

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: William Allan Cohn

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901-757-5535

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please

respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Self. Sole proprietorship. THE COHN LAW FIRM

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

April 18, 1978. No. 5378

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Texas, 1994

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

Yes. 90 day suspension in 2004 for filing proofs of claims for subsequent attorney fees in Chapter 13 Bankruptcy proceedings. The chapter 13 Trustee testified that he knew of the filings early on. The panel decided that a public censure was in order. The Supreme Court substituted a 90 day suspension and required the money to be repaid to the Chapter 13 Trustee, which was done.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1977-78 Law Office of Brad Wisler, Memphis, TN Clerk

1978-79 Law Office of Seymour Rosenberg, Memphis, TN Associate Attorney

1978 Law Offices of Van Eaton and Rosenberg, Memphis, TN Associate Attorney

2/79- 9/81	Law Office of Wm. A. Cohn, Attorney	Memphis, TN	Sole proprietor
9/81 – 1983	Law Office of Irion, Cohn, & Kirsch, Attorneys,	Memphis, TN	partnership
1983-85	Law Office of Cohn & Kirsch, Attorneys	Memphis, TN	partnership
1983-87	Sports Agent for professional athletes – part time-	Memphis, TN	sole proprietor
1985-87	Law Office of Cohn, Kleiman, Smith, & Harris	Memphis, TN	sole proprietor
1987- present	THE COHN LAW FIRM,	Cordova, TN	Sole proprietor

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

2005	Social Security Representative	90 days
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7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Bankruptcy	30%
Social Security Disability Appeals	20%
Family Law	30%
Commercial Collections	5%
Fair Debt Collection Practices Act	5%
Personal Injury	5%
Probate	5%

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the

fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I am admitted to practice and have tried cases in the following courts:

General Sessions Courts for Shelby, Tipton, Fayette, Madison, Crockett, Haywood, Dyer, Davidson, Knox, Hamilton, and many other counties in West and Middle Tennessee.

Collection, Personal Injury, Fair Debt Collection Practices Act, FED's, miscellaneous Circuit, Criminal, and Chancery Courts in Shelby, Tipton, Fayette, Hardeman, Dyer, Haywood, Dyer, Lauderdale, Gibson, Davidson, and other counties in West and Middle Tennessee.

Family Law, Personal Injury, Commercial Litigation, Collection, Real Estate, and Criminal,

Court of Appeals of Tennessee on numerous occasions.

Supreme Court of Tennessee on several occasions.

Office of Disability Adjudication and Review of the Social Security Administration:

Memphis, TN

Tupelo, MS

Jackson, MS

Dallas, TX

Santa Barbara, CA

Kansas City, MO

Appeals Council of the Office of Disability Adjudication and Review of the

Social Security Administration, Falls Church, Virginia

United States District and Bankruptcy Courts:

Western, Middle, and Eastern Districts of Tennessee

Bankruptcy, Social Security Disability, Discrimination, Personal Injury, Criminal, and represented 2 local labor unions

Northern District of Mississippi

Social Security Disability and Personal Injury

Eastern District of Arkansas

Personal Injury, Social Security Disability, Bankruptcy
Northern District of Texas
Social Security Disability
Southern District of Texas (admitted only)
United States Court of Appeals:
Sixth Circuit on several occasions
Bankruptcy, Discrimination cases
Fifth Circuit (admitted only)
Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals on several occasions
United States Court of Claims

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I had a Bankruptcy case appealed to the United States Supreme Court by the state of Tennessee. I obtained co counsel in New York for the 6th Circuit and Supreme Court appearances. He did the majority of the work at the Supreme Court level. 48 states filed Amicus Briefs. We won based on the original Arizona Bankruptcy Court decision that I had found and used in the original proceeding in Bankruptcy Court in Memphis.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Arbitrator for the American Arbitration Association- Mid 1990's
Special Judge for General Sessions Court - 1980's

11. Describe generally any experience you have of serving in a fiduciary capacity such as

guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have served as a Guardian ad litem on several occasions in the 1980's and 1990's.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I have not submitted an application for a judgeship since the mid 1990's.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee, Knoxville, TN	1968-70	No Degree
Memphis State University, Memphis, TN	1970-72	B. S., 1972
University of Tennessee Medical Units, Medical Microbiology	1972-73	No Degree
University of Tennessee College of Law, Knoxville, TN	1975-77	J.D.

