REPRESENTING ELDERLY CLIENTS IN BANKRUPTCY

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I. Characteristics Particular to the Elderly

A. Embarrassment

1. Many of the elderly are from a generation which regards bankruptcy as an indication of moral failure and shame.

2. May not want family members, including a spouse, to know about debts.

B. Types of debts

1. Credit cards. Continue spending after retirement as if income were the same.

2. Co-signed debt. Automobile loans for grandchildren. Determine whether debtor is on title to car, as well as liable on the loan.

3. Medical bills. Medicare and supplemental insurance will not cover everything. Also, potential liability for spouse's medical debts.

C. Budget issues

1. Household size. Determine if others are living in the household and whether they are contributing to household expenses.

2. Utility expenses. Elderly living by themselves are not as likely to have large telephone and internet expenses, but if there are younger family members in the house, ask if others are helping to pay for these expenses.

3. Medical expenses. Make sure all are covered. Elderly often consider medical expenses to include only their prescription drugs, and don't take into account dental care, eyecare, and physical therapy.

4. Support of relatives. Determine if debtor is providing regular support of children or grandchildren (such as helping with rent) or making large gifts to them.

5. Support from relatives. If budget looks hopeless, ask if there are family members who could help out. See IA, above.

D. Determining whether to file.

1. Is the debtor judgment-proof? Are assets and income exempt?

2. How active are creditors?

3. Is the current situation likely to change?

4. Has there been a previous filing, and if so, was a homestead deed filed?

5. Potential for inheritance or life-insurance proceeds from a spouse. - Importance of advising of provisions of Code §541(a)(5).

6. Status of tenancy by entireties property. Does the debtor have an interest in property with a spouse which would become the debtor's sole property upon the death of that spouse?

II. Status Issues

A. Competence

1. Warning signs of failing capacity and medical evaluation for determining incapacity.

2. Examples of financial exploitation of elderly.

3. Virginia Department for Aging and Rehabilitative Services – Adult Protective Services Unit – Virginia Code §51.5-148 et seq.

B. Filing by representative

1. Bankruptcy Rule 1004.1 – "If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor."

a. Conservatorship. Procedure in state court. Virginia Code §64.2-2000 et seq.

b. Distinction between conservator and guardian

c. Filing by "next friend"

2. Power of attorney

a. Specificity of authority granted

b. Potential conflict of interest of attorney-in-fact

3. Attendance at 341 hearing

III. Legal Issues

A. Voluntary conveyances

1. Bankruptcy Code section 544(b) authorizes the trustee to avoid "any transfer of an interest of the debtor in property . . .that is voidable by a creditor holding an unsecured claim."

2. Virginia Code section 55-81 states "Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made . . ."

3. Trustee stands in shoes of a creditor in existence at the time of a transfer and can therefore bring an action to set aside the transfer, if the trustee can show that the debtor was insolvent at the time of the transfer, or became insolvent because of the transfer.

4. Trustee has burden of showing existence of creditor at time of transfer, and of showing that debtor was insolvent at that time, or became insolvent as a result.

5. A discussion of these issues can be found in In Re Fraley, Farthing v. Fraley, Case No. 17-70067, AP No. 17-07027.

6. Practice Point: Question potential debtors about any transfers of property made within the past five years. Older clients sometimes want to give their children or grandchildren a head start by transferring assets to them.

B. Pre-petition transfers

1. Older clients with excess assets which can't be protected often ask if they can just give the property to their children.

2. In addition to the above, such clients need to be advised of Bankruptcy Code section 727(a)(2) which states that "The Court shall grant the debtor a discharge unless . . . the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed . . . (A) property of the debtor, within one year before the date of the filing of the petition."

B. Lifetime rights in real estate.

1. If a potential debtor claims that he or she has "lifetime rights" in property owned by a child, be sure to get a copy of the deed and a valuation of the equity in the property.

2. Determine first if the reservation of rights is binding and documented, and then determine the value of the lifetime interest. Use the annuity table in Virginia Code section 55-269.1 and the rule of calculation in 55-270.

3. Practice point – do the calculation, see if it can be exempted (remembering the enhanced homestead exemption amount for debtors 65 and older of $10,000.00), and if it can't be exempted, advise the client of the risks.

