



SO ORDERED.

SIGNED this 03 day of February, 2005.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

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

In re:

CHERYL LOU ROTHWELL

DEBTOR.

**CASE NO. 04-41153-JMK
CHAPTER 13**

**MEMORANDUM AND ORDER
SUSTAINING IN PART, AND DENYING IN PART,
OBJECTION TO CHAPTER 13 PLAN**

This matter is before the Court on Harold Rothwell's objection to confirmation of his former spouse's Chapter 13 plan.¹ A trial was held in December, 2004, the Court announced its decision at

¹Doc. No. 8.

the confirmation docket on January 26, 2005, and now codifies that oral ruling with this written decision. Plan confirmation is a core proceeding² over which this Court has jurisdiction.³

I. FINDINGS OF FACT

Debtor, Cheryl Rothwell (hereafter “Debtor”), and Harold Rothwell (hereafter “Harold”) were divorced after 38 years of marriage on February 3, 2004, when a final divorce decree was entered by the District Court of Douglas County, Kansas. The relevant portions of the divorce decree are contained in paragraphs 9, 10 and 16, which this Court sets out in a different order for clarity:

16. She [Debtor] shall have as her sole and separate property, to the exclusion of the Respondent [Harold], the residence (marital real estate) of the parties generally known as 1576 E. 767 Road, Lawrence, KS 66049 ... subject to the mortgage thereon.
9. He will ... receive within 10 days of the signing this Journal Entry \$10,000 paid through the offices of his attorney.
10. Further he will receive beginning the 1st of February, 2004 through January of 2006 (24 payments) a monthly payment of \$450.00 (i.e. an additional \$10,000, amortized over a 2 year period at 7% interest).*

*Both parties understand that this becomes a judgment when it becomes due and unpaid and will become a lien against all real estate owned by the Plaintiff in Douglas County.⁴

Debtor paid Harold the initial \$10,000 payment on February 13, 2004, and made three payments of \$450, each, on February 13, 2004, March 1, 2004 and April 1, 2004, respectively. She then stopped making payments, and instead, on May 6, 2004, filed a Chapter 13 petition.

²28 U.S.C. § 157(b)(2)(L).

³28 U.S.C. § 1334.

⁴The language after the asterisk appeared at the bottom of page 3 of the divorce decree.

Debtor listed Harold's remaining debt in Schedule F (unsecured non-priority claims).⁵ Her Chapter 13 plan treats his claim as unsecured, and provides, in a "Note" under the heading "Home Mortgage or Contract" that Harold's "claim to a lien and any such lien arising from such Decree of Divorce shall be voided upon confirmation of this Plan." Another reference to this language can be found in the section of the plan titled "Secured Creditors." There is no specific provision to pay Harold any amount during the bankruptcy, and it appears unlikely that general unsecured creditors should reasonably expect to receive a dividend.

Harold timely objected to confirmation of this plan. The primary bases for his objection are: 1) that the plan was not filed in good faith; 2) that it improperly eliminates his liens "that were given voluntarily," and 3) that the amount due him is "in the nature of maintenance or support and is not dischargeable and the plan fails to address said payments."

II. CONCLUSIONS OF LAW

A. **Harold Rothwell has standing to object to confirmation, despite his failure to file a claim.**

The Trustee argues that Harold does not have standing to object to confirmation because the bar date for filing claims has expired, and Harold filed no claim.⁶ Section 1324 of the Bankruptcy Code provides: "After notice, the court shall hold a hearing on confirmation of the plan. A party in interest may

⁵Debtor's Schedule F lists a debt of \$9,450, but after the trial on confirmation, Debtor submitted, pursuant to an agreement, post-trial evidence that she had paid the initial \$10,000, plus three \$450 payments, leaving a balance of \$8,650 plus interest. Harold does not dispute this fact.

