

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 00-30531

DONALD A. TANGWALL

Debtor

DEAN B. FARMER, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3083

BUTCH FAMILY PRESERVATION TRUST;
MARK PLOE, individually and in his capacity as
trustee and beneficiary of the Butch Family
Preservation Trust; DONALD A. TANGWALL,
individually and in his capacity as a beneficiary of
the Butch Family Preservation Trust; and
GOODRICH MANUFACTURING COMPANY

Defendants

**MEMORANDUM ON TRUSTEE'S
MOTION TO COMPROMISE AND ON PRETRIAL MOTIONS**

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The court has before it the following motions, the first of which was filed in the Debtor's Chapter 7 case and the remainder of which were filed in this adversary proceeding, No. 01-3083 (Adv. No. 01-3083):

1. The Motion to Authorize Compromise and Approve Settlement of Various Litigation to Which Debtor is a Party (Motion to Compromise), filed by Chapter 7 Trustee Dean B. Farmer (Chapter 7 Trustee) on March 27, 2002;
2. The Motion for Intervention, filed by the Defendant/Debtor on February 28, 2002;¹
3. The Motion to Stay Proceedings and Request for Declaratory Relief, filed by the Defendant Mark Ploe (Ploe) in his capacity as trustee of the Butch Family Preservation Trust (BFPT) on March 6, 2002;
4. The Motion to Amend Complaint, filed by the Plaintiff Chapter 7 Trustee on March 26, 2002;
5. The "Motion to Set Aside Entry of Default Against Def. Tangwall with Attached Affidavit, and Ex A & B," filed by the Defendant/Debtor on May 15, 2002; and
6. The "Motion to Remove Mark Jendrek from Representing the Butch Family Preservation Trust, or Any of Its Trustees" (Motion to Remove), filed by the Defendant/Debtor on May 20, 2002.

In addition, the court has before it a multitude of objections, replies, responses, briefs, transcripts, exhibits, and affidavits filed by the parties. Due to a commonality of issues, and in the interests of brevity and clarity, the six pending motions are consolidated for discussion within this single Memorandum.

¹ This motion was filed by the Debtor as "trustee of the Butch Family Preservation Trust." On March 12, 2002, the court entered an Order directing the Debtor to appear on March 28, 2002, to show cause why his Motion for Intervention should not be denied for failure to appear before the court in his fiduciary capacity properly represented by counsel. The show cause hearing has been continued from time to time. For reasons set forth in this Memorandum, the attorney-representation issue is rendered moot and the show cause hearing will be removed from the docket. See *infra* n.8.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I. Factual Background

The Debtor filed his Chapter 7 Petition, *pro se*, on February 11, 2000. His bankruptcy case has since engendered an abundance of litigation generally involving either: (1) the Debtor's purported beneficial and/or fiduciary relationships with various trusts, corporations, and partnerships; or (2) the enduring disharmony between the Debtor and Ploe. These two themes converge in the motions presently before the court, as each motion hinges on one or more issues involving BFPT, a Michigan trust in which Ploe and the Debtor are each purportedly a beneficiary and a trustee.

As noted, five of the six pending motions are filed in Adv. No. 01-3083, which was commenced by the June 26, 2001 filing of the Chapter 7 Trustee's Complaint. Alleging that BFPT is not a spendthrift trust, the Complaint seeks to liquidate and recover the Debtor's alleged 50% beneficial interest for the benefit of the estate.

II. BFPT's Trustees

As an initial matter, the court must determine who is, and who is not, presently a trustee of BFPT. The current Defendants in Adv. No. 01-3083 are BFPT, Ploe (individually and in his capacities as trustee and beneficiary), the Debtor (individually and in his capacity as beneficiary), and Goodrich Manufacturing Company (Goodrich).² The Debtor alleges that the court does not

² BFPT is a major stockholder of Goodrich.

have jurisdiction over BFPT due to the Chapter 7 Trustee's purported failure to sue all of BFPT's trustees. See *Hanson v. Denckla*, 78 S. Ct. 1228, 1235 (1958) (citing "the general rule that a trustee is an indispensable party to litigation involving the validity of a trust").³ Namely, the Debtor contends that he and Robert Looby (Looby) are BFPT trustees and therefore indispensable parties to Adv. No. 01-3083.

