

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Thomas B. McNamara

In re:

WALLACE CLARK SNIFF and
SHIRLEY LEE SNIFF

Debtors.

Case No. 15-18086 TBM
Chapter 7

**ORDER ON DEBTORS' MOTION TO APPOINT REPRESENTATIVE FOR
INCOMPETENT PERSON**

I. Introduction.

This matter is before the Court on the “Motion to Appoint Representative for Incompetent Person Pursuant to Federal Rule of Bankruptcy Procedure 1004.1 and Federal Rules of Civil Procedure 17(c)” (Docket No. 11, the “Motion”) filed by one of the Debtors, Shirley Lee Sniff (“Mrs. Sniff”). Mrs. Sniff seeks to be appointed as the “attorney in fact” for Wallace Clark Sniff, her husband and co-debtor (“Mr. Sniff”), “to make decisions for her husband in the administration of the Bankruptcy Proceeding, to execute appropriate documents in order to prosecute the case, and appear individually on his behalf at the 11 U.S.C. Section 341 hearing.” Motion ¶ 3. For the reasons set forth below, the Court determines that no Court appointment is required since Mrs. Sniff already has a “General Power of Attorney” to act for Mr. Sniff.

II. Jurisdiction.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and directly concerns the administration of this Chapter 7 bankruptcy case.

III. General Procedural Background.

Mr. Sniff and Mrs. Sniff, as joint debtors, filed their petition for relief under Chapter 7 of the Bankruptcy Code on July 20, 2015. (Docket No. 1.) The Debtors listed assets of \$102,722 and liabilities of \$74,619. *Id.* The Chapter 7 Trustee conducted a meeting of creditors under 11 U.S.C. § 341 on August 26, 2015. (Docket No. 12.) Immediately thereafter, the Chapter 7 Trustee submitted a “Report of No Distribution” wherein she determined that, after accounting for the Debtors’ exemptions, no property would be available for distribution in this bankruptcy case. The Chapter 7 Trustee confirmed that this case has been “fully administered.”

IV. Factual Findings.

In the Motion, Mrs. Sniff stated that Mr. Sniff suffers from Alzheimer’s disease and dementia. Motion ¶ 2. As a result, Mrs. Sniff alleged that Mr. Sniff is “unable to understand the nature of these [bankruptcy] proceedings.” *Id.* In further support of her contentions concerning

Mr. Sniff's medical condition, Mrs. Sniff attached a note from Ashakiran J. Sunku, M.D. (dated May 4, 2015). In the note, Doctor Sunku stated: "Mr. Sniff has Parkinson's disease and is not capable of processing conversations or making independent decisions." Doctor Sunku further confirmed that Mr. Sniff is approximately 77 years old. Mr. Sniff's incapacity is corroborated by the Debtors' Statement of Financial Affairs and Schedules as well as other submissions indicating that he is not working.

Mrs. Sniff holds a "General Power of Attorney" (the "POA"), a copy of which was attached to the Motion. The POA is dated November 20, 2014. It is signed by Mr. Sniff. Further, the POA bears a notarization indicating that Mr. Sniff executed the POA in the presence of a Colorado notary public.

Neither the Chapter 7 Trustee nor any other party in interest in this bankruptcy case has disputed any of the foregoing facts. Accordingly, the Court relies upon such facts and incorporates such facts as the Court's factual findings.¹

V. Legal Analysis and Conclusions of Law.

A. Legal Framework.

Mrs. Sniff relies upon Fed. R. Bankr. P. 1004.1 and Fed. R. Civ. P. 17(c) as support for the Motion and requests that the Court appoint her as "attorney in fact" for her husband "to make decisions for her husband in the administration of the Bankruptcy Proceeding, to execute appropriate documents in order to prosecute the case, and appear individually on his behalf at the 11 U.S.C. Section 341 hearing."