PERSONAL INFORMATION

15. State your age and date of birth.

64 DOB: October 10, 1950

16. How long have you lived continuously in the State of Tennessee?

Life

17. How long have you lived continuously in the county where you are now living?

Life

18. State the county in which you are registered to vote.

Shelby

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Regretfully, none

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

Not to my knowledge.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

I have been in private general practice. Everyone who is unhappy with their outcome files a disciplinary complaint. None have been of any real substance,.

I did have one Bankruptcy Judge as a protagonist who instigated a complaint for filing proofs of claim for work performed in chapter 13's. I received a public censure from the hearing

panel and the Supreme Court changed it to a 90 day suspension. The Chapter 13 Trustee testified that he knew of all of the filings and that the law firm name was on all. Despite that testimony, it was ruled that I “surreptitiously” filed the claims.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No. However, I have been the attorney who has filed hundreds of Bankruptcies for clients.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Divorced in Chancery Court in 1988 in Shelby County, Tennessee.

Divorced in Circuit Court in 2005 in Shelby County, Tennessee.

Sued numerous clients in General Sessions Court for fees over the years.

Sued numerous other types of cases in General Sessions Court where warranted, such as Fair Debt Collection Practices Act, Collections, etc.

Filed suit in Federal Court miscellaneous actions, including as a named Plaintiff to challenge the Fair Debt Collection Practices Act Law in US District Court in New York in the early 1990's.

Sued for Fair Debt Collection Practices Act alleged violation in Hartford, Connecticut Federal Court. Verdict for Defendant. I was merely the lawyer for the collection agency and had only made an offer to settle the case on behalf of my client, the collection agency.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Memphis Tennis Association United States Tennis Association
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27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

- a. If so, list such organizations and describe the basis of the membership limitation.
- b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No. They wouldn't let me in in the first place.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

American Bar Association Tennessee Bar Associations Commercial Law League of America
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29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

- 30. **Board Certified Specialist in Consumer Bankruptcy** – state of Tennessee- Mid 1990's
- 31. **Board Certified Specialist in Debtor Creditor Relations** – state of Tennessee – Mid 1990's
- 32. **Certified to examine Real Estate Titles** – Chicago Title, St. Paul Title, Mid South Title Insurance Companies – early 1980's

33. List the citations of any legal articles or books you have published.

Deferring Vesting of Real Property in a Chapter 13 Bankruptcy, Commercial Law Journal, 1983.

34. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

None in the last 5 years. Several prior to that time.

35. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Ran for Chancellor, Part 1 , Shelby County, Tennessee - mid 1990's	lost
Ran for Circuit Court Judge, Division 4, Shelby County, Tennessee – mid 1990's	lost

36. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

37. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See attached. All my own work.

ESSAYS/PERSONAL STATEMENTS

38. What are your reasons for seeking this position? *(150 words or less)*

I am the best qualified and have a desire to be a Chancellor. I am not relying on what law school or what I did in Law School. I do not believe that there are any other applicants, and very few other Shelby County lawyers, who have the experience, the wide range of areas of practice, and the broadest range of clients -from the biggest companies to the lowest of income - that I have had.

39. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I have represented hundreds of low income persons over the years at reduced rates or for no charge at all.

40. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

Chancery Court is a Court of Equity. It has similar jurisdiction to the Circuit Court.

I believe my addition would complement the other chancellors as I believe that I would work well with the other 2 chancellors.

41. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

I have served on the Board of directors of the Memphis Tennis Association and the Farmington Glen Condominium Homeowners Association, having served the HOA as President.

I intend on devoting all of my time to the job at hand until I can ascertain whether or not my work ethic will allow me to effectively participate in another organization.

42. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I have many varied experiences in dealing with individuals and businesses. I have a personality which allowed me to be successful selling life insurance and also which helped me be successful as a lawyer. The electorate must have confidence in their judges. I will be instrumental in furthering that confidence. I believe my relationships with other judges will aid

me in continuously improving my abilities.

43. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes. I was a named plaintiff in a class action to challenge the Fair Debt Collection Practices Act in federal Court in New York. However, I have successfully litigated the law on both sides of the issue since then.


AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] ___ Chancery Court _____ of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: MAY 22 , 20 15 .



