UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

KERRI MARIE GRIFFIN,
fka KERRI MARIE GUNTER,

Debtor.
_____/

Case No. DG 19-00020
Chapter 13
Hon. Scott W. Dales

MEMORANDUM OF DECISION & ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

On January 18, 2019, debtor Kerri Marie Griffin (the "Debtor"), through counsel, filed Debtor's Application for Appointment of Special Counsel DannLaw (ECF No. 20, the "Application"), using the court's notice with opportunity to object procedure under LBR 9013(c). The Application drew no objections, and counsel submitted an affidavit of no objection and proposed order. The court reviewed the Application and, on its own initiative, set the matter for a telephonic hearing on February 28, 2019. The Debtor, her current counsel, proposed counsel ("Proposed Counsel"), and counsel for the chapter 13 trustee (the "Trustee") participated in the hearing. The parties did not request an evidentiary hearing and waived the opportunity for briefing.

The court has subject matter jurisdiction over the Debtor's bankruptcy case, and the Application, under 28 U.S.C. §§ 1334, 157(a) and 157(b)(1), and W.D. Mich. LCivR 83.2(a). The Application qualifies as a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(A),

157(b)(2)(D), 157(b)(2)(M), and 157(b)(2)(O), because it involves the court's authority under § 11 U.S.C. § 327 and perhaps § 364.[1]

Although the Application drew no objection from the Trustee or the United States Trustee, the court set it for hearing out of concern that approving it under § 327[2] (as the Debtor requested) was unnecessary, potentially confusing, and destructive of the attorney-client relationship that the Debtor and Proposed Counsel seek to establish. The court is not alone in its apprehension about its role in the selection of chapter 13 debtors' counsel under similar circumstances. As mentioned during the hearing, the Hon. Thomas J. Tucker confronted the issue several months ago in *In re Blume*, 591 B.R. 675 (Bankr. E.D. Mich. 2018), ultimately declining to appoint counsel.

The Debtor already has retained counsel to represent her in connection with her bankruptcy case. She contends, however, that she requires the special expertise of Proposed Counsel to assist her in seeking redress for alleged (prepetition) violations of the Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act, Breach of Contract and/or Fraud (the "Causes of Action"), as disclosed in Schedule A/B. The Causes of Action generally relate to mortgage servicing, credit reporting, and mortgage loss mitigation controversies involving the Debtor's residential lender, U.S. Bank, N.A. Proposed Counsel reported during the hearing that he is in the early stages of investigating the Causes of Action.

The Debtor contends that § 327 applies in chapter 13 cases expressly under the rules of construction in § 103(a), which is true as far as it goes. While § 103(a) does make § 327 applicable in chapter 13 cases generally, this does not mean that § 327 applies to every attorney-client

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[1] Because Proposed Counsel is not serving *pro bono publico*, the Application to some extent anticipates that the Debtor will incur a post-petition debt under the retainer agreement. Because the parties did not discuss this aspect of the transaction the court mentions it only in passing.

[2] In the text of this opinion, the court will refer to sections of title 11, United States Code, simply by section number, as in "§ 327."

relationship in chapter 13. Rather, the scope of § 327 depends on the text of the statute itself, which expressly addresses a trustee's, not a debtor's, retention of professionals:

> (a) Except as otherwise provided in this section, the *trustee*, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or *assist the trustee* in carrying out the trustee's duties under this title.
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> . . .
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> (e) The *trustee*, with the court's approval, may employ, for a specified special purpose, other than to represent the *trustee* in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327 (emphasis added). The italicized language highlights the principal problem with the Application, namely that the Debtor, not the Trustee, is seeking to employ Proposed Counsel to assist the Debtor in liquidating the Cause of Action. *Cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000) ("a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity").

Nevertheless, as counsel for the Debtor and Trustee each points out, the Cause of Action is within the estate under § 541(a). Although the Debtor has exempted a portion of it, she intends to use most of the proceeds to fund her (presently unconfirmed) chapter 13 plan. *See* Debtor's First Preconfirmation Modification of Chapter 13 Plan (ECF No. 10) (dedicating unspecified amount of non-exempt proceeds of Cause of Action to creditors under the plan). Indeed, the Trustee's counsel stated during the hearing that her client sees appointment under § 327 as appropriate precisely because the Cause of Action is included within the estate and the proceeds

will, to some extent, fund the plan. There is some support in the cases for this approach. *In re Goines*, 465 B.R. 704, 706 (Bankr. N.D. Ga. 2012); *Wright v. Csabi* (*In re Wright*), 578 B.R. 570, 582 (Bankr. S.D. Tex. 2017).

