



**SO ORDERED.**

**SIGNED this 05 day of April, 2011.**

  
JANICE MILLER KARLIN  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE:**

**DAVID WAYNE CLUCK  
ANGELIA DENISE CLUCK,  
Debtors.**

**Case No. 05-41537  
Chapter 13**

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**ORDER DENYING MOTION TO DISMISS BUT ALLOWING ENTRY OF  
DISCHARGE EXCEPT FOR IRS DEBT**

The Trustee filed a Motion to Dismiss<sup>1</sup> because Debtors' case, which called for a refinance of their home if post-petition refunds had not retired the IRS claim by the time the case was ready for discharge, has been pending in excess of five years and no payment has been made for several months. Debtors argue that the five-year period referred to in 11 U.S.C. §§ 1322(d)<sup>2</sup> (and 1329(c)),<sup>3</sup>

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<sup>1</sup>Doc. 108.

<sup>2</sup>This is a pre-BAPCPA case, so the then-text of § 1322(d) follows: "The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years."

<sup>3</sup>The text of § 1329(c) read: "A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time."

although there is no modified plan in this case) runs from the date of the first payment due after the original plan is confirmed. Since it took a year for their plan to get confirmed because of disputes with the IRS, they argue they should have at least an extra year (for a total of six years) to refinance their home to pay the only remaining creditor (IRS), and request until August 2011, even more than a year. Their case has already been pending approximately 5 years and 11 months, and Debtors claim to have made 63 plan payments, the last on January 19, 2011.

For the reasons fully set forth on the record, which are incorporated herein by reference, the Court adopts the majority view that the five-year period begins within 30 days after the plan is filed, pursuant to 11 U.S.C. § 1326(a)(1).<sup>4</sup> The bases for this decision were fully set forth on the record, and those grounds are incorporated herein by reference, but essentially the Court agrees with the rationale well articulated in the following cases: *In re Profit*,<sup>5</sup> *In re Musselman*,<sup>6</sup> *In re Collier*,<sup>7</sup> and *In re Evans*.<sup>8</sup> The Court also believes, in light of the language (admittedly dicta) contained in the only Tenth Circuit authority this Court could find on the issue, *Black v. Christensen*,<sup>9</sup> that the Tenth Circuit would similarly hold.<sup>10</sup>

Although the Court denies Debtors' request to allow them until August, 2011 to refinance

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<sup>4</sup>The pre-BAPCPA text provided: "Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed."

<sup>5</sup>283 B.R. 567 (9th Cir. BAP 2002).

<sup>6</sup>341 B.R. 652 (Bankr. N.D. Ind. 2005).

<sup>7</sup>193 B.R. 1 (Bankr. D. Ariz.1996).

<sup>8</sup>183 B.R. 331 (Bankr. S. D. Ga. 1995).

<sup>9</sup>292 B.R. 693 (10th Cir. BAP 2003).

<sup>10</sup>*Cf.*, Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 200.1, at ¶ 12. Sec. Rev. June 7, 2004, [www.Ch13online.com](http://www.Ch13online.com).

or sell their house to satisfy their remaining obligation to the IRS,<sup>11</sup> the Court will grant Debtors' final request to proceed to enter their discharge under 11 U.S.C. § 1328(a), in light of the special agreement they had with the IRS. That agreement, contained in the Agreed Order Resolving Objection to Confirmation of Debtor's Chapter 13 Plan,<sup>12</sup> specifically contemplated this situation, and the parties agreed that if Debtors were otherwise entitled to a discharge, they could receive that discharge, but "[t]he Debtors expressly waive discharge with respect to the liabilities set forth in the Internal Revenue Service's claim, as well as any postpetition interest and penalties accruing on those liabilities."<sup>13</sup>

**IT IS, THEREFORE, ORDERED** that the Trustee's Motion to Dismiss will be denied, and Debtors' discharge will be entered, with all unpaid IRS obligations deemed non-discharged as set forth in the agreement between Debtors and the IRS.

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<sup>11</sup> Although there is authority for accepting a "cure" of plan payments within a reasonable time after the plan term has expired, in order to prevent the dismissal of the case, that "reasonable time" has already expired in this case, as the underlying Motion to Dismiss has been pending since November, 2010 to allow Debtors this opportunity to cure. *See* 8 Collier on Bankruptcy ¶ 1322.18[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

<sup>12</sup>Doc. 35.

<sup>13</sup>*Id.* at ¶ 4.