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Deal-Breaker Documents

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Deal-Breaker Documents

Bankruptcy attorneys review debtor documents every day. A careful review is required to notice small details that may cause big headaches. Our panelists will discuss red flags to look for in reviewing security documents, powers of attorney, notarizations, and other documents.

1. Real property documents

a. Deeds of trust

(1) Verify timely perfected

(a) *Fink v. Signature Federal Credit Union* 23-6008 (WDMO Adversary)
- Note entered into September 8, 2021, deed of trust not recorded until eight minutes after the case was filed on June 26, 2023.
- The trustee filed an adversary to determine the validity of the lien due to improper perfection.
- Default Judgment was entered for trustee.
- Mortgage claim treated as unsecured and additional non-exempt equity covered by the debtor.

(b) Preference Issues
- Lien has to be perfected within 30 days (see 11 U.S.C. 547(e)(2)). Should be recorded within 30 days of note.
- If recording more than 30 days but less than 90 days before bankruptcy, might be a preference.

(2) Verify recorded in correct county

(a) *Fink v. Mortgage Solutions of Colorado & PHH Mortgage* 17-4008 (WDMO Adversary)
- Real property located in Bates County, MO, but deed was recorded in Cass County, MO.
- The trustee filed an adversary to determine the validity of the lien due to improper perfection.
- Parties entered into a settlement agreement whereby the mortgage company made a lump sum payment to the trustee and they were allowed to retain security interest and re-record the deed of trust.

(3) Verify borrower matches signor

(a) Husband identified as the borrower but both husband and wife sign

(4) Verify original deed of trust recorded

(a) Affidavit and copy of deed of trust

b. Ownership Deeds (Warranty Deed, Quitclaim Deed)

(1) Verify ownership:

(a) Whether jointly owned with other parties

(b) Whether debtor has actual ownership interest

(2) Transfer of assets

(a) If property was transferred within last few years, need to review for potentially avoidable fraudulent transfer.

(b) 11 U.S.C. §548 allows for a two year look back, however most states have adopted some form of the Uniform Fraudulent Transfers Act that allows a longer look back period (in Missouri transfers within four years can be avoided under RSMO 428.024).

(c) Can avoid transfer into Tenancy by the Entireties property. See *Fink v. Arregui (In re Arregui)*, 2023 Bankr. LEXIS 2331 (Bankr. W.D. Mo. Sep. 22, 2023).

c. Judgment Liens

(1) Check state court document systems (e.g. Missouri Case Net)

(a) Tenancy by Entireties: Judgment by individual is not judgment lien on tenancy by entireties real estate.

d. Deeds offered as Security for Loans

(1) Oklahoma Statute 46 O.S. Sec. 1 Absolute Deed as Mortgage. "Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such either in an action to enforce the mortgage or in pursuant to a power of sale as provided for in the Oklahoma Power of Sale Mortgage Foreclosure Act."

(2) Cases:

(a) *Jenkins v. Abercrombie*, 228 P.2d 657, 204 Okla. 213 (Okla. 1951). An heir brought a foreclosure action on a property that was deeded to her deceased relative in exchange for $700 that was purportedly intended as a loan. A jury found for the heir, finding that the deed was given to the deceased relative as security for the payment of a loan of $700 and was intended as a mortgage. Judgment was entered accordingly, declaring the judgment to be a lien upon the

property and ordering upon failure of the defendants to satisfy the judgment that the land be sold according to law to satisfy the lien.

(b) *Wagg v. Herbert,* Okla., 19 Okla. 525, 92 P. 250 (1907), affirmed 30 S.Ct. 218, 215 U.S. 546, 54 L.Ed. 321. Where a transaction was in substance a loan of money on the security of a farm, equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.

(c) *Polk v. Long,* Okla., 138 Okla. 43, 280 P. 284 (1929). Every instrument purporting to be absolute or qualified conveyance of real estate, but intended to be defeasible or as security, will be deemed mortgage.

(d) *Fourth Nat. Bank v. Memorial Park,* Okla., 181 Okla. 574, 75 P.2d 887 (1937). Where instrument in form of deed was given as additional collateral on certain loan held by the grantee, it was a "mortgage" and would be treated as such.

e. Settlement Statements after sale of real property

(1) Need to closely review to make sure that funds are being distributed per court order or agreement.

(2) WDMO procedure – we need SIGNED settlement statement to stop making payments on mortgage claim.

(a) Also, WDMO procedure – need Motion to Retain the proceeds. Could be subject to an amendment to the plan per *In re Marsh*, 647 B. R. 725, (Bankr. W.D. MO 2023).

2. Personal property documents

a. Perfection issues

(1) Notices of Lien and Titles for cars

(a) Owners: Verify owners listed on titles match owners listed on schedules and exemptions.

(b) Dates: Verify dates for perfection, 910 cars per 11 U.S.C 1325 hanging paragraph.

(2) UCC Filings

(a) Will show liens on non-titled assets: e.g. lien on non-PMSI household goods (need motion to avoid lien).

(b) Careful that search matches name (abbreviations/ similar names may not be caught in search).

b. Liens held by individuals on personal property

(1) In Missouri - notation on title insufficient to create a security interest when no written agreement for family member loan for vehicle purchase (see EDMO case *In re Miller* 320 BR 911) – look at underlying loan agreements. Need "Words of Grant" to convey security interest.

(2) Other states may differ (see Ohio case *In re Giaimo*, 440 BR 761 – notation on NOL/title sufficient to create a security interest even with no written agreement).

(3) Tenancy by Entireties. If vehicle owned tenancy by the entireties, husband alone cannot grant security interest in vehicle. *Crozier v. Wint*, 736 F.3d 1134 (8th Cir. 2013).

(4) LLC. Security agreement by LLC member in his personal capacity does not grant security interest in LLC truck. *In re Clickingbeard*, 19-11605. Bankr. Kansas, March 30, 2020.

3. Leases and Contracts for Deed

a. Residential lease

(1) If written lease that is still in effect (usually annual lease) needs to be listed on Schedule G and plan.

(2) Service of plan may be required on landlord creditor.

b. Contracts for deed

(1) If purchasing property under contract for deed, debtor has an equitable interest.

(a) See *In re Cummings* 10-46658-drd-13 (WDMO unpublished opinion dated December 6, 2011).

(2) Value of property less amount owed on the date the petition was filed is how we determine the equitable interest in WDMO (sometimes you may need documentation from seller on how much is still owed if not clear from contract).

(3) Purchaser's equitable interest passes to the Trustee under 11 U.S.C. 54. *In re Jones*, 68 B.R. 483 (Bankr. W.D. Mo. 1984).

4. Power of Attorney issues

a. Requirements for Power of Attorney (POA)

(1) In writing

(a) Signature and acknowledgement can only occur with a written document
- Cannot say the POA arose prior to the signing and acknowledgement.
- Need POA before bankruptcy is filed.

(2) General Powers vs Express Powers

(a) US Trustee prefers POA to specifically state attorney in fact has power to file bankruptcy for principal.

(b) POA can grant general powers or specific powers for an express subject or purpose (RSMo 404.710).

(c) Some powers must be expressly stated (e.g. create/ revoke trusts), See RSMO 404.710.

(d) Some powers can never be done by power of attorney (e.g. make/ revoke will), See RSMO 404.710

(3) Unambiguous

(a) Ambiguous language example: "Initial next to each listed power to grant or deny." Does initial grant the power or deny the power?

(b) Clearly identify principal with full name and if use initials, consistent form

(c) Cannot have powers be effective both immediately and upon disability.

(4) Competency of principal at time POA signed

(5) Principal has to appear before notary

(6) Good faith

(7) Must be durable power of attorney.

(a) RSMo 404.705. Requirements for durable power of attorney
- Designation of POA as "Durable Power of Attorney"
- Inclusion of language re effect of POA in event of principal's incapacity/ death (statute has 2 options for mandatory language)
- Execution by principal that is dated and acknowledged in same manner as real estate transactions

(b) RSMo 442.210. Requirements for acknowledging POA
- State act of acknowledgement
- State that person making acknowledgement either personally knew the signer, or that 2 witnesses with disclosed names and addresses proved signer's identity

b. Using POA to file bankruptcy

(1) Signatures on petition/schedules must indicate POA.

(a) e.g." "John Smith by Susan Smith, Power of Attorney"

(2) POA must be filed with the court (redact if include Personal Identifiable Information).

(3) POA must be sent to the Trustee.

c. Appointing Guardian Ad Litem under Fed Rule Bankruptcy 1004.1

(1) An infant or incompetent persona may file a voluntary petition by next friend or guardian ad litem. A court shall appoint guardian ad litem. Motion filed with bankruptcy court.

(2) Applies if incompetent person is not represented. If POA not adequate, consider appointing Guardian Ad Litem. (*See In re Rivas,* 656 B.R. 898 (Bankr. E.D. Mo, 2023)

d. Federal Rule of Bankruptcy 9010(a)

(1) Authorizes attorney-in-fact to file bankruptcy

(2) But attorney-in-fact cannot practice law

e. Credit Counseling and Debtor Education

(1) Attorney-in-fact does not have to do credit counseling if Debtor qualifies for waiver under 109(h)(4).

(2) 11 U.SC. Sec. 109(h)(4) waiver of credit counseling requirement requires notice and hearing to show that the individual lacks capacity to make rational decisions about financial affairs or has physical impairment that prevents her from participating in credit counseling after a reasonable effort.

(a) Note: Incarceration is not a ground for waiver.

(3) 11 U.SC. Sec. 727(a)(11) requirement for financial management does not apply to those that get 109(h)(4) waiver.

f. Cases

(1) *In re Rivas,* 656 B.R. 898 (Bankr. E.D. Mo, 2023)

(2) *In re Sugg*, 632 B.R. 779 (Bankr. E.D. Mo. 2021)

(3) *In re Jones*, 632 B.R. 70 (Bankr. E.D. Mo. 2021)

(4) *In re Sniff*, Case No. 15-18086 TBM (Bankr. Colo. Oct. 6, 2015)

5. Notary issues

a. Fails to clearly identify who appeared before the Notary and/or who presented ID before signing document.

(1) E.G. Husband and wife both sign document but only husband listed in notary block.

(2) *In re Porter*, Case 23-40864-can-13 (WDMO): UST filed a motion to dismiss this chapter 13 case because the POA document identified only the attorney-in-fact and not the principal (the debtor) as having appeared before the notary public.

b. Does not indicate if each signer signed the documents in Notary's presence.

c. Fails to state is Notary personally knew the signer and/or of signers proved their ID with government-issued ID.

d. Notary commission expired

6. Joint ownership and Tenancy by the Entireties

a. Joint ownership of property

(1) In Missouri - Presumption of equal ownership based on title, but that presumption can be rebutted. See Judge Federman's two opinions below.

(a) Nelson v. Killman (In re Killman), 08-61703, Adv. 09-0675. 2010 Bankr. LEXIS 625 (Bankr. W.D. Mo. Feb. 26, 2010) (regarding real property).

(b) In re Foresee, 11-60155, 2011 Bankr. LEXIS 2967 (Bankr. W.D. Mo. Aug. 4, 2011) (analysis of a jointly owned CD, mutual funds and stocks).

(2) Practical Consideration: Get documentation of how asset was paid for, who is paying upkeep, if bank account who has put in money, etc. Trustee will assume ownership

based on title (if co-owned with one other person then a 50% ownership) absent documentation to the contrary.

b. Tenancy By the Entireties

(1) Documentation for real property, personal property, bank accounts, etc.

(a) Ownership deeds for real property: Warranty deed, quitclaim deed

(b) Bank statements showing account owners

(c) Titles for personal property.

(d) If not titled, an explanation and documentation of when purchased and whether married at the time should be provided.

(e) Make sure even if both listed that property was obtained after they were married.

(f) Verify both spouses listed in conveyance documents.

(2) Review claims: priority claims, tax claims, deficiency claims, medical claims (doctrine of necessaries) can all be joint claims that have not been considered.