The court acknowledges that the issue is murky for several reasons. For example, a chapter 13 debtor remains in possession of estate property under § 1306 (except as otherwise provided in the plan or confirmation order),[3] and has, "exclusive of the trustee," many of the rights and powers of a trustee under § 363 (regarding use, sale, or lease of estate property). *See* 11 U.S.C. §§ 1303 and 1306(b). If the Debtor is proposing to use estate property to pay creditors, and that use requires the assistance of Proposed Counsel, the Trustee's preference for judicial supervision is understandable. A chapter 7 or 11 trustee prosecuting a cause of action included in the estate would be required to secure court approval to retain counsel. And, a chapter 13 trustee, like a chapter 7 or 11 trustee, "is the representative of the estate." *Id*. § 323(a). So, if the Debtor is behaving like the representative of the estate, perhaps she should ask the court to approve her choice of counsel, subject to the requirement of disinterestedness, as a chapter 7 or 11 trustee would.

On the other hand, a chapter 13 trustee is not involved in liquidating estate property. Unlike a chapter 7 trustee, a chapter 13 trustee does not enjoy express statutory authority to "reduce to money the property of the estate for which the trustee serves." *Compare* 11 U.S.C. § 704(a)(1) *with* § 1302. In other words, § 1302 omits any reference to the duty to liquidate under § 704(a)(1) and, as noted above, § 1303 generally assigns the trustee's powers under § 363 to the chapter 13 debtor. Strictly speaking, the duties of a chapter 13 trustee depend on the statute. *Cf. Harris v. Viegelahn*, 135 S. Ct. 1829, 1838-39 (2015) (refusing to permit chapter 13 trustee to distribute plan payments to creditors after conversion given absence of express statutory authority). So, in

[3] In her original plan (ECF No. 4), the Debtor proposes to re-vest estate property in herself at confirmation, presumably including the Cause of Action.

liquidating the Cause of Action, the Debtor is not behaving like a chapter 13 trustee because a chapter 13 trustee is not charged with liquidating estate assets. The arguments that analogize a chapter 13 debtor to a trustee or chapter 11 debtor-in-possession are not perfect and do not, in the court's view, require approval of Proposed Counsel under § 327.

More philosophically, Trustee's counsel suggests that the court should have a role in approving the appointment of the Proposed Counsel because the proceeds of the Cause of Action will fund the plan to some extent. Perhaps the Trustee is concerned that the Debtor will lack the incentive to pursue recovery beyond the exempt portion of the Cause of Action. This argument, however, is also subject to challenge based on the particular plan terms and the structure and theory of chapter 13 more generally.[4]

At the end of the day, the difficulty the court and the parties wrestled with during the hearing is really one of standing. *In re Goines*, 465 B.R. at 705-06 (addressing issue as one of standing in the context of chapter 13 confirmation). In other words, who, as between the Debtor and the Trustee, may pursue the Cause of Action against U.S. Bank?

Framed in this way, the question that the Application presents becomes much simpler. First, as a matter of due process, it would be unfair to U.S. Bank for the court to resolve the question of the Debtor's standing to sue U.S. Bank in a contested matter addressing the appointment of

[4] A chapter 13 debtor retains possession of her property and, in exchange, makes payments to the trustee in an amount at least enough to account for the non-exempt value of the property (determined as of the effective date of the plan). 11 U.S.C. §§ 1306(c) & 1325(a)(4). After confirmation, as long as the Debtor makes her plan payments (sufficient to satisfy the liquidation test, among other requirements), the Trustee and the creditors should be indifferent to how or even whether she prosecutes her claim against U.S. Bank. If she defaults under the plan, and the default is material, the court will convert or dismiss the case, whichever is in the best interests of the creditors and the estate. *Id.* § 1307(c)(6). The court acknowledges that the analysis may be different if, instead of determining the value of the Cause of Action as of the plan's effective date (and setting plan payments that meet the liquidation test), the Debtor and the Trustee share an interest in the Cause of Action post-confirmation (making the Debtor's payment obligation dependent on recovery against U.S. Bank). The plan as currently proposed makes the creditors' recovery contingent on the Debtor's successful prosecution of the Cause of Action but does not clearly indicate an intent to share title to it. Instead, the plan proposes to re-vest the asset in the Debtor. Requiring the Debtor to pay the non-exempt proceeds of the Cause of Action into the plan may simply be a way of addressing the difficulty in valuing the asset at confirmation, but it may raise some of the other issues described herein.