The Debtor, in his purported capacity as trustee, filed his February 28, 2002 Motion for Intervention. In response, the Chapter 7 Trustee, by his March 26, 2002 Motion to Amend Complaint, seeks to add the Debtor as a defendant in his capacity as a trustee of BFPT "because the proof may show that the debtor is in fact a trustee" Ploe's Motion to Stay Proceedings and Request for Declaratory Relief asks for a declaratory ruling that the Debtor is not a BFPT trustee.⁴

(a) The Debtor

The parties agree that, as of February 1, 2000, BFPT's trustees were Ploe, Looby, and the Debtor. The "Minutes of [the February 2, 2000] Meeting of the Trustees of Butch Family Preservation Trust" show that Ploe and Looby removed the Debtor as trustee on that date. Their authority for removal is derived from Paragraph 20 of BFPT's Declaration of Trust which provides in material part:

³ Here, the Trustee sued BFPT in its own name. In the court's mind, the trustees of BFPT are the necessary defendants. See *Coverdell v. Mid-South Farm Equip. Ass'n, Inc.*, 335 F.2d 9, 13-14 (6th Cir. 1964) (Trustees are proper defendants rather than trust. Trust can only be sued through its trustees.).

⁴ Ploe's Motion for Declaratory Relief is rendered moot by the Debtor's Motion to Intervene. Because of the Debtor's motion, the issue of his trustee status is squarely before the court. Ploe's sought-after declaratory ruling on the same issue is not necessary.

That, should it become obvious at any time to the majority of the Board of TRUSTEES that the continuance in such capacity of one of their number would be inimical to this TRUST and its Beneficiaries, such Trustee may be removed by the unanimous decision of the other TRUSTEES, duly entered into the Minutes of the TRUST.

Pursuant to the authority granted by the Declaration of Trust, Ploe and Looby validly removed the Debtor from BFPT's board of trustees on February 2, 2000.⁵ The Debtor has offered no evidence that he was subsequently reappointed to the board. The court accordingly finds that the Debtor is not currently a trustee of BFPT.

(b) Robert Looby

The "Minutes of [the March 28, 2000] Meeting of the Trustees of Butch Family Preservation Trust" evidence in material part:

⁵ The Debtor is incorrect in his assertion that a BFPT trustee can only be removed by a court of equity. See MICH. COMP. LAWS § 555.26 (providing that a trustee "may" be removed by the chancery court). The Debtor has not cited, and the court's research has not uncovered, any Michigan caselaw holding that § 555.26 is the exclusive means of removing a trustee under Michigan law. Paragraph 20 of the Declaration of Trust clearly provides three independent and distinct avenues for removal or resignation, including the unanimous vote of the remaining trustees. "A trustee can be removed . . . by the person . . . who by the terms of the trust is authorized to remove the trustee." RESTATEMENT (SECOND) OF TRUSTS § 107(b) (1957); see also *Strong v. Page (In re Page)*, 239 B.R. 755, 764 (Bankr. W.D. Mich. 1999) ("In prior opinions, the Michigan Supreme Court has cited approvingly the authority of the RESTATEMENT (SECOND) TRUSTS."). Further, under the Debtor's proposed strict construction of Michigan trust law, the court would be forced to conclude that the Debtor himself was never a BFPT trustee, as there is no indication that he was formally appointed to that position by the chancery court. See MICH. COMP. LAWS § 555.27 ("The chancellor shall have full power to appoint a new trustee . . .").

