



SO ORDERED.

SIGNED this 06 day of January, 2005

ROBERT E. NUGENT  
UNITED STATES CHIEF BANKRUPTCY JUDGE

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

IN RE:

ROBERT LEE GIBBONS,

Debtor.

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Case No. 04-11200  
Chapter 13

**MEMORANDUM OPINION AND ORDER**

Robert Gibbons seeks to confirm his chapter 13 plan over the objection of his former wife Billie, who asserts that Robert lacks good faith in these proceedings.<sup>1</sup> An evidentiary hearing was held November 16, 2004. The Court took the matter under advisement and is now prepared to rule.

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<sup>1</sup> 11 U.S.C. § 1325(a)(3) requires that the debtor propose a plan in good faith and not by any means contrary to law. Unless otherwise noted, all subsequent references are to the Bankruptcy Code, Title 11, U.S.C.

### Jurisdiction

Plan confirmation is a core proceeding over which this court has jurisdiction.<sup>2</sup>

### Findings of Fact

Robert Lee Gibbons and Billie Jean Gibbons were married in February of 1981. They have two children, a son Daniel, age 19, and a daughter Ashley, age 18. Daniel is now a sophomore at Kansas State University. Ashley is a senior at Rose Hill High School and lives with Billie. Robert has been married three times; Billie one time. Robert is 58 years of age. Billie is 43 years of age.

Robert has been employed at Cessna Aircraft for 41 years where he is a supervisor making between \$65,000 and \$68,000. Billie is unemployed, having worked in the home throughout her marriage to Robert, but currently earns about \$300 per week as a home caretaker.

Billie filed a divorce case in Sedgwick County District Court on September 6, 2002 and the parties were divorced in 2003.<sup>3</sup> The proceedings in the divorce case figure prominently in this case. As a result of his long-time employment at Cessna, Robert had three employee benefit accounts. He had an interest in a General Dynamics Savings and Stock Investment Plan (“General Dynamics”) which had a value in November, 2002 of \$84,596. He has a Textron Savings 401k Plan (“Textron Savings”) which had a value of some \$110,000. Robert also has a pension plan at Cessna (“Textron Pension Plan”) which, being a defined benefit plan, has no lump sum value to him, but which will pay him a monthly benefit when he retires. He also had a Cessna Employees Credit Union account into which some \$300 of his bi-weekly paycheck was automatically deposited by payroll deduction.

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<sup>2</sup> 28 U.S.C. § 157(b)(2)(L); 28 U.S.C. § 1334.

<sup>3</sup> Case No. 02-D-4745.

When Billie filed for divorce, she was represented by Carolyn Sue Edwards, her attorney in this case. Robert was initially represented by Stan Singleton, a currently inactive attorney who has a history of disciplinary problems. On September 6, 2002, the domestic court issued a temporary order that granted shared custody of the children, granted temporary possession of the marital home to Robert and Billie, and, most importantly, for purposes of this case, restrained each party from disposing of any property without prior domestic court approval, pending the conclusion of the divorce case.<sup>4</sup>

Robert immediately violated the temporary order. In early October, he took steps to cash out his entire General Dynamics account. He received a gross distribution of \$84,596 in November, from which General Dynamics withheld taxes, leaving him with net proceeds of \$62,886, of which all but \$3,000 were deposited into a Commercial Federal Bank account. At the same time, he borrowed \$50,000 from his Textron Savings plan and deposited this sum in his Fidelity Bank account, giving him at least \$110,000 in cash. He immediately began to disperse these funds as outlined below. Neither the loan nor the cash-out were approved by the domestic court; nor did it appear that Robert even sought prior approval. Robert did not disclose all of these withdrawals until much later, during the arbitration of the divorce case which took place in the summer of 2003. Billie discovered the liquidation of the General Dynamics account in April 2003 when she saw the couple's tax return.

Despite the best efforts of his bankruptcy counsel, Robert could not, and cannot to this day, account for the disposition of some of these funds. The evidence showed that he spent some of it in the

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<sup>4</sup> Plaintiff's Ex. 1. Although the testimony at trial was that Robert was ordered to pay monthly child support of about \$500, the temporary order contains no such provision. *See also* Plaintiff's Ex. 21. Further, Billie testified that the *current* child support amount was \$768 per month and the spousal maintenance was \$250 per month. This is consistent with the \$1,016 shown by Robert on Schedule J.

