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TIMOTHY R. WALBRIDGE, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
ROSE A. ROBERTS,	**Case No. 00-01989-M**
	Chapter 13
Debtor.	

MEMORANDUM OPINION

THIS MATTER comes before the Court pursuant to the Objection to Confirmation of Plan (the "Objection") filed by David J. Carrino ("Carrino") on June 15, 2000, and the Trustee's Objection to Confirmation of Plan (the "Trustee's Objection") filed September 11, 2000, by Lonnie Eck, the Standing Chapter 13 Trustee ("Trustee"). An evidentiary hearing in the matter was held on October 25, 2000. James A. Williamson ("Williamson") appeared as attorney for Carrino. J. Scott McWilliams ("McWilliams") appeared as attorney for Rose A. Roberts, Debtor herein ("Roberts" or "Debtor"). The Trustee appeared *pro se*. At the conclusion of the evidentiary hearing, the Court provided the parties with the opportunity to submit briefs on the issues raised in the Objection. Carrino filed his brief on November 7, 2000. Roberts submitted her brief November 22, 2000. The Trustee declined to file a brief. The following findings of fact and conclusions of law are made pursuant to Bankruptcy Rule 7052 and Federal Rule of Civil Procedure 52.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C.A. §1334(b),[1] and venue is proper pursuant to 28 U.S.C.A. §1409. Reference to the Court of this matter is proper pursuant

[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West 2001) (the "Code").

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to 28 U.S.C.A. §157(a), and it is a core proceeding as contemplated by 28 U.S.C.A. §157(b)(2)(L).

Findings of Fact

Carrino and Roberts were married in 1967. The marriage lasted nearly a quarter-century. On June 18, 1991, Carrino and Roberts were divorced in the District Court of Rogers County, Oklahoma. The divorce decree required Carrino to pay Roberts $700 per month in support alimony for a period of thirty-six (36) months, subject to Oklahoma law relating to events giving rise to termination or modification.[2] The decree also mandated that Carrino pay certain marital debts, most of which derived from credit card charges.

Pursuant to the decree, Carrino began making alimony payments in July 1991. In March 1992, Roberts remarried. Although her divorce counsel had advised her that remarrying would lead to the termination of the alimony payments, Roberts continued to accept and spend the monthly alimony payments provided by Carrino. She did not inform Carrino or the divorce court of her recent nuptials, nor did she seek or receive a modification of the divorce decree permitting her to continue collecting alimony. Roberts eventually collected all thirty-six (36) of the alimony payments provided for in the divorce decree, with the final payment coming in June 1994. At no time between April 1992 and June 1994 did Roberts believe the decree permitted her to retain the alimony payments in question.

Sometime in 1997 Carrino became aware that Roberts had remarried. This revelation prompted him to file a lawsuit in state court seeking to recover the alimony received by Roberts

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[2] Under Oklahoma law, the recipient's entitlement to support alimony terminates upon remarriage, unless the recipient makes a showing that some amount of support is still needed and commences an action to continue repayment within ninety days of remarriage. *See* Okla. Stat. Ann. tit. 43, § 134(B) (West Supp. 2001).

between the time of her second marriage and the time of the final payment. On April 7, 1998, Carrino obtained a judgment in state court for the amount of the overpayments. The state court subsequently ordered a garnishment of Roberts's wages to satisfy the judgment.

On May 30, 2000, Roberts filed a petition for relief under chapter 13 of the Code. Concurrently with the filing of the petition, Roberts filed her Chapter 13 Plan (the "Plan"). Under the terms of the Plan, Roberts was to make monthly payments of $120.00 for a period of thirty-six (36) months. The Plan proposed to pay a dividend of approximately twelve (12) percent to unsecured creditors.

On June 15, 2000, Carrino filed a proof of claim in the amount of $20,081.00 for the unpaid portion of the state court judgment and accumulated interest (the "Carrino Claim"). On the same day, he also filed his Objection to Confirmation to Plan, alleging that the Carrino Claim was nondischargeable under § 523(a)(2)(A). On August 18, 2000, Roberts filed her First Amended Chapter 13 Plan (the "First Amended Plan"). The First Amended Plan also provides for thirty-six (36) monthly payments of $120.00. Due to an increase in the amount of the total projected unsecured claims, however, the projected dividend to unsecured creditors is decreased to approximately eight (8) percent under the First Amended Plan. The Carrino Claim constitutes approximately fifty-three (53) percent of the total projected unsecured claims. On September 11, 2000, the Trustee objected to the confirmation of the First Amended Plan on the ground that Carrino's Objection had not been resolved.

