UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN RE:	)	CHAPTER 7
	)	CASE NO. 05-54096-JDW
JOHN W. WILKERSON and,	)	
TARA CHANDRAS,	)	
	)	
DEBTORS.	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtors:	Pruett W. Burge 314 Corder Road Warner Robins, Georgia 31088-3606
For Chapter 7 Trustee:	Joy R. Webster Post Office Box 1098 Macon, Georgia 31202
For Cathy Spencer:	Kirby R. Moore 961 Walnut Street Macon, Georgia 31201

MEMORANDUM OPINION

This matter comes before the Court on the Chapter 7 Trustee's motion to deconsolidate and creditor Cathy Spencer's motion to dismiss. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

Debtors John Wilkerson and Tara Chandras were married and divorced prior to 2004. Ms. Chandras remarried and, in 2004, divorced her second husband. After the second divorce, she reconciled with Mr. Wilkerson. Debtors consulted with an attorney about filing for bankruptcy. After the initial consultation, Ms. Chandras told her attorney that she and Mr. Wilkerson had split, and she would be filing individually. Shortly after that, Debtors reconciled again and filed a joint Chapter 7 case on September 30, 2005. They were not married on the date of filing, but did marry a few months later on January 30, 2006.

The Chapter 7 Trustee alleges that prior to the bankruptcy filing, Ms. Chandras had purchased a real estate lot and mobile home from Cathy Spencer. Ms. Spencer agreed to finance the purchase. The parties executed the security deed on or about June 3, 2005, but Ms. Spencer did not record it until August 30, 2005. Based on those allegations, the Trustee filed an adversary proceeding to avoid Ms. Spencer's lien.[1] Consequently, Ms. Spencer

[1] On March 28, 2006, the Trustee filed a motion to compromise the adversary proceeding.

filed a motion to dismiss the bankruptcy case on the ground that the case was improperly filed as a joint case.[2] The Trustee filed a motion seeking deconsolidation of the case as an alternative to dismissal. The Court held a hearing on the motions on March 14, 2004, and now concludes that the case should be deconsolidated.

Conclusions of Law

Pursuant to Section 302(a) of the Bankruptcy Code, "[a] joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse." 11 U.S.C. § 302(a). It is undisputed that Debtors in this case were not married at the time they filed their joint petition. As a result, the Court must determine the appropriate remedy when a joint case has been filed by non-spouses.

Ms. Spencer has argued that the case should be dismissed. If the case is dismissed, Ms. Spencer will benefit because her security deed on Ms. Chandras's property will no longer be subject to avoidance. The Trustee has argued that the cases should be deconsolidated instead, because dismissal would prejudice Ms. Chandras's other creditors who could benefit from the avoidance action.

To support her position, Ms. Spencer has cited Bone v. Allen (In re Allen), 186 B.R. 769 (Bankr. N.D. Ga. 1995), and In re Lam, 98 B.R. 965 (Bankr. W.D. Mo. 1988). Neither case, however, really addresses the question before the Court. In both those cases, the issue was whether the debtors could maintain a joint petition. In Allen, a same-sex couple who

[2] Ms. Spencer also raised the improper joint filing as a defense to the adversary proceeding.

lived as though they were married but were not legally married filed a joint petition. Id. at 771. The court held that "in order to qualify to file a joint petition under § 302 of the Bankruptcy Code, the two parties must be legally married." Id. at 774. The court offered the debtors 20 days to remove one party from the petition or suffer dismissal. Id. In Lam, the parties filing a joint petition were a mother and daughter. 98 B.R. at 966. The court noted that § 302 requires the parties filing a joint petition to be spouses, and nothing in the Code authorizes any other type of joint petition. Id. The appropriate procedure for non-spouses who have numerous joint debts is to file individual cases and seek administrative consolidation. Id. As in Allen, the court gave the debtors time to dismiss one party or face dismissal of the case. Id.

In this case, Debtors do not dispute that on the date of filing, they were not married and, thus, lacked the necessary status as spouses to file a joint petition. In fact, Debtors' counsel represented at the hearing that Ms. Chandras is willing to remove herself from the case. The dispute here is really between one creditor and the Chapter 7 Trustee. The real question is not whether a joint case can be maintained, but what remedy the Court should apply when a joint case has been erroneously filed. Ms. Spencer has suggested the Court examine cases arising under § 109(h), which requires debtors to obtain credit counseling as a prerequisite to filing a petition, to answer this question.