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS

ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600

NASHVILLE CITY CENTER

NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

TENNESSEE BOARD OF JUDICIAL CONDUCT

AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

William A. Cohn

Type or Print Name

Signature

Date

5873

BPR #

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

AMBER NICOLE PRIDGEN,
Plaintiff/Counter-Defendant,

vs.

Docket No. CH-13-1120
Part III

MICHAEL JEROME PRIDGEN,
Defendant/Counter-Plaintiff.

PRE-HEARING MEMORANDUM REGARDING
CHILD SUPPORT ARREARAGE

I. FACTS

The Divorce Referee awarded arrearage of child support back to the day of separation. The Divorce Referee entered its calculation on the Chancery Court e-file website.

The Father appealed that ruling and the hearing is set for July 9th, 2014.

The Father did not file his appeal within the time frames required by the local Chancery Court rules and did not schedule the hearing within the time required by the local Chancery Court rules.

II. DISCUSSION

A. AWARD OF ARREARAGE IS MANDATORY

The award of arrearage back to the date of separation is *mandatory* in Tennessee.

If the Court wishes to change it, it must make written findings of fact and conclusions of law to support the deviations.

The law in Tennessee is as follows:

T.C.A. 36-5-101, Decree for Support of Children:

(a)(1) Upon dissolution of a marriage, whether dissolved absolutely or by a perpetual or temporary decree of separation, the court may make an order and decree for the suitable

support and maintenance of the children by either spouse or out of such spouse's property.

(2) Courts having jurisdiction of the subject matter and of the parties are hereby expressly authorized to provide for the future support of the children, in proper cases, by fixing some definite amount or amounts to be paid in monthly, semimonthly, or weekly installments, or otherwise, as circumstances may warrant.

(c)(1) The Court shall set a specific amount that is due each month, to be paid in one (1) or more payments as the Court directs.

(2) (A) The order or decree of the court may provide that the payments for the support of such child or children shall be paid either to the clerk of the court or directly to the spouse, or other person awarded the custody of the child or children;

(v) In any subsequent proceeding to modify or enforce support, there shall be a rebuttable presumption that the information provided by the parties, as required by this part, has not changed;

(e)(1)(A) In making the court's determination concerning the amount of support of any minor child or children of the parties, the court shall apply, as a rebuttable presumption, the child support guidelines, as provided in this subsection;

(c) When making retroactive support awards, pursuant to child support guidelines established pursuant to this subsection

(e), in cases where the parents of the minor child are separated or divorced, but where the court has not entered an order of child support, the court *shall* consider the following factors *as basis* for *deviation* from *the presumption* in the child support guidelines that *child and medical support for the benefit of the child (shall) be awarded retroactively to the date of the parents' separation or divorce*:

(D) In cases which the presumption of the application of the guidelines is *rebutted by clear and convincing evidence*, the court shall deviate from the child support guidelines to reduce, in whole or in part, any retroactive support. The Court must make a written finding that application of the guidelines would be unjust or inappropriate, in order to provide for the best interests of the child or children or the equity between the parties.

(F) In making any deviations from awarding child and medical support retroactively to the date of separation or divorce of the parties, the court *shall* make *written* findings of fact and conclusions of law to support the basis for deviation, and *shall* include in the order the total amount of retroactive child and medical support that would have been paid retroactively to the date of separation or divorce of the parties, had a deviation not been made by the court.

(f)(1) Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state. Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed. If the full amount of child support is not paid by the date when the ordered support is due,

the unpaid amount is in arrears, shall become a judgment for the unpaid amount, and shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year. All interest that accumulates on arrearages shall be considered child support. Computation of interest shall not be the responsibility of the clerk.

(3) Absent a court order to the contrary, if an arrearage for child support or fees due as court costs exists at the time an order for child support would otherwise terminate, the order of support, or any then existing income withholding arrangement, and all amounts ordered for payment of current support or arrears, including any arrears due for court costs, shall continue in effect in an amount equal to the then existing support order or income withholding arrangement, until the arrearage and costs due are satisfied, and the court may enforce all orders for such arrearages by contempt.

(3) The court shall not refuse to consider a modification of a prior order and decree as it relates to future payments of child support because the party is in arrears under that order and decree, unless the arrearage is a result of intentional action by the party.

