

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE) CASE NO. 99-50550
)
BRIAN & TAMMY TSCHANTZ) CHAPTER 13
)
DEBTORS) JUDGE MARILYN
SHEA-STONUM)

**PROVISIONAL ORDER GRANTING DEBTORS'
MOTION TO MODIFY CHAPTER 13 PLAN
SUBSEQUENT TO CONFIRMATION
AND ORDER SETTING HEARING ON SAME**

This matter came before the Court on the debtors' motion to modify their chapter 13 plan subsequent to confirmation (the "Motion"). That Motion was served on all holder of claims. No objections to the Motion were filed and a hearing on the matter was held on July 29, 1999. Appearing at the hearing were Morris Laatsch, counsel for debtors, and Jerome Holub, the chapter 13 trustee. Because the Court wanted to further consider the extent to which chapter 13 debtors can amend their plans after confirmation, the matter was taken under advisement and debtors' counsel was allowed, but not required, to provide the Court with legal authority in support of the Motion. No supporting authorities were filed in this matter.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (L) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the Motion and the documents of record in this chapter 13 proceeding, the Court makes the following findings of fact and conclusions of law.

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FACTS

On March 4, 1999, debtors filed their joint chapter 13 bankruptcy petition and on June 15, 1999, the debtors' chapter 13 plan was confirmed. In their original plan, debtors proposed to pay unsecured creditors 100% of their allowed claims and the duration of the plan was set at 40 months.

In their Motion, debtors state that a modification of their chapter 13 plan is necessary because the debtors have separated, are living apart and now have the expense of two households. Debtors also indicate that, because the debtor-wife has almost no disposable income, the plan will be funded almost entirely by the debtor-husband. In their Motion, debtors propose to reduce payments to unsecured creditors from 100% of allowed claims to 5% of allowed claims and to increase the arrearage payments to be paid to the holder of the first mortgagee on debtors' marital residence from \$2,000.00 to \$4,600.00. Debtors also propose to shorten the duration of the plan from 40 months to 36 months.

DISCUSSION

Modification of a chapter 13 plan may be requested at any time between the confirmation of the plan and the completion of all payments due under the plan. 11 U.S.C. §1329(a). Debtors may modify their plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan," or "extend or reduce the time for such payments." *Id.* A modified plan must comply with the Bankruptcy Code's provisions governing duration, contents, and acceptance of a chapter 13 plan. *See* 11 U.S.C. §1329(b) (specifically stating that §§1322(a), 1322(b), 1323(c) and 1325(a) apply to any modification). Additionally, a modified plan may not provide for payments over a period in excess of three years from the date the first payment was due under the original plan, unless a court, for cause, approves a longer period not to exceed five years from that time. 11 U.S.C. §1329(c).

See also Ledford v. Brown (In re Brown), 219 B.R. 191, 194 (B.A.P. 6th Cir. 1998); *Powers v. Savage (In re Powers)*, 202 B.R. 618, 623 (B.A.P. 9th Cir. 1996) (noting that because modification of a plan is essentially a new confirmation, it must be consistent with the statutory requirements for confirmation).¹

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The debtors' modification does not propose a change in any of the requirements set forth in §1322(a) and (b). Accordingly, those statutory provisions are satisfied. By its failure to object or otherwise respond to the Motion, the Court will construe the holder of the first mortgage on debtors' marital residence as accepting the debtors' modified plan as it relates to treatment of that secured creditor's arrearage payments. Accordingly, the requirements of §1323(c) have also been satisfied. The only requirements of §1325(a) that might be altered by debtors' proposed modifications are subsections (a)(3), (a)(4) and (a)(6). Because a potential issue may exist as to subsection (a)(3), that statutory provision will be discussed last.

§1325(a)(4): Subsection (a)(4) provides that, to be confirmed, the value, as of the effective date of the chapter 13 plan, of property to be distributed under the plan on account of each allowed unsecured claim, must not be less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7. *See* 11 U.S.C. §1325(a)(4). In their Schedules, debtors list \$55,350.00 in assets and \$49,112.04 in liabilities. Debtors also list \$14,900.00 in claimed exemptions, to which no objections have been filed. It appears that if debtors had instead filed a chapter 7 petition, there would be no distribution to holders of allowed unsecured claims. Accordingly, debtors' proposed modification to pay their unsecured creditors a 5% distribution, is not less than the amount that would be paid to those same creditors under a chapter 7.

§1325(a)(6): Subsection (a)(6) provides that, to be confirmed, debtors must be able to make all payments due under and to comply with the requirements of a proposed plan. *See* 11 U.S.C. §1325(a)(6). On August 3, 1999, the chapter 13 trustee's office filed a copy of a letter sent to debtors' counsel indicating that, given the proposed

¹ In the case at bar, debtors' contend that a change in their marital circumstances has precipitated the need to amend their chapter 13 plan subsequent to confirmation. Because debtors' original chapter 13 plan went well above the minimum statutory requirements for confirmation of a chapter 13 plan, the Court does not need to decide whether debtors' change in circumstances is unanticipated and substantial. *See, e.g.*, discussion of requirements of §1325(a)(4), *infra*.

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modifications, debtors' plan appears to be feasible. Providing that debtors' financial circumstances remain substantially the same, it appears that debtors should be able to make all payments due under and to comply with the requirements of their proposed plan.

§1325(a)(3): Subsection (a)(3) provides that, to be confirmed, a chapter 13 plan must be proposed in good faith. *See* 11 U.S.C. §1325(a)(3). Pursuant to their amended Schedules I and J, debtors' combined monthly income has increased by \$225.29 but their combined monthly expenses have also increased by \$465.00.² This \$239.71 increase in monthly expenses closely correlates to the proposed \$241.38 decrease in monthly payments into the plan.³ Additionally, it appears that the debtors are utilizing all of their excess income, after deduction of expenses, to fund the modified plan.

Given the absence of any objection to the Motion, the proposed reduction in monthly plan payments, coupled with the proposed reduction in the length of the plan by only 4 months, appears to have been proposed in good faith. However, upon review of the Motion and the other pleadings filed in this case, it is not clear to the Court whether the attempt to increase arrearage payments to the holder of the first mortgagee on debtors' marital residence is due to an underestimation of exactly what prepetition arrearages were due or, is instead due to a postpetition default in such payments. If it is the latter situation, an issue as to good faith may exist as debtors should not be permitted to direct plan funds to a postpetition creditor at the expense of the holders of prepetition claims.

² When debtors Schedules were initially filed, debtor-husband was receiving \$1,456.00 per month in unemployment compensation and debtor-wife was receiving \$649.04 in net take home pay. Since that time, debtor-husband has returned to work and now receives \$1,897.00 per month in net take home pay and debtor-wife has taken a new job in which she receives only \$433.00 in net take home pay.

³ Pursuant to their amended Schedule J, debtor-husband proposes to make monthly payments into the plan of \$282.61 and debtor-wife proposes to make monthly payments into the plan of \$8.33, constituting monthly payments into the plan of \$290.84. Pursuant to their original chapter 13 plan, debtors were making monthly plan payments of \$532.32.

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CONCLUSION

Based upon the foregoing, the Motion is provisionally granted, subject to a hearing at which debtors' counsel will be expected to address the issue raised with respect to debtors' proposal to increase arrearage payments to the holder of the first mortgagee on debtors' marital residence. That hearing will be held on **October 14, 1999**, at **3:30 p.m.**, in Room 250, U.S. Courthouse and Federal Building, 2 South Main Street, Akron, Ohio.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/29/99