SO ORDERED.
SIGNED this 12th day of March, 2021

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

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

In re

MARGARET ELIZABETH KINNEY

Debtor

Case No. 3:20-bk-30540-SHB
Chapter 7

MEMORANDUM AND ORDER

On March 11, 2021,[1] Debtor, *pro se*, filed Debtor's Emergency Application for a Temporary Restraining Order (the "Application") [Doc. 202]. The Application reiterates requests made in the Ex Parte Statement Concerning Dismissal of Adv. Proc. No. 3:20-ap-3032, Request to Issue a Protective Order and Enjoin Further Proceedings ("Request"), filed by Debtor and William Kinney, acting jointly and *pro se* on February 9, 2021. [Doc. 176.] By Memorandum and Order entered February 11, 2021, the Court denied the Request ("Order

[1] Debtor filed the document by mail, which was received by the bankruptcy court clerk on March 11, 2021, hours after conclusion of the hearing held on March 11, 2021, at which Debtor did not appear. *See* Order Approving Sale of Real Property Free and Clear of Liens [Doc. 200]. Notably, although the Court would not have deemed the Application an emergency filing under General Order 2020-07 because Debtor was served on February 12, 2021, with the Chapter 7 Trustee's filings that were set for hearing for March 11 [Docs. 180, 182], Debtor did not attempt to submit the "Emergency Application" by email or facsimile but chose, instead, to mail it on March 5.

Denying Request"). [Doc. 179.]

Specifically, the Application requests the issuance of a temporary restraining order under Federal Rule of Civil Procedure 65, made applicable by Federal Rule of Bankruptcy Procedure 7065, to enjoin "the Chapter 7 Trustee from seeking an order to sell the property located at 2444 Allegheny Loop Road, Maryville, TN." [Doc. 202 at p. 1.] Debtor indicates that (1) "[i]f granted, on the day that TRO expires, [she] will file an adversary complaint against the Trustee, seeking a temporary and permanent injunction" and (2) "th[e] application is for [her] benefit, as well as for the benefit of [her] daughter, Sarah E. Valdes." [*Id.*] Finally, Debtor states that Ms. Valdes "would benefit from [appointment of] a limited guardian to review her case for defects that an experienced attorney could address." [*Id.* at ¶ 3.] In the alternative to appointment of a "limited guardian," Debtor asks for the Court "to appoint William [Kinney] and [Debtor] as Next Friend of [Ms. Valdes], and allow [them] 30 days to submit a brief on [Ms. Valdes]'s behalf." [*Id.*]

The Order Denying Request addressed the assertion that Ms. Valdes suffers from a mental disability. [Doc. 179 at pp. 8-10.] As explained there and on the record at the March 11, 2021 hearing (at which neither Debtor, Mr. Kinney, nor Ms. Valdes appeared[2]), Federal Rule of Bankruptcy Procedure 1004.1 applies only to debtors, which Ms. Valdes is not, and this Court is not authorized under state or federal law to deem Ms. Valdes an incompetent person.

The Bankruptcy Code does not define "incompetent person," leaving bankruptcy courts to look to state law. In Tennessee, the appointment of a conservator for a person with a disability is governed by title 34, chapters 1 and 3 of Tennessee Code Annotated. The statutory scheme

[2] On March 3, 2021, Debtor and Mr. Kinney filed an Objection to Trustee's Sale of Real Property on Behalf of Sarah E. Valdes [Doc. 187], which the Court struck by Order entered on March 11, 2021 [Doc. 201], because Debtor and Mr. Kinney are not authorized by state or federal law or by any bankruptcy statute or rule to represent Ms. Valdes or to file documents on her behalf.

provides for the appointment of a guardian ad litem to "investigate the facts and make a report and recommendation to the court" concerning whether a conservator should be appointed. Tenn. Code Ann. § 34-1-107(d)(1). The guardian ad litem must "investigate the physical and mental capabilities of the respondent." Tenn. Code Ann. § 34-1-107(d)(3). "A petition for the appointment of a conservator may be filed by any person having knowledge of the circumstances necessitating the appointment of a conservator," Tenn. Code Ann. § 34-3-102, but the sworn petition must include information about the proposed conservatee's physical or psychological condition allegedly necessitating appointment of a conservator, including a sworn examination report of a physician or psychologist or a statement that an examination has occurred but the report is not yet available (but will be filed before a hearing on the petition) or that an examination was refused (in which case the petition must ask the court to direct an examination). Tenn. Code Ann. §§ 34-3-104, -105(c).