⁶Harold does not argue that his objection to confirmation constitutes an informal proof of claim, pursuant to *Clark v. Valley Fed. Savs. & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.2d 1338, 1344 (10th Cir. 1992), and a review of the five-part test set out in that case shows that nothing filed in this case by Harold constitutes an informal proof of claim.

object to confirmation of the plan.”⁷ Unfortunately, neither this section, nor any other part of the Code governing Chapter 13 cases, defines “party in interest.”⁸

The Court of Appeals for the Tenth Circuit has not determined whether a creditor who has failed to file a proof of claim is, or is not, a “party in interest,” with standing to object to confirmation of a Chapter 13 plan. The Tenth Circuit Bankruptcy Appellate Panel has provided some guidance on this issue, however, in *In re Davis*.⁹ In that case, debtor had filed a Chapter 7 proceeding, received a discharge, and then filed a Chapter 13 proceeding while the Chapter 7 proceeding was still administratively open. The Chapter 7 Trustee objected to confirmation of debtor’s Chapter 13 plan, and debtor argued the Trustee did not have standing to object, because he was not the holder of an allowed claim.

The BAP found this argument to be without merit. The court noted that § 1109(b), albeit applicable to Chapter 11 proceedings, provided guidance in determining who was a party in interest for the purpose of objecting to confirmation of Chapter 13 plans. The court further noted that “[t]he phrase is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings.”¹⁰ The court extended the definition “to include anyone who has an interest in

⁷All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

⁸11 U.S.C. § 1109(b) indicates “[a] party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.”

⁹239 B.R. 573 (10th Cir. B.A.P. 1999).

¹⁰*Id.* at 579 (citation omitted).

the property to be administered and distributed under the Chapter 13 Plan.”¹¹ Because the Davis plan proposed to surrender non-homestead property that was still part of the Chapter 7 estate, the court held that the Trustee clearly had an interest in any non-homestead property the plan proposed to surrender and thus was a party in interest with standing to object to the plan.

The *In re Davis* court also cited *In re Turpen*,¹² which considered a similar issue. The *Turpen* court held that a party need not have filed a timely proof of claim prior to the confirmation hearing, admittedly when the confirmation hearing in that case was held prior to the bar date, to be a “party in interest” with standing to object to confirmation. That court argued that had Congress so desired, it could have added a phrase to the definition of the word “creditor,” in §101(10), so that it would read “an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor, *proof of which has been filed.*” The court argued that because Congress had not so limited the definition, there was no requirement in the Code that one’s status as a creditor was dependent on having filed a claim.

The *Turpin* court further reasoned that if the rule were otherwise, creditors in Chapter 7 cases could not meaningfully participate in no-asset cases without filing claims, even though no-asset bankruptcy notices advise that it is unnecessary to file claims.¹³ Further, using that reasoning, creditors in

¹¹*Id.*

¹²218 B.R. 908 (Bankr. N.D. Iowa 1998).

¹³*See* Fed. R. Bankr. P. 2002(e).

no-asset cases could not file objections to exemptions without first filing proofs of claim, since Fed. R. Bankr. P. 4003(b) also limits those who may object to exemptions to parties in interest.¹⁴

Conversely, the United States Bankruptcy Court for the District of New Hampshire, in *In re McKenzie*,¹⁵ held that a mortgagee who failed to timely file a proof of claim lacked standing to object to a Chapter 13 plan that purportedly understated the mortgage arrearage. The court noted:

The Bankruptcy Code does not require any creditor to file a proof of claim. If a secured creditor does not file a proof of claim, it may look to its lien for satisfaction of the debt because the failure to file does not affect the validity of a perfected lien. Unless avoided by the Court, a creditor's lien will pass through bankruptcy unaffected. However, in a chapter 13 proceeding a creditor does not have a right to receive a distribution under a confirmed Plan until it holds a claim allowed pursuant to § 502(a). In a chapter 13 proceeding, a secured creditor must file a claim under § 501 before it can be allowed. In this case, the Mortgagee's claim was untimely filed and was disallowed after an objection by the Debtor. Therefore, the Mortgagee does not have an allowed claim and is not entitled to a distribution under any confirmed Plan. Since the Mortgagee in this case does not have any right to a distribution under a confirmed plan, it does not have standing to object to the confirmation of the Chapter 13 Plan based upon the failure of such plan to make a payment on account of its claim.¹⁶

This Court believes, in light of the above reasoning, that had the *McKenzie* court been faced with a plan that attempted to void the mortgage lien, instead of merely disallowing payment during the plan, it would have held the secured creditor had standing to challenge the voiding of its mortgage, notwithstanding its failure to file a claim.