B. APPEAL OF CHILD SUPPORT NOT TIMELY

Local Rule 12(d) of The Chancery Court says:

"Appeals from a Divorce Referee's ruling shall be made written Motion within ten (10) days of the referee's oral or written ruling and shall be placed on the Motion Docket of the Court to which the case is assigned or specially set by fiat. The Motion shall specifically set forth what the movant seeks and where the Divorce Referee was in error."

In the instant case, both the Divorce Referee hearing was held and the written ruling of the Divorce Referee was entered on January 30th, 2014. That is forty (40) days later. Forty (40) days is far more than the ten (10) days allowed.


III. CONCLUSION

The Father's appeal has no basis in law or fact.

The Father's appeal is not timely.

The appeal should be denied.

THE COHN LAW FIRM


William A. Cohn
Attorneys for the Plaintiff

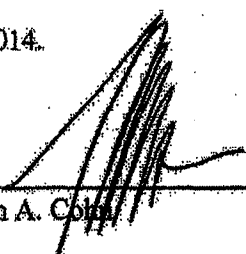
291 Germantown Bend Cove
Cordova, TN 38018
901-757-5557 (phone)
901-757-5535 (fax)
TN Supreme Court No. 005873
TX Supreme Court No. 04512980

CERTIFICATE OF SERVICE:

I, William A. Cohn, hereby certify that a true and correct copy of the foregoing was mailed

Mr. Terrell Tooten, Attorney
100 Peabody Place, Suite 1300
Memphis, Tennessee 38103

by U.S. Mail, postage prepaid this 4th day of June, 2014.



William A. Cohn

Deferring Vesting of Property in a Chapter 13 Plan and the Court's Duty to Protect the Interest of Creditors

William A. Cohn*
of Memphis, Tennessee

Introduction

Since our Bankruptcy Act was radically changed in 1978, it has become increasingly apparent that the changes in the Act modify the rights of creditors precipitously. One of the changes made in the Act was to re-vest the debtor's property in the debtor after the confirmation of the debtor's Chapter 13 wage earner plan. This article will address the question of whether the Bankruptcy Judge should defer the vesting of the debtor's property in the debtor when confirming the wage earner plan, and the larger question of whether the Bankruptcy Court has a duty to protect the interest of creditors in a rehabilitation plan such as a Chapter 13 plan.

Why the Motion to Defer Vesting of Property?

Upon the filing of the petition for relief in the Bankruptcy Court, a "bankruptcy estate" is created.¹ All of the property of the debtor is divested out of the debtor and becomes property of the debtor's "bankruptcy estate."² A trustee is appointed to administer the estate,³ but the debtor no longer owns any of the property.⁴ Under the Bankruptcy Act of 1898, the bankruptcy estate came

under the exclusive jurisdiction of the Bankruptcy Court and continued to be under the Court's jurisdiction during the period of consummation of the plan.⁵ Under the Bankruptcy Reform Act of 1978, the bankruptcy estate may continue until the discharge of the debtor in a Chapter 7 proceeding, at which time the estate will be liquidated,⁶ or the estate may continue until such time as the Court orders, as in a Chapter 13 proceeding. In a Chapter 13 proceeding, the estate can automatically re-vest in the debtor upon the confirmation of the plan,⁷ or the estate can continue in existence until the discharge of the debtor under 11 U.S.C.S. Section 1322(b)(9), which says that the plan may provide for the vesting of the property of the estate on confirmation or at a later time. The latter is the basis of the motion to defer vesting of the property of the debtor in a Chapter 13 plan.

At first glance, because 11 U.S.C.S. Section 1322(a) uses the word "shall" and because 11 U.S.C.S. Section 1322(b) uses the word "may"⁸ it would appear that the options listed in 11 U.S.C.S. Section 1322(b), including the deferring of vesting of property, is purely discretionary with the Bankruptcy Judge.⁹ However, that is misleading because 11 U.S.C.S. Section 1322(b) must be

*The Author is an attorney in private practice and is a partner in the Memphis law firm of Cohn & Kirsch. A member of the Tennessee Bar, he received his J.D. from the University of Tennessee College of Law in 1977. He is a member of the Commercial Law League and the CLLA Bankruptcy and Insolvency Section.