In these cases, courts are divided about whether or not the requirement to obtain prepetition credit counseling is jurisdictional, and that division affects the remedy they apply. Those courts finding that the requirement is jurisdictional generally strike the bankruptcy petition so that the case is *void ab initio*. In re Rios, 336 B.R. 177, 180 (Bankr.

S.D.N.Y. 2005); In re Hubbard, 333 B.R. 377, 388 (Bankr. S.D. Texas 2005). Those courts finding that the requirement is not jurisdictional, dismiss the case. In re Ross, 338 B.R. 134, 136 (Bankr. N.D. Ga. 2006).[3] Ms. Spencer apparently wants the Court to conclude that § 302 is not jurisdictional, thus mandating dismissal of the case.

However, cases dealing with eligibility requirements under § 109 are not very helpful to analyzing § 302 because § 302 simply has no reference to an individual's eligibility to be a bankruptcy debtor. In fact, all parties agree that both Debtors meet all the eligibility requirements. The problem is that their case was mistakenly filed as a joint petition. A similar situation sometimes arises in the context of an involuntary petition.

It is well-established that involuntary petitions may only be brought against an individual, not against spouses in a joint case. In re Bowshier, 313 B.R. 232, 235 (Bankr. S.D. Ohio 2004). When a joint involuntary case is filed, courts have disagreed on the appropriate remedy. Id. at 235-36. Some courts have found, without any analysis, that they lack subject matter jurisdiction over the case and dismiss it.[4] Id. at 236; In re Gale, 177 B.R. 531, 534 (Bankr. E.D. Mich. 1995) (collecting cases). The better view seems to be that bankruptcy courts have jurisdiction over involuntary cases and jurisdiction over individuals

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[3] Courts also have split as to whether § 109(g)–which bars a debtor from refiling for 180 days after a dismissal for failure to abide by court orders or after a voluntary dismissal made while a motion for stay relief was pending–is jurisdictional. See Ross, 338 B.R. at 137-38 (collecting cases). On the other hand, courts generally agree that the Chapter 13 debt limits set forth in § 109(e) are not jurisdictional because an individual may be eligible to file under a different chapter. Id. at 136-37.

[4] These cases demonstrate that the remedy for lack of jurisdiction is not consistent. As noted above, courts finding a lack of jurisdiction under § 109(g) and (h) have stricken the bankruptcy petition. In the involuntary cases, lack of jurisdiction resulted in dismissal.

who meet all the eligibility requirements to enter bankruptcy. Id. at 534-35; 313 B.R. at 239. "[O]nce proper subject matter jurisdiction is determined to exist in the first instance, bankruptcy courts, as a matter of course, may cure pleading defects through procedural rules." 313 B.R. at 238.

The same is true when the case is voluntary. The Court is faced with a filing defect, one based on misjoinder, which does not require dismissal. In fact, Federal Rule of Civil Procedure 21, which governs misjoinder, provides as follows:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed. R. Civ. P. 21 (emphasis added). Pursuant to Bankruptcy Rule 7021, Rule 21 applies in adversary proceedings. Although the motions at issue here were filed in the main bankruptcy case and not an adversary proceeding, the Court is persuaded by reference to Rule 21 that it need not and should not dismiss the case merely due to a joinder defect.

Rule 21 does contemplate curing the misjoinder by dismissing one party to the case. However, this is a Chapter 7 case, which cannot be dismissed absent a showing of cause or abuse of Chapter 7. 11 U.S.C. § 707. No such showing has been made. For that reason, the Court concludes that the appropriate remedy in this case is severance or deconsolidation of the case. As previously noted, both Debtors voluntarily filed for bankruptcy and both are eligible to be debtors, so there is no reason why they should not both proceed in separate cases. Therefore, the Court will grant the Trustee's motion to deconsolidate and deny Ms. Spencer's motion to dismiss.

An Order in accordance with this Opinion will be entered on this date.

Dated this 29th day of March, 2006.

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James D. Walker, Jr.
United States Bankruptcy Judge

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ORDER

In accordance with the Memorandum Opinion entered on this date, the Court hereby GRANTS the motion of the Chapter 7 Trustee to deconsolidate the case.

The Court further hereby DENIES the motion of Cathy Spencer to dismiss the case.

The Court further hereby ORDERS that separate orders for relief be entered for John Wilkerson and Tara Chandras.

So ORDERED, this 29th day of March, 2006.

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James D. Walker, Jr.
United States Bankruptcy Judge