following manner. It appears that he retained a substantial amount of it, in cash, in a box at his home. He deposited all but \$3,000 of the General Dynamics proceeds in a Commercial Federal Bank account on December 15, 2002, writing checks on that account or withdrawing cash in several \$2,500 increments until it was closed out with an \$811.43 cash withdrawal on January 10, 2003, a period of about one month.<sup>5</sup> According to the bank records for the Commercial Federal account, Robert wrote checks totaling \$34,561.71 and withdrew cash totaling \$26,314.43.<sup>6</sup>

Despite the efforts of both Robert's and Billie's counsel, determining the exact amount of cash Robert deposited in the box at his home and later spent is imprecise at best. A record of some of the expenditures of the General Dynamics account proceeds is found in Robert's arbitration materials submitted to the retired state judge who arbitrated the parties' divorce, Judge James Beasley.<sup>7</sup> Among the expenditures listed are the following:

Daniel's Wichita Collegiate School Tuition	\$5,375.00
Paying off Daniel's 2002 Truck	\$17,000.00
Advance payment on street assessment	\$11,265.00
Miscellaneous fees for school pictures, doctor bills, Daniel's baseball camps, attorneys fees, home repair, etc.	\$7,193.03

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<sup>5</sup> Plaintiff's Ex. 10.

<sup>6</sup> Plaintiff's Ex. 10. It appears that the January 3, 2003 cash withdrawal of \$10,503 was used to obtain a money order for payment to Robert's sister of \$10,500. It also appears that the \$11,000 check made payable to Commercial Federal Bank was used to obtain cash since there was no evidence that Robert was indebted to Commercial Federal Bank. If accurate, Robert in actuality obtained some \$37,000 in cash withdrawals from the Commercial Federal account. *See also* Plaintiff's Ex. 22.

<sup>7</sup> Plaintiff's Ex. 21.

Credit card bills	\$13,498.00
Total <sup>8</sup>	\$54,331.03

When these numbers are compared to the actual checks written on the Commercial Federal account discrepancies are apparent. For example, the payoff on Daniel’s truck to GMAC was \$13,025.22, not \$17,000.<sup>9</sup> The check for Daniel’s Wichita Collegiate School tuition was \$3,135.45, not \$5,375.<sup>10</sup> The arbitration materials also omit the check to Daniel of \$5,000.<sup>11</sup> The advance payment on the street assessment was not written on a check from the Commercial Federal account, rather it was written on Robert’s Fidelity Bank account.<sup>12</sup> These are but some of the omissions and inconsistencies in the record and filings in this dispute, both here and in state court.

In yet another accounting of the General Dynamics proceeds offered by Robert, he claims that “most of the cash withdrawals [from the Commercial Federal account] eventually made it into the Fidelity account.<sup>13</sup> But the evidence presented at trial was insufficient to enable this Court to trace all of these funds. Indeed, Billie’s counsel could only establish that \$11,700 of the General Dynamics proceeds were deposited

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<sup>8</sup> The Court notes that the total outlay is about \$54,331, not \$44,236 as noted on the exhibit presented to the arbitrator.

<sup>9</sup> Defendant’s Ex. K. This appears to have been an early payoff as there was no evidence that the installment note required this payoff or that there had been any default in installment payments.

<sup>10</sup> Defendant’s Ex. K.

<sup>11</sup> Defendant’s Ex. K.

<sup>12</sup> Plaintiff’s Ex. 7, Bates No. 000117; Defendant’s Ex. R.

<sup>13</sup> Plaintiff’s Ex. 22.

into the Fidelity Bank account. Moreover, none of this accounts for the use of the \$50,000 borrowed from the Textron Savings account and deposited into Robert's Fidelity Bank account on December 20, 2002. Presumably, Robert used these funds to pay the couples' credit card bills. Robert's arbitration packet reported payments of about \$35,000 in the nine months preceding the July arbitration. The parties charged all of their living expenses and paid each monthly balance in full for simplification of bookkeeping and to avail themselves of credit card premiums.

Robert testified that he would use the boxed cash when and as needed and that, by February of 2004, he had expended all of it. He admitted that he did not have receipts for all the expenditures.

It also appeared that the couple had maintained a "cushion" account at Cessna Employees Credit Union into which a \$300 deposit was made from Robert's biweekly paychecks. There was some \$3,600 in this account when, in June of 2003, Robert withdrew and transferred it to Fidelity for use in paying for food and incidentals.<sup>14</sup> Robert testified that he discontinued the automatic payroll deduction and deposit into the credit union account in January of 2004 because he needed the money.

Another Fidelity Bank savings account in Daniel's name was detailed at trial.<sup>15</sup> Daniel purportedly established this account in September of 2002 while a senior in high school. Robert is a signatory on this account, but says he makes no withdrawals. On December 6, 2002, after the divorce was filed, some \$5,000 was deposited into Daniel's savings account by a check from Robert to Daniel drawn on Robert's Commercial Federal account.<sup>16</sup> It appears the rest of the deposits into this account, much smaller in amount,

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<sup>14</sup> Plaintiff's Ex. 8.