1. 11 U.S.C.S. §541(a).
2. 11 U.S.C.S. §541(c)(1).
3. 11 U.S.C.S. §323, 11 U.S.C.S. §704.
4. 11 U.S.C.S. §541(c)(1).
5. 11 U.S.C.S. §1011. Repealed November 6, 1978, P.L. 95-598, Title IV §401(a), 92 Stat. 2682.
6. 11 U.S.C.S. §726(a)(6).
7. 11 U.S.C.S. §1327(b).
8. 11 U.S.C.S. §1322. "Contents of plan"

(a) The plan shall—

- (1) provide for the submission of all or such portion of

future earnings of other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments of all claims entitled to priority under section 507 of this title . . . unless the holder of a particular claim agrees to a different treatment of such claim; and
(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title . . .

9. *Id.*

read with 11 U.S.C.S. Section 1327(b), which says the following:

Except as otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor. (Emphasis added.)

It is clear that the two statutory provisions read together can only mean that the Bankruptcy Court *may order* any of the electives in 11 U.S.C.S. Section 1322(b) to be included in the debtor's plan which the Court feels is justified and necessary to protect the debtor or the creditors. The logical corollary is that the Court should utilize its discretion to order at least a modicum of protection for creditors by virtue of the Court's powers under 11 U.S.C.S. Section 105(a)¹⁰ Under 11 U.S.C.S. Section 105, the Bankruptcy Court may issue any order that is necessary or appropriate to carry out the provisions of the Bankruptcy Act.¹¹ This would certainly include any order which will aid a creditor and not harm the debtor. Where the vesting of the property is to be deferred, there is no harm to be done to the debtor or to the wage earner plan of the debtor, but there is a possibility of harm to be done to the creditor.¹² Further, it is only fair for the debtor to continue to have his property subject to the jurisdiction of the Bankruptcy Court when the creditor has also been subjected to the jurisdiction of the Bankruptcy Court. Thus, the Bankruptcy Court should order the electives of 11 U.S.C.S. Section 1322(b) when appropriate, and deferring the vesting of the debtor's property is generally appropriate in a Chapter 13 case.

The obvious retort of the debtor is that only the debtor can file a Chapter 13 plan under 11 U.S.C.S. Section 1321.¹³ However, the language in 11 U.S.C.S. Section 1321 merely commands the debtor to file a plan if he wants relief from the Court. It does not exclude any creditor from filing a proposed plan.

The position that only a debtor may file a plan was indeed taken by the Senate Judiciary Committee in Senate Report No. 95-989, at page 141, which says: "Chapter 13 contemplates the filing of a plan only by the debtor." However, the House Judiciary Report states the following: "This section requires the debtor to file a repayment plan. The debtor has the exclusive right to propose and file a plan either with the petition or within such time as the rules prescribe. *Creditors may file a plan under any*

circumstances." (House Report No. 95-595 at page 428 (emphasis added).) It is thus quite obvious that the two legislative branches were in conflict when Section 1321 was enacted. In other words, there is no legislative intent prohibiting the creditor from filing a proposed plan.

To the contrary, 11 U.S.C.S. Section 1327(b) suggests that the Court can accept a proposed plan from a creditor because Section 1327(b) states "[E]xcept as otherwise provided in the plan or the order confirming the plan . . ." (emphasis added).¹⁴ It can thus be seen that the drafters of Chapter 13 intended for the Court to have the power to order changes enumerated in 11 U.S.C.S. Section 1322(b). Obviously, the only way that the Court can order items in Section 1322(b) to be added to the debtors plan is if they are proposed from another source other than the debtor. If the debtor initially proposes the items in Section 1322(b), obviously Section 1322(b) is useless and of no relevance to the Bankruptcy Code as there would be no need for the Court to order the enumerated changes. The debtor can modify his plan at any time before confirmation,¹⁵ and after the debtor files his modification, the plan as modified becomes the plan.¹⁶ Again, it is obvious that there would be no need for the Court "to order" changes enumerated in 11 U.S.C.S. Section 1322(b) unless proposed from another source other than the debtor.

It is the intent of the Senate Judiciary Report to prohibit *involuntary* Chapter 13 petitions from being filed, not to prohibit proposed plans from creditors to be filed.¹⁷ It is clear that a debtor cannot have an involuntary Chapter 13 petition filed against it as in an involuntary Chapter 7 bankruptcy. It is certainly obvious from previous history and from present practice that there is a great deal of negotiation between the debtor and creditors prior to confirmation of the Chapter 13 plan. Certainly the Congress did not intend to mandate that every Chapter 13 plan would be a cram down situation.

What Is the Motion to Defer Vesting?

It is clear that under 11 U.S.C.S. Section 1327(b) and 11 U.S.C.S. Section 1306 all property of the debtor vests back in the debtor upon the confirmation of the plan unless the Court ordered otherwise under 11 U.S.C.S. Section 1322(b)(9). The only property which is not vested back in the debtor is the wages of the debtor and that remains property of the bankruptcy estate.¹⁸ Further, any property acquired by the debtor after the commencement of the case but before the case is closed,

10. 11 U.S.C.S. §105(a). "The Bankruptcy Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

11. *Id.*

12. Examples of harm to the Creditor will be discussed later in this article.

13. 11 U.S.C.S. §1321. "The debtor shall file a plan."

14. It should be noted that §1327(c) uses the same language.

15. 11 U.S.C.S. §1323(a).

16. 11 U.S.C.S. §1323(b).

17. Bkr-L Ed §46:3 It should be noted that this treatise section argues against creditors submitting a payment plan, citing the House Judiciary Report. However, this treatise section fails to consider the adverse language of the House Judiciary Report, which states that "Creditors may file a plan under any circumstances."

18. 11 U.S.C.S. §1306(a)(2).

dismissed, or converted, becomes property of the bankruptcy estate.¹⁹ It can be thus seen that there is a loophole which allows any property of the debtor acquired prior to the commencement of the case to be exempt from the bankruptcy estate, even though all wages of the debtor and property of the debtor acquired after the filing of the petition for relief remain property of the bankruptcy estate.

The motion to defer vesting asks the Bankruptcy Court to defer re-vesting the property of the debtor in the debtor until the earliest of the following times:

1. Upon the dismissal of the debtor's petition for relief under Chapter 13;
2. Upon the discharge of the debtor's Chapter 13 wage earner plan;
3. Upon the vacating by the Court of the automatic stay imposed upon the creditor upon the filing of the debtor's petition for relief;
4. Upon the granting by the Court of permission to sell real property.

It is clear that there is no harm done to the debtor in that he may dispose of the property subject to the limitation that he must have approval of the Bankruptcy Court after notice and a hearing to determine the effect of the sale on other creditors. The property is automatically re-vested in the debtor on any of the contingencies heretofore listed.

If the creditor is a secured creditor, the harm done to that creditor is predominantly impairment of its security, but there is other harm which can come to this secured creditor in the form of protracted litigation costs and fees resulting from the failure to defer the vesting of the property. Additionally, unsecured creditors can be harmed if the sale of the property results in an unfair repayment plan to the unsecured creditor relative to the profit realization to the debtor upon the sale of the property.

There are several examples of situations which illustrate the need to defer the vesting of the property. A situation which recently occurred saw a husband and wife file a joint Chapter 13 wage earner plan, including a secured creditor in the plan who was the holder of the first mortgage on their home. After the plan was confirmed, the property vested back in the debtors. The debtors promptly deeded the real property by a quit claim deed to their daughter, who then went to a bank and encumbered the property with a second mortgage.

The second mortgage was defaulted upon. Litigation costs and attorneys' fees paid by the mortgagee-creditor were very much in excess of \$1,000.00. Litigation involved the bank which held the second mortgage, the first mortgagee, the debtors in Chapter 13, the daughter and the contractor. The total value of the property was approximately \$17,000.00. Had the vesting of the title of the property been deferred originally, all subsequent dealings by the debtors and their daughter would have been void. It would have been a simple matter for the Bankruptcy Court to deal with and would have saved the creditor an enormous sum of money.

A second example concerns the interaction of the secured and unsecured creditors. After the confirmation of a plan, the title to the debtor's house is vested back in the debtor. The house is sold without permission of the Court and without the knowledge of the Court as the permission of the Court is not needed under 11 U.S.C.S. Section 1327(b).²⁰ The secured creditor is very happy to get his money and he is now out of the wage earner plan and is no longer a problem to the debtor. Further, there is substantial equity in the house which is retained by the debtor. However, the debtor allows his wage earner plan to continue. While creditors of the debtor must continue to receive the small drawn out benefit of the plan, which may be less than a 100% payout to unsecured creditors, the debtor enjoys the benefits that he has reaped from the equity sale. These monies may be an amount which is quite substantial, which may be in excess of the exemptions of the debtor and which would immediately pay off the creditors at 100% of their claim amount. The inequities of the situation are obvious.

A third situation involves a post confirmation creditor who reduces his post confirmation claim against the debtor to judgment. A post confirmation creditor of the debtor is not stayed and can reduce the post confirmation claim to judgment without the permission of the Bankruptcy Court.²¹ It can be seen additionally, that the post confirmation judgment creditor can execute on all property of the debtor other than the wages of the debtor²² and property acquired after the commencement of the Chapter 13 case.²³ Since 11 U.S.C.S. Section 1327(b) takes the property acquired by the debtor prior to commencement of the case out of the bankruptcy estate and re-vests all said property in the debtor, situations could arise which would unfairly encumber creditors of the debtor with litigation costs and other expenses. For example, a debtor in Chapter 13 owns a house worth \$40,000.00. After confirmation, he incurs a debt which is reduced to judgment and execution is issued on the real property of the debtor. There is a \$30,000.00 mortgage

19. 11 U.S.C.S. §1306(a)(1).

20. 11 U.S.C.S. §1327(b) "... [T]he confirmation of a plan vests all of the property of the estate in the debtor."

21. 11 U.S.C.S. §362 read with 11 U.S.C.S. §1306 and §1327(b)

can be seen to address only debts upon which the debtor became liable prior to his filing a petition for relief.

22. 11 U.S.C.S. §1306(b).

23. 11 U.S.C.S. §1306(a).

on the real property and the house is sold at auction. Under the statutes of the State of Tennessee,²⁴ the Sheriff cannot sell any property at a Sheriff's sale for less than an amount which is equal to 50% of the fair market value of the property. Therefore it would be possible for the proceeds of the sale of a house with a fair market value of \$40,000.00 to be \$20,000.00. If the mortgagee was not notified of the sale or failed to see the publication of the sale and failed to appear and bid in its claim amount at such a sale, the house would then be sold for \$20,000.00. There would be a \$10,000.00 balance left on the real property. It would still be an encumbrance on the real property to that extent, but the mortgage company would then have to expend enormous sums for litigation costs and attorney fees in order to do the following things:

- A. Obtain a release from the automatic stay in the Bankruptcy Court;
- B. Validate the mortgage with the new purchaser;
- C. Obtain all of the necessary information concerning the new purchaser;
- D. If necessary, liquidate the remaining claim.

Obviously this is a great burden which need not be imposed on a mortgage company who is a secured creditor.

Objections to the Motion to Defer Vesting

There are two basic objections to the motion to defer vesting. The first objection is that the deferring of vesting of the property is an aspect of adequate protection under the Bankruptcy Code and ends at the confirmation of the plan and that therefore there is no separate motion to defer vesting. The issue of deferring vesting is obviously not a question of adequate protection as it is clear from the Bankruptcy Code itself that it is a separate issue inasmuch as it is separately addressed in 11 U.S.C.S. Section 1322(b)(9).

The second objection is that the deferring of the vesting of the real property impedes the "fresh start" of the debtor envisioned in the Bankruptcy Code. In point of fact, the "fresh start" of the debtor does not come into play until after the discharge of the debtor, whether that discharge is after a Chapter 7 liquidation or after the completion of a plan under Chapter 11 or 13. Obviously, a debtor laboring under a rehabilitation plan is not laboring under a "fresh start" and will not have a "fresh start" until the plan is completely paid out. Further, if a post confirmation creditor can execute upon property

which is re-vested in the debtor without permission of the Bankruptcy Court,²⁵ the "fresh start" of the debtor is therefore hindered. It can readily be seen that if the vesting of the property had been deferred, the debtor's "fresh start" would have been aided in that the post confirmation creditor would have had to receive permission of the Bankruptcy Court to proceed against the debtor's re-vested property as that property would be part of the bankruptcy estate and therefore under the protective jurisdiction of the Bankruptcy Court.

Does the Bankruptcy Court Have a Duty to Protect the Interests of Creditors?