The Debtor's other arguments are equally without merit. Paragraph 20 governs removal from the board of trustees and is not limited only to removal from specific offices (such as secretary-trustee) as the Debtor suggests. Paragraph 20 empowers the board of trustees to remove "in such capacity . . . one of their number," which phrasing can only refer to other board members. Officers are addressed within a separate paragraph (19) and are nowhere mentioned within Paragraph 20. A provision relating solely to the removal of officers would logically be found in Paragraph 19, not Paragraph 20. Further, the court rejects the Debtor's suggestion that his removal violated the automatic stay. See 11 U.S.C.A. § 362(a) (West 1993 & Supp. 2001). The Debtor grounds this argument on the fact that the minutes memorializing the trustees' action on February 2, 2000, were not signed until March 15, 2000, after he commenced his bankruptcy case. The court does not agree that such a ministerial act is violative of the automatic stay. Additionally, even if the Debtor is correct that the removal in fact took place after his February 11, 2000 Chapter 7 filing, the termination of his fiduciary relationship with a trust in which he may or may not have a beneficial interest is simply too tenuous and remote of a connection to constitute a violation of the automatic stay. See *id.* (focusing on actions against the property rights of debtors and their estates).

2. Robert J. Looby verbally tendered his resignation as Trustee. The resignation was accepted by unanimous vote of Mark Ploe and Linda Ploe. The Trust wishes to thank Mr. Looby for his outstanding services.

The Debtor argues that Looby's resignation was ineffective because it was not authorized by the chancery court. See MICH. COMP. LAWS § 555.25 (providing that the chancellor may accept a trustee's resignation). As with his argument under MICH. COMP. LAWS § 555.26, the Debtor has not cited, and the court's research has not discovered, any Michigan caselaw holding that § 555.25 is the only way a trustee may resign pursuant to Michigan law.⁶

Paragraph 20 of the Declaration of Trust plainly provides that a trustee "may resign at his or her discretion[.]" A trustee may generally resign "in accordance with the terms of the trust[.]" RESTATEMENT (SECOND) OF TRUSTS § 106(b) (1957); see also *Page*, 239 B.R. at 764 ("In prior opinions, the Michigan Supreme Court has cited approvingly the authority of the RESTATEMENT (SECOND) TRUSTS.").⁷

In sum, Looby validly resigned as trustee on March 28, 2000. The Debtor has presented no evidence of a subsequent reappointment. Looby is not currently a BFPT trustee, and he need not be named as a defendant in Adv. No. 01-3083.

⁶ See *supra* n.5.

⁷ The Debtor's position (demanding formal court approval of all BFPT board modifications) is even further weakened when juxtaposed against his claim to be a BFPT beneficiary, which claim is apparently based entirely on a highly-informal notation scrawled on a copy of BFPT's Declaration of Trust. The Debtor's other arguments relating to Looby, particularly the assertion that acceptance of a position on BFPT's board manacles the acceptor to a lifetime of service, are utterly without merit and will not be addressed by the court. See, e.g., "Record of Action of the Board of Trustees of the Butch Family Preservation Trust of Action Taken by Consent Without Formal Meeting," May 24, 1999 (in which the Debtor accepted "the resignation of Daniel Hempton as a [BFPT] trustee" without court approval).

(c) Linda Ploe

Although the court disagrees with the Debtor's theories relating to his and Looby's board positions, it appears nonetheless that the Chapter 7 Trustee has not sued all of BFPT's trustees. The February 2, 2000 Minutes announce the appointment of Linda Ploe as a trustee of BFPT. The court sees no indication from the record before it that Linda Ploe is not still serving in that capacity. It therefore appears that the Chapter 7 Trustee has failed to name an indispensable party in Adv. No. 01-3083. See *Hanson v. Denckla*, 78 S. Ct. at 1235.

III. The Settlement

The Chapter 7 Trustee's March 27, 2002 Motion to Compromise asserts the following purpose:

Dean B. Farmer, Trustee, by and through counsel, pursuant to Federal Rule of Bankruptcy Procedure 9019, moves the Court to enter an Order authorizing the Trustee to compromise, settle, sell, assign, transfer, convey, and/or release the interest of the estate in various litigation in which the Debtor is a party or otherwise directly involved, and to execute such documents in order to effectuate the compromise as provided[.]