¹⁴Fed. R. Bankr. P. 4003(b) also provides that a "party in interest" may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors is concluded.

¹⁵314 B.R. 277 (Bankr. D. N.H. 2004)

¹⁶*Id.* at 279-80 (citations omitted).

That is exactly the issue that faced the Bankruptcy Court for the Eastern District of Pennsylvania in *In re Kressler*.¹⁷ That court held that the assignee of a secured claim, whose lien the debtor's proposed Chapter 13 plan sought to avoid, was a party in interest with standing to object to confirmation, despite the fact that its proof of claim had been disallowed as untimely. The court reasoned as follows:

. . . Since the failure of a secured creditor to file a proof of claim will not result in the loss of the creditor's lien and generally speaking, after the bankruptcy case is concluded, the creditor may pursue the collateral to satisfy its lien, ... such a secured creditor would be a "party in interest" and would have standing to object to confirmation of a debtor's plan which purports to cramdown and avoid the secured creditor's lien.¹⁸

This Court agrees with that analysis, for several reasons.

First, Debtor Cheryl Rothwell's Chapter 13 plan proposes to void the lien on her homestead "upon confirmation,"¹⁹ which lien secures the repayment of money to Harold. If this court held that he lacked standing to object to confirmation, he would be barred from challenging a plan that provides for his lien to be "voided upon confirmation," notwithstanding the notion that secured creditor's liens pass through bankruptcy unaffected. Second, the 10th Circuit Bankruptcy Appellate Panel has rejected a restrictive view of "party in interest" and has held that the phrase "generally includes all persons whose

¹⁷252 B.R. 632 (Bankr. E.D. Pa. 2000).

¹⁸*Id.* at 633-34.

¹⁹This Court has held that such a plan provision is impermissible, and that at most, such a provision should become effective after a debtor has completed all the payments in the plan, and received a discharge. *See Centex v. Woodling (In re Woodling)*, Case No. 03-40183, Adv. No. 03-7102, Memorandum and Order (Bankr. D. Kan. Oct. 14, 2004) (holding it improper for debtors to attempt to strip off and render void, at confirmation, a mortgage on primary residence based on claim that the mortgagee is in effect unsecured, because the real estate is worth less than the amount owed on the first mortgage, noting such strip off is only effective at discharge).

pecuniary interests are directly affected by bankruptcy proceedings. . . .²⁰ Harold Rothwell clearly has a pecuniary interest in retaining his lien, so that post-discharge, he can attempt to collect the amount due him in an *in rem* proceeding.

Third, allowing the holder of a judicial lien, without a timely filed claim, to object to that part of a plan that attempts to void his lien, is different from prohibiting a wholly unsecured creditor who failed to file a timely proof of claim from objecting to its proposed distribution under the plan.²¹ In that latter situation, the only remedy the unsecured creditor has is to be paid some distribution from the bankruptcy estate. It is arguably unfair to the other unsecured creditors who did timely file proofs of claim to allow a creditor who did not do so to potentially upset the ultimate distribution scheme contained within the plan. In this case, allowing Harold Rothwell to pursue his timely objection to confirmation, so that he can at least argue that his lien should be preserved, does not impact unsecured creditors, who did timely file claims, in any fashion. As noted below, Harold's only remedy will be an *in rem* proceeding against the real estate after the completion or dismissal of this bankruptcy, and this means that any payments being distributed to other creditors during this Chapter 13 proceeding will be unaffected by his objection to confirmation of a plan that attempts to avoid his lien. For all these reasons, this Court holds that Harold Rothwell is a "party in interest" with standing to object to confirmation.

B. Cheryl Rothwell may not avoid Harold Rothwell's judicial lien.

²⁰*In re Davis*, 239 B.R. at 579.