The Court set the matter of confirmation of the First Amended Plan for an evidentiary hearing on October 25, 2000. At the hearing, Carrino conceded that § 523(a)(2)(A) is not applicable in chapter 13 cases. However, he argued that Roberts had not proposed the First Amended Plan in

good faith, based upon the fact that the debt in question would not have been dischargeable in a chapter 7 case, and that the projected dividend to be paid to the unsecured creditors is insufficient.

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," they are incorporated herein by this reference.

Burden of Proof

The chapter 13 debtor has the burden of proving that a plan has been proposed in good faith. *See Mason v. Young (In re Young),* 237 B.R. 791, 798 (10th Cir. BAP 1999). Even though the burden is on the debtor, the court has an independent duty to assess whether a plan has been proposed in good faith. *See In re Henricksen,* 131 B.R. 467, 468 (Bankr. N.D. Okla. 1991).

Conclusions of Law

In this case the Court must determine whether a chapter 13 plan which proposes to pay less than ten (10) percent of an unsecured claim resulting from a judgment for overpayment of support alimony "has been proposed in good faith and not by any means forbidden by law." *See* § 1325(a)(3). "Good faith" is not defined in the Bankruptcy Code; however, "[t]he good faith requirement 'has long been the policing mechanism of bankruptcy courts to assure that those who invoke the reorganization provisions of the bankruptcy [law] do so only to accomplish the aims and objectives of bankruptcy philosophy and for no other purpose.'" *In re Smith,* 130 B.R. 102, 103 (Bankr. D. Utah 1991) (quoting *In re Chase,* 43 B.R. 739, 745 (Bankr. D. Md. 1984)).

The Tenth Circuit has adopted a list of factors relevant to a determination of good faith. *See Flygare v. Boulden (In re Flygare)*, 709 F.2d 1344 (10th Cir. 1983).[3] This list is not exhaustive, and

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[3] The factors outlined in *Flygare* are:

(1) the amount of the proposed payments and the amount of the debtor's surplus;

the weight given each factor will necessarily vary with the facts and circumstances of each case. *See id.* at 1348. Prior bankruptcy filings and the pre-petition conduct of the debtor may be relevant to the good faith inquiry under § 1325(a)(3). *See Pioneer Bank of Longmont v. Rasmussen (In re Rasmussen),* 888 F.2d 703, 704 (10th Cir. 1989) (citation omitted). The bankruptcy court may also consider other pertinent circumstances "including any that may indicate the debtor has 'unfairly manipulated the Bankruptcy Code.'" *In re Young,* 237 B.R. at 798 (quoting *In re Rasmussen,* 888 F.2d at 704 n. 3). The Court now turns to the *Flygare* factors and other relevant circumstances to determine whether the First Amended Plan was proposed in good faith.

Amount of the Proposed Payments and the Amount of the Debtor's Surplus

In the First Amended Plan, Roberts has proposed a monthly payment of $120.00. The Schedules I and J filed by Roberts show projected monthly income, after all deductions, of $1,042.02 and projected monthly expenses of $921.97 for a surplus of $120.05. None of the expenses Roberts

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(2) the debtor's employment history, ability to earn and likelihood of future increases in income;
(3) the probable or expected duration of the plan;
(4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
(5) the extent of preferential treatment between classes of creditors;
(6) the extent to which secured claims are modified;
(7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in chapter 7;
(8) the existence of special circumstances such as inordinate medical expenses;
(9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
(10) the motivation and sincerity of the debtor in seeking chapter 13 relief; and
(11) the burden which the plan's administration would place upon the trustee.

See Flygare v. Boulden (In re Flygare), 709 F.2d 1344, 1347-48 (10th Cir. 1983) (citations omitted).

has listed appear to be improper or excessive. Nothing about the amount of the proposed payments in relation to the amount of Roberts's disposable income indicates the First Amended Plan has not been proposed in good faith.[4]

Debtor's Employment History, Ability to Earn and Likelihood of Future Increases in Income

Roberts is employed full time in the health care field and was earning $9.36 an hour at the time of filing. She provided no evidence regarding her education, employment history, or the possibility of future pay raises or promotions.