Under the terms of the compromise, the Chapter 7 Trustee is to receive \$152,500.00 from Ploe and his wife, Linda Ploe, BFPT, Goodrich, "and others." The Motion to Compromise is accompanied by a 15-page proposed Order Approving Settlement Agreement (Settlement). The Motion to Compromise and Settlement are opposed only by the Debtor.⁸ See generally *Bauer v.*

⁸ Throughout his May 10, 2002 "Brief in Support of Objection to Trustee Farmer's Proposed Compromise and Settlement Agreement with Affidavit," the Debtor purports to represent "the Objectors," but does not reveal "the Objectors'" identities. The court will remind the Debtor that he is not a licensed attorney. He therefore may not
(continued...)

Commerce Union Bank, 859 F.2d 438, 441 (6th Cir. 1988) (“Fully litigating a . . . claim could easily exhaust assets that would otherwise go to creditors, and in the first instance the person vested with responsibility for deciding whether to settle or fight is the trustee, not the debtor.”).

The court need not yet reach the ultimate question of whether the Settlement is “fair and equitable.” *See id.* Instead, in addition to the BFPT/Linda Ploe jurisdictional concern discussed above, the Motion to Compromise will be denied without prejudice on the following grounds:

(a) Jurisdiction over Butch II Trust

The Butch II Trust (Butch II) is a trust in which the Debtor is alleged to be the sole trustee and sole beneficiary. At § VIII, the Settlement requires the Chapter 7 Trustee to transfer the sole asset of Butch II, 2000 shares of Goodrich, to Ploe as partial consideration for the \$152,500.00 settlement amount. Butch II is the subject of Adversary Proceeding 02-3032 (Adv. No. 02-3032), through which the Chapter 7 Trustee seeks to liquidate and recover the Debtor’s beneficial interest.

The named defendants in Adv. No. 02-3032 are Butch II and the Debtor. The Chapter 7 Trustee contends that he has sued the proper parties because the Debtor is the sole remaining trustee of Butch II. The Debtor, however, alleges that Butch II’s actual trustees were not named in the suit. He has submitted a piece of paper purporting to be the April 1, 1998 Butch II Minutes.

⁸(...continued)
represent any partnership, person (other than himself), corporation, trust, or any other conceivable entity before this court. *See* 28 U.S.C.A. § 1654 (West 1994); *Parris v. Herman*, No. 99-5338, 2000 WL 571932, at *2 (6th Cir. May 3, 2000) (corporations and partnerships); *Knoefler v. United Bank of Bismark*, 20 F.3d 347, 347-48 (8th Cir. 1994) (trusts).

Those minutes evidence that Bradford Huebner and the Pacific Rim Trust were named Butch II trustees prior to the Debtor's bankruptcy filing.

Trustees are indispensable parties to litigation involving the validity of a trust.⁹ See *Hanson v. Denckla*, 78 S. Ct. at 1235. There exists an issue of whether the actual trustees of Butch II have been sued. Accordingly, the court's jurisdiction over Butch II is in doubt as is the Chapter 7 Trustee's ability to compromise a claim against that entity in the absence of the approval and participation of its trustees.

(b) The Debtor's Lake County, Illinois Litigation

At § VII, the Settlement proposes to dismiss with prejudice the June 15, 2000 "Complaint for Breach of Contract and Trover and Conversion" filed in the Circuit Court of the 19th Judicial Circuit in Lake County, Illinois. The Illinois Plaintiff is Donald Tangwall "individually and as General Partner of Frog Partners Limited Partnership."¹⁰

The Illinois complaint alleges both prepetition and postpetition damages. To the extent that the litigation involves prepetition claims of the Debtor, such claims are property of the estate and may be disposed of by the Settlement. See 11 U.S.C.A. § 541(a)(1); *Bauer*, 859 F.2d at 441. To the extent, however, that the Settlement seeks to compromise postpetition claims of the Debtor

⁹ See *supra* n.3.