²¹That was the fact pattern in *In re Stewart*, 46 B.R. 73 (Bankr. D. Or. 1985), where the court held that a wholly unsecured creditor whose only relief would be to receive a distribution within the Chapter 13 estate was barred from objecting to confirmation after he failed to timely file a claim.

Debtor seeks to avoid her ex-spouse's judgment lien on her homestead—the parties' former marital residence—pursuant to § 522(f)(1). That statute provides, in pertinent part:

Notwithstanding any waiver of exemptions, but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is –

(A) a judicial lien, other than a judicial lien that secures a debt–

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt –

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or ...

Debtor may thus avoid Harold's lien only if she can prove three elements: (1) the lien is a judicial lien, (2) the lien impairs an exemption to which he is otherwise entitled; and (3) the lien was fixed on an interest of Debtor in the property before his judicial lien was fixed.²²

The term “judicial lien” is defined by § 101(36) to mean a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” Harold Rothwell contends that because the lien arose out of an agreed divorce settlement, it is a consensual, rather than a judicial, lien.

²²*In re Rittenhouse*, 103 B.R. 250, 252 (D. Kan. 1989).

The evidence does not support his contention. The lien arose because of the entry of the judgment in the divorce proceeding. No evidence of the existence of a contract, mortgage or other nonjudicial document executed by the parties creating a lien on the homestead was produced at trial to indicate the lien is anything other than a judicial lien. Accordingly, Debtor meets the first prong of her § 522(f)(1) burden of proof; Harold's lien is a judicial lien.

It is uncontroverted that Harold's lien impairs Debtor's homestead, and thus the second element is satisfied. Thus, the sole remaining question is whether § 522(f)(1) permits Debtor to avoid the fixing of Harold's lien on the property interest that she obtained in the divorce decree. Harold argues that a judicial lien can only be avoided where that lien attached to a debtor's interest at some point after the debtor obtained that specific property interest, and that his judicial lien tacitly attached to the real estate simultaneously with the divorce court's award of fee simple title to Debtor on the date the divorce was granted.

In a case with similar facts, the United States Supreme Court, in *Farrey v. Sanderfoot*,²³ analyzed § 522(f)(1). In deciding that the debtor could not avoid his ex-spouse's judicial lien, the Court explained, as follows:

The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid "the fixing" of the lien on the debtor's interest in property. The gerund "fixing" refers to a temporal event. That event--the fastening of a liability--presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, unless the debtor had the property interest to which the lien

²³500 U.S. 291 (1991).

attached at some time *before* the lien and attached to that interest, he or she can not avoid the fixing of the lien under the terms of § 522(f)(1).²⁴

The Supreme Court then held that it was a question of state law whether the debtor had possessed an interest in the real property, to which the judicial lien attached, before that lien was fixed.²⁵

In a case similar to this one, *In re Hilt*,²⁶ Judge Flannagan, had the opportunity to analyze Kansas law on the question of what property interest exists in each spouse immediately before, and then after, a divorce decree is entered. The divorce court granted Margaret Hilt the homestead, and granted her husband, Leonard Hilt, a money judgment to equalize the property division. That money judgment was expressly secured by a judicial lien on the homestead. Margaret Hilt then filed for Chapter 7 relief, and claimed the homestead exempt under Kansas law. The case was later converted to a Chapter 13. Debtor sought to avoid her former spouse's judicial lien in the property, and the creditor to whom the former spouse had assigned his judicial lien objected to confirmation.

The bankruptcy court examined Kansas divorce law, found primarily in K.S.A. 60-1610(b), K.S.A. 23-201(b), and *Cady v. Cady*,²⁷ and determined that the filing of a divorce petition creates a species of common ownership in all property owned by either or both of the married persons at the time the divorce proceeding is initiated. The court further found when a divorce decree ultimately grants property to one spouse or the other, a wholly new fee simple interest is created, and it is that new fee

²⁴*Id.* at 296 (emphasis in original).

²⁵*Id.* at 299.

²⁶*In re Hilt*, 175 B.R. 747 (Bankr. D. Kan. 1994).