(3) Beware of fraudulent transfer issues: See *Fink v. Arregui (In re Arregui)*, 2023 Bankr. LEXIS 2331 (Bankr. W.D. Mo. Sep. 22, 2023).

7. Red Flag issues for trustee

a. Bank Statements:

(1) Statements not being reviewed for date of filing balances;

(2) Transactions not being reviewed (i.e. deposits, transfers, unscheduled accounts, payments, etc);

(3) Providing transaction history with no daily balance information;

(4) Not disclosing credit union share accounts when loans held at credit unions;

(5) Not disclosing all sources of income;

(6) Not disclosing assets with regular monthly payments (i.e. life insurance policy, etc);

(7) Not providing all bank statements because either not available online or only quarterly statements produced instead of requesting necessary documents from bank.

(8) Transfers between insiders that are not disclosed or dealt with in plans.

b. Pay statements/Schedules I and J:

(1) Review all CMI pay statements to verify income on Form 122C

(2) Review recent pay statements to verify income on Schedule I

(3) Look out for: retirement loans, DSO payments, bonus income, loans with employer, marijuana income, etc.

(4) Income calculations not matching with paystubs;

(5) Lumping deductions together instead of using categories (i.e. all deductions listed as tax deduction instead of as tax, retirement, insurance, etc);

(6) Not providing income information for non-filing spouse;

(7) Claiming monthly expenses debtor does not actually pay (i.e. car insurance when no vehicle scheduled, real estate taxes when no real property scheduled, etc);

(8) Claiming monthly expenses with exaggerated amounts (i.e. utilities, insurance, etc);

(9) Claiming dependents, who are not actual dependents (i.e. adult children, grandchildren, siblings, etc.).

c. Tax Returns

(1) Compare income on tax returns to income on Schedule I, SOFA.

(2) If significant increase or decrease in wage income, contact Debtor.

(3) Look also for non-wage income. Retirement withdrawals, lawsuit funds. Contact debtor. Probably need to file after-the-fact motion to retain funds.

(4) Claiming business losses on returns when no business scheduled in petition

(5) Filing status (i.e. debtors filing separate returns with both as head of household instead of married filing jointly or married filing separately when living together, etc).

(6) Claiming dependents who are not actual dependents.

(7) Gambling winnings/losses.

(8) Large tax liabilities or failure to withhold properly.

d. Cash App/Venmo/PayPal/Metapay:

(1) Statements not being reviewed for preference payments; - the statements regularly reveal transactions with insiders.

(2) Not disclosing all sources of income.

e. Documents Associated with the Schedules A/B and C:

(1) Not disclosing all bank and/or financial accounts;

(2) Not disclosing all assets (i.e. life insurance policies, personal injury claims, etc);

(3) Undervaluing of assets (i.e. real estate, vehicles, etc) – This one is important because there are a variety of free sources to get accurate values (i.e. KBB, realtor.com, Zillow.com, county assessor, etc);

(4) Another issue with vehicles is always using least expensive models instead of using VIN to get most accurate valuation on KBB;

(5) Applying exemptions incorrectly (i.e. joint debtor claiming exemption in property owned solely by debtor, etc.).

8. Trustee Audits:

a. What is requested:

(1) Pay statements for the full six calendar months preceding the date of the petition,

(2) Bank statements for 6 months (including checking, savings, money market, mutual funds, brokerage, and retirement accounts),

(3) Divorce decrees and domestic support orders,

(4) Payments in excess of $1,000.00 to unsecured creditors or insiders.

b. What is often found:

(1) Understatement of income on the schedules,

(2) Transfers or preference payments,

(3) Support orders not disclosed in plans,

(4) Undisclosed assets (most often listed in a property settlement and not disclosed on the schedules),

(5) Payments to non-insider creditors not listed in the Statement of Financial Affairs.

c. What happens:

(1) Objections to confirmation if found early enough.

(2) Motions to vacate confirmation.

(3) Motions to dismiss case.

(4) UST referrals.

9. UST Referrals:

a. Duty of both standing trustee and UST's to report fraud or criminal activity

b. What is reported:

(1) Tax filing status Irregularities
(a) Most common: Filing Head of Household improperly

(2) Malpractice/sloppy attorney work
(a) Most common: Lack of communication with clients

(3) Potential Creditor fraud
(a) Most rare, but possibly false proof of claims

(4) Potential Debtor fraud
(a) Most common: Material misstatements on Schedules

(5) Bankruptcy crimes as set forth in 18 U.S.C Sections 152-157
(a) Most common one: Concealment of Assets

Okla. Stat. tit.46, Sec. 1 Absolute deed as mortgage (Oklahoma Statutes (2024 Edition))

§ 1. Absolute deed as mortgage

Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such either in an action to enforce the mortgage or pursuant to a power of sale as provided for in the Oklahoma Power of Sale Mortgage Foreclosure Act.

History:

R.L. 1910, § 1156; Amended by Laws 1986, SB 563, c. 319, § 10, eff. 11/1/1986.

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In re: Miguel Angel Arregui and Angela Marie Arregui, Debtors.

Richard V. Fink, Plaintiff,
v.
Miguel Angel Arregui and Angela Marie Arregui, Defendants.

No. 22-40516-btf

Adversary No. 22-04027-btf

United States Bankruptcy Court, W.D. Missouri

September 22, 2023

Chapter 13

MEMORANDUM OPINION

Brian T. Fenimore Chief U.S. Bankruptcy Judge

Defendants Miguel and Angela Arregui owned their residence as joint tenants from 1999 to 2022. Though the Arreguis married in 2007, they waited until three days before they filed their chapter 13 petition to record a quit claim deed transferring title in their residence from themselves as joint tenants to themselves as husband and wife. The purpose of this transfer was to take advantage of the tenancy by the entireties exemption, which would shield the $127,322.00 equity that existed in the residence before the transfer and relieve the Arreguis of a would-be obligation to pay 100% of their individual general unsecured creditors.

Chapter 13 trustee Richard Fink seeks in this adversary proceeding to recover the Arreguis' joint tenancy in the residence and include the equity in the residence in

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the "best interests of creditors" calculation under 11 U.S.C. § 1325(a)(4). The trustee argues that the Arreguis' recordation of the quit claim deed was an actually and constructively fraudulent transfer under the Bankruptcy Code and the Missouri Uniform Fraudulent Transfer Act (MUFTA).

The Arreguis oppose this adversary proceeding. They first argue the trustee cannot succeed under either theory because the Arreguis' recordation of the quit claim deed was not a "transfer" under either the Bankruptcy Code or the MUFTA. The Arreguis further argue the transfer was not actually fraudulent because they effectuated it as part of permissible pre-bankruptcy exemption planning, and, therefore, necessarily lacked fraudulent intent. Finally, the Arreguis argue the transfer was not constructively fraudulent because they received at least reasonably equivalent value.

For reasons explained below, the court determines the trustee has established actual but not constructive fraud under the Bankruptcy Code and the MUFTA.

JURISDICTION

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157(a). This proceeding is statutorily core under 28 U.S.C. § 157(b)(2)(H) and is constitutionally core. The court, therefore, has the authority to hear this proceeding and make a final determination. No party has contested jurisdiction or the court's authority to make final determinations.

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BACKGROUND

This adversary proceeding comes before the court as a consequence of the Arreguis' pre-bankruptcy efforts to increase their exemptions in their residence. The parties have stipulated to many of the relevant facts.

The Arreguis purchased their residence in 1999.[1] At the time, the Arreguis were not married and held title to their residence as joint tenants

with the right of survivorship.[2] Miguel and Angela married in 2007.[3] And though loan documents the Arreguis executed after they married recognize that the Arreguis were then husband and wife, nothing in the record suggests that any transaction converted the Arreguis' joint tenancy in the property to a tenancy by the entireties until they recorded a quit claim deed in April 2022.[4]

The bankruptcy case currently pending before this court is not the Arreguis' first attempt to obtain a chapter 13 discharge. The Arreguis commenced a prior joint chapter 13 case in July 2019.[5] During the 2019 case, the Arreguis reported that their residence was worth $138,000.00, scheduled $108,690 in total claims secured by the residence, and claimed a $15,000 homestead exemption.[6] Thus, the total nonexempt

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equity in the residence during the Arreguis' 2019 case was $14,310. The court dismissed the Arreguis' 2019 case on June 24, 2021.[7]

On Friday, April 29, 2022, the Arreguis filed a quit claim deed transferring title to the residence from themselves as single persons to themselves as husband and wife.[8] The next business day, on Monday, May 1, 2022, the Arreguis commenced their current chapter 13 case.[9]

The Arreguis now value their residence at $230,700.00.[10] The Arreguis claim two exemptions in their residence, a $15,000.00 homestead exemption and a $127,322.00 tenancy by the entirety exemption.[11] The Arreguis scheduled debts secured by the residence totaling $88,378.65.[12] Creditors have asserted a total of $57,673.21 general unsecured claims against the Arreguis' chapter 13 estate.[13] Of that amount, only $12,912.89 is joint debt.[14]

In September 2022, the trustee filed an adversary proceeding, seeking to avoid the Arreguis' transfer of the residence and recover the joint tenancy for the estate.[15]

The parties stipulated to several of the relevant facts, and the court conducted a trial. Angela Arregui was the only witness to testify at trial. In her testimony, Angela explained that the Arreguis transferred the property from themselves as joint

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tenants to themselves as tenants by the entireties on advice of counsel, and that she understood the transfer was necessary because the value of the residence had increased significantly in the time since their 2019 case. When Angela's counsel asked her about the Arreguis' motivation for changing their form of ownership, Angela explained that she and Miguel would have otherwise had to pay back all of their unsecured debts in their chapter 13 case, and that they did not earn enough income to repay all of their unsecured debts. And though Angela initially testified that she thought she and Miguel had disclosed the transfer on their statement of financial affairs, she later appeared to remember that she and Miguel chose not to disclose the transfer because they did not believe the change in ownership qualified as a transfer.

Having outlined the relevant facts, the court turns to the legal issues in this adversary proceeding.

ANALYSIS

The Eighth Circuit has long permitted debtors to transform assets into exempt forms to maximize available exemptions in anticipation of bankruptcy. *See, e.g., Panuska v. Johnson (In re Johnson)*, 880 F.2d 78, 81 (8th Cir. 1989) ("The law permits debtors to intentionally transform property into exempt assets."); *Forsberg v. Sec. State Bank of Canova*, 15 F.2d 499, 501 (8th Cir. 1926) (discussing policy in favor of exemption planning). And though permissible pre-bankruptcy planning sometimes involves transfers of assets to exempt forms, there is a

threshold beyond which debtors become vulnerable to allegations of fraud. *See Norwest Bank Neb., N.A. v. Tveten,*

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848 F.2d 871, 874-75 (8th Cir. 1988) (discussing distinction between permissible exemption planning and exemption planning with fraudulent intent). When debtors cross that threshold, the Bankruptcy Code empowers a trustee to avoid prebankruptcy fraudulent transfers for the benefit of the debtors' creditors. *See, e.g.*, 11 U.S.C. §§ 544, 548.

In this case, the trustee alleges that the Arreguis' transfer of their residence from themselves as joint tenants to themselves as tenants by the entireties crossed the line. Accordingly, the trustee asks the court to avoid the transfer as actually and constructively fraudulent under both the Bankruptcy Code and the MUFTA.

In the following sections, the court first analyzes whether the Arreguis' transfer was actually fraudulent under federal and Missouri law, then analyzes whether the Arreguis' transfer was constructively fraudulent under federal and Missouri law.