counsel. The Debtor's standing, or lack of standing, should be addressed if the Debtor files suit as part of a civil action or adversary proceeding (depending on the forum she chooses), or perhaps at confirmation as in *Goines.* In any event, the court cannot fairly resolve the issue until after U.S. Bank is formally apprised of the claim. Regardless of whether the Debtor retains Proposed Counsel, another counsel, or no counsel, U.S. Bank will likely challenge her standing to pursue the prepetition Cause of Action.

Second, the terms of the Application itself make clear that the Debtor is seeking to employ Proposed Counsel to represent *her*, not the trustee and not the estate. Just as her current counsel had no need to seek approval or appointment to represent her under § 327(a), Proposed Counsel has no need to seek approval or appointment under § 327(e). The statutory text is clear, and it simply does not apply to this attorney-client relationship. *In re Blume*, 591 B.R. at 679; *In re Gilliam*, 582 B.R. 459, 465-66 (Bankr. N.D. Ill. 2018); *In re Jones*, 505 B.R. 229, 231 (Bankr. E.D. Wisc. 2014).

Third, the court reiterates its concern that appointing Proposed Counsel under § 327(e), with the attendant implication that the firm represents the estate, confuses the relationship and could lead to difficulties with respect to Proposed Counsel's professional responsibilities, including potential for conflicts of interest, delay, and avoidable litigation expense. For example, if the Trustee and the Debtor eventually disagree about litigation strategy against U.S. Bank, whether to settle, or for how much, perhaps the court should favor the Trustee, as the representative of the estate, because the appointment under § 327 implies that the lawyer represents the Trustee. Similarly, an opponent could argue that conversations between the Debtor and Proposed Counsel are not privileged because the order approving the appointment under § 327 implies that the estate, rather than the Debtor, is the client, and the privilege only protects communications regarding legal

advice between attorney and client. The court hesitates to enter an order that confuses, rather than clarifies, the situation. Given the clear text of § 327, and the obvious intent of the Debtor to retain Proposed Counsel to assist her, the court will deny the Application as unnecessary and unwise. Nothing in today's order, however, should be construed to prevent the Debtor from retaining Proposed Counsel to assist her in pursuing the Cause of Action, subject to any uncertainty about her standing.

As the parties acknowledged during the hearing, even if the court determines (as it has) that § 327 does not apply to the proposed retention, § 329 and Fed. R. Bankr. P. 2016(b) may nevertheless apply (*i.e.*, if Proposed Counsel represents the Debtor in her case or in connection with her case). Similarly, § 330(a)(4) and § 503(b) may also apply, to the extent counsel seeks payment of fees and expenses from the estate.[5] Because the court is declining to approve the Application under § 327, it has no reason to make any decisions today regarding the applicability of § 329, or § 330, or the approval of any fee or means of paying any fee.

In closing, the court suggests that many of these complicated issues could and should be raised in the confirmation process by including clear and conspicuous provisions in the proposed chapter 13 plan regarding title to the Cause of Action and its role in the Debtor's plan. This will give creditors, including U.S. Bank, an opportunity to be heard regarding the means of liquidating the Cause of Action and how to account for any non-exempt value before the plan becomes binding under § 1327(a).

[5] The Application labels the retainer agreement as a "Contingent Fee Agreement" but that mischaracterizes, or at least oversimplifies, the RESPA Investigation and Litigation Attorney Retainer and Fee Contract (Client in Bankruptcy) included as an exhibit to the Application.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Application is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision & Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Kerri Marie Griffin, Jeremy Shephard, Esq., Brett N. Rodgers, Esq., chapter 13 trustee, Elizabeth Clark, Esq., and Brian Flick, Esq., and the United States Trustee (by first class U.S. Mail).

END OF ORDER

IT IS SO ORDERED.

Dated March 4, 2019

Scott W. Dales
United States Bankruptcy Judge