²⁷224 Kan. 339 (1978).

simple interest to which the former spouse's judicial lien contemporaneously attaches. To satisfy this condition required for lien avoidance, Margaret Hilt would have had to have a preexisting fee simple interest in the homestead, which under state law she did not have prior to the entry of the divorce decree. Instead, her preexisting interest was the common interest of both spouses in all the marital assets; that interest was necessarily extinguished upon the filing of the divorce decree.²⁸

Debtor argues that this case should be distinguished from *Hilt* and *Sanderfoot*, however, as a result of the specific language concerning the judicial lien that was used by the state court. She argues that the state court indicated Harold would never be entitled to a judgment lien until and unless she missed any of the payments, and at that point, and that point only, a judicial lien would arise only for the payment(s) missed. Her argument is that because she did ultimately make the first \$10,000 payment, and three other \$450 payments, the judicial lien did not attach to the real estate until some time in May, 2004, when she missed her first payment and filed Chapter 13. She thus argues that because her ex-spouse's judicial lien on her homestead did not fix on her new, fee simple interest, acquired in the divorce decree until some point after the divorce became final, she can avoid Harold's lien under § 522(f)(1).

The Court disagrees with this argument, both as a matter of fact and as a matter of law. First, as a matter of fact, the first \$450 payment was due February 1, 2004, pursuant to the terms of the divorce decree. Evidence presented to the Court²⁹ reflects that Debtor's check for the first \$450 payment was

²⁸*In re Hilt*, 175 B.R. at 755

²⁹At trial, Harold's attorney indicated that if Debtor's attorney could demonstrate that she had in fact made any of the \$450 payments, that evidence could be submitted to the Court post-trial, and the Court could treat that evidence as if it had been properly and timely introduced and admitted.

not dated until February 13, 2004, some 13 days after it was first due pursuant to the terms of the decree,³⁰ and thus, when the divorce decree was entered, according to Debtor’s interpretation of the language, Harold already had a judicial lien—at least for the delinquent payment. Second, as a matter of law, the Court does not accept that with the use of the “asterisk” language in the divorce decree, the state court judge intended to reverse the longstanding law of judgment liens and state procedural law on the effective date of judgment liens. The Court will discuss that point more fully, below.

The *Hilt* court also considered the Congressional purpose behind lien avoidance, as did the Supreme Court in *Sanderfoot*. That purpose is to allow debtors to “undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.”³¹ The bankruptcy court compared the policy behind § 522(f)(1) with the state’s paramount concern in obtaining a “just and reasonable division of property,”³² for divorcing parties, and held that a fair reading of § 522(f)(1) also promotes the state’s interest.

Within the time allowed by the Court, Debtor’s counsel submitted a letter, with a copy of four checks. The Court has treated the letter, with the copies of checks attached, as Debtor’s Exhibit S, and finds that Exhibit S should be, and hereby is, admitted pursuant to the agreement of the parties. Harold’s attorney, by letter dated January 5, 2005, stipulated to the fact that he had been paid the initial \$10,000 required, as well as three \$450 payments, prior to the date Debtor filed for bankruptcy protection.

³⁰It took several days or weeks to finalize the language of the divorce decree after the parties announced their settlement to the divorce court, and this is likely why the first payment was due even before the divorce decree was entered.

³¹*Farrey v. Sanderfoot*, 500 U.S. at 297-98.

³²K.S.A. 60-1610(b).

This court agrees with Judge Flannagan’s analysis of state divorce law, as it impacts the application of § 522(f)(1). Under the facts of this case, and applicable state law, a joint marital estate was created in both spouses on the date Debtor filed her divorce petition in the subject real property, and in all other property owned by either spouse. The divorce decree, entered several months later, then granted Debtor a new fee simple interest in the real property. That divorce decree also granted Harold a judgment lien against that new interest.

Under Kansas law, a lien securing a judgment dividing marital assets arises no later than the time the judgment is filed.³³ The language of the divorce decree upon which Debtor relies is simply insufficient to indicate that the divorce court intended to delay the fixing of the lien. At most, the footnote in the decree indicates that the divorce court may have misunderstood Kansas law with respect to the question of when a lien securing a judgment equalizing property division arises.³⁴ The Court finds, as a result of the sound public policy behind giving one spouse a judicial lien against real estate to secure repayment of a money judgment meant to equalize the division of property at the termination of a marriage, and as a result of clear Kansas law on the issue, that if the state divorce court had intended to upset long-standing Kansas law on the issue of when the judicial lien becomes effective, it would have done so in clear and unequivocal language. It did not do so, and the Court finds that Harold’s judicial

³³*Bohl v. Bohl*, 234 Kan. 227 (1983) (holding judgment lien previously acquired in divorce attached to all of ex-spouse’s real estate, even when tract subsequently became ex-spouse’s homestead with new wife) and *Wichita Federal Savings and Loan Association v. North Rock Road Limited Partnership*, 13 Kan. App.2d 678 (1989) (holding that all installments of a money judgment ordered by the court are protected by the judgment lien—even installment payments not yet due at the time the judgment lien was entered).

³⁴*See also* K.S.A. 60-2202(a) (lien effective from date petition filed).

lien became effective upon entry of the divorce decree on February 3, 2004. Because Debtor never possessed her new fee simple interest before Harold's judicial lien was "fixed," she may not use § 522(f) to avoid his lien.

D. Debtor met her burden of proving she filed this bankruptcy in good faith.

Harold Rothwell also objected to confirmation on the basis that the bankruptcy was not filed in good faith. His only allegation of bad faith was the timing of the filing; the bankruptcy was filed three months after the divorce was final. The debtor, the party who seeks a discharge under Chapter 13, bears the burden of proving good faith by a preponderance of the evidence.³⁵ A determination of good faith must be made on a case by case basis, looking at the totality of the circumstances.³⁶ In evaluating whether a debtor has filed in good faith, courts are guided by the eleven factors set forth in *Flygare v. Boulden*,³⁷ as well as any other relevant circumstances.

Applying the *Flygare* factors here, the Court notes the following. First, Debtor has no income other than what she receives from her son, who lives with her, and from her elderly father. Although

³⁵*In re Davis*, 239 B.R. 573 (10th Cir. B.A.P. 1999).

³⁶*Id.*

³⁷709 F.2d 1344 (10th Cir. 1983). The eleven *Flygare* factors are: (1) the amount of proposed payments and the amount of the debtor's surplus; (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 Code, (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and (11) the burden the plan's administration would place upon the trustee. *Mason v. Young (In re Young)*, 237 F.3d 1168 (10th Cir. 2001).

Schedule I shows additional income of \$100/month from cleaning a church, the testimony is that she is actually physically unable to clean with any frequency. Second, Debtor is paying \$377 a month into this plan, leaving a \$7/month budget surplus. Her stated expenses on Schedule J are exceedingly conservative, including no provision for home maintenance expenses, utilities, auto payments, health, life, auto or other insurance, or taxes of any kind. Her son does pay some of these expenses for her, at least for now.

Third, Debtor is disabled, and has literally no employment history (other than cleaning a church when she was physically able), and no apparent education to allow her to perform any tasks other than manual labor, which she is now physically unable to perform. Thus, it is unknown how she would support herself, or fund this plan, but for the money she receives from her son in exchange for him living in her home. Fourth, the probable duration for the plan is over 36 months. Fifth, there is no contention her schedules are not accurate. Sixth, there is no preferential treatment alleged. Seventh, secured claims are not being modified, except for Harold's claim, which was discussed, above. Eighth, special circumstances exist because of Debtor's medical condition. Ninth, there is no evidence Debtor has filed bankruptcy in the past. Tenth, there is no evidence of any bad motive, or lack of sincerity in seeking Chapter 13 relief. Finally, the plan appears to present no substantial burden to the trustee, and the trustee has no objected to confirmation. .

