis exists for an exception to the general rule. An eligibility requirement unique to Chapter 13 relief is that "[o]nly an *individual with regular income* . . . may be a debtor under chapter 13."[6] Common sense and basic grammar provide strong foundation for the ruling that a deceased person's estate cannot, as a matter of law, qualify as an "individual with regular income."[7]

An exception to the general rule might be available, however, under Chapter 11 business reorganization rules. The Bankruptcy Code provides that a business trust, a partnership or a corporation

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2. *Id.* § 109(a) (Supp. II 1984). Subsection 109(a) provides: "Notwithstanding any other provision of this section, only a *person* that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." *Id.* (emphasis added).

3. *Id.* § 101(33) (Supp. II 1984). Subsection 101(33) defines "person":

> "[P]erson" includes individual, partnership, and corporation, but does not include governmental unit, *Provided, however*, that any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.

4. *Id.* " 'Person' is defined in paragraph [(33)]. . . . The definition does not include an estate or a trust . . . . S. Rep. No. 95-989, 95th Cong., 2d Sess. 25 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5811; H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 313 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270.

5. *In re* Estate of Hiller, 240 F. Supp. 504, 504 (N.D. Cal. 1965); *In re* James, 31 Bankr. 67, 69 (Bankr. D.S.D. 1983); *In re* Jarrett, 19 Bankr. 413, 414 (Bankr. M.D.N.C. 1982); *In re* Estate of Brown, 16 Bankr. 128, 128 (Bankr. D.D.C. 1981).

6. 11 U.S.C. § 109(e) (1982) (emphasis added).

7. *See In re* Jarrett, 19 Bankr. 413, 414 (Bankr. M.D.N.C. 1982).

may be eligible to file for Chapter 11 relief.[8] The question is whether the Probate Code and the Bankruptcy Code permit a decedent's personal representative to transfer decedent's estate assets into a business trust, a partnership or a corporation, subject to claims of creditors, thereby rendering the estate's assets eligible for the protection of Chapter 11 of the Bankruptcy Code. Authorization for such a transfer is provided in the Probate Code.[9] However, the decisive issue under the Bankruptcy Code on whether the newly formed entity becomes eligible for Chapter 11 relief is whether the bankruptcy petition has been filed in "good faith."[10]

The concept of "good faith" or "bad faith" is difficult to define.[11] In attempting a definition it should be noted that no single factor is determinative.[12] Rather, good faith is given substance by comparing the debtor's purposes in filing the Chapter 11 petition with the reor-

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8. The definition of "person" under the Bankruptcy Code includes a "partnership" and a "corporation." 11 U.S.C. § 101(33) (1984). *See supra* note 2. The definition of "corporation" includes a "business trust." 11 U.S.C. § 101(8)(A)(v) (1982). There is no clear, precise definition of "business trust" in either the Bankruptcy Code, the bankruptcy rules, or case law; however, some guidelines do exist, for example:

> The basic distinction between business trusts and nonbusiness trusts is that business trusts are created for the purpose of carrying on some kind of business or commercial activity for profit; the object of a nonbusiness trust is to protect and preserve the trust res. The powers granted in a traditional trust are incidental to the principal purpose of holding and conserving particular property, whereas the powers within a business trust are central to its purpose. It is the business trust's similarity to a corporation that permits it to be a debtor in bankruptcy.

In re Treasure Island Land Trust, 2 Bankr. 332, 334 (Bankr. M.D. Fla. 1980). *See also, e.g., In re* Tru Block Concrete Prod., Inc., 27 Bankr. 486, 490-91 (Bankr. S.D. Cal. 1983) (using "business trust" to include a liquidating trust); *In re* Wayson Trust, 29 Bankr. 58, 59 (Bankr. D. Md. 1982) (stating that a trust created by a will did not qualify as a "business trust" because the beneficiaries were prohibited from disposing of their interests); *Treasure Island*, 2 Bankr. at 334-36 (stating that an example of a "nonbusiness trust" is a trust that does nothing more than hold title to land).

9. *See* NEB. REV. STAT. § 30-2476(25) (Reissue 1985), which provides:

> Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priority stated in section 30-24,100, a personal representative, acting reasonably for the benefit of the interested persons, may properly: . . . (25) incorporate any business or venture in which the decedent was engaged at the time of his death.

10. If a personal representative transfers the decedent's estate assets into a corporation and then files bankruptcy, interested parties in the bankruptcy proceeding may wish to assert that the bankruptcy petition was not filed in good faith and move under 11 U.S.C. § 1112(b) for a dismissal of the bankruptcy "for cause." *See* 5 COLLIER ON BANKRUPTCY ¶ 1112.03, at 1112-26 to -28 (L. King 15th ed. 1985) [hereinafter COLLIER]. The court, in the case of *In re* Thirtieth Place, Inc., 30 Bankr. 503 (Bankr. 9th Cir. 1983), ruled that "[a]lthough 11 U.S.C. § 1112(b) does not expressly require a petition for relief under Chapter 11 to be filed in good faith, evidence of an intent to abuse the reorganization process has been held to be sufficient "cause" upon which a case can be dismissed." *Id.* at 505 (citations omitted).

11. 5 COLLIER, *supra* note 10, ¶ 1112.03, at 1112-26 to -28.