A. Actual Fraud Under 11 U.S.C. § 548(a)(1)(A) &Mo. Rev. Stat. § 428.024.1(1)

The Bankruptcy Code empowers a trustee to avoid a transfer as actually fraudulent both under § 548(a)(1)(A) of the Bankruptcy Code and under state law. § 548(a)(1)(A) (authorizing trustee to avoid fraudulent transfers); 11 U.S.C. § 544(b)(1) (authorizing trustee to avoid any transfer that would otherwise be voidable by a creditor under applicable law). Though the evidentiary standard under § 548 is a preponderance of the evidence, *Kelly v. Armstrong*, 206 F.3d 794, 801 (8th Cir. 2000), the standard under relevant state law-§ 428.024.1(1) of the MUFTA-is

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clear and convincing evidence. *Patrick V. Koepke Constr., Inc. v. Paletta*, 118 S.W.3d 611, 614 (Mo.Ct.App. 2003).

Under either the Bankruptcy Code or the MUFTA, to avoid a transfer as actually fraudulent, a plaintiff must prove two elements: (1) the debtor transferred property, and (2) the debtor acted with actual intent to hinder, delay, or defraud creditors. 11 U.S.C. § 548(a)(1)(A); Mo. Rev. Stat. § 428.024.1(1). The court will discuss each element in turn.

1. The debtors transferred the property

The first element of a fraudulent transfer under § 548(a)(1)(A) and § 428.024.1(1) is that the debtor transferred property. 11 U.S.C. § 548(a)(1)(A); Mo. Rev. Stat. § 428.024.1(1).

Initially, the parties appeared to agree that the Arreguis' April 29 quit claim deed effectuated a transfer within the meaning of § 548 and Missouri law. In fact, the Arreguis characterized the transaction as a transfer in their brief, stating, for example, "[§ 442.025] specifically allows the type of *transfer* at issue in this case." Debtor Defs. Brief in Opposition to Trustee's Compl. to Avoid Fraudulent Transfer, at 4, ECF No. 15 (emphasis added). But at trial, counsel for the Arreguis contradicted this characterization by arguing that the quit claim deed did not effectuate a transfer, and Angela testified that the Arreguis did not disclose the transaction because they did not believe the transaction constituted a transfer.

Their argument and belief contradict applicable law. "A party . . . need not surrender ownership in an asset in order to effectuate a transfer." *Kaler v. Craig (In re Craig),*

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144 F.3d 587, 591 (8th Cir. 1998). The effect of the transaction determines its characterization as a transfer, "not the circuity of the arrangement." *Id.*

The court determines that when a fraudulent-transfer defendant transforms his or her ownership interest from joint tenancy to tenancy by the entireties, the transaction that alters the form of the defendant's interest is a "transfer" of property under the Bankruptcy Code and the MUFTA. *See, e.g., Konopasek v. Konopasek*, No. SC99816, 2023 WL 4201660, at *5 (Mo. June 27, 2023) (explaining that transformation of husband's interest in individual property to tenancy by the entireties was a "transfer" under the MUFTA); *Olsen v. Paulsen (In re Paulsen)*, 623 B.R. 747, 754-55 (Bankr. N.D.Ill. 2020) (determining that husband and wife's transformation of property from a joint tenancy to a tenancy by the entireties was a transfer). The Bankruptcy Code and the MUFTA each broadly define the term "transfer" to include any "mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" "an interest" in property. 11 U.S.C. § 101(54)(D); Mo. Rev. Stat. § 428.009(12). When a former joint tenant transforms his or her joint tenancy to a tenancy by the entireties, the owner "part[s] with" "interest[s]" in property: the joint tenancy interest and all of the characteristics that accompany that form of ownership, including the automatic severance of the joint tenancy at alienation. *See e.g., A/C Supply Inc. v. Botsay (In re Botsay)*, Case No. 20-51440-KMS, Adv. No. 21-06001-KMS, 2022 WL 106580, at *6 (Bankr. S.D.Miss. Jan. 11, 2022) (explaining that transformation from joint tenancy to tenancy by the entireties was a transfer); *United States v. Craft*, 535 U.S. 274, 279-84 (2002)

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(describing property rights as a "bundle of sticks" and explaining how the joint tenancy "bundle" differs from the tenancy by the entirety "bundle"). Thus, the transformation of an interest from a joint tenancy to a tenancy by the entireties constitutes a "transfer" under the MUFTA and Bankruptcy Code.

The Missouri statute that enables the transformation of a joint tenancy into a tenancy by the entireties interest, Mo. Rev. Stat. § 442.025, supports the conclusion that the transformation constitutes a transfer. The statute repeatedly characterizes the transformation as a "conveyance," and states that even if the owner does not effectuate the transformation by first conveying property to a third party, "the conveyance [of an owner's interest in property from himself or herself to himself or herself] has the same effect as to whether it creates a . . . tenancy by the entireties . . . as if it were a conveyance from a stranger who owned the real estate to the persons named as grantees in the conveyance." Mo. Rev. Stat. § 442.025. The term "conveyance" means "[t]he voluntary transfer of a right or of property." CONVEYANCE, Black's Law Dictionary (11th ed. 2019). Thus, Missouri law supports the court's conclusion that a transaction that transforms an owner's interest from a joint tenancy to a tenancy by the entireties is a "transfer."

In this case, the Arreguis executed and recorded a quit claim deed transferring their residence from themselves as joint tenants to themselves as tenants by the entireties. Because this form of transaction constitutes a transfer under the Bankruptcy Code and Missouri law, the court determines the April 2022 quit claim deed satisfies the "transfer" element under § 548(a)(1)(A) and § 428.024.1(1).

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The court next analyzes whether the Arreguis acted with the requisite fraudulent intent.

2. The Arreguis transferred the property with intent to hinder, delay, or defraud creditors

The second element under § 548(a)(1)(A) and § 428.024.1(1) is that the debtor acted with actual intent to hinder, delay, or defraud creditors. 11 U.S.C. § 548(a)(1)(A); Mo. Rev. Stat. § 428.024.1(1). Although § 548(a)(1)(A) and Mo. Rev. Stat. § 428.024.1(1) each use the disjunctive phrase "hinder, delay, or defraud," courts generally interpret the phrase as establishing a

single test: whether the debtor acted with fraudulent intent. *See Panuska v. Johnson (In re Johnson)*, 880 F.2d 78, 79 n.1 (8th Cir. 1989) (declining to separately analyze the terms hinder, delay, and defraud).

Because direct evidence of fraudulent intent is rarely available, courts analyze all relevant facts and circumstances surrounding a transfer to infer whether the debtor acted with fraudulent intent. *Addison v. Seaver (In re Addison)*, 540 F.3d 805, 811 (8th Cir. 2008). Courts have identified the following common law "badges of fraud" that may support the inference that a debtor acted with fraudulent intent:

> (1) a conveyance to a spouse or near relative; (2) inadequacy of consideration; (3) transactions different from the usual method of transacting business; (4) transfers in anticipation of suit or execution; (5) retention of possession by the debtor; (6) the transfer of all or nearly all of the debtor's property; (7) insolvency caused by the transfer; and (8) failure to produce rebutting evidence when circumstances surrounding the transfer are suspicious.

Fink v. Wright (In re Wright), 611 B.R. 319, 324 (Bankr. W.D. Mo. 2019). The Missouri legislature has similarly adopted a list of the following eleven statutory

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factors a court may consider, among other factors, in determining whether a debtor acted with fraudulent intent:

> (1) The transfer or obligation was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Mo. Rev. Stat. § 428.024.2. Because the common law badges of fraud and statutory factors are similar, courts may use either the common law badges of fraud or the statutory factors to analyze fraudulent intent. *Brown v. Third Nat'l Bank (In re Sherman)*, 67 F.3d 1348, 1354 (8th Cir. 1995).

a. The circumstances of this case support the inference that the Arreguis acted with fraudulent intent

In this case, the parties focused on Missouri's statutory factors rather than the common law badges of fraud in analyzing fraudulent intent. The trustee does not argue that the following Missouri factors apply: (1) ("The transfer or obligation was to an insider"), (4) ("Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit"), (6) ("The debtor absconded"), (10) ("The transfer occurred shortly before or shortly after a substantial debt was incurred"), or (11) ("The debtor transferred the essential assets of the business to a

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lienor who transferred the assets to an insider of the debtor"). Accordingly, the court focuses its analysis on the Missouri statutory factors the trustee raised.

The court determines Missouri factors (3) ("The transfer or obligation was disclosed or concealed"); and (5) ("The transfer was of substantially all the debtor's assets") weigh in favor of finding fraudulent intent. Factor (2) ("The debtor retained possession or control of the property transferred after the transfer") also weighs in favor of finding fraudulent intent, though not strongly. In contrast, factors (7) ("The debtor removed or concealed assets") and (8) ("The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred") do not weigh in favor of finding fraudulent intent. Because the federal formula defining insolvency differs materially from the Missouri's insolvency formula, the court's determination of Missouri factor (9) ("The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred") differs under the Bankruptcy Code and Missouri law. As the court explains below, the Arreguis were insolvent under the Bankruptcy Code's definition but were not insolvent under Missouri law. The court will analyze the Missouri factors the trustee raises in order.

i. Missouri's second factor: the debtor retained possession or control of the property transferred after the transfer

Under the second statutory factor, evidence that a debtor retained exclusive possession or control of purportedly transferred property may support the inference that the debtor acted with fraudulent intent.

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The implication of fraudulent intent under this factor is straightforward in a typical fraudulent transfer case. Fraudulent transfer causes of action typically arise when a debtor has transferred property to a third party, often a friend or relative, while in financial peril. D. Christopher Carson, *Analyzing and Pursuing Fraudulent Transfer Claims*, in LEADING LAWYERS ON NAVIGATING FRAUDULENT TRANSFER CLAIMS, DEVELOPING AN EFFECTIVE LITIGATION STRATEGY, AND RESPONDING TO RECENT TRENDS AND DEVELOPMENTS (2009), 2009 WL 2510926, at *3. If the debtor retains control or possession of the property despite the purported transfer, the post-transfer retention suggests the debtor intended to create the false appearance of a transfer while retaining a secret interest-not to effectuate a genuine transfer. *See Rosen v. Bezner*, 996 F.2d 1527, 1532 (3d Cir. 1993) (explaining implication of fraud when the debtor "represents to the world that the debtor has transferred away all his interest in the property while in reality he has retained some secret interest."). The sham transfer and secret interest suggest the debtor acted with intent to hinder, delay, or defraud creditors. *See id.* at 1533 ("In many and perhaps most cases, . . . the very fact that the debtor has created and retained a secret interest will be sufficient to hold . . . [the debtor acted to] hinder creditors.").

In contrast, when a debtor effectuates an allegedly fraudulent transfer as a part of pre-bankruptcy exemption planning, the debtor's post-transfer retention does not strongly support the inference that the debtor acted with fraudulent intent. Specifically, debtors who transfer property as a part of pre-bankruptcy exemption planning do so with the express purpose of maintaining the interest they claim as

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exempt. *See* 11 U.S.C. § 522(b) (permitting a debtor to exempt property "from the estate"); 11 U.S.C. § 541 (defining property of the estate by reference to the debtor's interests in property). But the Eighth Circuit has repeatedly held that the intent to pursue exemption planning is not inherently fraudulent, even if the transfer was "for the express purpose of placing [transferred] property beyond the reach of creditors" and into exempt forms. *Hanson v. First Nat'l Bank in*

Brookings, 848 F.2d 866, 868 (8th Cir. 1988). Because openly and overtly retaining exempt property is inconsistent with the intention to create the false appearance of a transfer while retaining a secret interest (the intention that suggests fraudulent intent outside of the exemption-planning context), post-transfer retention of exempt property does not strongly support the inference that the debtor acted with fraudulent intent.