¹⁰ Despite this caption, the Debtor is evidently acting as the attorney for Frog Partners Limited Partnership in the Illinois litigation. See, e.g., "Complaint For Breach of Contract and Trover and Conversion," at ¶ 12 ("Frog request [sic] a money judgment in the amount of \$4,000.00 . . .") (signed by the Debtor); cf. *National Bank of Austin v. First Wis. Nat'l Bank of Milwaukee*, 368 N.E.2d 119, 125 (Ill. App. Ct. 1977) ("[A] partner who is a layman should not be permitted to . . . represent the partnership in legal proceedings."). The handling of that unauthorized practice of law by the Debtor, however, is a matter for the Circuit Court of Lake County, Illinois.

and/or any claims of Frog Partners Limited Partnership, the Chapter 7 Trustee is acting beyond the scope of his authority. Those claims have not been shown to be property of the estate.

(c) The Settlement is Overbroad

Lastly, the court finds the proposed Settlement overbroad. At § XIX, the Chapter 7 Trustee proposes to compromise, settle, and dismiss all possible claims of the Debtor “acting through any of his various alter ego entities or trusts[.]” The Settlement does not indicate to which entities and trusts it refers, nor has the Chapter 7 Trustee made a showing that any particular entity or trust is in fact an alter ego of the Debtor.

Further, at §§ IX through XVII, the Chapter 7 Trustee attempts to release various known and unknown claims “for himself and on behalf of the Debtor[.]” This language is ambiguous and could be construed as including claims that are not property of the estate.¹¹

IV. The Debtor’s Prior Default

The court next turns to the Debtor’s May 15, 2002 “Motion To Set Aside Entry of Default Against Def. Tangwall with Attached Affidavit, and Ex A & B.” On November 14, 2001, the court recorded an Entry of Default, pursuant to FED. R. BANKR. P. 7055 and FED. R. CIV. P. 55(a), against the Debtor in Adv. No. 01-3083. The default was entered with the Debtor’s

¹¹ For example, at § XVI the Chapter 7 Trustee releases “for himself and on behalf of the Debtor” all conceivable claims against the law firm of Norton & Luhn, P.C. (Norton). The court is unaware of any prepetition contact between Norton and the Debtor. Any postpetition claim that the Debtor may assert against Norton is not property of the estate and therefore cannot be released by the Chapter 7 Trustee.

approval and was a direct result of the following conversation, which occurred in open court at the October 25, 2001 scheduling conference:

THE COURT: Dean B. Farmer, Trustee v. Butch Family Preservation Trust; Adversary 01-3083. Mr. Edmiston, you're representing the [Chapter 7] Trustee in this adversary.

MR. EDMISTON: Yes, Your Honor.

. . . .

THE COURT: Mr. Tangwall is here *pro se*. Mr. Edmiston, tell me a little bit about this litigation.

MR. EDMISTON: Okay. There's a trust, which the trust corpus includes several parcels of real property, some personal property, most of the stock of Goodrich Manufacturing Company, and so forth.

We contend that Mr. Tangwall is a fifty percent beneficiary of that trust. And although there's some spendthrift language in the trust, we contend that it's either not a spendthrift trust or it lost its spendthrift character due to the mismanagement and so forth of the trust; and the fact that the beneficiaries were the trustees at the same time they were the beneficiaries and whatnot.

So under [11 U.S.C.A. §§] 542 and 543 we're attempting to liquidate the trust and take Mr. Tangwall's fifty percent beneficial interest.

THE COURT: All right. Mr. Tangwall hasn't answered. I noticed he signed the discovery plan.

MR. EDMISTON: As far as I know, he doesn't -- I don't think he objects to our arguments.

THE COURT: Well, let me hear from --

MR. TANGWALL: No, Your Honor, I'll [sic] can go on record and say I don't object to the argument of the Trustee.

THE COURT: All right. So as far as you're concerned, the Trustee can set aside the trust?

MR. TANGWALL: That's correct.

. . . .