12. *Thirtieth Place*, 30 Bankr. at 505. The Ninth Circuit Court of Appeals stated:

ganization-related purposes for which Congress established Chapter 11 relief.[13]

The starting point for an analysis of "good faith" in the context of a newly created entity from a decedent's estate assets is the case of *In re 299 Jack-Hemp Associates*.[14] In *Jack-Hemp*, the court ruled that the personal representative of a decedent's estate did not act in good faith in transferring the decedent's estate assets to a new entity for the sole purpose of becoming eligible for Chapter 11 relief.[15] The court specified:

> [Where the bankruptcy process] has been utilized by a specially created entity which only the day before was barred from access to this court, and where nothing can be achieved by recourse to that process, the attempt to do so can only be characterized as disingenuous in the last degree. More need not be shown to afford this court the cause to dismiss with prejudice.[16]

It must be noted, however, that the *Jack-Hemp* case contains particularly strong indicia of bad faith. The decedent's estate had been before the appropriate state courts for over ten years, and the property of the decedent's estate had been the subject of applications to reduce assessed valuations for over ten years.[17] The court found that "nothing can be achieved" by recourse to the bankruptcy process.[18] The bankruptcy court also found that the executors had formed the new entity for the *exclusive* purpose of invoking the protection of the automatic bankruptcy stay to stop a mortgage foreclosure process without any hope of, or intent for, reorganization.[19] Under these facts, three fundamental indicia of bad faith in the filling of a Chapter 11 voluntary petition exist:

> (1) A resort to the Chapter 11 device for the sole purpose of invoking the automatic stay;
> (2) A resort to the Chapter 11 device without an intent or

> We consider the determination of this [good faith] question to require an examination of all the particular facts and circumstances in each case.
>
> "Whether [good faith] exists in any case depends upon the facts and circumstances presented. No one evidentiary fact can be given paramount weight in deciding the question. If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist."

Id. (quoting *In re* Levinsky, 23 Bankr. 210, 218 (Bankr. N.Y. 1982)).

13. *See* 5 COLLIER, ¶ 1112.03, at 1112-26.
14. 20 Bankr. 412 (Bankr. S.D.N.Y. 1982).
15. *Id.* at 413-14.
16. *Id.* at 413.
17. *Id.*
18. *Id.*
19. *Id.*

ability to reorganize financial activities;[20] and
(3) The creation of a new entity immediately prior to, and for the exclusive purpose of, filing a bankruptcy.[21]

Had the *Jack-Hemp* facts revealed that the debtor truly intended and was capable of a reorganization, a finding of bad faith and consequent dismissal would not have been appropriate.[22] Illustrating this proposition is the case of *In re Spenard Ventures, Inc.*[23] *Spenard* did not involve a decedent's estate; rather, it involved two individuals who owned certain real estate on which foreclosure sale had been scheduled for December 16, 1981.[24] On November 23, 1981, the individual owners created the debtor corporation; on December 11, 1981, the individuals transferred the real estate in question to the new corporation; on December 15, 1981, the new corporation filed a voluntary petition under Chapter 11 of the Bankruptcy Code.[25] The secured creditors then filed a motion to dismiss the bankruptcy proceeding for lack of good faith, alleging that the debtor corporation had been

20. *Thirtieth Place*, 30 Bankr. at 505. The court stated:

> A petition filed in bad faith may manifest an intent to cause hardship or to delay creditors by resort to the Chapter 11 devise merely for the purpose of invoking the automatic stay without an intent or ability to reorganize his financial activities.

Id.

21. *Id.* The court stated: "The transfer of one's assets to a new debtor on the eve of a Chapter 11 filing may be evidence of . . . an improper state of mind and such transfers will be scrutinized with great care." *Id.* (citations omitted). *Contra In re* Spenard Ventures, Inc., 18 Bankr. 164, 168 (Bankr. D. Alaska 1982) (illustrating a good faith bankruptcy filing for a newly created entity).

22. It must be noted, however, that the *Jack-Hemp* court offered the following contrary dicta:

> As of March 10, 1982, the day before the petition, title to the mortgaged property was in the coexecutors of the estate of one Frank Wolk, deceased for about ten years. While the word "includes" in the section defining "person" is not limiting under Section 102(3), Congress left no doubt that "person" was not to include an estate.
>
> Faced, thus, with Congress' clear purpose to leave the administration of decedents' estates where they belong in specialized probate or surrogate courts able to interface the interests of heirs or legatees with other interests, the co-executors under the decedent's will formed a partnership on March 10, 1982. In doing so, the partnership became a "person" within Section 101[(33)] and thus facially eligible for relief under the Code. But, the fact is, the relief really sought by the filing of the petition is the automatic stay of Section 362(a)(5) by which the mortgagee cannot continue to enforce its rights against the mortgaged property despite having procured a judgement of foreclosure on January 12, 1982. Surely, the debtor will not seriously contend that this testator's wishes must override Congress' choice to exclude decedents' estates as eligible debtors.

Jack-Hemp, 20 Bankr. at 413 (citations omitted). The implication of the *Jack-Hemp* court that the debtor is not eligible for relief as a matter of law appears to be based primarily upon a reaction to the strong showing of bad faith rather than upon any legal compulsion.

23. 18 Bankr. 164 (Bankr. D. Alaska 1982).

24. *Id.* at 166.