IV. Tenants by the Entirety Considerations and Lien Avoidances

A. Pre-2010 Lien Avoidance Practice

It had always been an open question as to how to treat individual judgment lien creditors when husband and wife debtors held property as tenants by the entirety. As a matter of practice, the question was whether to do nothing in the bankruptcy and treat the lien as a void lien or to file a motion pursuant to Code sec. 522(f) to have the lien formally avoided. Most bankruptcy practitioners would file a motion to have the lien avoided so that the debtor could record the order avoiding the lien with the discharge in the land records of the Circuit Court in the jurisdiction where the debtor resided. The reason behind this practice was to ensure that a title company would not later hold up a refinancing or sale of the property in the event of a later divorce or death of one of the debtors so that it would be clear that the lien had been avoided.

That practice ceased, however, after 2010 due to the holding in the case of In re James and Virginia Smith, Bankr. W.D. Va., case #10-50687, 12/22/10. In that decision, Judge Krumm held that a judgment lien against only one spouse of marital property held as tenants by the entirety is void and does not attach to that property when both of the debtors are still alive and married. Because the lien is void and does not attach to the property, the debtors could not use sec. 522(f) to avoid the lien.

B. Medical Debt Issues with Tenants by the Entirety Property

Another potentially thorny issue over the years has been how to deal with judgment liens by hospital creditors against property held as tenants by the entirety. Virginia Code sec. 55-37 had long ago codified the necessaries doctrine where spouses are liable for each other's necessary medical bills. However, that section also specifically provided that no joint judgment lien held by a medical provider could attach to the debtors' principal residence held as tenants by the entirety.

The Virginia General Assembly, however, had also long ago muddied the fairly clear waters set forth above by enacting the emergency medical treatment statute in Virginia Code sec. 8.01-220.2. That section again provided that spouses were jointly and severally liable for each other's emergency medical care, which it defined as "any care the physician or other health care professional deems necessary to preserve the patient's life or health." That section, however, was silent as to the question of whether a

judgment lien under this section could attach to a principal residence held as tenants by the entirety.

The absence of such clarifying language in sec. 8.01-220.2 led to an ambiguity for years for both bankruptcy practitioners and trustees. Could a Chapter 7 trustee sell tenants by the entirety property where there was equity in the real estate and where the only joint creditor was a medical provider, and at least part of the underlying debt was emergency in nature? Or in the context of a Chapter 13, how would you calculate the Chapter 7 test to determine the amount that must be paid to that one medical provider, especially when some of the bills from that provider were for emergency services, and some of the bills were for scheduled services? On top of those questions is the question as to whether all necessary medical services could be construed as emergency services. To make matters worse, most hospitals do not separately code for emergency medical care, so that if you call their billing departments and ask how much of the total bill is for emergency care and follow-up to that versus other necessary or scheduled medical care, they usually cannot give you a clear answer.

The General Assembly has recently amended both secs. 55-37 and 8.01-220.2 to address these questions. In 2012, the last sentence of sec. 55-37 was amended to say that "no lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entireties *or that was held by them as tenants by the entireties prior to the death of either spouse where the tenancy terminated as a result of the death of either spouse*. [italics indicating the added text] In 2016, the following sentence was added to sec. 8.01-220.2 as a separate paragraph. *Any lien arising out of a judgment under this section against the judgment debtor's principal residence held as tenants by the entireties shall not be enforced unless the residence is refinanced or is transferred to a new owner.*

The language of the amendments do not exactly mirror each other, which would lead one to infer that the General Assembly intends to maintain a distinction between emergency medical care and necessary medical care. Clearly, a hospital cannot enforce a judgment lien for necessary or scheduled medical services even after the death of either spouse. However, for emergency medical services, the General Assembly created two limited instances where such a lien can still be enforced – when the residence is either refinanced or sold. For bankruptcy purposes, though, the amendment to sec. 8.01-220.2 appears to prevent a Chapter 7 trustee from selling the debtors' principal residence solely to pay joint emergency medical debt or a Chapter 13 trustee including joint emergency medical debt in a Chapter 7 test. Neither a Chapter 7 nor a Chapter 13 debtor may modify the claim of a mortgage creditor holding a deed of trust on the debtors' residence, so a bankruptcy filing cannot be construed as a refinancing event. (In theory, in Chapter 12, a debtor may modify the claim of a mortgage holder on the debtor's principal residence, however as a practical matter, a debtor would only modify a mortgage to the extent there is negative equity in the property.) Nor can the filing of a bankruptcy petition be construed as a conveyance of title to property. See In re Janice Benner, 253 B.R. 719 (W.D. Va. 2000).