THE COURT: . . . Mr. Tangwall has indicated -- now, Mr. Tangwall, you understand if a default is entered against you, I'm not going to put a default judgment down because we'll wait and hear the proof, and what's good for one is going to be good for the other.

So if you'll consent to that, then they can go ahead and default you in the pretrial order and just provide that the default is entered against you in the pretrial order.

Now, is that what you --

MR. TANGWALL: The entry of default is okay with me.

THE COURT: All right.

MR. TANGWALL: Not a judgment.

THE COURT: No, not a judgment.

Notwithstanding this conversation, the Debtor now asks the court to set aside his prior default.

An entry of default may be set aside "for good cause shown" pursuant to FED. R. BANKR. P. 7055 and FED. R. CIV. P. 55(c). The decision to grant or deny Rule 55(c) relief is within the court's discretion and is based upon a consideration of:

1. Whether the default was willful and/or the result of culpable conduct by the defendant;
2. Whether a set-aside would prejudice the non-movant; and
3. Whether the movant has a meritorious defense to the underlying action.

See United Coin Meter Co., Inc. v. Seaboard Coastline R.R., 705 F.2d 839, 844-45 (6th Cir. 1983) (citations omitted). None of these elements weighs in the Debtor's favor.

As for the first *United Coin* factor, the Debtor's default was clearly willful. Moments after hearing counsel for the Chapter 7 Trustee concisely explain the issues of Adv. No. 01-3083, the Debtor answered that he would "go on record and say I don't object to the argument of the Trustee." Soon thereafter, the Debtor stated "The entry of default is okay with me."

The Debtor, although unrepresented by counsel, is far more sophisticated than the conventional *pro se* debtor. Throughout his three years of appearances before this court, the Debtor has shown himself to be an experienced, articulate, and savvy litigant. The court therefore has little difficulty concluding that the Debtor's default, in addition to being willful, was also understood and informed. Further, the court rejects, as patently false and disingenuous, the Debtor's assertion that he did not agree to a default in his capacity as a BFPT beneficiary.¹² Compare "Affidavit [sic] of Donald Tangwall," Mar. 11, 2002, at ¶ 4 ("I allowed a default to be entered against me in this action as an individual and a beneficiary of the Butch Family Preservation [Trust]."), with "Affidavit," May 15, 2002, at ¶ 4 ("My understanding was the default was against me as an individual[.] Never did I believe [sic] the default was against me as a beneficiary of the BFPT.").

As for the second *United Coin* factor, the court finds that numerous entities would be prejudiced by a set-aside of the Debtor's default. The Chapter 7 Trustee, Ploe, Goodrich, and others have undergone lengthy settlement negotiations, a primary component of which is the BFPT spendthrift trust issue. These negotiations, and the Settlement itself, have relied upon the Debtor's

¹² The legal distinction between the Debtor, "individually," and as a "beneficiary" of BFPT escapes the court. Being the beneficiary of a trust does not elevate the Debtor, in that capacity, to the status of a separate entity. Nonetheless, the court will address the Debtor's argument.

default, which prevents him from coming before the court to argue that BFPT is a spendthrift trust.

Lastly, the Debtor has not shown a “meritorious defense” to the Chapter 7 Trustee’s Complaint. What the Debtor claims as a “meritorious defense” is in fact merely a change in litigation strategy. His argument - distilled to its essence - is that he now wants to reverse course by 180 degrees and argue that BFPT is a spendthrift trust. See, e.g., “Special limited Appearance of Donald A. Tangwall Cestui Que Trust, Cestui QueUse [sic] of the Butch Family Preservation Trust and of The Butch II Trust appearing specially herein and not generally to object to the jurisdiction of the Court in reference to Dean Farmer’s Trustee Motion to authorize compromise and approve settlement of various litigation to which Debtor is a party,” April 19, 2002, at ¶ 2 (“The Butch Family Preservation Trust is a Spendthrift Trust[.]”); cf. *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990) (Litigants should not “abus[e] the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.”).