Probable or Expected Duration of the Plan

The First Amended Plan is thirty-six (36) months in duration. The Bankruptcy Code limits the length of chapter 13 plans to three years, unless the court approves a longer period upon a showing of cause. *See* § 1322(d). Nevertheless, the filing of a three-year plan may be circumstantial evidence of bad faith that must be considered together with other evidence presented to the bankruptcy court. *See In re Young,* 237 B.R. at 798; *see also In re Maras,* 226 B.R. 696, 701 (Bankr. N.D. Okla. 1998) (good faith does not require proposal of sixty month plan, but length of plan relevant to debtor's state of mind).

Under the First Amended Plan, unsecured creditors, including Carrino, may expect payment of eight (8) percent of their claims. While extending the plan to the maximum allowable length of five years would not enable Carrino to recover the full amount owed to him, it would permit him to receive a greater percentage of the funds owed to him than would the proposed three-year plan.

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[4] The Court notes that the First Amended Plan complies with the requirements of § 1325(b)(1)(B) by devoting all of the debtor's surplus income for the next three years to the Plan payments.

Accuracy of the Plan's Statements of the Debts Owed by the Debtor

Carrino has not questioned the accuracy of the statement of debts contained in the First Amended Plan, nor does the Court find any indication that Roberts has failed to accurately report her debts. Similarly, there is no evidence that Roberts has attempted to mislead the Court with respect to her current financial status.

The Extent to Which Secured Claims are Modified

No secured claims are modified under the First Amended Plan.

Type of Debt Sought to be Discharged

Carrino alleges that his allowed claim of $20,081.00 would be nondischargeable under chapter 7 of the Bankruptcy Code as a debt for money obtained by false representation or by actual fraud. *See* § 523(a)(2)(A). Roberts does not directly contest the position taken by Carrino, but instead argues that the issue of dischargeability in a chapter 7 case is not relevant in this chapter 13 case. The fact that the debt may not have been dischargeable in a chapter 7 proceeding, standing alone, is not enough to sustain Carrino's Objection. "[A]n attempt to discharge a debt in a Chapter 13 case that is not dischargeable in a Chapter 7 is not per se bad faith unless combined with other factors that show an overall effort to avoid paying creditors." *In re Young,* 237 B.R. at 799.

There has been no judicial determination that Roberts's debt to Carrino is nondischargeable under any chapter of the Bankruptcy Code. Additionally, the Court does not have before it the state court judgment giving rise to the claim.[5] Nevertheless, the Court may consider the nature of the acts giving rise to the claim. As the Fourth Circuit has stated:

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[5] The proof of claim filed by Carrino states that his claim is based upon the "[f]raudulent receipt of alimony by Debtor." However, the claim is not accompanied by any supporting documentation. *See Claims Docket at #2.*

> Of course the issue of dischargeability in Chapter 7 need not, and cannot, be litigated to conclusion in every Chapter 13 confirmation proceeding. Where significant claims involve conduct that would otherwise raise serious Chapter 7 dischargeability issues, however, the quality of the conduct is part of the "totality of the circumstances" which must be weighed, with other factors, in assessing the debtor's good faith under Chapter 13.

Neufeld v. Freeman, 794 F.2d 149, 153 (4th Cir. 1986). The significance of Carrino's claim cannot be disputed; it totals approximately fifty-three (53) percent of the total projected unsecured claims. Equally undisputable is the fact that Roberts's conduct in collecting the alimony payments following her second marriage raises "serious Chapter 7 dischargeability issues." Thus, while the Court has concerns about the type of debt Roberts seeks to discharge, additional indicia of bad faith is required before the Objection may be sustained.

The Existence of Special Circumstances such as Inordinate Medical Expenses

Roberts has presented no evidence of any inordinate expenses, medical or otherwise. In addition, the Court finds that there are no other special circumstances that merit consideration.

The Frequency with Which the Debtor has Sought Relief Under the Bankruptcy Reform Act

Nothing in the record indicates Roberts has filed bankruptcy previously.

