

FRCP 17(a)  
FRCP 17(c)  
Real Party in Interest

Hoyt v. Bennett (In re Bennett)                      BAP # OR-03-1383-BKMu  
Adv.No. 01-6302-aer      Main Case No. 01-64498-aer

12/15/03                      BAP (reversing Radcliffe)                      Unpublished  
(No underlying written Bankruptcy Court opinion)

A conservator for a "protected person" was appointed in state court before Debtors' Chapter 7 case was filed. The conservator filed a Section 523 action against Debtor-husband. Approximately 3 months before trial, a successor conservator was appointed in state court. As of the trial date, the successor conservator had not moved to substitute in as Plaintiff. At trial, at the end of the former conservator's case in chief, Debtor moved for dismissal because the real party in interest was not prosecuting the action. The bankruptcy court granted the motion.

On appeal, the Bankruptcy Appellate Panel (BAP) reversed and remanded. The BAP held the bankruptcy court had correctly determined that the former conservator was not the real party in interest. However, the court should have applied FRCP 17(a) and allowed a reasonable time for substitution by the successor conservator. Further, the court should have applied FRCP 17(c) and exercised its duty to inquire whether, and takes steps to assure that, the interests of an incompetent person were being protected. That Plaintiff never requested more time did not relieve the court of this duty.

E03-9(13)

DEC 15 2003

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

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In re: )  
)  
6 ALLAN LEE BENNETT; )  
WANDA MAY BENNETT; )  
7 WANDA M. BENNETT, )  
Trustee of the Wanda Bennett )  
8 Trust, )  
)  
9 Debtors. )

BAP No. OR-03-1383-BKMu

MARK HOYT; Conservator for )  
11 RONNY LYNN BENNETT; C. )  
FREDERICK BURT, Successor )  
12 Conservator for Ronny Lynn )  
Bennett, )  
13 )  
14 Appellants, )

Bk. No. 01-64498-AER

Adv. No. 01-6302-AER

v. )

MEMORANDUM<sup>1</sup>

15 ALLAN LEE BENNETT; )  
16 WANDA MAY BENNETT, )  
)  
17 Appellees. )

Argued and Submitted on November 20, 2003  
at Pasadena, California

Filed - December 15, 2003

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and MUND<sup>2</sup>, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of the law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Geraldine Mund, Bankruptcy Judge for the Central District of California, sitting by designation.

1 This matter arises out of the bankruptcy court's judgment for  
2 defendants after trial on the adversary complaint for determination of  
3 dischargeability under § 523(a).<sup>3</sup> Without considering FRCP 17, the  
4 bankruptcy court entered a judgment dismissing the adversary proceeding.  
5 We REVERSE and REMAND.

6  
7 **I. FACTS**

8 The facts are uncontested. Beginning in 1992, Allan Lee Bennett  
9 served as conservator appointed by the Marion County Circuit Court for  
10 his brother, Ronny Bennett. After he was removed as conservator, Gregory  
11 Hansen was appointed successor conservator nunc pro tunc as of 20 July  
12 1994; three successor conservators have been appointed.

13 On 28 January 1997, after a jury trial, the Polk County Circuit  
14 Court for the State of Oregon entered judgment in favor of a successor  
15 conservator against defendants Allan Lee Bennett and Wanda May Bennett  
16 for breach of fiduciary duty, conversion, fraudulent conveyance, and  
17 money damages (the "State Court Judgment").

18 On 21 February 2001, Mark Hoyt was appointed successor conservator.  
19 On 13 June 2001, Allan and Wanda Bennett filed for chapter 13 bankruptcy  
20 protection, and later converted to chapter 7. On 9 November 2001, Hoyt,  
21 in his capacity as conservator, filed the adversary proceeding seeking  
22 a determination that the State Court Judgment is nondischargeable under  
23 § 523(a)(4).<sup>4</sup>

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24  
25 <sup>3</sup> Absent contrary indication, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. All  
27 "Rule" references are to the Federal Rules of Bankruptcy Procedure,  
"FRCP" references are to the Federal Rules of Civil Procedure, and  
"FRAP" references are to the Federal Rules of Appellate Procedure.

28 <sup>4</sup> The record is scant. There is no copy of the petition,  
schedules, or the complaint. Appellant bears the burden of providing  
the entire record on appeal. Kritt v. Kritt (In re Kritt), 190 B.R.  
382, 387 (9th Cir. BAP 1995).

1 On 10 March 2003, C. Frederick Burt was appointed successor  
2 conservator, replacing Hoyt; the Letters of Conservatorship establish no  
3 limitation on his authority. Burt was not substituted as plaintiff in  
4 the adversary proceeding.

5 At trial on 4 June 2003, Plaintiff's counsel alluded to the issue  
6 of real party in interest in his opening statement, introduced certain  
7 exhibits into evidence, then rested. There was no pretrial objection to  
8 Hoyt as real party in interest. Defendant did not file a trial  
9 memorandum.

10 Allan Bennett, who appeared pro se at trial, twice objected to  
11 Hoyt's claim to be the real party in interest:

12 MR. BENNETT: . . . As to the authority to bring this  
13 adversary proceeding, the facts would show that there was no  
14 authority at the time it was commenced. And there was the  
15 comment that there was a conservator in place all during this  
16 controversy is not correct and the facts would show that, if  
17 that's relevant. That's all I have, Your Honor.

18 . . .  
19 With respect to Mr. Linder's advice to the court that the  
20 evidence shows that there was authority, the evidence does not  
21 show that there was any authority prior to the issuance of the  
22 letters of conservatorship.

23 Transcript, 4 June 2003, pages 6 and 16.

24 The bankruptcy court inquired of plaintiff's counsel:

25 THE COURT: . . . I notice that based on documents you've  
26 introduced, and I'm referring specifically to Plaintiff's 7,  
27 that effective apparently March 6th of this year, the Marion  
28 County Circuit Court appointed C. Frederick Burt to be the  
successor conservator of the estate of Ronny L. Bennett. This  
case of course has been prosecuted by Mark Hoyt as the  
conservator for Mr. Bennett.

Have there been any steps taken to substitute Mr. Burt as  
the plaintiff in the adversary proceeding?

MR. LINDER: No, there hasn't, Your Honor. We have been  
working on substituting him into all of the areas for  
conservatorship, but we haven't filed anything with this  
court. We've had him put on as being representative, paid for  
social security, but we haven't done anything with this court,  
Your Honor.

1 THE COURT: Well, clearly Mark Hoyt does not have any  
2 standing today to proceed, does he?

3 MR. LINDER: No. Mark Hoyt doesn't. I believe that the  
4 real party in interest in this matter is still Ronny Lynn  
5 Bennett though.

6 Transcript, 4 June 2003, pages 16-17.

7 The court later opined:

8 While the defendant has objected to these proceedings on  
9 the basis that there's a lack of the real party in interest  
10 prosecuting the case, based on Plaintiff's Exhibit 7,  
11 establishing the fact that C. Frederick Burt is the  
12 conservator, not the plaintiff, Mark Hoyt, the defendant would  
13 appear to be correct.

14 . . . .  
15 The litigation may be for the benefit of Ronny Bennett,  
16 but my understanding from the evidence is that Ronny Bennett  
17 is a protected person, that a conservator has been appointed  
18 to manage his affairs . . . .

19 That if anyone has the right to prosecute a claim on  
20 behalf of Ronny Lynn Bennett, it would be C. Frederick Burt.  
21 C. Frederick Burt was apparently appointed . . . [but]  
22 Plaintiff's law firm . . . has taken no steps in this case to  
23 substitute C. Frederick Burt and place instead Mark Hoyt as  
24 the plaintiff in this adversary proceeding.

25 Accordingly, I am left with the conclusion that the point  
26 made by Mr. Bennett is well taken and this case must be  
27 dismissed. An appropriate judgment shall be entered.

28 Transcript, 4 June 2003, pages 17-19.

On 11 June 2003, the bankruptcy court entered a judgment:

This matter came on for trial on June 4, 2003. Plaintiff  
appeared through counsel Larry L. Linder. Defendant Allan  
Bennett appeared pro se. Plaintiff presented his case, after  
which Defendant moved for a judgment in his favor, based on  
lack of real party in interest.

The Court having announced its findings and conclusions  
on the record and therefore being fully advised in the  
premises;

**IT IS HEREBY ORDERED AND ADJUDGED** that Defendants shall  
have judgment in their favor based on a lack of the real party  
in interest prosecuting this action. Plaintiff's amended

1 complaint is dismissed; and Plaintiff shall take nothing  
2 thereby.

3 Defendants are awarded their costs and disbursement  
4 incurred herein.

5 (emphasis in original).<sup>5</sup>

6 Hoyt timely appealed.

## 7 II. JURISDICTION

8 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334,  
9 § 157(b)(1) and (b)(2)(A) and (I), and we do under 28 U.S.C. § 158(c).

## 10 III. ISSUE

11 Whether the bankruptcy court abused its discretion by dismissing the  
12 adversary proceeding because the plaintiff was not the real party in  
13 interest.  
14

## 15 IV. STANDARDS OF REVIEW

16 A. We review the bankruptcy court's dismissal of the adversary  
17 proceeding for lack of real party in interest for abuse of discretion.  
18 See Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308 (5th Cir. 2001).  
19 Under the abuse of discretion standard, we must have a definite and firm  
20 conviction that the bankruptcy court committed a clear error of judgment  
21 in the conclusion it reached before reversal is proper. AT&T Universal  
22 Card Servs. v. Black (In re Black), 222 B.R. 896, 899 (9th Cir. BAP  
23 1998). A bankruptcy court necessarily abuses its discretion if it bases  
24 its decision on an erroneous view of the law or clearly erroneous factual  
25 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).  
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28 <sup>5</sup> The caption of the judgment erroneously notes Hoyt as the  
debtor.

1 B. Standing is a legal issue which we review de novo. Loyd v.  
2 Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Aheong v. Mellon  
3 Mortgage Co. (In re Aheong), 276 B.R. 233, 238 (9th Cir. BAP 2002);  
4 Hasso v. Mozsgai (In re La Sierra Fin. Servs., Inc.), 290 B.R. 718, 726  
5 (9th Cir. BAP 2002).

6  
7 **V. DISCUSSION**

8 **A. Appellate Standing**

9 Appellee has not raised Hoyt's standing on appeal as an issue, but  
10 we have an independent duty to consider it. Aheong, 276 B.R. at 238.  
11 "Appellate standing in bankruptcy is determined under the 'person  
12 aggrieved' test" [.] Id.

13 To have standing to appeal a decision of the bankruptcy court,  
14 an appellant must show that it is a "person aggrieved" who was  
15 directly and adversely affected pecuniarily by an order of the  
16 bankruptcy court. The order must diminish the appellant's  
property, increase its burdens, or detrimentally affect its  
rights.

17 McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668, 670  
18 (9th Cir. 1998) (citations omitted).

19 Hoyt has no standing to appeal the judgment dismissing the adversary  
20 proceeding. As will be seen, the real party in interest is Burt, the  
21 conservator at the time the judgment was entered; Hoyt has no interest  
22 in the matter beyond his former status.

23 On 28 October 2003, we entered an order adding Burt as appellant,  
24 absent timely objection. As no objection was filed, we need not explore  
25 whether FRAP 43(a) applies; and Burt is an additional appellant. The  
26 clerk shall amend the caption accordingly.

27

28

1 B. Merits

2 1. Standing as Distinguished From Real Party in Interest

3 We begin by noting that all parties agree that Ronny Lynn Bennett  
4 is an incompetent person, and there is no dispute about the fact of  
5 Burt's appointment as his successor conservator.

