

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE JEROME GRIGGS BEERY,  
Debtor.

BAP No. NM-98-003

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JEROME GRIGGS BEERY,  
Appellant,

Bankr. No. 94-10504  
Chapter 7

v.

YVETTE J. GONZALES, Trustee; and  
INTERNAL REVENUE SERVICE,  
Appellees.

**ORDER DENYING  
MOTION FOR LEAVE TO APPEAL  
INTERLOCUTORY ORDER  
AND  
DISMISSING APPEAL  
March 11, 1998**

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Before CLARK, PEARSON, and MATHESON, Bankruptcy Judges.

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The matter before the Court is a Motion for Leave to Appeal Interlocutory Order (“Motion”) filed by the Appellant, Jerome Griggs Berry (“Appellant”), as part of a responsive memorandum of law to the Court’s Order to Show Cause Why Appeal Should Not Be Considered for Dismissal as Interlocutory. The Appellee, Yvonne Gonzales, Trustee, has objected to the Court’s jurisdiction in this case. For the reasons set forth below, the Court DENIES the Appellant’s Motion and DISMISSES this appeal.

**DISCUSSION**

The Appellant appeals an “Order Setting Aside Final Decree and Reopening Case,” which was entered by the United States Bankruptcy Court for the District of New Mexico, on its own motion. According to the Order, a final decree was inadvertently entered in the Appellant-debtor’s bankruptcy case which had the effect of

closing the case. The bankruptcy case is still being administered.

This Court has jurisdiction to hear an appeal from a “final” order of a bankruptcy court. 28 U.S.C. § 158(a)(1). The sua sponte order of a bankruptcy court to reopen a case inadvertently closed due to clerical error, such as the Order appealed in the present case, is not a final order. See Arney v. Finney, 967 F.2d 418, 422 (10th Cir. 1992) (district court decision to reopen a final order under Fed. R. Civ. P. 54(b) is not a final order). Such an order is also not a “final” order under the collateral order doctrine. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) (exception to final order rule arises when denial of immediate review would render the issue unreviewable at a later stage of the litigation or cause litigants irretrievable loss of rights); see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (“To come within the ‘small class’ of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal and from a final judgment.”). In particular, the bankruptcy court’s Order does not conclusively determine a disputed question or resolve an important issue completely separate from the merits of the action. Moreover, the Order would be reviewable on appeal from a final judgment. In addition, denial of immediate review will not cause Appellant or other parties to the bankruptcy case irretrievable loss of rights.

This Court may also exercise jurisdiction over an appeal from an interlocutory order entered by a bankruptcy court if leave to appeal is granted. 28 U.S.C. § 158(a)(3). Leave to appeal is appropriate only in those cases in which the order involves a controlling question of law as to which there is substantial ground for difference of opinion, and in which an immediate appeal will materially advance the termination of the litigation. Personette v. Kennedy (In re Midgard Corp.), 204 B.R. 764, 769 (10th Cir. BAP 1997).

The circumstances presented here do not permit interlocutory appeal. The

bankruptcy court made a clerical error and sua sponte corrected that error. There is no controlling question of law as to which there is a substantial ground for difference of opinion.

Accordingly, it is HEREBY ORDERED THAT:

- (1) Appellant's motion for leave to appeal interlocutory order is DENIED; and,
- (2) This appeal is DISMISSED for lack of jurisdiction. The mandate shall issue forthwith.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By:

Deputy Clerk