The Motivation and Sincerity of the Debtor in Seeking Chapter 13 Relief

The Court concludes that Roberts was motivated to seek relief under the Code by a desire to avoid paying Carrino. During the evidentiary hearing, Roberts testified that she filed bankruptcy because she was unable to pay her monthly expenses once the garnishment of her wages began. She also testified that the garnishment was in place for more than a year before she filed her bankruptcy petition. This is borne out by the information contained in her schedules. Although Roberts testified that she was unable to make her car payments, she did not indicate that the creditor holding the security interest in the vehicle was pursuing collection. The Court wonders why, if the wage

garnishment truly rendered Roberts incapable of paying her bills, she waited more than a year before seeking the relief under the Code.

More troubling to the Court is the cavalier attitude Roberts has exhibited with respect to this debt. Her own testimony establishes that she accepted the alimony payments after remarrying, knowing full-well that she was not entitled to them. Roberts argues that she did so in order to pay some of the debts stemming from her marriage which Carrino had been ordered to pay in the decree of divorce. She also argues that she was unable to locate Carrino in order to inform him of her second marriage. The Court finds both of these justifications of her conduct implausible. Even if Carrino was not paying off the marital debts as ordered, his failure would not justify Roberts's actions. The laws of the State of Oklahoma provide ample remedies to individuals whose former spouses refuse to abide by a divorce decree. Roberts could easily have availed herself of such remedies by returning to state court. Instead, she chose to resort to self-help, ignoring the prohibition against collecting alimony upon remarriage.

The evidence also indicates that Carrino continued to live within a few miles of Roberts for more than a year after Roberts remarried. Moreover, both Carrino and Roberts testified that they were in regular contact with their grown children during the time between Roberts's second marriage and the date of the final payment. The Court finds it difficult to believe that Roberts could not have succeeded in locating Carrino during this period had she put forth even a modest effort, which she apparently was not inclined to do. Finally, Carrino testified that Roberts was able to contact him by telephone on at least one occasion, and perhaps others, during the time in question. If Roberts had the ability to reach Carrino by telephone, she easily could have informed him that she had remarried.

The Burden which the Plan's Administration would Place upon the Trustee

The Trustee has not alleged that the administration of the First Amended Plan would result in any undue burden. The Trustee's Objection is based solely on the lack of a resolution to Carrino's Objection.

Additional Considerations

The evidence adduced at the hearing indicates that Roberts transferred a home that she owned to her children not long before filing her petition. Roberts testified that the transfer was made "in lieu of a will." While this may indeed have been the reason for the transfer, the Court notes that the timing of the transfer appears on its surface to have been more than coincidental. Furthermore, while the Court appreciates Roberts's candor in conceding that she accepted the alimony payments during the course of her second marriage, her steadfast refusal to admit that she acted inappropriately by doing so is disturbing.

The object of the good faith inquiry is to determine whether, considering all militating factors, there has been an abuse of the provisions, purpose, or spirit of chapter 13 in the proposal or plan. *See Neufeld,* 794 F.2d at 152 (internal quotes and citation omitted). The purpose of the Bankruptcy Code is to give the honest debtor a fresh start. *See, e.g., Gullickson v. Brown (In re Brown),* 108 F.3d 1290, 1294 (10th Cir. 1997). In this case the Court perceives a debtor who has sought protection under the Code for the purpose of escaping liability to her former spouse for her wrongful receipt of support alimony. No other creditors were pressuring Roberts for payment before she filed her petition. No secured claims are modified by her First Amended Plan. Roberts has not sought this Court's approval to extend the length of the plan beyond thirty-six (36) months. Viewed in their totality, the circumstances of this case lead the Court to conclude that the First Amended

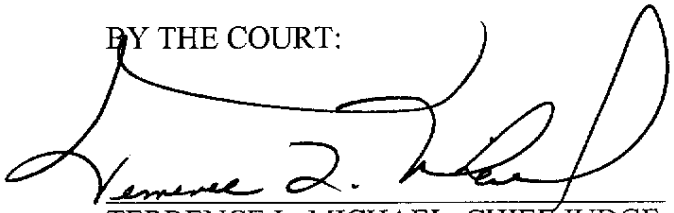
Plan does not comport with the purpose and spirit of the Bankruptcy Code and is not indicative of a good faith effort on the part of Roberts to pay her creditors, particularly Carrino.

Conclusion

The First Amended Plan is not confirmed. Roberts will be provided fifteen (15) days to file a Second Amended Plan with the Court. A separate judgment in accordance with this Memorandum Opinion is entered concurrently herewith.

Dated this 16th day of January, 2001.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

cc: J. Scott McWilliams
Lonnie D. Eck
James A. Williamson

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