The Debtor has in no way shown “good cause” to set aside the November 14, 2001 Entry of Default. The default estops the Debtor from contesting any position asserted in the Chapter 7 Trustee’s Adv. No. 01-3083 Complaint.

V. Motion to Remove Mark Jendrek

Lastly, the court turns to the Debtor’s May 20, 2002 Motion to Remove. Alleging an inherent conflict of interest, the Debtor contends that Jendrek cannot adequately represent BFPT and trustee Ploe while at the same time serving as counsel to Ploe in his individual and beneficial

capacities.¹³ The Motion to Remove therefore asks the court to broadly disqualify Jendrek from representing BFPT or any of its trustees . . . or any of its beneficiaries.”

Disciplinary Rule 5-105 (DR 5-105) of Tennessee’s Code of Professional Responsibility, captioned “Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer,” provides in material part:

(B) A lawyer shall not continue multiple employment if . . . it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer’s independent professional judgment on behalf of each.

DR 5-105(B)-(C). DR 5-105 and similar rules recognize “that attorneys cannot represent conflicting interests or discharge inconsistent duties. They simply cannot serve two masters.”

Tennessee v. Locust, 914 S.W.2d 554, 557 (Tenn. Crim. App. 1995).

Pursuant to DR 5-105(B), Jendrek should not continue the present multiple employment because it “involve[s] [him] in representing differing interests[.]” DR 5-105(B); *see also* TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, 5-14, 5-18. As counsel for BFPT and trustee Ploe, Jendrek represents a fiduciary owing a duty of care to the Debtor’s purported

¹³ Jendrek serves as counsel to Ploe in his individual, beneficial, and fiduciary capacities. *See, e.g.*, Reply of Mark Ploe to the Response of Trustee Dean B. Farmer to Mark Ploe’s Motion for Summary Judgment, Dec. 31, 2001, at 1. Jendrek is also “local counsel for the Butch Family Preservation Trust[.]” *See* Memorandum in Support of Motion to Stay Proceedings and Request for Declaratory Relief, Mar. 6, 2002, at 3.

beneficial interest.¹⁴ Conversely, as counsel for Ploe as an individual and beneficiary, Jendrek represents a client who vigorously contends that the Debtor is not a beneficiary at all. See generally *Alexander v. Tennessee*, No. 03C01-9903-CC-00097, 2000 WL 66069, at *3 (Tenn. Crim. App. Jan. 27, 2000) (“An actual conflict of interest is usually defined in the context of one attorney representing two or more parties with divergent interests.”); cf. TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6 (“Every lawyer owes a solemn duty to . . . strive to avoid . . . the appearance of impropriety.”).

The exception provided by DR 5-105(C) is not available in the present case. It is obvious that the divergent interests of Ploe the individual/beneficiary and Ploe the trustee cannot be sufficiently counseled by the same attorney. See DR 5-105(C). Accordingly, Jendrek must discontinue his representation of BFPT and trustee Ploe.

Under more normal conflict circumstances, the court could also require Jendrek to cease his representation of Ploe as an individual and beneficiary. See, e.g., *Steinberg v. Morton (In re Buchanan)*, 25 B.R. 162, 170-71 (Bankr. E.D. Tenn. 1982). In most conflict situations there would exist the danger that the attorney “acquired information which might either consciously or unconsciously be used to the disadvantage of the former clients.” *Id.* at 171.

¹⁴ According to Ploe, the Debtor is not a BFPT beneficiary and therefore is owed no duty of care. Ploe’s position is premature, conclusory, and an example of the conflict between his individual and fiduciary capacities. The issue of the Debtor’s beneficial status has not yet been determined by the court. Further, as part of the proposed Settlement, Ploe, BFPT, and others propose to pay the Chapter 7 Trustee a significant sum of money. The court questions whether the Settlement offer would be quite as lucrative if the Debtor’s claim did not have at least some merit. Regardless, to whatever extent the Debtor may or may not in fact have a beneficial interest in BFPT, that interest is subject to the fiduciary duties of loyalty and due care from trustee Ploe.