<sup>15</sup> Account No. 0757500218. Plaintiff's Ex. 7, Bates stamp nos. 000003-000016.

<sup>16</sup> Defendant's Ex. K.

were comprised of money earned by Daniel mowing lawns or officiating basketball games. One transaction is notable, but not explained. On January 15, 2003, Daniel withdrew the balance in the amount of \$4,796, closed the savings account, and deposited the same into a new checking account. An observer could safely conclude that nearly all of the money withdrawn by Daniel and deposited to his checking account (which Robert is also on) consisted of the \$5,000 check from Robert. These funds can be traced back to the General Dynamics money deposited in the Commercial Federal account.

There is also confusion, no doubt enhanced by the conduct of the divorce proceedings, about the number of retirement accounts that Robert had. In Judge Beasley's arbitration award, he found that Robert had the General Dynamics account valued at \$86,597, the Textron Savings Plan valued at \$66,394 (after the \$50,000 loan), the Textron Pension Plan, and a "401(k) Savings" plan valued at \$79,368.<sup>17</sup> This latter plan appears not to have ever existed, notwithstanding Judge Beasley's findings. It is listed as having the identical value to the balance in the General Dynamics stock account as of October 10, 2002.<sup>18</sup> For some unknown reason, Robert did not challenge the finding concerning this phantom plan and Judge Beasley's division of it is a final order of the state court, even though the plan does not exist. The matter of the extra plan may have been raised by Robert's divorce counsel in a post-trial motion to correct the approved arbitration award, but the domestic court apparently concluded that the motion was filed out of time and never reached the merits of the issue.

In addition to Robert's withdrawal and transfer of various retirement funds, Billie also complains that

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<sup>17</sup> Defendant's Ex. A. Robert did not list a 401(k) savings plan in his bankruptcy schedules B or C.

<sup>18</sup> Defendant's Ex. O.

Robert disposed of several vehicles for minimal consideration prior to his bankruptcy filing. In February of 2004, he sold a 1985 Chevy pickup to Amy Banks, a former girlfriend, for \$2,500. Later, he paid \$1,000 to have the transmission replaced. Ms. Banks testified that she paid for the pickup with proceeds of her deceased sister's estate. While there was evidence that Robert spent some \$5,500 of the "box" money on the repair of this vehicle before selling it to Ms. Banks, there was no appraisal evidence upon which a court could determine whether the \$2,500 sale price was reasonably equivalent value. The Court is aware that funds expended to repair vehicles do not necessarily translate into added sale value.

Iris Newton, Robert's sister, bought a 1986 pickup from Robert for \$500. She testified that she took the vehicle home, but lent it to Robert from time to time. He maintains the vehicle for her. As with the 1985 pickup sold to Ms. Banks, there was no evidence upon which the court could reach a conclusion concerning the value of the vehicle at the time of sale.

The most suspicious transfer made by Robert is that of \$10,500 to another sister, Janet Swigart in January of 2003, pre-petition, but before the divorce proceedings were concluded. In the 1970's, when Robert was younger and in the service, Ms. Swigart would apparently make him small loans of a few hundred dollars from time to time. Robert says that he kept track of these loans "in his head" and that he owed her some \$10,500 which he paid after the divorce was filed. Ms. Swigart's deposition testimony was that she had no expectation of repayment and that she was surprised to receive the check as the loans had been made of "love and good faith." This payment was made with the General Dynamics stock proceeds. Ms. Swigart deposited these funds in a separate account and has maintained them separately since. She testified that Robert told her he needed to pay her at that time because he wasn't sure what he would have

left after the divorce.<sup>19</sup> Robert did not list this payment on the schedule his attorney submitted in support of his arbitration, suggesting his desire, at least at that time, to keep the payment secret.

Another questionable transfer was Robert's payment of some \$11,265 to Butler County for a road paving special assessment that was made against the parties' homestead. This payment was made in December 2002, prior to the arbitration, although it appears that Robert had the option to pay the assessment over a fifteen year period at a nominal rate of interest.<sup>20</sup>

In August of 2003, Judge Beasley issued his Arbitration Award in which he attempted to divide the parties' assets equitably between them.<sup>21</sup> As part of the award, he determined that the marital home would be awarded to Robert, but made subject to an equalization lien of \$80,020 in favor of Billie. He also awarded as property to Billie a division of Robert's Textron Pension Plan (to be paid at his retirement and thereafter), one-half of his Textron Savings plan, one-half of the General Dynamics stock account, one-half of the phantom "401(k) Savings," a 1970 Chevelle, and household goods. In addition, she was to receive a \$13,149 cash payment to equalize property awarded to Robert in kind. The total award, including the house lien, is \$226,349. The arbitration award was approved by the state court and incorporated into the Journal Entry of Judgment and Decree of Divorce.<sup>22</sup> This Court notes, however, that none of the documents of transfer contemplated by the Arbitration Award have been executed.