Here, though the Arreguis retained exclusive possession and control of the residence after they transferred title from themselves as joint tenants to themselves as tenants by the entireties, their apparent intent was to effectuate pre-bankruptcy planning, not to create the false appearance of a transfer. Accordingly, though this statutory factor is present, the post-transfer retention does not strongly support the inference that the Arreguis acted with fraudulent intent in this case.

ii. Missouri's third factor: the transfer or obligation was disclosed or concealed

Missouri's third factor requires the court to analyze whether the debtor disclosed or concealed the transfer. Mo. Rev. Stat. § 428.024.2(3). Debtors have an affirmative "duty to truthfully disclose these transactions on their bankruptcy schedules." *See Brown v. Third Nat'l Bank (In re Sherman)*, 67 F.3d 1348, 1354 (8th Cir. 1995)

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(analyzing effect of omission from a "bankruptcy schedule"). A violation of the duty to disclose a transfer is tantamount to concealment and may support an inference of fraudulent intent. *Id.*

The court determines this factor weighs heavily in favor of fraudulent intent. The Arreguis transferred title to themselves three days before the petition date, then egregiously and without a valid explanation failed to disclose the transfer on their statement of financial affairs. Angela's trial testimony (which is inconsistent with the Arreguis' previous apparent concession that a transfer occurred) makes clear that the Arregnis decided not to disclose the transfer in reliance on the unfounded legal argument that the quit claim deed did not give rise to a "transfer" under the law. But the Arreguis' erroneous legal argument concerning the proper characterization of the transfer does not absolve them of their duty of candor to this court. Instead, the Arreguis' legal argument in favor of nondisclosure suggests the Arreguis' nondisclosure was part of a scheme to escape the scrutiny that the integrity of the bankruptcy system demands. Their deliberate nondisclosure strongly supports the inference that they acted with fraudulent intent.

iii. Missouri's fifth factor: the transfer was of substantially all of the debtors' assets

Next, under the fifth factor, the debtor may have acted with fraudulent intent if the debtor transferred "substantially all the debtor's assets." Mo. Rev. Stat. § 428.024.2. The phrase "substantially all" connotes close to the entirety of, or "some percentage which is very near 100%." *Cent. States Se. & Sw. Areas Pension Fund v. Bellmont Trucking Co., Inc.*, 610 F.Supp. 1505, 1511 (N.D. Ind. 1985). In a case

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involving a transfer from a debtor to himself or herself, the court must consider the transfer's effect on the sum of the debtor's *nonexempt* assets. *See Addison v. Seaver (In re Addison)*, 540 F.3d 805, 816-17 (8th Cir. 2008) (distinguishing the facts in that case with the facts in *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871 (8th Cir. 1988), where the debtor "converted almost all of his *nonexempt* property (approximately $700,000) into exempt life insurance policies and annuities" (emphasis added)). This factor imposes a "principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered." *Tveten*, 848 F.2d at 879 (Arnold, J., dissenting) (quoting *Albuquerque Nat'l Bank v. Zouhar (In re Zouhar)*, 10 B.R. 154, 157 (Bankr. D.N.M. 1981)).

The court determines the fifth factor is present. The Arreguis' schedule A/B reveals that the total value of their assets equals $445,020.25. Absent the tenancy by the entireties exemption in the residence, the Arreguis' estate would include nonexempt assets worth $129,482. But the quit claim deed transferring the Arreguis' property to themselves as tenants by the entireties reduced the nonexempt assets available to the estate to only $2,160. By reducing the available nonexempt equity by $127,322 (from $129,482 to $2,160), the Arreguis' transfer reduced their nonexempt assets by 98.3 percent ($127,322 divided by $129,483). Because this percentage is "very near 100%," the court determines the transfer at issue was of "substantially all the debtor's assets" under the fifth statutory factor.

iv. Missouri's seventh factor: the debtor removed or concealed assets

Under the seventh factor, the court must analyze whether the debtor removed

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or concealed assets. Mo. Rev. Stat. § 428.024.2. This factor applies only if the debtors removed or concealed the nature and existence of an asset or transfer from their creditors at the time they made the transfer. *Maxus Liquidating Tr. v. YPF S.A. (In re Maxus Energy Corp.)*, 641 B.R. 467, 520-21 (Bankr. D. Del. 2022).

The court determines the seventh factor is not present. The trustee does not allege that the Arreguis removed or concealed the residence itself or concealed the transfer at the time they made it, but instead argues that this element is satisfied because the transfer made the equity in the residence unavailable to the Arreguis' individual creditors. The trustee cited no authority supporting the proposition that a transfer of non-exempt property to an exempt form constitutes the removal or concealment of the property itself, and the court is aware of none. Because the Arreguis did not remove or conceal the residence when they made the transfer, the court determines the trustee has not established this factor.

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v. Missouri's eighth factor: the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred

Under Missouri's eighth factor, the court must determine whether the value the debtor received as a result of the transfer was at least reasonably equivalent to the value transferred. Though reasonably equivalent value is a factor that may support a finding of actual fraud, it is also a "hallmark" of constructive fraud, 5 Collier on Bankruptcy ¶ 548.05[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2018), and is critical to the court's constructive fraud analysis in Part B.4 of this opinion. For the reasons explained in Part B.4 below, the court determines the Arreguis received at least reasonably equivalent value for the transfer at issue in this case. *See infra* Part B.4. As a result, the reasonably equivalent value statutory factor does not weigh in favor of fraudulent intent here.

vi. Missouri's ninth factor: the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation incurred

The ninth statutory factor requires that the court determine whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation incurred. Mo. Rev. Stat. § 428.024.2.

The Bankruptcy Code and the MUFTA each define the term "insolvent" differently. Under the Bankruptcy Code,

> "The term 'insolvent' means (A) . . . financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of-(i)

> property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors;
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> and (ii) property that may be exempted from property of the estate under section 522 of this title."

11 U.S.C. § 101(32). Under the MUFTA,

> "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation; ... (4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under sections 428.005 to 428.059; and (5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset."

Mo Rev. Stat. § 428.014. Thus, the definitions of insolvency under Bankruptcy Code and the MUFTA include common elements. For example, under both the Bankruptcy Code and the MUFTA, a debtor is insolvent if the sum of the debtor's debts exceeds the fair value of its assets. *See* Mo. Rev. Stat. § 428.014 (defining insolvency under Missouri law); 11 U.S.C. § 101(32) (defining insolvency under bankruptcy law). And under both the Bankruptcy Code and the MUFTA, the court must exclude the value of allegedly fraudulently transferred property from its calculation of the debtor's assets. 11 U.S.C. § 101(32); Mo. Rev. Stat. § 428.014.

But the calculations for insolvency otherwise differ under the Bankruptcy Code and the MUFTA. *Compare* 11 U.S.C. § 101(32) (defining insolvency under the Bankruptcy Code), *with* Mo Rev. Stat. § 428.014 (defining insolvency under Missouri law). Specifically, though both the Bankruptcy Code and MUFTA require that the court exclude fraudulently transferred property from its calculation of debtor's assets, the Bankruptcy Code additionally requires that the court exclude the value of exempt property from the calculation. *See* 11 U.S.C. § 101(32) ("exclusive of-(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such

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entity's creditors; and (ii) *property that may be exempted from property of the estate under section 522 of this title*") (emphasis added). In contrast, the MUFTA does not require that the court exclude exempt property. *See* Mo. Rev. Stat. § 428.014 (requiring exclusion of fraudulently transferred property but not exempt property). And though the Bankruptcy Code does not require that the court exclude any specific categories of liabilities from its debt calculation, the MUFTA directs the court to exclude from the debt component of the equation the value of the any debts secured by the allegedly fraudulently transferred property. *Compare* 11 U.S.C. § 101(32) (making no exclusion for debts secured by fraudulently transferred assets), *with* Mo Rev. Stat. § 428.014 ("Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset."). Because the calculations under the Bankruptcy Code and MUFTA differ, the court independently analyzes each below.

The court determines the Arreguis were insolvent during the relevant period under the Bankruptcy Code. The Arreguis listed debts totaling $177,173.27 on their schedules D and E/F. The Arreguis listed assets totaling $445,020.25 on their schedule A/B. After subtracting from the Arreguis' total assets the value of the alleged fraudulently transferred residence ($230,700) and the value of the Arreguis' other exempt property ($201,399), the remaining value of the Arreguis' assets equals $12,921.25. The sum of the Arreguis' debts

($177,173.27) exceeds the sum of their assets ($12,921.25) under the Bankruptcy Code. As a result, the ninth factor is present under the Bankruptcy Code.

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In contrast, the court determines the Arreguis were not insolvent during the relevant period under the MUFTA. As discussed, the Arreguis listed a total of $445,020.25 assets on their schedule A/B, and listed a total of $177,173.27 debts on their schedules D, and E/F. Of their $445,020.25 aggregate asset value, $230,700 is from their allegedly fraudulently transferred residence. And of their $177,173.27 aggregate debts, $88,378 are secured by their residence. Thus, the sum of the Arreguis' assets, after subtracting the value of their residence but not subtracting their other exempt property, is $214,320.25. The sum of the Arreguis' debts, excluding the $88,378 debts secured by their residence, is $88,795.27. Because their debts ($88,795.27) do not exceed their assets ($214,320.25) under the MUFTA calculation, the ninth factor is not present for purposes of the MUFTA.

In summary, the court determines the statutory factors support the inference that the Arreguis acted with fraudulent intent. In particular, that the Arreguis retained possession or control of the property after the transfer supports the inference of fraudulent intent, though not strongly. That the Arreguis did not disclose the transfer on their statement of financial affairs despite making the transfer only three days before the petition date strongly supports the inference that they acted with fraudulent intent. Finally, that the transfer deprived the estate of substantially all of the Arreguis' nonexempt assets supports the inference of fraudulent intent. The debtor's insolvency under the Bankruptcy Code weighs in favor of fraudulent intent, though the debtor's lack of insolvency under the MUFTA undermines the implication

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of fraudulent intent. Taken together, the presence of these factors support the inference that the Arreguis acted with fraudulent intent.

b. The circumstances of this case establish extrinsic evidence of fraud

Even when a debtor's transformation of nonexempt assets to exempt forms satisfies several badges of fraud or statutory factors, the Eighth Circuit also requires evidence of fraud "extrinsic to the mere facts of conversion of non-exempt assets into exempt." *Addison v. Seaver (In re Addison)*, 540 F.3d 805, 813 (8th Cir. 2008) (quoting *Jensen v. Dietz (In re Sholdan)*, 217 F.3d 1006, 1010 (8th Cir. 2000)). Examples of extrinsic evidence include that the transferor (1) had been sued or threatened with suit prior to the transfer, *In re Addison*, 540 F.3d at 814; (2) radically departed from a previous lifestyle, *In re Sholdan*, 217 F.3d at 1010; (3) materially misled or deceived creditors about the debtor's position, *Panushka v. Johnson (In re Johnson)*, 880 F.2d 78, 82 (8th Cir. 1989); (4) conveyed the property for less than fair consideration, *Graven v. Fink (In re Graven)*, 936 F.2d 378, 383-84 (8th Cir. 1991); (5) continued retention, benefit, or use of property after the transfer, *id.*; (6) transferred property after a creditor obtained a judgment, *Ford v. Poston (In re Ford)*, 773 F.2d 52, 55 (4th Cir. 1985); and (7) made false statements or failed to disclose the transfer on his or her bankruptcy schedules, *Brown v. Third Nat'l Bank (In re Sherman)*, 67 F.3d 1348, 1354-55 (8th Cir. 1995).

The court determines three circumstances provide extrinsic evidence of fraud in this case. Several of those circumstances were also relevant to the court's above analysis of the statutory factors weighing in favor of actual fraud. First, the Arreguis

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continue to retain, benefit from, and use their property after the transfer. Second, the Arreguis transferred the property in close proximity to the petition date-within one business day. Third, and most egregiously, despite transferring the

property in such close proximity to the petition date, the Arreguis appear to have deliberately omitted the transfer from their statement of financial affairs. This omission is inexcusable and might alone have been sufficient to establish that the Arreguis acted with fraudulent intent.

Because these three circumstances provide extrinsic evidence of fraudulent intent to supplement the statutory factors that are present in this case, the court determines the Arreguis made the transfer "with the intent to hinder, delay, or defraud" their creditors under both § 548 and the MUFTA. Thus, the transfer is avoidable as actually fraudulent.