The discussion of the motion to defer vesting can be seen to lead to a much larger question: Does the Bankruptcy Judge have a duty to protect creditors in a rehabilitation type plan? In a Chapter 11 reorganization or in a Chapter 13 wage earner bankruptcy, there are different interests and goals than there are in a Chapter 7 liquidation bankruptcy. In a Chapter 7 liquidation bankruptcy, the intent is for the creditors to obtain what is available after liquidation from the debtor and nothing more. There is no interest which must be protected other than seeing that the debtor's estate is properly liquidated and that the burdens previously imposed on the debtor are lifted, subject to the liquidation of his estate. The creditors really have no interest except to see that the estate property is properly divided and distributed, assuming all other issues to be in order. However, in a rehabilitation type plan such as a Chapter 11 organization or a Chapter 13 wage earner, there is an interplay between the creditors and the debtor to commence and complete a workable plan which lifts the burdens of debt from the debtor, allowing him to pay off the creditors in a manner less burdensome to the debtor and which allows the creditors to participate in the plan and not to have their interests unduly impaired. In this interplay, the Bankruptcy Code is clear that the interest of the debtor must be protected. The automatic stay provisions²⁶ and other provisions clearly indicate protection for the debtor. It is clear that "[t]he Bankruptcy Court may issue any order, process, or judgment that is *necessary or appropriate to carry out* the provisions of this title . . ." (emphasis added).²⁷ It is also clear that under 11 U.S.C.S. Section 105 the Bankruptcy Court has jurisdiction to order the bankrupt to perform certain duties,²⁸ to grant a preliminary injunction if both the balance of hardship test and likelihood of success test are satisfied while considering whether the injunction was in the public interest,²⁹ preserve the status quo,³⁰ and also to protect third parties.³¹ Certainly creditors of the debtor are third parties which the Court has the jurisdiction to

24. Tennessee Code Annotated §26-5-115

25. 11 U.S.C.S. §1327(b).

26. 11 U.S.C.S. §362, 11 U.S.C.S. §1301.

27. 11 U.S.C.S. §105.

28. *In Re Reiter* 58 F2d 631 (2nd Circuit, 1932), cert. den. 287

U.S. 652, 53 S.Ct. 116.

29. *In Re Blackwelder Furniture Company*, 6 BCD 1337 (BC WD NC, 1980).

30. *In Re The Eli Witt Company*, 21 CBC 618 (ND FL, 1979).

31. *In Re Lang*, 6 BCD 713 (BC SD NY, 1980).

protect; and if the Court indeed possesses the jurisdiction to protect, it follows that the Court has a duty to provide the protection where and when the debtor and other parties will not be harmed by the imposition of that protection.

In view of the above, where a debtor is asking the Court for a rehabilitation plan and is not seeking immediate discharge of his debts, Section 105 would appear to mandate that the Bankruptcy Judge protect the creditor as well as the debtor. It is only fair for the debtor to continue to have his property subject to the jurisdiction of the Bankruptcy Court when the creditor has also been subjected to the jurisdiction of the Bankruptcy Court. The creditor is under an automatic stay and must incur expenses in order to have the automatic stay removed. Further, the creditor loses the use of his money and the interest that that money may earn in the time it takes to have the stay removed. On the other hand, the debtor obtains his property and runs away, leaving the creditor to be unduly burdened, relative to the debt. It is implied in Section 105 that the Court has the duty to issue any order that is necessary or appropriate to carry out a Chapter 13 or rehabilitative plan. That duty includes protecting creditors who are within the Court's jurisdiction and are included in the plan, espe-

cially where possible harm might come to the creditors but no harm will come to the debtors by virtue of the Court's order.

Conclusion

The motion to defer vesting of the property of a Chapter 13 debtor should be filed to protect the interest of a creditor when there are assets owned by the debtor in excess of exemptions claimed by the debtor. The motion to defer vesting does not harm the debtor but can substantially protect the interest of creditors by keeping the property of the bankruptcy estate within the jurisdiction of the Bankruptcy Court and by minimizing the litigation costs risk to the creditor. The motion to defer the vesting of the real property should be granted by the Court pursuant to its responsibility to protect the interests of creditors as well as the interest of debtors. Under rehabilitation plans such as a Chapter 11 reorganization plan or a Chapter 13 wage earner plan, the Bankruptcy Court may not abdicate its moral, ethical, and legal duty and responsibility to protect creditors who participate in the plan as well as the debtors. Hopefully, this article will help encourage efforts to investigate, litigate, and define the scope of the Bankruptcy Court's duty to protect creditors in rehabilitation plans. (11a)

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