Harold's evidence to support the contention that this bankruptcy was filed in bad faith was essentially non-existent. The evidence overwhelmingly showed Debtor to be a woman who had for over 38 years been almost totally dependent, financially and emotionally, on her husband, who single-handedly made business decisions that resulted in the debt that, for the most part, this Debtor feels she

must now discharge. She has essentially no earned income, nor the education, experience or good health necessary to produce sufficient income, to pay her debts outside of this Chapter 13 proceeding.

Harold also infers that she agreed to repay \$20,000 after the divorce decree was entered, knowing she would then attempt to discharge that debt. If that were Debtor's true motivation for filing bankruptcy, which the evidence does not support, Debtor would not have made the \$10,000 initial payment, or the three \$450 payments in the three months before she filed this case. Her explanation for why she decided to file, and the timing for that decision, was understandable and credible. Debtor has demonstrated by more than a preponderance of the evidence that this bankruptcy was filed in good faith, and Harold has not come close to refuting that evidence.

D. The \$20,000 Debtor was ordered to pay to Harold was not for alimony, maintenance or support.

Harold also asserts that Debtor must pay the debt owed to him during this bankruptcy because his debt is actually for alimony, support or maintenance.³⁸ If possible, Debtor's evidence on this allegation was even weaker than on his good faith objection. First, the divorce decree expressly states "... the Petitioner has waived maintenance in this matter as has the Respondent and each understands that once maintenance is waived, it can never be reinstated."³⁹ Secondly, although Harold is a licensed electrician and at one time had a healthy electrical business, the evidence showed he in essence walked out on that business, instead choosing to follow a ministry that had almost no following, and which not

³⁸Section 1322 requires that plans provide for full payment of claims entitled to priority under § 507, and § 507(a)(7) provides that a debt to a spouse or former spouse for alimony, maintenance or support is such a priority debt.

³⁹Debtor's Exhibit R, page 7.

only provided no income to his family, but which Harold single-handedly supported by using or pledging their marital assets. Harold donated over \$77,000 to that ministry over a rather short period of time, resulting in mounting debts to him and his then wife, even placing a mortgage against their home to fund his ministry.

Harold holds a bachelor's degree and a master's degree, but as of the date of trial, was taking classes at an unaccredited church school, pursuing another degree or "certificate," while admitting that it was unlikely that additional schooling would increase his ability to earn income. In contrast with Harold's ability, but refusal, to support himself, the evidence that Debtor has no ability to support herself, both because of illness, emotional issues, prior injuries, and a lack of training and education, was overwhelming. The evidence was also clear that Debtor would never have agreed to a divorce order that provided for her to support Harold, in light of all the facts surrounding their contentious marriage and divorce, and in light of her own financial situation. The \$20,000 that the divorce decree ordered Debtor to pay Harold was clearly an attempt to equalize the division of marital assets; there is simply no credible evidence that that debt was for alimony, support or maintenance.

III. Confirmation of Debtor's Plan.

Although this Court has sustained that portion of Harold's objection to Debtor's plan that seeks to avoid his lien, the Court finds that with the deletion of that provision, there is no remaining basis to deny confirmation. The plan calls for no payment to Harold during the duration of the plan, which is permissible because Harold failed to file a claim, and thus he has chosen to be treated as a secured creditor outside the plan. Debtor has proved her plan was filed in good faith, and it meets the provisions of § 1325. Accordingly, although Harold's lien cannot and will not be avoided, either at confirmation or

at discharge, the plan is confirmed except for the provision that seeks to avoid Harold's judicial lien.

That portion of the plan is stricken.

IV. CONCLUSION

Harold Rothwell's objection to confirmation of that part of Debtor's Chapter 13 plan that provides that his judicial lien will be avoided is sustained, but the remainder of his objection to confirmation is overruled, and the rest of the plan is confirmed. His judicial lien attached simultaneously with Debtor's post-divorce fee simple interest in the former marital homestead, and his lien is thus not avoidable under § 522(f)(1). He may enforce that lien against the subject real estate after completion, or dismissal, of Debtor's Chapter 13 case.

IT IS, THEREFORE, ORDERED that Harold Rothwell's objection to confirmation is sustained, in part, in that his judicial lien will not be avoided by Debtor's plan. The rest and remainder of his objection to confirmation is overruled.

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