The court will now analyze whether the transfer is also avoidable as constructively fraudulent under the Bankruptcy Code and the MUFTA.

B. Constructive Fraud Under 11 U.S.C. § 548(a)(1)(B)(ii) &Mo. Rev. Stat. § 428.024.1(2)

Many of the elements a plaintiff must prove to establish constructive fraud under the Bankruptcy Code are identical to those a plaintiff must establish under the MUFTA. Specifically, to succeed under § 548(a)(1)(B) of the Bankruptcy Code and § 428.024.1(2) of the MUFTA, a plaintiff must prove the following common elements: (1) the debtor had a property interest; (2) the debtor voluntarily or involuntarily transferred that interest; (3) the transfer occurred within a specified limitations period-two years under § 548 of the Bankruptcy Code, and four years under

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§ 428.024.1(2) of the MUFTA; (4) the debtor received less than reasonably equivalent value for the transfer; and (5) the debtor suffered from at least one "fragile financial condition," such as insolvency or inadequate capitalization. 11 U.S.C. § 548(a)(1)(B); Mo. Rev. Stat. § 428.024.1(2). *See also* 5 Collier on Bankruptcy ¶ 548.05[3] (Richard Levin &Henry J. Sommer eds., 16th ed. 2018) (using the phrase "fragile financial condition[]" to describe the requirement under § 548(a)(1)(B)(ii)). The fragile financial condition that a plaintiff must prove under the fifth element above, however, differs under each fraudulent transfer statute.

Section 548 lists four alternative fragile financial conditions the plaintiff may prove to satisfy its burden under the fifth element: that the debtor (a) was insolvent at the time of the transfer or became insolvent as a result of the transfer, (b) had or was about to have unreasonably small capital, (c) intended to incur or believed it would incur debts beyond its ability to pay, or (d) made the transfer to or for the benefit of an insider under an employment contract and not in the ordinary course of business. 11 U.S.C. § 548(a)(1)(B)(ii).

In contrast, § 428.024.1(2) of the MUFTA provides only two available fragile financial conditions the plaintiff may prove to satisfy the fifth fraudulent transfer element: that the debtor (a) had or was about to have unreasonably small capital, or (b) intended to incur or "believed or reasonably should have believed" it would incur debts beyond its ability to pay. Mo. Rev. Stat. § 428.024.1(2).

For the following reasons, the court determines the trustee has established that the Arreguis (1) had a property interest; (2) voluntarily or involuntarily

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transferred that interest; (3) made the transfer within the specified limitations periods; and (5) suffered from at least one fragile financial condition. The trustee, however, has not established under element (4) that the Arreguis received less than reasonably equivalent value for the transfer. Because the trustee has not satisfied his burden of establishing all elements under either the Bankruptcy Code or MUFTA, the transfer at issue in this case is not avoidable as constructively fraudulent.

1. The Arreguis had a property interest in their residence

The Arreguis concede that they had a property interest in their residence. Thus, this element is satisfied.

2. The Arreguis voluntarily transferred title in their residence to themselves

For the reasons the court explained in Part A.1 above, the quit claim deed transferring the Arreguis' interest in the property from themselves as joint tenants to themselves as tenants by the entireties effectuated a "transfer" under the Bankruptcy Code and the MUFTA. This element is satisfied.

3. The Arreguis transferred title in their residence within the appropriate timeframe under the Bankruptcy Code and the MUFTA

Because the Arreguis effectuated the transfer three days prior to filing their bankruptcy petition, they made the transfer within the applicable lookback periods: two years under the Bankruptcy Code and four-years under the MUFTA. This element is satisfied.

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4. The Arreguis received reasonably equivalent value

Under the fourth element of constructive fraud, the court must determine whether the value of the consideration the debtors received was at least reasonably equivalent to the value they transferred.

The Bankruptcy Code defines "value" in relevant part as, "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A). The value a debtor receives in a transfer is "reasonably equivalent" to the value transferred if the property received and the property transferred are "substantially comparable" in worth. *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 548 (1994). A debtor also receives reasonably equivalent value if the debtor receives property more valuable than the property the debtor transferred. *See Rebein v. Cornerstone Creek Partners, LLC (In re Expert S. Tulsa, LLC)*, 842 F.3d 1293, 1297-99 (10th Cir. 2016) (determining fraudulent transfer claim failed because the debtor received more than reasonably equivalent value from the sale of property).

The question of "reasonably equivalent value" commonly arises after a debtor transfers an interest to a third party in exchange for nothing or for distinct property of lesser value-not when the debtor transfers property to himself or herself to create an exemption in a formerly nonexempt asset. *See* David G. Epstein, Bruce A. Markell, Steve H. Nickles & Lawrence Ponoroff, *Bankruptcy: Dealing With Financial Failure for Individuals and Businesses* 504 (West Academic, 5th ed. 2021) (describing the "classic example" of a constructively fraudulent transfer as one in which the debtor did not receive "any economic value in exchange for the [transfer]"). In circumstances

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not involving exemption planning, the values at issue are the same whether the court views them from the perspective of the debtor or from the perspective of the estate: the estate is depleted by an amount equal to the value the debtor forfeited, and the estate is enriched by an amount equal to the value the debtor received. *See, e.g.*, *BFP*, 511 U.S. at 535-40 (analyzing reasonably equivalent value and making no distinction between value to the debtor and the value to the estate).

But in the context of exemption planning, valuation is less straightforward. When a debtor makes a transfer to transform nonexempt property to exempt property, the debtor's gain is inherently the estate's (and creditors') loss. Specifically, the nonexempt property the debtor transferred (property vulnerable to creditors) was *less valuable to the debtor* than the newly exempt

property the debtor received as a result of the transfer (property protected from creditors). Conversely, the nonexempt property was *more valuable to creditors* than the exempt property. Thus, from the debtor's perspective, the value received was at least reasonably equivalent to the value transferred. But from the creditors' perspectives, the value received was less than reasonably equivalent to the value transferred.

In this case, the trustee asks the court to analyze reasonably equivalent value from creditors' perspectives, rather than from the debtors' perspective, because fraudulent transfer causes of action exist to protect creditors' interests. *See* Brief in Support of Trustee's Complaint to Avoid Fraudulent Transfer, at 4, ECF No. 14 (citing *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 646 (3d Cir. 1991)). Reasoning that "[i]ndividual creditors of the [Arreguis] were harmed by the transfer

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into tenancy by the entirety ownership," the trustee argues this element is satisfied. *Id.*

The court disagrees. The trustee's argument makes sense both intuitively and as a matter of policy,[16] and has persuaded other courts. *See, e.g., Rebein v. Cornerstone Creek Partners, LLC (In re Expert S. Tulsa, LLC)*, 842 F.3d 1293, 1297 (10th Cir. 2016) ("Because fraudulent-transfer statutes are for the protection of unsecured creditors, we measure the value received in terms of the effect on those creditors."); *Mellon Bank, N.A.*, 945 F.2d at 646 ("The purpose of the laws is estate preservation; thus, the question whether the debtor *received* reasonable value must be determined from the standpoint of the creditors."). But it suffers two fatal flaws. First, it contradicts the language of the relevant statutes; and second, it would severely restrict a debtor's ability to engage in good faith pre-bankruptcy exemption planning despite longstanding Eighth Circuit authority recognizing the ability to do so. *See, e.g., Fosberg v. Sec. State Bank of Canova*, 15 F.2d 499, 501-02 (8th Cir. 1926) (discussing policy in favor of exemption planning); *Norwest Bank of Neb., N.A. v. Tveten*, 848 F.2d 871, 873-74 (8th Cir. 1988) (same).

First, the trustee's argument contradicts the language of the relevant statutes, which direct the court to analyze: "the value of the consideration *received by the debtor*." Mo. Rev. Stat. § 428.024.2(8); *see also* 11 U.S.C. § 548(a)(1)(B)(i) ("if the

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debtor voluntarily or involuntarily-received less than a reasonably equivalent value in exchange for such transfer or obligation.") (emphasis added). Because both statutes focus on the value the debtor received rather than the value that became available to unsecured creditors as a result of the transfer, the relevant language does not contemplate analysis from creditors' perspectives. The court must follow the clear statutory language and analyze whether the value the *debtor* received was at least reasonably equivalent to the value transferred.

Second, viewing reasonably equivalent value from the creditors' perspectives under these circumstances would severely limit a debtor's right to engage in good faith exemption planning-a right the Eighth Circuit has repeatedly upheld. *See, e.g., Panuska v. Johnson (In re Johnson)*, 880 F.2d 78, 81 (8th Cir. 1989) ("The law permits debtors to intentionally transform property into exempt assets."); *Forsberg v. Sec. State Bank of Canova*, 15 F.2d 499, 501 (8th Cir. 1926) (discussing policy in favor of exemption planning). For the reasons explained above, from creditors' perspectives, the value of exempt property is inherently less than reasonably equivalent to the value of non-exempt property. Thus, transfers in pursuit of exemption planning will typically satisfy the "less than a reasonably equivalent value" element from the perspectives of creditors. Moreover, because exemption planning in anticipation of bankruptcy inherently involves the deliberate transfer of non-exempt property to an exempt form at a time when the debtor's financial condition has made bankruptcy appealing, transfers effectuating exemption

planning will satisfy the first and second elements of a constructively fraudulent transfer (that

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the debtor had a property interest and voluntarily or involuntarily transferred that interest, respectively) and will typically also satisfy the remaining elements (that the debtor made the transfer within the specified limitations periods and while under a qualifying fragile financial condition). Thus, viewed from creditors' perspective, transfers in pursuit of pre-bankruptcy exemption planning will almost always be constructively fraudulent. This result is untenable because-though the Eighth Circuit does not appear to have considered whether pre-bankruptcy exemption planning transfers might qualify as constructively fraudulent transfers-it has long held that "the conversion of non-exempt to exempt property for the purpose of placing the property out of the reach of creditors, without more, will not deprive the debtor of the exemption to which he otherwise would be entitled." *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871, 873-74 (8th Cir. 1988). Consequently, the court declines to adopt the interpretation the trustee proposes.

The court determines the Arreguis received at least reasonably equivalent value in this case. The Arreguis transferred title to their $230,700 residence as joint tenants and received title to their $230,700 residence as tenants by the entirety, plus "the sum of $10 and other good and valuable consideration." Because these values are substantially comparable in worth, the fair market value of the property the Arreguis received was reasonably equivalent to the fair market value of the property the Arreguis transferred. And from the Arreguis' perspective, the intrinsic value of the newly exempt residence was more than reasonably equivalent to the value of the non-exempt residence they transferred because the transfer shielded the residence

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from their individual creditors' claims. The trustee has, therefore, not established that the Arreguis received less than reasonably equivalent value under the Bankruptcy Code and the MUFTA.

5. Fragile financial condition

The fragile financial condition the trustee relies on to establish its burden under the Bankruptcy Code differs from the fragile financial condition the trustee relies on under the MUFTA. The court separately analyzes the trustee's arguments under the Bankruptcy Code and the MUFTA below.

a. Fragile financial condition under the Bankruptcy Code

The fragile financial condition the trustee asserts under § 548(a)(1)(B) of the Bankruptcy Code is that the Arreguis were insolvent at the time of the transfer. The court analyzed insolvency under the Bankruptcy Code in Part A.2.a.vi above and determined trustee satisfied his burden to prove insolvency under the Bankruptcy Code. For the same reasons the court determined the Arreguis were insolvent in its above analysis of actual fraud under § 548(a)(1)(A), the court determines this element is also satisfied as to constructive fraud under § 548(a)(1)(B).

b. Fragile financial condition under the MUFTA

The fragile financial condition the trustee asserts under the MUFTA is that the Arreguis intended to incur or believed or reasonably should have believed they would incur debts beyond their ability to pay. Mo. Rev. Stat. § 428.024.1(2)(b). This fragile financial condition contains a subjective component-the transferor must have subjectively intended or subjectively held a belief that he or she was incurring

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debts beyond his or her ability to pay. *Sosne v. Van Vleck (In re Van Vleck)*, 211 B.R. 689, 693 (Bankr. E.D. Mo. 1997).