1. Fed. R. Bankr. P. 1004.1.

Fed. R. Bankr. P. 1004.1 is titled: "Petition for an Infant or Incompetent Person." Fed. R. Bank. P. 1004.1 provides as follows:

[1] If an infant or incompetent person has a representative, including a general guardian, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. [2] An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by a next friend or guardian ad litem. [3] The court shall appoint a guardian ad litem for an infant or incompetent person who

¹ The Court observes a slight discrepancy in the factual allegations. Mrs. Sniff claims that Mr. Sniff has *Alzheimer's disease*; but Dr. Sunku states that Mr. Sniff has *Parkinson's disease*. The Court notes that Alzheimer's disease and Parkinson's disease are both progressive neurologic system disorders typically resulting in communication difficulties and, at least in the case of Alzheimer's disease, confusion and disorientation. STEADMAN'S MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS AND NURSING 69 and 1252 (Wolters Kluwer Seventh Ed. 2012). Given these similarities, the exact disease is of little moment for purposes of the Motion. Both Mrs. Sniff and Dr. Sunku confirm, and the Court finds (for purposes of this Motion only), that Mr. Sniff is unable to make decisions and understand these proceedings.

is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent person.

Although Mrs. Sniff did not reference Fed. R. Bankr. P. 1016, that rule also potentially is implicated in circumstances of incapacity. Fed. R. Bankr. P. 1016 provides:

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.

The difference between Fed. R. Bankr. P. 1004.1 and Fed. R. Bankr. P. 1016 is that the former rule applies when the debtor is incompetent at the time of the commencement of the bankruptcy case, while the later rule governs if the debtor becomes incompetent during the pendency of the bankruptcy case. In the case, *In re Petrano*, 2013 WL 6503672, at *1 (Bankr. N.D. Fla. April 16, 2013), the court explained:

This Rule [Fed. R. Bankr. P. 1004.1] applies in bankruptcy cases involving a person who is incompetent when the petition is filed. In the event of a debtor's death or incompetency during a [bankruptcy] case..., Rule 1016 allows a court to either dismiss the case; 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*' The difference in the two rules is that Rule 1004.1 allows a bankruptcy court to appoint a guardian ad litem when an incompetent person filed a petition and is not 'otherwise represented,' whereas Rule 1016 applies to a post-petition death or incompetency....

(Emphasis in original; citations omitted.)

2. Fed. R. Civ. P. 17(c).

Mrs. Sniff also references Fed. R. Civ. P. 17(c) which states:

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person: (A) a general guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

Fed. R. Civ. P. 17(c) bears some resemblance to Fed. R. Bankr. P. 1004.1 in that both rules make a threshold distinction between whether the incompetent person is *represented* or *not represented*. The general idea is similar. If there already is a representative, that representative may act for the incompetent person. However, if there is no representative, then the Court may appoint a representative.

The Court has some concern whether Fed. R. Civ. P. 17(c) generally is applicable in this case. Fed. R. Bankr. P. 7017 incorporates Fed. R. Civ. P. 17(c), but only in *adversary proceedings*.² Since this matter arises in a main bankruptcy case, not in an adversary proceeding, Fed. R. Civ. P. 17(c) does not appear to apply directly. *See In re Murray*, 199 B.R. 165 (Bankr. M.D. Tenn. 1996)(acknowledging that Fed. R. Civ. P. 17(c) does not apply directly, but utilizing Fed. R. Bankr. P. 9029(b) as a mechanism to import Fed. R. Civ. P. 17(c) into a main Chapter 13 bankruptcy case).

B. Incompetency.

Incompetency determinations are not a common exercise of bankruptcy courts. Indeed, the Bankruptcy Code does not define “incompetency.” *See, e.g., In re Whitehead*, 2005 WL 1819399, at * 1 (Bankr. M.D.N.C. July 22, 2005) (citing *In re Moss*, 239 B.R. 537, 539 (Bankr. W.D. Mis. 1999)); *Petrano*, 2013 WL 6503672, at *2.³ In the absence of express statutory authority to determine incompetency, at least some bankruptcy courts have deferred and required such determinations to be made only in state court. *Petrano*, 2013 WL 6503672, at *4. However, most bankruptcy courts willing to delve into the issue have engaged in an assessment under state law. *In re Douglas*, 2006 WL 4449695, at *1 (Bankr. W.D. Mo. Sept. 14, 2006)(applying Missouri law); *Whitehead*, 2005 WL 1819399, at *1 (citing *Moss*, 239 B.R. at 539 (“since there is no federal law on the determination of incompetency, which has traditionally been left to state law, the incompetency laws of the state of the debtor’s domicile must be examined for guidance on the matter”)).