25. *Id.*

created, and the transfers to it made "for the sole purpose of filing a Chapter 11 petition and obtaining a stay of foreclosure on the property."[26] After examining the evidence, however, the court refused to dismiss the case and ruled: "The evidence shows that [the debtor corporation] was organized for a legitimate business reason and not solely to file a Chapter 11 petition or to hinder the [creditors]."[27]

Factors that evidence, according to *Spenard* and other authorities, the existence of good faith in the context of a newly created entity include:

> (1) Operation of the new business as a viable economic entity for a significant period of time before the filing of bankruptcy;[28]
> (2) Demonstration that a legitimate business reorganization purpose exists for creation of the debtor;[29]
> (3) Demonstration that the debtor has an actual intent and ability to reorganize its business, which intent to reorganize may include an orderly liquidation;[30]
> (4) Demonstration that the new entity debtor has given no hint or appearance of making an effort to defraud creditors;[31]
> (5) Demonstration that unsecured creditors exist who may be protected by reorganization under the Bankruptcy Code;[32] and
> (6) Specific demonstration of intent and ability to reorganize by the prompt filing of a reorganization plan and disclosure statement that have a reasonable probability of confirmation.[33]

When the foregoing factors are crystallized to their basic underlying policy, the existence or lack of good faith turns ultimately on whether the new entity was created for a legitimate business reorganization purpose or for the sole purpose of becoming eligible for Chapter 11 relief.[34] Unless the debtor can demonstrate such a legiti-

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26. *Id.* at 165.

27. *Id.* at 167.

28. *In re* Dutch Flat Inv. Co., 6 Bankr. 470, 471 (Bank. N.D. Cal. 1980).

29. *Spenard*, 18 Bankr. at 167. For dismissals based in substantial part upon a failure to demonstrate a legitimate business reorganization purpose, see *Dutch*, 6 Bankr. at 471 (Bankr. N.D. Cal. 1980) and *In re* Sacramento Metro. Real Estate Investors, 28 Bankr. 228, 230 (Bankr. E.D. Cal. 1983).

30. *Spenard*, 18 Bankr. at 167. For dismissal based in substantial part upon a lack of such intention, see *Sacramento*, 28 Bankr. at 230.

31. *Spenard*, 18 Bankr. at 168.

32. *Dutch Flat*, 6 B.R. at 472.

33. *See* 5 COLLIER, *supra* note 9, ¶ 1112.03, at 1112-28, which provides: "In cases in which the debtor files a petition with a plan and disclosure statement, dismissing the case for want of 'good faith' without considering the merits of the debtor's plan, would appear to be an abuse of discretion."

34. Such a crystallization is explained in *Spenard*:

mate purpose, the likelihood of withstanding a motion to dismiss for lack of good faith would appear to be very slim.

III. EFFECT OF DEBTOR'S DEATH ON BANKRUPTCY CASE

A. CHAPTER 7 LIQUIDATION

In a Chapter 7 liquidation, the bankruptcy estate will continue notwithstanding the death of the debtor, and the bankruptcy trustee will proceed to conclusion of the liquidation and distribution process.[35] Property that is not liquidated or distributed by the Chapter 7 trustee will become a part of the probate estate for administration and disposition in accordance with the requirements of the Probate Code.

Property moves from the bankruptcy estate into the probate estate upon an abandonment[36] by the trustee becoming effective under the Bankruptcy Code. A trustee abandons property of the bankruptcy estate when the property is either "burdensome to the estate" or "of inconsequential value and benefit to the estate."[37] Under these standards, abandonment generally occurs when property is exempt[38] or is encumbered to the extent that no equity exists therein for distribution to unsecured creditors.

> A review of the cases involving the formation of new entities shortly before the filing of Chapter 11 petitions, indicates that the Court must balance several factors in determining whether a petition was filed in bad faith. The underlying inquiry is whether the debtor seeks to abuse the bankruptcy law by employing it for a purpose for which it was not intended to be used, *e.g.*, to cause hardship or delay to creditors. A weighing of all factors in the present case causes this Court to conclude that Spenard was formed for a valid business purpose and that the Chapter 11 petition was not filed in bad faith.

Spenard, 18 Bankr. at 166-67.

35. BANKR. R. 1016, 11 U.S.C. app. (Supp. II 1984). Rule 1016 provides that "[d]eath or insanity of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred.". See *In re* Crowell, 53 Bankr. 555, 557-58 (Bankr. M.D. Tenn. 1985) for an application of Rule 1016.

36. *See* 11 U.S.C. §§ 554, 725 (Supp. II 1984); BANKR. R. 6007, 11 U.S.C. app. (Supp. II 1984).

37. 11 U.S.C. § 554(a) (Supp. II 1984).

38. The Nebraska Revised Statutes contain exemptions which apply in Nebraska under the Bankruptcy Code. *Id.* § 522(b) (1982 & Supp. II 1984); NEB. REV. STAT. § 25-15,105 (Reissue 1985). *See* NEB. REV. STAT. § 40-101 (Supp. 1986) (providing a homestead exemption of $10,000); *id.* § 25-1558 (Reissue 1985) (providing a wage exemption); *id.* § 25-1556 (providing an exemption of six months' support for immediate personal possessions, necessary wearing apparel, kitchen utensils, household furniture, equipment, tools and provisions); *id.* § 25-1552 (providing a $2,500 personal property in-lieu-of homestead exemption); *id.* § 44-371 (Reissue 1984) (providing an exemption for cash values in annuities and life insurance policies). Exemptions which apply in a bankruptcy case do not apply in a probate proceeding. The Nebraska Probate Code sets forth the probate exemptions. *Id.* § 30-2322 to -2326 (Reissue 1985).

The existence of a deceased debtor's will does not affect the existing bankruptcy proceeding. The pre-death bankruptcy filing places all of the debtor's assets into the bankruptcy estate, and the subsequent death of the debtor leaves no assets for the will to distribute, other than those assets not administered by the bankruptcy trustee.

B. REORGANIZATIONS

The applicable bankruptcy rule appears at first blush to allow Chapter 11 and Chapter 13 reorganizations to continue notwithstanding a post-petition death of the debtor.[39] However, as a practical matter, in reorganization cases the bankruptcy proceeding will generally not continue as if death had not occurred.[40]

1. *Chapter 13*

In a Chapter 13 proceeding entitled *In re Jarrett*,[41] the court took the position that a Chapter 13 case must be dismissed upon the death of the debtor, notwithstanding the permissive language of Bankruptcy Rule 1016.[42] The *Jarrett* court pointed to the criterion for Chapter 13 eligibility that a debtor must be an individual with regular income[43] and concluded as a matter of law that, since "the debtor is deceased, it is evident that he does not meet the necessary prerequisites to be a Chapter 13 debtor."[44] Consequently, the court ruled that the Chapter 13 debtor's death compelled dismissal of the Chapter 13 proceeding.[45]

A varying result has been reached by the court in the case of *In re Bond*,[46] which involved a unique factual situation. The debtor, Patricia Johnson Bond, filed her Chapter 13 petition on June 5, 1981.[47] At the time of the filing of her petition, all of the debtor's property

39. *See* BANKR. R. 1016, 11 U.S.C. app. (Supp. II 1984). Rule 1016 provides:

> If a reorganization or individual's debt adjustment case is pending under chapter 11 or chapter 13, 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 or insanity had not occurred.

40. *Id.* The advisory committee's note indicates that "[t]his rule is derived from former Rules 118 and 11-16. In a chapter 11 reorganization case or chapter 13 individual's debt adjustment case, the likelihood is that the case will be dismissed."

41. 19 Bankr. 413 (Bankr. M.D.N.C. 1982).

42. *Id.* at 414. The court focused on that portion of the rule authorizing dismissal rather than upon that portion of the rule allowing continuation of the proceeding. *Id.*

43. *Id.* (referring to the criterion for Chapter 13 eligibility set forth in 11 U.S.C. § 109(e) (1982)).

44. *Id.*

45. *Id.*

46. 36 Bankr. 49 (Bankr. E.D.N.C. 1984).

47. *Id.* at 50.

qualified as exempt assets under the provisions of the Bankruptcy Code;[48] consequently, the court found that the debtor's "unsecured creditors would have received no payment in a chapter 7 liquidation."[49] The plan was confirmed on August 4, 1981, and the debtor made all her monthly payments under the plan until her death on August 14, 1983.[50] The pre-death payments into the Chapter 13 plan had been sufficient to pay in full all secured claims dealt with by the plan,[51] but unsecured creditors had received very little under the plan at the time of debtor's death.[52] Counsel for the debtor filed a request with the bankruptcy court for a "hardship discharge" under the Chapter 13 provisions of the Bankruptcy Code[53] "just as Ms. Bond could have done if she were still alive."[54] The *Bond* court appears to have been impressed with the debtor's honest and best efforts to pay her creditors, including unsecured creditors, in full under the Chapter 13 process, and the court found that such a debtor "should not be penalized for making that choice."[55]The court, therefore, ruled that the debtor in *Bond* met all of the requirements for a hardship discharge[56] and that a hardship discharge was "entirely

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48. *Id.* Regarding exemptions set forth in the Bankruptcy Code, see 11 U.S.C. § 522(d) (1982 & Supp. II 1984).

49. *Bond*, 36 Bankr. at 50.

50. *Id.*

51. *Id.*

52. *Id.* at 51.

53. *Id. See* 11 U.S.C. § 1328(b) (1982). Subsection 1328(b) sets forth the hardship discharge rules:

> 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 of this title on such date; and
> (3) modification of the plan under section 1329 of this title is not practicable.

Id. § 1328(b) (1982).

54. *Bond*, 36 Bankr. at 51.

55. *Id.* at 52.

56. *Id.* at 51. The court found:

> Specifically: 1) the Debtor made payments up until the time of her death and her failure to complete the Plan is certainly due to circumstances beyond her control; 2) the value of the funds distributed to each allowed unsecured claim in this case is not less than the amount that would have been paid in a chapter 7 liquidation—some unsecured creditors received nothing from the Plan but this is the same as they would have received had the case been filed under chapter 7; 3) modification of the Plan is not a practical alternative because there is no source of regular income.

Id.

appropriate."[57]

In light of the unique factual context and special equitable considerations identified by the court in the *Bond* case, the *Bond* ruling appears to be the aberration, with *Jarrett* representing the general Chapter 13 rule.

2. *Chapter 11*

The stringent *Jarrett* rule requiring immediate dismissal upon death of a Chapter 13 debtor[58] would not appear to apply in Chapter 11 reorganization cases. The rules for eligibility for Chapter 11 relief under the Bankruptcy Code do not contain an "individual with regular income" requirement.[59] Consequently, the sole test under Bankruptcy Rule 1016 for continuing or dismissing the Chapter 11 estate is "the best interest of the parties."[60]

C. CONVERSION

One option generally available to a bankruptcy debtor is conversion of an existing case to a case under one of the other chapters of the Bankruptcy Code.[61] The estate of a bankruptcy debtor who dies post-petition does not possess the conversion option for two reasons. First, the bankruptcy rule authorizing continuation of a bankruptcy case after death of the debtor does not make mention of any authority to convert the case to a case under another chapter of the Bankruptcy Code.[62] Second, in order to convert a bankruptcy case from one chapter to another chapter, the bankruptcy debtor must be eligible for relief under the new chapter proceeding.[63] Because a decedent is not a "person," the decedent's bankruptcy estate is not

57. *Id.* at 52.