Here, the court determines the trustee has established the Arreguis "intended to incur" or "believed or reasonably should have believed" they would incur debts beyond their ability to pay. When Angela's counsel asked her about the Arreguis' motivation for the transfer, Angela explained that she and Miguel would have otherwise had to pay back all of their unsecured debts in their chapter 13 case, and that they did not earn enough income to repay all of their unsecured debts. This testimony establishes that Arreguis made the transfer at a time when they subjectively believed they lacked the ability to pay their debts. Thus, the trustee has established a fragile financial condition under the MUFTA.

In summary, the court will avoid the Arreguis' transfer as actually fraudulent under § 548(a)(1)(A) of the Bankruptcy Code and § 428.024.1(1) of the MUFTA. But the court determines the plaintiff has not established the Arreguis' transfer was constructively fraudulent under § 548(a)(1)(B) of the Bankruptcy Code or § 428.024.1(2) of the MUFTA.

CONCLUSION

For the reasons explained above, the court determines that the Arreguis' transfer was actually fraudulent under the Bankruptcy Code and the MUFTA, the transfer should be avoided, and the Arreguis' joint tenancy ownership should be recovered and reinstated for the benefit of the chapter 13 estate. The clerk of the court is directed to set this matter for status hearing to address the appropriate

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disposition of this adversary proceeding in light of other developments and circumstances in the Arreguis' main chapter 13 bankruptcy case.

Notes:

[1] Agreed Stipulation of Undisputed Facts ¶ 1, ECF No. 13.

[2] *Id.* at ¶ 2.

[3] *Id.* at ¶ 5.

[4] *See id.* at ¶¶ 6-7, 9 (explaining that refinancing and home equity line of credit documents identify the Arreguis as husband and wife and describing quit claim deed filed three days before the petition date).

[5] Chapter 13 Voluntary Petition, Case No. 19-41895, ECF No. 1.

[6] *Id.*

[7] Order Dismissing Case on Trustee's Motion to Dismiss Case for Default in Plan Payments, Case No. 19-41895, ECF No. 63.

[8] Agreed Stipulation of Undisputed Facts, Case No. 22-40516, ¶ 9, ECF No. 13.

[9] *Id.* at ¶ 10.

[10] *Id.* at ¶11.

[11] *Id.* at ¶ 12.

[12] *Id.* at ¶13, 14.

[13] *Id.* at ¶ 17.

[14] *Id.* at ¶¶ 18, 19.

[15] Complaint to Avoid Fraudulent Transfer, Adv. No. 22-04027, ECF No. 1.

[16] The court notes that other features of federal fraudulent transfer law consider creditors' perspectives. For example, the Bankruptcy Code defines insolvency to exclude the value of a debtor's exempt assets (an exclusion that increases the likelihood that a debtor's liabilities will exceed assets). 11 U.S.C. § 101(32). The exclusion of property that would be unavailable to satisfy creditors' claims (due to its exempt status)

suggests Congress views insolvency from the creditors' perspectives.

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656 B.R. 898
United States Bankruptcy Court, E.D. Missouri, Southeastern Division.

IN RE: Carlos Alberto **RIVAS**
and Tamara Lynn **Rivas**, Debtors.

Case No. 23-10505-357
|
Signed December 12, 2023

Synopsis

Background: Chapter 7 debtor filed motion for waiver of credit counseling and financial management course on behalf of her husband.

Holdings: The Bankruptcy Court, Brian C. Walsh, J., held that:

[1] debtor-husband was "disabled" under Missouri law, and thus "incompetent" within meaning of rule allowing representative to file bankruptcy petition on behalf of another;

[2] debtor-wife, as debtor-husband's attorney in fact, was not a "representative" who could file bankruptcy petition on his behalf;

[3] debtor-wife qualified as incompetent debtor-husband's "next friend," and thus her filing of bankruptcy petition on his behalf was valid;

[4] appointment of debtor-wife as guardian ad litem for incompetent debtor-husband was warranted; and

[5] grounds existed to waive the credit-counseling and financial-management-course requirements for debtor-husband.

Motion granted; debtor-wife appointed guardian ad litem.

West Headnotes (12)

[1] **Bankruptcy** ⇐ Application of state or federal law in general

Bankruptcy court looks to state law for guidance as to who may file bankruptcy petition on behalf of "incompetent" person. Fed. R. Bankr. P. 1004.1.

[2] **Bankruptcy** ⇐ Who May Institute Case

Debtor who is "disabled" under Missouri law is "incompetent" for purposes of Bankruptcy Rule governing who has authority to file bankruptcy petition on behalf of another, such that a representative, a next friend, or a guardian ad litem may file a bankruptcy petition on the debtor's behalf. Fed. R. Bankr. P. 1004.1.

[3] **Bankruptcy** ⇐ Who May Institute Case

Chapter 7 debtor was "disabled" under Missouri law, and therefore "incompetent" within meaning of Bankruptcy Rule allowing representative to file bankruptcy petition on behalf of another, where debtor had experienced serious health issues and by the time the bankruptcy petition was filed, his mental capacity had significantly diminished, including being unable to process complex or new information, nor was he able to pay his bills or understand the extent of his financial resources. Mo. Ann. Stat. § 475.079; Fed. R. Bankr. P. 1004.1.

[4] **Principal and Agent** ⇐ Construction of letters or powers of attorney

Principal and Agent ⇐ Construction of letters or powers of attorney

As general principle, Missouri courts strictly construe powers of attorney.

[5] **Principal and Agent** ⇐ Construction of letters or powers of attorney

Principal and Agent ⇐ Construction of letters or powers of attorney

Under Missouri law, because power of attorney is ultimately an agency relationship, strict construction does not preclude implied authority to act.

[6] **Bankruptcy** ⇐ Who May Institute Case

Chapter 7 debtor-wife, as debtor-husband's attorney in fact, was not a "representative" who could file bankruptcy petition on behalf of debtor-husband. Fed. R. Bankr. P. 1004.1.

[7] **Attorneys and Legal Services** ⇐ Attorney as officer of court

Under Missouri law, attorney in fact is not an officer of the court.

[8] **Bankruptcy** ⇐ Who May Institute Case

"Next friend" who may file bankruptcy petition on behalf of incompetent debtor is broad enough to include anyone who has interest in welfare of debtor. Fed. R. Bankr. P. 1004.1.

[9] **Bankruptcy** ⇐ Who May Institute Case

Chapter 7 debtor-wife qualified as incompetent debtor-husband's "next friend," and thus her filing of bankruptcy petition on behalf of debtor-husband was valid; debtor-husband was unable to process complex information or understand his financial affairs, and debtor-wife had been married to him for 28 years and their joint debts were substantial, such that they had a significant relationship. Fed. R. Bankr. P. 1004.1.

[10] **Bankruptcy** ⇐ Attorneys

Appointment of Chapter 7 debtor-wife as guardian ad litem for incompetent debtor-husband was warranted, solely for purposes of the bankruptcy proceeding, since debtor-husband was unrepresented in the bankruptcy case and she was the next friend of debtor-husband.

[11] **Bankruptcy** ⇐ Who May Institute Case

Next friend is not a "representative" for purposes of Bankruptcy Rule allowing representative to file bankruptcy petition on behalf of another. Fed. R. Bankr. P. 1004.1.

[12] **Bankruptcy** ⇐ Dischargeable Debtors

Grounds existed to waive the credit-counseling and financial-management-course requirements for Chapter 7 debtor, who was unable to manage his financial resources or to process complex information, and thus was incapacitated. 11 U.S.C.A. § 109(h)(4).

Attorneys and Law Firms

*900 John A. Loesel, Lichtenegger, Weiss & Fetterhoff, LLC, Jackson, **MO**, for Debtors.

MEMORANDUM OPINION

Brian C. Walsh, United States Bankruptcy Judge

Debtor Tamara Lynn **Rivas** filed a Motion for Waiver of Credit Counseling and Financial Management Course on behalf of her husband, Debtor Carlos Alberto Rivas, on October 31, 2023 (the "Motion"). For the reasons stated below, I will grant the Motion and appoint Tamara as Carlos's guardian ad litem.[1]

I. Factual and Procedural Background

The Debtors filed their joint Chapter 7 petition on October 31, 2023. That same day, Tamara filed her Certificate of Credit Counseling. No certificate was provided by or for Carlos. Instead, purporting to act in her capacity as Carlos's attorney in fact, Tamara filed the Motion, alleging that Carlos is unable to complete the credit-counseling and financial-

management course requirements of 11 U.S.C. § 109(h) and 11 U.S.C. § 727(a)(11), respectively, because of his "incapacity." Attached to the Motion was a copy of a durable power of attorney executed by Carlos in favor of Tamara. The Debtors also filed a letter from a registered nurse practitioner, stating that Carlos has a medical condition that physically prevents him from attending court, as well as inhibits his focus and memory.

I conducted an evidentiary hearing on the Motion on December 4, 2023. Tamara gave sworn testimony as to Carlos's capacity at the time of the execution of the power of attorney, as well as at the time the bankruptcy petition was filed.

II. Analysis

A threshold question in this case is whether Tamara had the power to file a bankruptcy petition on behalf of Carlos. If so, I must determine whether Carlos should be excused from the credit-counseling and financial-management requirements, as Tamara requests in the Motion.

A. Carlos Is Incompetent for Purposes of Rule 1004.1.

[1] Under Federal Rule of Bankruptcy Procedure 1004.1, a "representative may file a voluntary petition on behalf of [an] infant or incompetent person." Neither the Bankruptcy Code nor the Federal Rules of ***901** Bankruptcy Procedure define the term "incompetent." Therefore, I look to Missouri law for guidance. *See In re Kjellsen*, 53 F.3d 944, 946 (8th Cir. 1995) ("In general, state law determines who has the authority to file a bankruptcy petition on behalf of another."); *In re Sugg*, 632 B.R. 779, 786 (Bankr. E.D. Mo. 2021) (same); *In re Maes*, 616 B.R. 784, 797 (Bankr. D. Colo. 2020) (similar).

Missouri law does not use the term "incompetent" in any relevant context. However, state law authorizes the appointment of a guardian for a person who is "incapacitated" and the appointment of a conservator for a person who is "disabled." § 475.079, RSMo. For the following reasons, I conclude that it is sufficient for a representative, next friend, or guardian ad litem seeking to file a bankruptcy petition to demonstrate that the debtor is "disabled" under Missouri law.

An "incapacitated person" is one who is:

> unable by reason of any physical, mental, or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person, even with appropriate services and assistive technology, lacks capacity to manage the person's essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur.

Id. § 475.010.11. By contrast, a "disabled person" is one who is:

> Unable by reason of any physical, mental, or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage the person's financial resources.

Id. § 475.010.6(a).

Bankruptcy is fundamentally a process concerning a debtor's financial resources. So is a state-law conservatorship. The general duties of a conservator include preserving, protecting, and managing the estate of the protectee, and specific powers include the right to prosecute or defend actions "for the protection of estate assets." *See id.* §§ 475.130.1, 475.130.6(14).

A guardianship is both more general and more comprehensive. A guardian is empowered to "make decisions regarding the adult ward's support, care, education, health, and welfare." *Id.* § 475.120.3. These may include matters such as deciding where the ward lives and making funeral arrangements for the ward. *See id.* §§ 475.120.3(1), 475.120.9.