Colorado law provides for incompetency determinations in numerous contexts such as criminal proceedings, commitment proceedings, involuntary medical treatment, and otherwise. Although the definitions vary, the central consideration is whether the individual is incapable of participating effectively in communication and decision-making. *See, e.g., People ex Rel. Strodtman*, 293 P.3d 123, 132 (Colo. App. 2011)(explaining incompetency determination in involuntary medical treatment case); *see also* COLO. REV. STAT. 27-65-101 *et seq.* (containing various definitions pertaining to mental health). The Colorado approach comports with common understanding of the term “incompetent” and is consistent with Section 109(h)(4) of the Bankruptcy Code. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 889

² Adversary proceedings are defined in Fed. R. Bankr. P. 7001.

³ With the passage of the Bankruptcy Abuse and Consumer Protection Act of 2005 (“BAPCPA”), Congress included a definition of “incapacity” for purposes of 11 U.S.C. § 109(h)(4). Congress added a requirement that in order for an individual debtor to be eligible to be a debtor, that individual must take a course in credit counseling from an approved agency within 180 days prior to the filing of his or her case. A debtor who is unable to complete that course due to incapacity may be excused from taking such a course. Section 109(h) permits the bankruptcy court to determine “after notice and a hearing” if the debtor is unable to complete the course due to incapacity, or for other reasons. Section 109(h)(4) defines “incapacity” for purposes of that section to mean “that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable or realizing and making rational decisions with respect to his financial responsibilities.”

(Houghton Mifflin Harcourt, Fifth Ed. 2011)(“incompetent” means “lacking sufficient mental ability or awareness”).

This Court is reticent to engage in a comprehensive competency analysis with respect to Mr. Sniff. Mr. Sniff’s doctor has confirmed that Mr. Sniff is “not able capable of processing conversations or making independent decisions.” Mrs. Sniff states that Mr. Sniff “unable to understand the nature of these [bankruptcy] proceedings.” These assertions are uncontested and appear to indicate that Mr. Sniff is incompetent (and was incompetent as of the date that the bankruptcy petition was filed). Accordingly, only for purposes of deciding the Motion, the Court assumes that Mr. Sniff is incompetent. (Such assumption shall not have any effect with respect to other matters or proceedings.)

C. Mr. Sniff Already Has a Representative: Mrs. Sniff Under the POA.

Having assumed for purposes of the Motion that Mr. Sniff is incompetent, the next step is to determine whether or not he already has *a representative*.

The first sentence of Fed. R. Bankr. P. 1004.1 provides that “[i]f an... incompetent person *has a representative*, including a general guardian, conservator, or *similar fiduciary*,” then “the representative may file a voluntary petition...” (emphasis added). On the other hand, the second sentence of Fed. R. Bankr. P. 1004.1 addresses the situation in which the incompetent person “*does not have a duly appointed representative*.” In such circumstances, the Court may “appoint a guardian ad litem” but only if the incompetent person “is not *otherwise represented*.” *Id.* (emphasis added). The Court acknowledges that Fed. R. Bankr. P. 1004.1 appears addressed primarily toward the filing of the petition. But even if the debtor becomes incompetent after the filing of the petition, Fed. R. Bankr. P. 1016 directs that Chapter 7 liquidation proceedings should proceed and the case be administered as if the event of incompetency had not occurred.