In the present case, however, the soon-to-be "former clients" - BFPT (with Ploe and his wife as the only trustees) and Ploe the trustee - are the same people as the "remaining clients" - Ploe the individual and Ploe the beneficiary. For obvious reasons, the court is not concerned with the improper use of acquired information by one side to the detriment of the other. Instead, the court is solely concerned with eliminating the suggestion of impropriety that currently exists in the representation of Ploe's divergent capacities.

VI. Conclusion

For the reasons stated herein, the Chapter 7 Trustee's March 27, 2002 Motion to Authorize Compromise and Approve Settlement of Various Litigation to Which Debtor is a Party, the Debtor's February 28, 2002 Motion for Intervention, Ploe's March 6, 2002 Motion to Stay Proceedings and Request for Declaratory Relief, the Chapter 7 Trustee's March 26, 2002 Motion to Amend Complaint, and the Debtor's May 15, 2002 "Motion to Set Aside Entry of Default Against Def. Tangwall with Attached Affidavit, and Ex A & B" must all be denied. The Debtor's May 20, 2002 Motion to Remove will be granted to the extent that it seeks to disqualify attorney Mark Jendrek from representing BFPT and Ploe in his fiduciary capacity. The Motion to Remove must in all other respects be denied. Additionally, the court will allow the Chapter 7 Trustee fourteen days within which to amend his Complaint to add Linda Ploe in her capacity as a trustee of BFPT as a party defendant.

Orders consistent with this Memorandum will be entered.¹⁵

¹⁵ A separate order will be entered in the Debtor's case on the Trustee's Motion to Compromise.

FILED: June 12, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
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In re

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DONALD A. TANGWALL

Debtor

DEAN B. FARMER, TRUSTEE

Plaintiff

v.

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BUTCH FAMILY PRESERVATION TRUST;
MARK PLOE, individually and in his capacity as
trustee and beneficiary of the Butch Family
Preservation Trust; DONALD A. TANGWALL,
individually and in his capacity as a beneficiary of
the Butch Family Preservation Trust; and
GOODRICH MANUFACTURING COMPANY

Defendants

ORDER

For the reasons stated in the Memorandum on Trustee's Motion to Compromise and on Pretrial Motions filed this date, the court directs the following:

1. The Motion for Intervention filed February 28, 2002, by Defendant Donald A. Tangwall is DENIED.
2. The Motion to Stay Proceedings and Request for Declaratory Relief filed March 6, 2002, by Defendant Mark Ploe is DENIED.

3. The Motion to Amend Complaint filed March 26, 2002, by the Plaintiff Chapter 7 Trustee Dean B. Farmer is DENIED.

4. The Motion to Set Aside Entry of Default Against Def. Tangwall with Attached Affidavit, and Ex A & B” filed May 15, 2002, by Defendant Donald A. Tangwall is DENIED.

5. The Motion to Remove filed May 20, 2002, by Defendant Donald A. Tangwall is GRANTED to the extent disqualification of Attorney Mark Jendrek from representing Defendants Butch Family Preservation Trust and Mark Ploe in his capacity as a trustee of the Butch Family Preservation Trust is sought. Mr. Jendrek is disqualified from representing the Butch Family Preservation Trust and Mark Ploe, trustee. The Motion to Remove is in all other respects DENIED.

6. The Plaintiff Chapter 7 Trustee Dean B. Farmer will have fourteen (14) days within which to amend his Complaint to add Linda Ploe in her capacity as a trustee of Butch Family Preservation Trust as a party defendant.

SO ORDERED.

ENTER: June 12, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 00-30531

DONALD A. TANGWALL

Debtor

ORDER

For the reasons stated in the Memorandum on Trustee's Motion to Compromise and on Pretrial Motions filed this date, the court directs that the Motion to Authorize Compromise and Approve Settlement of Various Litigation to Which Debtor is a Party filed by the Chapter 7 Trustee, Dean B. Farmer, on March 27, 2002, is DENIED.

SO ORDERED.

ENTER: June 12, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE