

**UST Guidance on Debtors –
Disability, Incompetence, Military Service, Incarceration, Powers of Attorney**

The UST often receives inquiries regarding debtors or prospective debtors who are mentally incompetent, physically disabled, in military service, incarcerated, or reside outside West Virginia. Often the debtor has issued a power-of-attorney to a spouse or other relative. Although the specific issues vary from case to case, there are usually three areas of concern in these situations.

1. Signing the petition and schedules
2. Appearing at the §341 meeting of creditors
3. Obtaining credit counseling / debtor education

Petition and other Documents:

Each debtor is required to personally sign the petition, schedules or other documents.

A debtor who is mentally competent and physically able to sign the petition and other documents must personally sign the petition, schedules and other documents.

If a debtor is mentally incompetent, the petition should be signed by any legal representative who has been appointed for the debtor (i.e. legal guardian, committee, conservator or similar fiduciary). If the mentally incompetent debtor has no such legal representative, the petition may be signed by next friend (i.e. spouse, family member) or guardian ad litem. See *Bankruptcy Rule* 1004.1. If a petition is signed by a legal representative or by a next friend pursuant to a durable power of attorney, the order appointing the legal representative or the POA should be attached to the petition.

If debtor is mentally competent but unable to sign the documents because of physical disability or military service, an attorney-in-fact may sign the petition for the debtor pursuant to a valid POA.

In either event, the POA must specifically authorize filing bankruptcy or the powers are broad enough to include filing bankruptcy (i.e. powers regarding general financial affairs or litigation). The POA must be attached to the petition.

If the debtor is unable to appear at the meeting of creditors, the legal representative or next friend signing the petition should then (1) appear at the meeting of creditors, (2) demonstrate the authority of the person signing the petition for the debtor, (3) provide documentation of the incompetence, disability, or military service of the debtor, and (4) demonstrate personal knowledge of the debtor's financial affairs.

341 Meeting of Creditors

The Code (§343) requires that every debtor appear and be examined under oath at a meeting of creditors. The Code provides no exceptions to this requirement.

The UST may approve an alternative appearance for debtors unable to appear in person due to physical or mental disability, military service, incarceration, or relocation outside West Virginia. An alternative appearance may include telephone or video conference.

If a debtor is unable to appear in person, or by video or telephone, because of physical or mental disability or military service, the debtor's appearance may be excused. In such cases, the legal representative or next friend (i.e. spouse, family member) must (1) appear at the meeting of creditors, (2) demonstrate the authority of the person appearing for the debtor; (3) provide documentation of the incompetence, disability, or military service of the debtor, (4) demonstrate that the debtor is unable to appear or testify by any means; and (5) demonstrate personal knowledge of the debtor's financial affairs.

If debtor is unable to appear in person, or by video or telephone, because of incarceration, debtor should contact the trustee or UST prior to the meeting and the matter will be handled on a case-by-case basis.

If the debtor has relocated outside West Virginia, the debtor must still appear in person or by alternative means. In such cases, the debtor may appear at a UST office near the current residence and participate in the West Virginia meeting by telephone or video.

Credit Counseling

Every individual debtor is required to obtain credit counseling prior to filing a petition. The credit counseling may be obtained in person, by phone, or by internet. A third person may not obtain credit counseling for the debtor pursuant to a power of attorney. *In re Pease*, 2010 WL 2670815 (Bankr.N.D.Ohio.2010).

The court may waive the credit counseling requirement if debtor is unable to obtain counseling, by any available means, because of mental incapacity, physical disability, or military service. §109(h)(4). The debtor must assert the waiver on Exhibit D to the Petition, AND must file a motion with the Court. In order to obtain a waiver, the Motion should show the nature of the (1) mental incapacity, (2) physical disability, or (3) military service. In addition, the debtor must also show that the incapacity, disability, or military service prevents the debtor from obtaining counseling by any available means. *In re Hall*, 347 B.R. 532 (Bankr.N.D.W.Va.,2006)

An incarcerated debtor may obtain a waiver by showing that the incarceration prevents debtor from obtaining counseling by any available means, and that the correctional facility has denied debtor's request to use telephone or internet services to obtain credit counseling. *In re Vollmer*, 361 B.R. 811, 813–815 (Bankr.E.D.Va.2007). *In re Latovljevic*, 343 B.R. 817 (Bankr.N.D.W.Va.,2006).