Although its application to a main bankruptcy case is unclear, Fed. R. Civ. P. 17(c) also makes the representative / no-representative distinction. A representative, including a guardian, conservator, or *a like fiduciary* may sue or defend a lawsuit on behalf of an incompetent person. *Id.* Only if there is no representative, may the court appoint a guardian ad litem. *Id.*

The holder of a durable power of attorney, like Mrs. Sniff, may qualify as *a representative* for an incompetent bankruptcy debtor — without a separate appointment by the bankruptcy court. *See In re Drenth*, 2015 WL 5331797 (Bankr. W.D. Mich. Sept. 10, 2015); *In re James*, 2005 WL 6443631 (Bankr. N.D. Tex. Oct. 18, 2005)(confirming that debtor’s daughter may act for incapacitated debtor in bankruptcy case under power of attorney granting authority regarding claims and litigation); *In re Matthews*, 516 B.R. 99, 102 (Bankr. N.D. Tex. 2014) (citing *United States v. Spurlin*, 664 F.3d 954, 959 (5th Cir. 2011)(“a general power of attorney may be used to file a bankruptcy on another’s behalf”)).

The Colorado Uniform Power of Attorney Act, COLO. REV. STAT. § 15-14-701 *et seq.* (the “CUPOA”), generally governs the meaning and effect of the POA.⁴ The POA facially complies

⁴ The CUPOA generally governs the POA since the POA was executed by Colorado residents in Colorado after January 1, 2010. COLO. REV. STAT. §§ 15-14-703, 707 and 745. Notwithstanding, the portions of the POA related to

with the basic requirements of the CUPOA in that it was signed by Mr. Sniff (as the principal) before a notary public who also acknowledged Mr. Sniff's signature. COLO. REV. STAT. § 15-14-705. Accordingly, the POA is valid under Colorado law. COLO. REV. STAT. § 15-14-706(1).⁵ Under the CUPOA, the POA is durable — it is effective as of the date of execution and does not terminate by Mr. Sniff's incapacity. COLO. REV. STAT. §§ 15-14-702(2), 704(1) and 709(1). The presumptive durability of the POA under the CUPOA is further bolstered by the express terms of the POA which confirm that the POA "shall continue even in the event of my insanity or other disability."

Importantly, the CUPOA mandates the imposition of a series of fiduciary duties on the designated attorney-in-fact (such as Mrs. Sniff) under a power of attorney. COLO. REV. STAT. § 15-14-714. Among other things, Mrs. Sniff is required to: act in accordance with Mr. Sniff's reasonable expectations (to the extent actually known); act in Mr. Sniff's best interests; act in good faith; act within the scope of the POA; act loyally for Mr. Sniff's benefit; and act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances. *Id.*; *see also* D. Whitmer, *The Durable Power of Attorney: Defining the Agent's Duties*, 41 COLO. LAW. 49, 53 (May 2012)(describing fiduciary duties under CUPOA); K. Box, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1 (Fall 2001)(describing fiduciary duties under durable power of attorney laws). Under the CUPOA, "with the incapacity of the principal, the relationship between the agent and principal resembles a trustee or conservator relationship." Whitmer, *supra*, 41 COLO. LAW. at 51.

The POA is titled "General Power of Attorney" and clearly contemplates the broadest scope of authority permissible. Although the POA does not expressly refer to bankruptcy issues, it does expressly encompass *claims and litigation*. Through the POA, Mr. Sniff appointed Mrs. Sniff as his "true and lawful Attorney" to act for him, "and in his name, place and stead":

To ask, demand, sue for, collect, recover and receive all sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise, for the recovery thereof, by attachments, arrests, distress or otherwise, and to compromise, and agree for the same, and acquittances or other sufficient discharges for the same, for me, and in my name to make, seal and deliver, to bargain, contract, agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in real estate, and with goods and merchandise, choses in action and other property, in possession or in action, and to release mortgages on lands and chattels, and to make, do and transact all and every kind of business of whatsoever nature, including the ability of Attorney to make gifts or other voluntary conveyances without consideration to

health care decisions are governed by the separate Colorado Patient Autonomy Act, COLO. REV. STAT. §§ 15-14-500.3 *et seq.* Since this matter does not involve health care issues, the Court addresses only the CUPOA.