There is, of course, some overlap between the circumstances of disabled persons and incapacitated persons. In particular, a disabled person's inability to manage his financial resources may expose him to physical injury, illness, or disease, such that the person also is incapacitated. But the overlap is not inevitable or necessarily immediate, particularly if the person has access to the "appropriate services" referenced in the definition of "incapacitated person." *Id.* § 475.010.11. Thus, if I were to equate "incompetent person" in Rule 1004.1 with "incapacitated person" under state law, a meaningful number of disabled persons in need of bankruptcy relief would be unable, as a practical matter, to obtain it because no representative could act on their behalf. There is no reason to believe that the rulemaking authorities intended for debtors who are unable to manage their financial resources to remain on the sidelines, exposed to creditor actions, until their personal circumstances become so dire that a guardianship is appropriate.

[2] I conclude, therefore, that a debtor who is "disabled" under Missouri law is "incompetent" for purposes of Rule 1004.1, such that a representative, a next friend, *902 or a guardian ad litem may file a bankruptcy petition on the debtor's behalf.

[3] In this case, the evidence establishes that Carlos is disabled. Tamara testified that Carlos experienced serious health issues in the fall of 2022. She also stated that on the date the power of attorney was executed in February 2023, Carlos understood his medical condition and the purpose of the instrument. However, by the time the bankruptcy petition was filed on October 31, 2023, Carlos's mental capacity had significantly diminished. Tamara testified that Carlos is unable to process complex or new information. Nor is he able to pay his bills or understand the extent of his financial resources. Therefore, I find that Carlos is incompetent for purposes of Rule 1004.1.

B. Tamara, as Attorney in Fact, Cannot File a Bankruptcy Petition for Carlos.

Next, I must determine whether Tamara qualifies as a person who may file a bankruptcy petition on behalf of Carlos. Tamara argues that as Carlos's attorney in fact, she is a "representative" permitted to initiate this case under Rule 1004.1.

The language of the power of attorney supports Tamara's position in certain respects. It appears to meet Missouri's basic statutory requirements for validity and durability. *See* § 404.705, RSMo. It also grants Tamara "general authority to act" for Carlos with respect to "Claims and Litigation." This general authority is not the same as a grant of general powers —for example, the power "to act with respect to all lawful subjects and purposes." *Id.* § 404.710.2. Rather, a grant of general authority with respect to an express subject, such as litigation, is confined in scope to that particular subject. *See id.* § 404.710.3.

[4] [5] As a general principle, Missouri courts strictly construe powers of attorney. *See Mercantile Trust Co., N.A. v. Harper*, 622 S.W.2d 345, 349 (Mo. Ct. App. 1981); *In re Lambur*, 397 S.W.3d 54, 64 (Mo. Ct. App. 2013). However, because a power of attorney is ultimately an agency relationship, "a strict construction does not preclude implied authority to act." *Ingram v. Brook Chateau*, 586 S.W.3d 772, 775 (Mo. 2019). The *Ingram* court relied heavily on the Restatement (Second) of Agency § 35 (1958), which provides that "authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." *Ingram*, 586 S.W.3d at 776 (cleaned up). Whether Tamara's powers regarding claims and litigation are sufficient to permit her to commence a bankruptcy case under the *Ingram* standard, therefore, is a complex question.

[6] I need not resolve this question, because even if the power of attorney grants Tamara authority to file a bankruptcy petition for Carlos, an attorney in fact is not a "representative" for purposes of Rule 1004.1. The rule states that "representative ... includ[es] a general guardian, committee, conservator, or similar fiduciary." Fed. R. Bankr. P. 1004.1. The meaning of "similar fiduciary," and indeed the meaning of "representative" itself, must be determined in the context of the three specific examples included in the rule. No one would contend, for example, that Carlos's representative in Congress could commence a bankruptcy case on his behalf. *See Yates v. United States*, 574 U.S. 528, 546, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (holding that phrase "record, document, or tangible object" does not include illegally caught fish). Rather, under the principle of *noscitur a sociis*, the broad terms "representative" and "similar fiduciary" derive meaning from the more *903 specific terms that surround them. *See id.* at 543, 135 S.Ct. 1074.

[7] Guardians, committees, and conservators have two important characteristics in common: they are appointed by and supervised by courts, *see* 57 C.J.S. *Mental Health* § 113 (2023), and they centralize decision-making power in one individual or group, *see, e.g., Kjellsen*, 53 F.3d at 946 (holding that guardian was debtor's "duly appointed representative," such that purported next friend could not commence bankruptcy case). An attorney in fact is not an officer of the court. *See Mikesic v. Trinity Lutheran Hospital*, 980 S.W.2d 68, 74 (Mo. Ct. App. 1998). Moreover, nothing prevents a debtor from granting powers of attorney to several individuals over the course of his lifetime. *See* § 404.707.1, RSMo. ("A principal may appoint more than one attorney in fact."). As a result, it is possible—though not particularly likely—that several attorneys in fact for a single debtor could take inconsistent actions in preparation for or in the conduct of that debtor's bankruptcy case. *See In re Benson*, No. 10-64761, 2010 WL 2016891, at *2 (Bankr. N.D. Ga. Apr. 30, 2010) (appointing guardian ad litem for debtor who had two relatives holding powers of attorney but no "duly appointed representative").

Another distinction is important as well. Rule 9010(a) permits any party, including a debtor, to "perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy." Fed. R. Bankr. P. 9010(a). Rule 1004.1 is more specific than Rule 9010(a) in two respects: it concerns the filing of a voluntary petition, and it addresses actions taken on behalf of principals who are unable to act for themselves. As the more specific rule, Rule 1004.1 controls here. *See, e.g.*, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). And it is notable that the three types of actors identified in Rule 9010(a)—agents, attorneys in fact, and proxies—are not specifically included among the representatives authorized to commence a voluntary case.

Because of these distinctions, I conclude that a "representative" under Rule 1004.1 does not include a person who acts merely as the debtor's attorney in fact.

C. Tamara Qualifies as Carlos's Next Friend.

[8] Tamara's failure to qualify as a representative is not the end of the matter. Rule 1004.1 permits an incompetent person who does not have a duly appointed representative to file a petition by a "next friend." Although "next friend" is not defined, the term is "broad enough to include anyone who has an interest in the welfare of an infant or incompetent person who may have a grievance or a cause of action." *In re Brown*, 645 B.R. 524, 529 (Bankr. D.S.C. 2022) (cleaned up). The Supreme Court has formulated a test to determine whether a person may qualify as next friend in the habeas-corpus context, and other bankruptcy courts have adopted that test under Rule 1004.1. *See Whitmore v. Arkansas*, 495 U.S. 149, 163-64, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); *Brown*, 645 B.R. at 529; *Maes*, 616 B.R. at 800. First, the party must "provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf." *Whitmore*, 495 U.S. at 163, 110 S.Ct. 1717. Second, the proposed next friend must "be truly dedicated to the best interests of the person" and have a "significant relationship with the real party in interest." *Id.* at 163-64, 110 S.Ct. 1717.

*904 **[9]** Tamara qualifies as Carlos's next friend. First, as described above, Tamara provided sworn testimony regarding Carlos's inability to process complex information or understand his financial affairs. This is a sufficient explanation for Carlos's inability to file or prosecute this case himself. Second, because Tamara has been married to Carlos for 28 years and their joint debts are substantial, they have a "significant relationship" permitting Tamara to pursue this case on Carlos's behalf.

Therefore, I conclude that Tamara qualifies as Carlos's next friend for purposes of this case, and her filing of the bankruptcy petition on behalf of Carlos was valid.

D. Tamara Should Be Appointed as Guardian Ad Litem.

Rule 1004.1 directs a bankruptcy court to appoint a guardian ad litem on behalf of an incompetent debtor who "is not otherwise represented." Fed. R. Bankr. P. 1004.1. Furthermore, the court must "make any other order to protect the infant or incompetent debtor." *Id.*

[10] **[11]** The appointment of Tamara as guardian ad litem is necessary because Carlos is unrepresented in this bankruptcy case. Although Tamara is the next friend of Carlos, a next friend is not a "representative" for purposes of Rule 1004.1. *See Maes*, 616 B.R. at 801; *Brown*, 645 B.R. at 529-30.

Therefore, I conclude that Tamara Rivas should be appointed as guardian ad litem for Carlos Rivas solely for the purposes of this bankruptcy proceeding, including any related contested matters or adversary proceedings.

E. Waiver of the Credit-Counseling and Financial-Management Requirements Is Appropriate.

A debtor may be excused from the credit-counseling and financial-management course requirements if, after notice and hearing, the court determines that the debtor is unable to complete the requirements because of "incapacity." *See* 11 U.S.C. §§ 109(h)(4) (credit-counseling exception), 727(a)(11) (financial-management course exception). Incapacity exists if "the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities." *Id.* § 109(h)(4).

[12] As described above, the evidence establishes that Carlos is unable to manage his financial resources or to process complex information. Therefore, I find that Carlos is incapacitated for purposes of Section 109(h)(4). Carlos will not be required to complete the credit-counseling and financial-management courses.

III. Conclusion

For these reasons, I will enter a separate order granting the Motion and appointing Tamara Rivas as guardian ad litem for Carlos Rivas.

All Citations

656 B.R. 898

Footnotes

1 I refer to the Debtors by their first names to avoid confusion. No disrespect is intended.

End of Document

404.705. Durable power of attorney, procedure to create, requirements, effect, recording not required, exception — person appointed has no duty to exercise authority conferred, exception. — 1. The authority granted by a principal to an attorney in fact in a written power of attorney is not terminated in the event the principal becomes wholly or partially disabled or incapacitated or in the event of later uncertainty as to whether the principal is dead or alive if:

(1) The power of attorney is denominated a "Durable Power of Attorney";

(2) The power of attorney includes a provision that states in substance one of the following:

(a) "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY IN FACT SHALL NOT TERMINATE IF I BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE"; or

(b) "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY IN FACT, WHEN EFFECTIVE, SHALL NOT TERMINATE OR BE VOID OR VOIDABLE IF I AM OR BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE"; and

(3) The power of attorney is subscribed by the principal, and dated and acknowledged in the manner prescribed by law for conveyances of real estate.

2. All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal's successors in interest, notwithstanding any disability or incapacity of the principal or any uncertainty as to whether the principal is dead or alive.

3. A durable power of attorney does not have to be recorded to be valid and binding between the principal and attorney in fact or between the principal and third persons, except to the extent that recording may be required for transactions affecting real estate under sections 442.360 and 442.370.

4. A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, whether or not the principal has become disabled or incapacitated, is missing or is held in a foreign country, unless the attorney in fact has agreed expressly in writing to act for the principal

in such circumstances. An agreement to act on behalf of the principal is enforceable against the attorney in fact as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so. Acting for the principal in one or more transactions does not obligate an attorney in fact to act for the principal in subsequent transactions.

(L. 1989 H.B. 145 § 3, A.L. 1997 S.B. 265)

---- end of effective 28 Aug 1997 ----
use this link to bookmark section 404.705

Click here for the **Reorganization Act of 1974 - or - Concurrent Resolutions Having Force & Effect of Law**

In accordance with Section **3.090**, the language of statutory sections enacted during a legislative session are updated and available on this website on the effective date of such enacted statutory section.

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History and Fun Facts

SHARE

Title XXIX OWNERSHIP AND CONVEYANCE OF PROPERTY

Chapter 442

442.210. Certificate of acknowledgment — contents. — 1. The certificate of acknowledgment shall state the act of acknowledgment, and that the person making the same was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; and the following forms of acknowledgment may be used in the case of conveyances or other written instruments affecting real estate; and any acknowledgment so taken and certificate shall be sufficient to satisfy all requirements of law relating to the execution or recording of such instruments (begin in all cases by a caption, specifying the state and place where the acknowledgment is taken):

(1) In case of natural persons acting in their own right

On this _____ day of _____, 20_____, before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

(2) In the case of natural persons acting by attorney

On this _____ day of _____, 20_____, before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of C D.

(3) In the case of corporations or joint stock associations

On this _____ day of _____, 20_____, before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed) did say that he is the president (or other officer or agent of the corporation or association), of (describing the corporation or association), and that the seal affixed to foregoing instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

2. In case the corporation or association has no corporate seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or association), and

that", and add at the end of the affidavit clause the words "and that said corporation (or association) has no corporate seal".