58. *See supra* notes 39-43 and accompanying text.

59. *See* 11 U.S.C. § 109 (1982 & Supp. II 1984).

60. BANKR. R. 1016, 11 U.S.C. app. (Supp. II 1984). The pertinent language of rule 1016 provides that "if further administration is possible and in the best interest of the parties, the case may proceed . . . ."

61. 11 U.S.C. § 1307 (1982 & Supp. II 1984) (allowing for conversion of a case from Chapter 13 to Chapter 7 or Chapter 11); *id.* § 1112 (allowing for conversion of a case from Chapter 11 to Chapter 7 or Chapter 13); *id.* § 706 (1982) (allowing for conversion from Chapter 7 to Chapter 11 or Chapter 13).

62. *See* BANKR. R. 1016, 11 U.S.C. app. (Supp. II 1984).

63. 11 U.S.C. § 706(d) (1982) (providing that "notwithstanding 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."); *id.* § 1112(3) (providing that "notwithstanding 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."); *id.* § 1307(f) (providing that "notwithstanding 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.").

eligible for relief under a conversion proceeding.[64]

IV. EFFECT OF BANKRUPTCY ON COMMONLY OWNED PROPERTY

A. SURVIVORSHIP RIGHTS

The filing of a bankruptcy petition may alter rights of survivorship in jointly owned property. It should be noted initially that the nature of the interests in the property are determined by state law, regardless of the fact that bankruptcy is filed under federal law.[65]

1. *Joint Tenancy*

When one joint tenant files bankruptcy, the bankruptcy filing severs the joint tenancy and converts it into a tenancy in common. Under Nebraska law, the conveyance by one co-tenant to a third person severs the joint tenancy and extinguishes the right of survivorship,[66] and the filing of a voluntary petition in bankruptcy by one of the joint tenancy co-owners effects such a conveyance.[67] In other words, a comprehensive conveyance by the debtor to the bankruptcy estate takes place with the commencement of the proceeding, which conveyance severs the joint tenancy and terminates the right of survivorship.[68]

In Re Lambert[69] illustrates the joint tenancy rule. In *Lambert*, the debtor filed his Chapter 7 petition on January 13, 1983, at which time he held a joint tenancy interest in certain real property with his sister. On September 23, 1983, the debtor died.[70] The *Lambert* court recited the applicable Colorado state law regarding severance of a joint tenancy by a transfer of one tenant's interest to a third person[71]

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64. *See id.* § 109(1) (Supp. II 1984). *See also supra* notes 1-4 and accompanying text.

65. Butner v. United States, 440 U.S. 48, 54-55 (1979).

66. *See* Krause v. Crossley, 202 Neb. 806, 811, 277 N.W.2d 242, 245 (1979); Buford v. Dahlke, 158 Neb. 39, 50, 62 N.W.2d 252, 258 (1954).

67. *See In re* Tyson, 48 Bankr. 412, 413 (Bankr. C.D. Ill. 1985) (quoting *In re* Lambert, 34 Bankr. 41, 43 (Bankr. D. Colo. 1983)); *In re* Panholzer, 36 Bankr. 647, 651 (Bankr. D. Md. 1984); *In re* Lambert, 34 Bankr. 41, 43 (Bankr. D. Colo. 1983).

68. *See supra* note 65 and accompanying text.

69. 34 Bankr. 41 (Bankr. D. Colo. 1983).

70. *Id.* at 42.

71. *Id.* The court stated:

> Colorado law on joint tenancies is straightforward. Joint tenants hold an undivided interest in the whole property. A joint tenant is free to convey his interest in the property to a third party, and, upon conveyance, the joint tenancy is severed and the right of survivorship is destroyed. The right of survivorship is retained until the joint tenancy is effectively severed and the severance must occur prior to the death of one of the joint tenants because the right of survivorship instantly vests title to the whole property in the surviving tenant at the moment of the death of the other joint tenant. A joint

and concluded that "[t]he only thing which arguably could have severed the joint tenancy in this case would be the filing of the bankruptcy petition."[72] The court, allowing that the Bankruptcy Code does not explicitly provide for the bankruptcy trustee too receive title to bankruptcy estate property, found that legislative history directly,[73] and statutory language indirectly[74] supported the following conclusion:

> [T]he filing of a petition in bankruptcy effects a severance of any joint tenancy the debtor may have had in property and that the Trustee and the other former joint tenants of the debtor become tenants in common. Thus, the right of survivorship enjoyed by the former joint tenants is destroyed.[75]

The case of *In re Panholzer*[76] involved the application of the joint tenancy rule enunciated by the *Lambert* court in a different factual context. In *Lambert*, the bankruptcy debtor died, and his joint tenant survived;[77] in *Panholzer*, it was the Chapter 7 debtor's joint tenant who died during the administration of the debtor's bankruptcy

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> tenancy is severed by destroying one of the four unities of time, title, interest and possession either by operation of law, by death, or by acts of one joint tenant without the consent of the other joint tenant, or by mutual agreement. And a joint tenancy is severed by operation of law by an execution sale.

Id. (citations omitted).

72. *Id.*

73. *Id.* at 43. The court stated:

> The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or leasehold interest, for example. . . . Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate . . . will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue *in rem* with respect to property of the estate, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

Id. (quoting S. REP. NO. 95-989, 95th Cong. 2d Sess. 82-83 (1978)).

74. *Id.* The court stated:

> Although several Code sections appear to support the thesis that a joint tenancy survives the filing of a bankruptcy petition, on closer examination those sections lend support to the antithesis. For example, Sec. 363(h) provides in pertinent part, ". . . the trustee may sell both the estate's interest . . . and the interest of any co-owner in property in which the debtor *had*, immediately before the commencement of the case, an undivided interest as a . . . joint tenant . . . ." Likewise, Sec. 522(b)(2)(B) provides in pertinent part that a debtor may exempt from property of the estate ". . . any interest in property in which the debtor *had*, immediately before the commencement of the case, an interest as a . . . joint tenant . . . ."
>
> Both of these sections are written in the past tense "had", not the present tense "has", thus indicating that the debtor no longer holds the title that he did just prior to commencement of the case.

Id. (quoting 11 U.S.C. § 363(h) (1982 & Supp. III 1985); *id.* § 522(b)(2)(B) (1982)).

75. *Id.*

76. 36 Bankr. 647 (Bankr. D. Md. 1984).

77. *Lambert*, 34 Bankr. at 42.

case.[78] The *Panholzer* court concluded that "[a] comprehensive conveyance by the debtor to the Chapter 7 trustee takes place with the commencement of the proceeding and the creation of the bankruptcy estate under [11 U.S.C.] § 541(a)."[79] The court added that "[j]ust as a bankruptcy estate is not depleted by the death of the debtor who is a joint tenant, so ought it not be enriched by the death of a joint tenant survived by the debtor."[80]

Additionally, the court in *In re Tyson*[81] applied in the Chapter 11 context the same rules regarding severance of joint tenancy enunciated by the *Lambert* and *Panholzer* courts in the Chapter 7 context.

2. Tenancy by the Entirety

The rule concerning a tenancy by the entirety ownership, unlike the joint tenancy rule, is that the bankruptcy filing neither severs the tenancy nor terminates the right of survivorship.[82] The reason for the difference from the joint tenancy rule is that "entirety property can neither be transferred by either spouse acting alone nor subject to judicial process to satisfy the claims of the individual creditors of one spouse . . . ."[83]

An illustration of the tenancy by the entirety rule is found in the case of *In re Crowell*.[84] On December 20, 1983, the Crowells, husband and wife, filed a voluntary joint petition under Chapter 11 of the Bankruptcy Code. On January 16, 1984, they voluntarily converted the case to a case under Chapter 7, and, on March 26, 1984, Mr. Crowell died.[85] Thereafter, Crowell's widow amended her schedules of assets and property claimed exempt, listing six assets she acquired as a result of her husband's post-petition death and claiming each asset as exempt.[86] The trustee argued that the property held by the decedent as tenancy by the entirety did not become property of the widow's bankruptcy estate and should be administered through the decedent's bankruptcy estate under Bankruptcy Rule 1016 as though a death

78. *Panholzer*, 36 Bankr. at 648.
79. *Id.* at 651 (citation omitted).
80. *Id.* at 651-52.
81. 48 Bankr. 412 (Bankr. C.D. Ill. 1985) (holding that the debtor lost any joint tenancy interest in real estate with his wife when he filed a Chapter 11 petition, and that upon the debtor's subsequent death his interest in the property did not pass to his widow).
82. *See In re* Crowell, 53 Bankr. 555, 559 (Bankr. M.D. Tenn. 1985); *In re* Abdallah, 39 Bankr. 384, 389 (Bankr. D. Mass. 1984); *In re* Dawson, 10 Bankr. 680, 684 (Bankr. E.D. Tenn. 1981); *In re* Ford, 3 Bankr. 559, 570 (Bankr. D. Md. 1980), *aff'd*, 638 F.2d 14 (4th Cir. 1981).
83. *Ford*, 3 Bankr. at 568.
84. 53 Bankr. 555, 559 (Bankr. M.D. Tenn. 1985).
85. *Id.* at 556.
86. *Id.*

had not occurred.[87] The court, in resolving the issue, concluded that "the debtors did indeed own the property as tenants by the entirety" at the time of the bankruptcy filing.[88] The court also concluded:

> Since Mr. Crowell's estate owned only a survivorship interest in the property, his death defeated that interest. When a party holding property in a tenancy by the entirety dies, that party's interest in the property is terminated by operation of law, and the surviving party owns the property in fee. The land passes to the surviving spouse by operation of law under the deed and not by inheritance. Accordingly, Mr. Crowell's death did not divest his estate of his survivorship interest in the tenancy by the entirety property but caused that survivorship interest to become valueless.
>
> Correlatively, upon Mr. Crowell's death, the survivorship interest held by Mrs. Crowell's estate ripened into a fee interest. Since the estate owned the survivorship interest, the fee title to each of these parcels of property became vested in Mrs. Crowell's estate, subject to Mrs. Crowell's exemptions.[89]

B. Liquidation by Bankruptcy Trustee

The bankruptcy trustee, or the debtor in possession exercising the rights of a trustee,[90] may proceed towards sale of all interests in a jointly owned asset in which one of the co-owners is the bankruptcy debtor.[91] To authorize such a sale, the trustee or debtor in possession must prove:

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87. *Id.*

88. *Id.* at 557.

89. *Id.* at 558 (citations omitted).

90. 11 U.S.C. § 1107(a) (Supp. II 1984). Subsection 1107(a) provides:

> Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, an shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

In a Chapter 13 bankruptcy proceeding, the debtor in possession may exercise certain of the trustee's powers to transfer property by virtue of 11 U.S.C. § 1303 (1982), which provides that "[s]ubject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title." *Id.*

91. *Id.* § 363(h) (1982 & Supp. II 1984). Subsection 363(h) provides:

> Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize

(1) Partition in kind of the property is impracticable;[92]
(2) Sale of the bankruptcy estate's undivided interest in the property alone would realize significantly less for the bankruptcy estate than sale of the interest of all co-owners in the property;[93]
(3) The benefit to the bankruptcy estate of a sale of all interests outweighs any detriment to the co-owners;[94]and
(4) Such property is not used in the production, transmission or distribution of electric energy or gas.[95]

A conflict may develop when the bankruptcy estate wishes to sell all interests in the jointly owned property but the personal representative of the co-owner decedent's estate does not want the decedent's interest sold. As long as the trustee can prove the existence of all the elements identified above, and as long as the trustee follows the proper procedures, the personal representative will not be able to prevent a sale of the property by the bankruptcy estate.

Procedurally, the usual way for the bankruptcy estate to sell property, other than in the ordinary course of business, is by "notice

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significantly less for the estate than sale of such property free of the interests of such co-owners;

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be cone, and the court authorizes such act . . . .

11 U.S.C. § 102(1) (1982). Rule 6004 provides:

(a) . . . Notice of a proposed use, sale, or lease of property other than in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c), and (i).

(b) . . . Except as provided in subdivision (c) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court.

. . . .

(d) . . . If a timely objection is made pursuant to subdivision (b) or (c) of the rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.

BANKR. R. § 6004, 11 U.S.C. app. (Supp. II 1984). Rule 2002 provides:

(a) . . . Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . (2) a proposed use, sale, or lease of property other than in the ordinary course of business unless the court for cause shown shortens the time or directs another method of giving notice;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, or electric energy or of natural or synthetic gas for heat, light, or power.

92. *Id.* § 363(h)(1) (1982).

93. *Id.* § 363(h)(2).

94. *Id.* § 363(h)(3).

95. *Id.* § 363(h)(4).

and a hearing."[96] As a practical matter, "notice and a hearing" amounts to reasonable notice to all interested parties, with a hearing occurring only if an objection is made to the action described in the notice.[97] However, in the context of a proposed sale of a co-owner's interest in property with the bankruptcy estate's interest, the usual notice and hearing procedure may not be adequate. The bankruptcy rules provide that authorization for sale of both the interest of the bankruptcy estate and of a nonconsenting co-owner may be obtained only through an adversary proceeding.[98]

The protection for the co-owner who cannot prevent a sale by the trustee of all interests in the jointly owned property is found in the following:

> (1) a right of first refusal at whatever price the bankruptcy estate is willing to accept for all interests in the property;[99] and
>
> (2) a right to receive a proportionate share of the net proceeds from sale by the bankruptcy estate.[100]

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96. *See id.* § 363(b)(1) (Supp. II 1984).

97. The "notice and a hearing" requirements are found in 11 U.S.C. § 102(1) (1982), BANKR. R. 6004, 11 U.S.C. app. (Supp. II 1984), and in BANKR. R. 2002, 11 U.S.C. app. (Supp. II 1984). Subsection § 102(1) provides:

> (1) "[A]fter notice and a hearing", or a similar phrase—
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
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> (B) authorizes an act without an actual hearing if such notice is given properly and if—
>
> (i) such a hearing is not requested timely by a party in interest; or
>
> (C) . . . (1) . . . Subject to Rule 6004 the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property.

BANKR. R. 2002, 11 U.S.C. app. (Supp. II 1984).

98. BANKR. R. 7001, 11 U.S.C. app. (Supp. II 1984). Rule 7001 provides that "[a]n adversary proceeding is governed by the rules of this Part VII. It is a proceeding in a bankruptcy court . . . (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property . . . ."

99. 11 U.S.C. § 363(i) (1982). Subsection 363(i) provides:

> Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's sopuse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

100. *Id.* § 363(j) (Supp. II 1984). Subsection 363(j) provides:

> After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

V. EFFECT OF BANKRUPTCY ON PROBATE ACTIVITY

A. DISTRIBUTING DECEDENT'S ASSETS WHEN BENEFICIARY IS BANKRUPTCY DEBTOR

Beneficiaries of a decedent's estate generally seek prompt distribution by the personal representative. When the beneficiary is a chapter 7 bankruptcy debtor or a Chapter 11 debtor in possession,[101] however, the personal representative may be unable to distribute the property directly to the beneficiary because the property to be distributed may also be an asset of the bankruptcy estate.[102] Consequently, the personal representative must decide whether to distribute the beneficial interest to the debtor, to the bankruptcy trustee, or to both.

In bankruptcy cases with the debtor in possession,[103] the distribution should be made directly to the debtor. In Chapter 7 bankruptcy cases and in Chapter 11 bankruptcy cases in which a trustee has been appointed, there are no definitive rules regarding the distribution. The practical realities, nevertheless, suggest that the distribution should be made to the trustee alone or jointly to the trustee and the debtor to prevent any liability for the personal representative in the event the assets are depleted after distribution. Granted, the bankruptcy rules place the burden upon the debtor to assure that the debtor's assets are brought into the bankruptcy estate.[104] How-

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101. A Chapter 11 debtor is a "debtor in possession" under 11 U.S.C. § 1101(1) (1982), unless a trustee is serving in the case.

102. The beneficial interest in a probate estate may be included by the Bankruptcy Code as property of the bankruptcy estate. Under 11 U.S.C. § 541(a) (1982 & Supp. II 1984), proceeds to be distributed to a beneficiary who is also a bankruptcy debtor are property of the bankruptcy estate, if the decedent has died prior to the bankruptcy filing, or if the decedent has died within 180 days after the filing of the beneficiary's bankruptcy petition. *Id.* § 541(a)(1) (1982); *Id.* § 541(a)(5) (Supp. II 1984).

Section 30-2401 of the Nebraska Revised Statutes provides that the beneficiary acquires or becomes entitled to acquire the beneficial interest at the time of the decedent's death. NEB. REV. STAT. § 30-2401 (Reissue 1985).

103. Chapter 11 cases without a trustee and Chapter 13 cases provide examples.

104. BANKR. R. 1007(h), 11 U.S.C. app. (Supp. II 1984) provides:

> Within ten days after the information comes to the debtor's knowledge or within such further time as the court may allow, the debtor in a chapter 7 liquidation case, chapter 11 reorganization case, or chapter 13 individual debt adjustment case shall file a supplemental schedule with respect to any property that the debtor acquires or becomes entitled to acquire within 180 days after the date of the filing of the petition (1) by bequest, devise, or inheritance . . . or (3) as a beneficiary of a life insurance policy or of a death benefit plan. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case before the duty is or can be performed, except that the schedule need not be filed in a chapter 11 or chapter 13 case with respect to property acquired after entry of the order confirming the plan.

ever, a personal representative should not rely upon this debtor's burden as a shield from liability for distribution of the property to the debtor without including the trustee in the distribution.

Distribution to the bankruptcy trustee or the bankruptcy debtor should be made by the personal representative as quickly as practicable. The trustee and the debtor in possession under the Bankruptcy Code have the authority[105] to commence an adversary proceeding[106] to compel turnover.[107] Nevertheless, the personal representative should not await the filing of an adversary proceeding by the trustee or the debtor in possession before making distribution for two reasons:

First, the Bankruptcy Code provisions requiring turnover of property of the estate are mandatory in nature;[108] and second, it is a violation of the automatic bankruptcy stay to "exercise control over property of the estate."[109] A violation of the automatic bankruptcy stay could subject the personal representative to an order of contempt and a judgment for damages, including punitive damages.[110]

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105. Regarding the question of the Chapter 11 debtor in possession exercising the trustee's powers, *see supra* note 87 and accompanying text. Regarding the exercise of such powers by the Chapter 13 debtor, case law is split. The majority view appears to be that the debtor has standing to exercise the trustee powers. *See In re* Ciavarella, 28 Bankr. 823, 828 (Bankr. S.D.N.Y. 1983); *In re* Berry, 30 Bankr. 36, 38 (Bankr. E.D. Mich. 1983); *In re* Carr, 34 Bankr. 653, 655 (Bankr. D. Conn. 1983). Other cases take a restrictive view of the debtor's standing to exercise the trustee's powers. *See In re* Walls, 17 Bankr. 701, 704 (Bankr. S.D.W. Va. 1982); *In re* Carter, 2 Bankr. 321, 322 (Bankr. D. Colo. 1980).

106. *See* BANKR. R. 7001(1), 11 U.S.C. app. (Supp. II 1984).

107. *See* 11 U.S.C. §§ 542(e), 543 (Supp. II 1984).

108. *Id.* § 542(a) (1982) (emphasis added) provides:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, *shall deliver* to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Id. § 543(b) (Supp. II 1984) (emphasis added) provides:

> A custodian *shall*—
>
> (1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, products, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and
>
> (2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

109. *Id.* § 362(a)(3).

110. *Id.* § 362(h). Subsection 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

See 2 COLLIER, *supra* note 10, at ¶ 362.11, at 362-66 to -69, ¶ 362.12, at 362-69.

B. PROTECTING PROBATE ESTATE AS CREDITOR OF BANKRUPTCY DEBTOR

No special problems arise when a probate estate is a creditor of a bankruptcy debtor, other than assuring that the proof of claim is filed in the name of the decedent's estate and that the claim is executed by or on behalf of the personal representative.[111] Once the proof of claim is filed, the decedent's estate as creditor should take action like any other creditor in the bankruptcy proceeding, including the following:

(1) Determine whether a non-dischargeability action would be appropriate or advisable;[112]
(2) Determine whether service on an official creditors' committee would be advisable;[113]
(3) In the case of a secured creditor, assure that the collateral is not dissipated, obtain adequate protection,[114] and move for relief from the automatic bankruptcy stay if appropriate to proceed with recovery and liquidation of collateral;[115]
(4) Secure a reaffirmation of debt;[116] or
(5) Examine a reorganization disclosure statement and plan and object thereto if unacceptable.

VI. CONCLUSION

Bankruptcy has become an all-too-prevalent phenomenon in recent years. This prevalence, when combined with the reality upon which mortality tables are based, leads to the conclusion that an interaction between the provisions of the Bankruptcy Code and the provisions of the Probate Code is inevitable. Unlike Rudyard Kipling's East and West,[117] the twain of bankruptcy and probate shall meet and intertwine.

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111. BANKR. R. 3001(b), 11 U.S.C. app. (Supp. II 1984).
112. *See* 11 U.S.C. §§ 523(a), 727(a) (1982 & Supp. II 1984).
113. *See id.* § 1102.
114. *See id.* § 361.
115. *See id.* § 362(d).
116. *See id.* § 524(c) (Supp. II 1984).
117. Oh, East is East, and West is West, and never the twain shall meet,
Till Earth and Sky stand presently at God's great Judgment Seat.
R. KIPLING, *The Ballad of East and West*, from RUDYARD KIPLING'S VERSE, DEFINITIVE EDITION 233 (1940).