⁵ This Court has not been presented with an original of the POA. However, under COLO. REV. STAT. § 15-14-706(4), a photocopy of the POA (which was attached to the Motion) has "the same effect as the original" POA.

third parties in the State of Colorado and in other states, commonwealths or other jurisdictions.

By covering the topic of claims and litigation, the POA implicates bankruptcy issues. COLO. REV. STAT. §§ 15-14-725, 726 and 735. More specifically, the CUPOA states:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to... [a]ct for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person....

COLO. REV. STAT. § 15-14-735(1)(g).

Thus, as a matter of Colorado state law, an attorney-in-fact under a valid power of attorney (such as Mrs. Sniff) has the right to file a petition for bankruptcy relief and otherwise participate in a bankruptcy proceeding for the principal (such as Mr. Sniff) unless the power of attorney provides otherwise. In this case, the POA does not negate Mrs. Sniff's authorization to act for Mr. Sniff in bankruptcy matters. Therefore, under the POA and CUPOA, Mrs. Sniff already is Mr. Sniff's representative and already has duties and responsibilities which resemble a trustee, guardian, or conservator.

The Court's conclusion is bolstered by Fed. R. Bankr. P. 9010(a) which confirms that the debtor may "perform any act [in a case under the Bankruptcy Code] not constituting the practice of law, *by an authorized agent, attorney in fact, or proxy.*" (Emphasis added.) In this case, Mr. and Mrs. Sniff both have a common attorney assisting them jointly in this bankruptcy case. Mrs. Sniff is not attempting to provide legal services. Instead, she intends only to exercise her powers under the POA for the benefit of Mr. Sniff (utilizing counsel as appropriate). Thus, Fed. R. Bankr. P. 9010(a) also authorizes Mrs. Sniff's participation in this case on behalf of Mr. Sniff.

Although this appears to be a novel issue in Colorado (perhaps since the CUPOA was only recently enacted), bankruptcy courts from other jurisdictions construing their own respective state laws also have reached the conclusion that a valid power of attorney may suffice for purposes of representation of an incompetent person in a bankruptcy proceeding. *See Drenth*, 2015 WL 5331797; *James*, 2005 WL 6443631; *Matthews*, 516 B.R. 99. For example, in *Drenth*, the Court stated: "The fact that the attorneys-in-fact were not formally appointed by a court does not mean that the Debtor lacks a representative or 'similar fiduciary' within the meaning of Rule 1004.1; judicial appointment of the representative would be helpful but is not crucial." *Drenth*, 2015 WL 5331797, at *2.

VI. Conclusion.

At this stage, there is no need for the Court to appoint Mrs. Sniff as attorney-in-fact to act for Mr. Sniff in this bankruptcy case. Instead, Mr. Sniff himself, through the vehicle of the POA, already appointed his wife as his attorney-in-fact. The POA is valid under Colorado law and encompasses bankruptcy issues. Mrs. Sniff already is Mr. Sniff's representative under the POA and Colorado law. She has fiduciary duties and her role is similar to a trustee, guardian, or

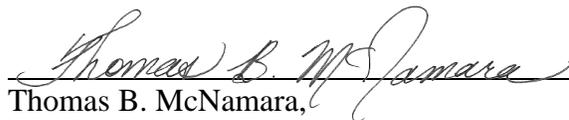
conservator. Since Mr. Sniff already has a representative in this bankruptcy case, neither Fed. R. Bankr. P. 1004.1 nor Fed. R. Civ. P. 17(c) require the Court to appoint a representative for Mr. Sniff.

The Court observes that neither the Chapter 7 Trustee nor any other party in interest contests Mrs. Sniff's capacity to act for Mr. Sniff as his representative. Further, this Chapter 7 bankruptcy proceeding already is fully administered. So, given the current status of the bankruptcy case, little purpose would be served by appointing a representative at this stage.

The Court need not appoint Mrs. Sniff as a representative of Mr. Sniff. The die already has been cast. Accordingly, following principles of judicial restraint, the Court denies the Motion as unnecessary.

DATED this 6th day of October 2015.

BY THE COURT:


Thomas B. McNamara,
United States Bankruptcy Judge