6 The concepts of standing and real party in interest are confused in  
7 the briefs. At trial, the bankruptcy court referred to both standing and  
8 real party in interest. Standing is capacity to sue: "The fundamental  
9 aspect of standing is that it focuses on the party seeking to get his  
10 complaint before a federal court and not on the issues he wishes to have  
11 adjudicated." Reynolds v. Feldman (In re Unger & Assoc., Inc.), 292 B.R.  
12 545, 551 (Bankr. E.D. Tex. 2003) (citations omitted). Standing refers to  
13 the proper litigant in a suit, and is not identical to the concept of  
14 real party in interest. Id.

15 "Real parties in interest are the persons entitled or entities  
16 possessing the right or interest to be enforced through the litigation."  
17 4 James Wm. Moore et al., Moore's Federal Practice § 17.10[1] (3d ed.  
18 2003). "The real party in interest is the person holding the substantive  
19 right sought to be enforced, and not necessarily the person who will  
20 ultimately benefit from the recovery." Unger, 292 B.R. at 551.

21 FRCP 17 defines who may bring an action in federal court; under FRCP  
22 17(c), a conservator may sue on behalf of an incompetent person. The  
23 rule provides:

24 (a) Real Party in Interest. Every action shall be  
25 prosecuted in the name of the real party in interest. An  
26 executor, administrator, guardian, bailee, trustee . . . may  
27 sue in that person's own name without joining the party for  
28 whose benefit the action is brought . . . . No action shall  
be dismissed on the ground that it is not prosecuted in the  
name of the real party in interest until a reasonable time has  
been allowed after objection for ratification of commencement  
of the action by, or joinder or substitution of, the real



1 party in interest; and such ratification, joinder, or  
2 substitution shall have the same effect as if the action had  
3 been commenced in the name of the real party in interest.

4 . . . .  
5 (c) Infants or Incompetent Persons. Whenever an infant  
6 or incompetent person has a representative, such as a general  
7 guardian, committee, conservator, or other like fiduciary, the  
8 representative may sue or defend on behalf of the infant or  
9 incompetent person . . . . **The court shall appoint a guardian  
10 ad litem for an infant or incompetent person not otherwise  
11 represented in an action or shall make such other order as it  
12 deems proper for the protection of the infant or incompetent  
13 person.** (emphasis added)

14 Appellant contends, without any citation to authority, that  
15 "[r]egardless of who the current conservator was, the conservator had  
16 standing to bring this adversary proceeding. The real party in interest  
17 was always, and continues to be, Ronny Bennett." Appellant also argues  
18 that the same law firm has been retained throughout but assigns no legal  
19 significance to this fact in this case, nor can we discern any.

20 The first part of this statement is incorrect: the current  
21 conservator, not the former conservator, has standing to continue to  
22 prosecute on behalf of Ronny Bennett. Under Oregon law, a conservator  
23 has authority to bring an action on behalf of a "protected person"  
24 (defined in Or. Rev. Stat. § 125.005(7)).<sup>6</sup> After issuance of the Letters  
25 of Conservatorship substituting Burt on 10 March 2003, only Burt could  
26 continue the adversary proceeding on Ronny Bennett's behalf.<sup>7</sup> Appellant

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27 <sup>6</sup> Or. Rev. Stat. § 125.445(26) provides: "A conservator may  
28 perform the following acts without prior court authorization or  
confirmation if the conservator is acting reasonably to accomplish the  
purposes for which the conservator was appointed: . . . (26) Prosecute  
or defend actions, claims or proceedings in any jurisdiction for the  
protection of estate assets and of the conservator in the performance  
of duties."

<sup>7</sup> Appellee does not argue that Ronny Bennett does not qualify  
as an "incompetent person" under FRCP 17(c).

1 cites no authority that would allow us to interpret the rules or Oregon  
2 law to permit a former conservator to continue prosecuting litigation on  
3 behalf of a protected person.

4 The second part of the statement is also inaccurate; under FRCP  
5 1717, the currently serving conservator, not Ronny Bennett, is probably  
6 the real party in interest. 4 Moore's Federal Practice § 17.10(3)(c);  
7 6A Chas. A. Wright et al., Federal Practice & Procedure § 1548. In any  
8 event, the bankruptcy court correctly ruled that Hoyt, the former  
9 conservator, was not the real party in interest.

10  
11 2. FRCP 17(a)

12 Citing FRCP 17(a) and one authority, appellant vaguely argues that  
13 neither Ronny Bennett nor Burt "have been provided time to prosecute this  
14 adversary complaint after objection because no objection was lodged."<sup>8</sup>  
15 This is the crux of this appeal. Burt became conservator approximately  
16 three months before trial. Bennett's first objection to Hoyt as  
17 plaintiff was lodged at the conclusion of plaintiff's case.

18 The proper procedure when a defendant believes that a cause of  
19 action is not being prosecuted by the real party in interest is to object  
20 under FRCP 17(a), and pro se litigants must follow the same rules as  
21 represented parties. King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

22 Under FRCP 17(a), "[a] motion, either by the parties or by the  
23 court, must be made in order to notify the disputed party of the error."  
24 See also Weissman v. Weener, 12 F.3d 84, 87 (7th Cir. 1993) (where the  
25 court raises the question sua sponte, reasonable time must still be given

26  
27  
28 <sup>8</sup> Neither party raised FRCP 17 at trial.

1 to cure the defect); Unger, 292 B.R. at 552-53; FRCP 17 Adv. Comm. Note  
2 (1966).

3 The Advisory Committee on Civil Rules that prepared the current  
4 version of FRCP 17(a) explained:

5 The provision that no action shall be dismissed on the ground  
6 that it is not prosecuted in the name of the real party in  
7 objection has been raised, for ratification, substitution,  
8 etc., is added simply in the interests of justice. In its  
9 origin the rule concerning the real party in interest was  
10 permissive in purpose; it was designed to allow an assignee to  
11 sue in his own name. That having been accomplished, the  
12 modern function of the rule in its negative aspect is simply  
13 to protect the defendant against a subsequent action by the  
14 party actually entitled to recover, and to insure generally  
15 that the judgment will have its proper effect as res judicata.

16 Adv. Comm. Note to 1966 Amendment.

17 Even if the oral objection sufficed as a motion, granting it without  
18 allowing time to remedy was implicitly the application of an erroneous  
19 view of the law, and hence, an abuse of discretion.

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3. FRCP 17(c)

Our conclusion that we must return this matter to the trial court  
is reinforced by FRCP 17(c), which requires a court to take whatever  
measures it deems proper to protect an incompetent person during  
litigation. This includes a specific obligation to consider whether the  
person is adequately protected, which the Ninth Circuit regards as no  
"mere formalism." United States v. 30.64 Acres, 795 F.2d 796, 805-06  
(9th Cir. 1986). The failure of a court to inquire into whether, and  
take steps to assure that, the interests of an incompetent person are  
being adequately protected "is not an abuse of discretion but a failure  
to exercise legally required discretion." Id., at 805. That appellant

1 never requested more time does not relieve the court of this duty. Under  
2 the law of the Ninth Circuit, the bankruptcy court was required to  
3 exercise this Rule 17(c) "legally required discretion," supported with  
4 factual findings, id. at 806, before dismissing the adversary proceeding.

5  
6 **VI. CONCLUSION**

7 The bankruptcy court properly ruled that Hoyt was not the real party  
8 in interest, but without considering application of FRCP 17(a) and (c)  
9 or allowing a reasonable period for substitution. We REVERSE the  
10 judgment dismissing the adversary proceeding and REMAND for further  
11 proceedings.

U.S. Bankruptcy Appellate Panel  
of the Ninth Circuit  
125 South Grand Avenue, Pasadena, California 91105  
Appeals from Central California (626) 229-7220  
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-03-1383-BKMu

RE: ALLEN LEE BENNETT; WANDA MAY BENNETT; WANDA M. BENNET, Trustee of  
the Wanda Bennett Trust

A separate Judgment was entered in this case on 12/15/03.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.  
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

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The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Elaine Lewis

Deputy Clerk: December 15, 2003

*Elaine Lewis*