In short, if Debtor believes that Ms. Valdes is in need of a conservator, she must seek appointment from a state court. As explained by another bankruptcy court, *In re Petrano*, No. 13-10052-KKS, 2013 WL 6503672, at *2 (Bankr. N.D. Fla. Apr. 16, 2013), even if Rule 1004.1 applied to Ms. Valdes, there is "no statutory authority for making an initial finding or determination of whether or not a debtor may be 'incompetent.' Bankruptcy courts are not designed or equipped to make such determinations. Nothing in the Bankruptcy Rules or reported cases suggests that bankruptcy courts should be making such adjudications." The court further explained:

> A finding of incompetency is not to be undertaken lightly. If this Court were to appoint a guardian ad litem for [the debtor] under Bankruptcy Rule 1004.1, thereby automatically labeling her as an "incompetent person," it could have significant consequences in other aspects of the [d]ebtors' lives. No doubt this is why the applicable [state] statutes require that a determination as to whether a person should have a guardian ad litem must be made by a panel of three experts

> trained in psychiatry or other medicine, social work and/or gerontology. Without an order of a court of competent jurisdiction ruling [the debtor] as "incompetent" and/or appointing a guardian or guardian ad litem for [the debtor], it is the determination of this Court that it should go no further on this issue.

Id. at *4.

Accordingly, the Court will for again reject the attempt by Debtor to have this Court deem her daughter incompetent or otherwise allow Debtor to "represent" her daughter or her daughter's interests in this case.[3]

As for Debtor's assertion on behalf of herself that the Court should enjoin the Chapter 7 Trustee from selling her possessory interest in her residence, the Court ruled at the March 11, 2021 hearing and granted the Trustee's Motion to Sell Real Property Free and Clear of Liens. [Doc. 200.] Debtor has no exemption in the property, the Court having sustained the Trustee's objection to Debtor's claim of a homestead exemption because his recovery of the property for the benefit of the estate under 11 U.S.C. § 551 by the judgment entered in *Milligan v. Valdes*, No. 3:20-AP-3032-SHB, which judgment is final in all respects, does not benefit Debtor because she does not meet the requirements of 11 U.S.C. § 522(g). Section 522(g) provides:

> Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section . . . 551 . . . of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if –
>
> (1)(A) such transfer was ***not*** a voluntary transfer of such property by the debtor; and
>
> (B) the debtor did not conceal such property; or

[3] Debtor cites the Judiciary Act of 1789, Section 35, as authority for Ms. Valdes to "choose her own counsel to assist her, other than an attorney." [Doc. 202 at n.1.] In the first instance, Ms. Valdes has not asked for anyone to represent her before this Court. More important, this Court has a duty to prevent the unauthorized practice of law. *See Zanecki v. Health Alliance Plan of Detroit*, 576 F. App'x 594, 595 (6th Cir. 2014) ("The rule against non-lawyer representation 'protects the rights of those before the court' by preventing an ill-equipped layperson from squandering the rights of the party he purports to represent." (quoting *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 400 (4th Cir. 2005)).

(2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.[4]

11 U.S.C. § 522(g) (emphasis added). Because Debtor voluntarily transferred her ownership (as well as the related homestead exemption right (*see* Tenn. Code Ann. § 26-2-301(d)[5]) in the property to Sarah Valdes by the quit claim deed executed on March 19, 2016, she may not assert any exemption here. [*See* Doc. 51.]

Moreover, as Federal Rules of Bankruptcy Procedure 7001(7) and 7065 make clear, Debtor may not seek an injunction by a motion or application in the Chapter 7 proceeding and may do so only through the filing of an adversary proceeding.

For these reasons, the Court directs the following:

1. To the extent that the Application seeks a temporary injunction against the Chapter 7 Trustee, the Application is DENIED.

2. To the extent that the Application seeks appointment of a guardian ad litem or of legal counsel for Sarah Valdes, the Application is DENIED.

3. To the extent that the Application seeks appointment of William Kinney and/or Debtor as "Next Friend" of Sarah Valdes, the Application is DENIED.

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[4] Subsection (f)(1)(B) does not apply to Debtor.

[5] "A deed . . . or any other deed or instrument by any other name whatsoever conveying property in which there may be a homestead exemption, duly executed, conveys the property free of homestead exemption . . . ."