3. (In all cases add signature and title of the officer taking the acknowledgment.)

(RSMo 1939 § 3416, A.L. 2024 S.B. 1359)

Prior revisions: 1929 § 3029; 1919 § 2188; 1909 § 2799

---- end of effective 28 Aug 2024 ----

use this link to bookmark section 442.210

Effective dates prior to 1940 may not be the actual effective date. See FAQ 'When do laws become effective?'

- All versions

	Effective	End
442.210	8/28/2024	
442.210	8/28/1939	8/28/2024

Click here for the **Reorganization Act of 1974 - or - Concurrent Resolutions Having Force & Effect of Law**

In accordance with Section **3.090**, the language of statutory sections enacted during a legislative session are updated and available on this website on the effective date of such enacted statutory section.

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History and Fun Facts

SHARE

Title XXVI TRADE AND COMMERCE

Chapter 404

< > • Effective - 28 Aug 2016, 2 histories

404.710. Power of attorney with general powers. — 1. A principal may delegate to an attorney in fact in a power of attorney general powers to act in a fiduciary capacity on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. A power of attorney with general powers may be durable or not durable.

2. If the power of attorney states that general powers are granted to the attorney in fact and further states in substance that it grants power to the attorney in fact to act with respect to all lawful subjects and purposes or that it grants general powers for general purposes or does not by its terms limit the power to the specific subject or purposes set out in the instrument, then the authority of the attorney in fact acting under the power of attorney shall extend to and include each and every action or power which an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever, except as provided in subsections 6 and 7 of this section. When a power of attorney grants general powers to an attorney in fact to act with respect to all lawful subjects and purposes, the enumeration of one or more specific subjects or purposes does not limit the general authority granted by that power of attorney, unless otherwise provided in the power of attorney.

3. If the power of attorney states that general powers are granted to an attorney in fact with respect to one or more express subjects or purposes for which general powers are conferred, then the authority of the attorney in fact acting under the power of attorney shall extend to and include each and every action or power, but only with respect to the specific subjects or purposes expressed in the power of attorney that an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever, except as provided in subsections 6 and 7 of this section.

4. Except as provided in subsections 6 and 7 of this section, an attorney in fact with general powers has, with respect to the subjects or purposes for which the powers are conferred, all rights, power and authority to act for the principal that the principal would have with respect to his or her own person or property, including property owned jointly or by the entireties with another or others, as a nondisabled and nonincapacitated adult; and without limiting the foregoing has with respect to the subjects or purposes of the

power complete discretion to make a decision for the principal, to act or not act, to consent or not consent to, or withdraw consent for, any act, and to execute and deliver or accept any deed, bill of sale, bill of lading, assignment, contract, note, security instrument, consent, receipt, release, proof of claim, petition or other pleading, tax document, notice, application, acknowledgment or other document necessary or convenient to implement or confirm any act, transaction or decision. An attorney in fact with general powers, whether power to act with respect to all lawful subjects and purposes, or only with respect to one or more express subjects or purposes, shall have the power, unless specifically denied by the terms of the power of attorney, to make, execute and deliver to or for the benefit of or at the request of a third person, who is requested to rely upon an action of the attorney in fact, an agreement indemnifying and holding harmless any third person or persons from any liability, claims or expenses, including legal expenses, incurred by any such third person by reason of acting or refraining from acting pursuant to the request of the attorney in fact, and such indemnity agreement shall be binding upon the principal who has executed such power of attorney and upon the principal's successor or successors in interest. No such indemnity agreement shall protect any third person from any liability, claims or expenses incurred by reason of the fact that, and to the extent that, the third person has honored the power of attorney for actions outside the scope of authority granted by the power of attorney. In addition, the attorney in fact has complete discretion to employ and compensate real estate agents, brokers, attorneys, accountants and subagents of all types to represent and act for the principal in any and all matters, including tax matters involving the United States government or any other government or taxing entity, including, but not limited to, the execution of supplemental or additional powers of attorney in the name of the principal in form that may be required or preferred by any such taxing entity or other third person, and to deal with any or all third persons in the name of the principal without limitation. No such supplemental or additional power of attorney shall broaden the scope of authority granted to the attorney in fact in the original power of attorney executed by the principal.

5. An attorney in fact, who is granted general powers for all subjects and purposes or with respect to any express subjects or purposes, shall exercise the powers conferred according to the principal's instructions, in the principal's best interest, in good faith, prudently and in accordance with sections 404.712 and 404.714.

6. Any power of attorney, whether durable or not durable, and whether or not it grants general powers for all subjects and purposes or with respect to express subjects or purposes, shall be construed to grant power or authority to an attorney in fact to carry out any of the actions described in this subsection if the actions are expressly enumerated and authorized in the power of attorney. Any power of attorney may grant power of authority

to an attorney in fact to carry out any of the following actions if the actions are expressly authorized in the power of attorney:

(1) To execute, amend or revoke any trust agreement;

(2) To fund with the principal's assets any trust not created by the principal;

(3) To make or revoke a gift of the principal's property in trust or otherwise;

(4) To disclaim a gift or devise of property to or for the benefit of the principal, including but not limited to the ability to disclaim or release any power of appointment granted to the principal and the ability to disclaim all or part of the principal's interest in appointive property to the extent authorized under sections 456.970 to 456.1135;

(5) To create or change survivorship interests in the principal's property or in property in which the principal may have an interest; provided, however, that the inclusion of the authority set out in this subdivision shall not be necessary in order to grant to an attorney in fact acting under a power of attorney granting general powers with respect to all lawful subjects and purposes the authority to withdraw funds or other property from any account, contract or other similar arrangement held in the names of the principal and one or more other persons with any financial institution, brokerage company or other depository to the same extent that the principal would be authorized to do if the principal were present, not disabled or incapacitated, and seeking to act in the principal's own behalf;

(6) To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;

(7) To give or withhold consent to an autopsy or postmortem examination;

(8) To make an anatomical gift of, or prohibit an anatomical gift of, all or part of the principal's body under the Revised Uniform Anatomical Gift Act or to exercise the right of sepulcher over the principal's body under section 194.119;

(9) To nominate a guardian or conservator for the principal; and if so stated in the power of attorney, the attorney in fact may nominate himself as such;

(10) To give consent to or prohibit any type of health care, medical care, treatment or procedure to the extent authorized by sections 404.800 to 404.865;

(11) To designate one or more substitute or successor or additional attorneys in fact; or

(12) To exercise, to revoke or amend the release of, or to contract to exercise or not to exercise, any power of appointment granted to the principal to the extent authorized under sections 456.970 to 456.1135.

7. No power of attorney, whether durable or not durable, and whether or not it delegates general powers, may delegate or grant power or authority to an attorney in fact to do or carry out any of the following actions for the principal:

(1) To make, publish, declare, amend or revoke a will for the principal;

(2) To make, execute, modify or revoke a living will declaration for the principal;

(3) To require the principal, against his or her will, to take any action or to refrain from taking any action; or

(4) To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

8. A third person may freely rely on, contract and deal with an attorney in fact delegated general powers with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly identifies the specific property, account, security, storage facility or matter as being within the scope of a subject or purpose contained in the power of attorney, and without regard to whether the power of attorney expressly authorizes the specific act, transaction or decision by the attorney in fact.

9. It is the policy of this state that an attorney in fact acting pursuant to the provisions of a power of attorney granting general powers shall be accorded the same rights and privileges with respect to the personal welfare, property and business interests of the principal, and if the power of attorney enumerates some express subjects or purposes, with respect to those subjects or purposes, as if the principal himself or herself were personally present and acting or seeking to act; and any provision of law and any purported waiver, consent or agreement executed or granted by the principal to the contrary shall be void and unenforceable.

10. Sections 404.700 to 404.735 shall not be construed to preclude any person or business enterprise from providing in a contract with the principal as to the procedure that thereafter must be followed by the principal or the principal's attorney in fact in order to give a valid notice to the person or business enterprise of any modification or termination of the appointment of an attorney in fact by the principal; and any such contractual provision for notice shall be valid and binding on the principal and the principal's successors so long as such provision is reasonably capable of being carried out.

(L. 1989 H.B. 145 § 5, A.L. 1991 S.B. 148, A.L. 1997 S.B. 265, A.L. 2011 S.B. 59, A.L. 2016 H.B. 1765)

---- end of effective 28 Aug 2016 ----
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Faculty

Robert E. Eggmann is an attorney with Carmody MacDonald P.C. in St. Louis and practices in the fields of bankruptcy, restructuring, creditors' rights, commercial litigation and financial transactions. He has experience representing chapter 11 debtors and creditors' committees. Mr. Eggmann also serves as a chapter 7 panel trustee for the U.S. Bankruptcy Court for the Southern District of Illinois and a Subchapter V trustee for the U.S. Bankruptcy Court for the Central District of Illinois. Previously, he had co-founded Desai Eggmann Mason LLC in St. Louis in 2011 after having been a partner with the law firm of Lathrop & Gage LLP. Mr. Eggmann received his B.A. from St. Louis University in 1986 and his J.D. from St. Louis University School of Law in 1989.

Holly Malone-Zukaitis is a staff attorney for Richard V. Fink, the standing chapter 13 trustee for the Western District of Missouri in Kansas City, Mo. She has been with the trustee's office since March 2008. Ms. Malone Zukaitis is a member of the Missouri Bar Association and the Kansas City Bankruptcy Bar Association. She received her undergraduate degree from the University of Kansas and her J.D. from the University of Missouri-Kansas City.

Craig M. Regens is a shareholder in Crowe & Dunlevyy's Oklahoma City office. He concentrates his practice in the areas of bankruptcy, restructuring and creditors' rights, energy and environmental litigation, oil and gas transactions, and commercial litigation. Mr. Regens frequently represents oil and gas companies and financial institutions in chapter 11 bankruptcies and in matters involving the acquisition and divestiture of oil and gas assets through bankruptcy court and private sales. He also has significant experience representing business entities, including special-purpose entities, in a variety of energy-related, commercial and general business litigation in federal, state and administrative courts. Mr. Regens has been listed in *The Best Lawyers in America* since 2018 and was recognized as the 2023 Lawyer of the Year (OKC) in the practice area of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law by the same publication. Since 2023, Mr. Regens has been listed in *Benchmark Litigation* as a National and Oklahoma Litigation Star. An active member of the legal community, he formerly served as chair of the Oklahoma County Bar Association's Bankruptcy Section and was a member of the National Conference of Bankruptcy Judges Next Gen Class IX. Prior to entering private practice, Mr. Regens served as a term and career federal judicial law clerk to Hon. Sarah A. Hall, then-Chief Judge of the U.S. Bankruptcy Court for the Western District of Oklahoma. He received his B.A. from the University of Oklahoma, his M.S. from the London School of Economics and his J.D. from the University of Iowa College of Law.

Hon. Bianca M. Rucker is a U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas in Fayetteville, appointed on April 26, 2021. Prior to her judicial appointment, she was a chapter 7 panel bankruptcy trustee and attorney representing creditors and debtors in consumer and business bankruptcy matters at Rucker Law PLLC, in Fayetteville. Before working as a trustee, Judge Rucker was a partner at Wright, Lindsey & Jennings, LLP (WLJ), where her practice focused on bankruptcy, commercial litigation and insurance defense. She also served as a staff attorney to Hon. Richard D. Taylor (2006-07) and Hon. Ben T. Barry (2007-11) of the U.S. Bankruptcy Court for the Eastern and Western Districts of Arkansas. Judge Rucker has served as president of the Northwest Arkansas

Debtor and Creditor Bar Association, and she is an adjunct professor at the University of Arkansas School of Law, where she teaches alcohol beverage law. She received her B.A. in political science in 2003 from the University of Arkansas at Little Rock and her J.D. with honors in 2006 from the William H. Bowen School of Law.