Robert filed this bankruptcy case on March 15, 2004. He filed a chapter 13 plan in which he

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<sup>19</sup> Plaintiff's Ex. 17. Ms. Swigart's testimony was received in deposition form; she lives in Oklahoma, more than 100 miles from Wichita. *See* Fed. R. Civ. P. 32(a)(3).

<sup>20</sup> Defendant's Ex. R.

<sup>21</sup> Defendant's Ex. A.

<sup>22</sup> Defendant's Ex. C.

proposed to treat Billie’s lien as a secured claim, offering to pay it off at no interest over the life of the plan at \$300 per month for a total of \$10,800 during the 36 month plan. Robert proposes to refinance whatever remains unpaid at the plan’s completion so that Billie may receive a lump sum payout. With respect to the defined benefit plans (Textron Savings and Textron Pension), because those plans are ERISA plans they are not property of the estate, Robert’s plan contemplates that Billie will receive her share as contemplated by the divorce settlement. As to the balance of the marital award, Billie’s claim will be treated as unsecured and will participate pro rata with other unsecured creditors. The Court estimates that her unsecured claim will amount to some \$96,132. This is comprised of the following:

General Dynamics Stock Plan	\$43,299.00
401(k) <sup>23</sup>	\$39,684.00
Cash Settlement	\$13,149.00
<b>TOTAL</b>	<b>\$96,132.00</b>

As the original plan contemplated payments of \$450 per month over 36 months, the return to the various claimants would be as follows:

Total Plan Payments (36 x \$450)	\$16,200.00
Less: Attorneys Fees	\$800.00
Less: Trustee’s Fees (11.1115%)	\$1,800.00
Less: Payments on Home Lien (36 x 300)	\$10,800.00
Remainder for Unsecured Creditors	\$2,800.00

If Billie were the only unsecured creditor, her dividend would be approximately 3% ( $\$2,800 \div \$96,132$ )

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<sup>23</sup> Even though this plan does not appear to exist, because it was set over to Billie in a final and non-appealable state court judgment, this Court must give that judgment full faith and credit and, absent further proceedings in the state court, will consider this to be a part of Billie’s unsecured claim.

= 0.029).

Robert's plan has never been formally amended, but, at trial, Robert indicated that he would agree to amend by increasing his plan payment to \$700 per month when his daughter reached the age of 18 and his child support obligation terminates. He would also extend the term of the plan. According to the Trustee, this change would result in an increase of the dividend to some 24 per cent. The Trustee believes the plan, as orally amended, to be feasible and takes no position regarding its good faith or lack thereof.

Because the Court must consider whether any of Robert's debts would be excepted from his discharge in a chapter 7 case, some comparison of his circumstances to Billie's are in order. In a chapter 7 case, Billie would likely assert that Robert's property settlement obligation is nondischargeable under § 523(a)(15). Robert continues to be employed at Cessna where he is paid a net salary of \$4,192 per month according to his Schedule I. His expenses, including the alimony and support obligations he has, are only \$3,734. Billie works part time and is paid about \$300 per week. She also receives some spousal support from Robert, when he pays it.<sup>24</sup> While it is apparent that Robert could not pay in a lump sum the \$96,000 he owes her, he could arrange to pay a significant portion of it (and indeed could have paid over \$20,000 of it had he not transferred funds to his sister and paid his road assessment in advance). Billie has been out of the job market most of her life and has no special training or education that would enable her to earn anywhere near what Robert can earn. She currently lives in a rental house with her daughter while Robert lives in the marital homestead which is valued at some \$250,000 and in which he has \$80,000 equity, even after paying Billie in full for her share of the homestead. He has a classic Corvette in addition to his 1985

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<sup>24</sup> Robert was ordered to pay \$250 per month. *See* Defendant's Ex. A. Robert's new attorney in the divorce case, Andy Fletcher, testified that the parties had recently reached an agreement that the amount of arrearage for spousal maintenance was some \$1,257 as of September 2004.

pickup. She has a pickup only. Based on this much evidence, the Court can at least surmise that it would find Robert able to pay his debt to Billie from property not necessary to his support. Moreover, it seems likely that Billie would suffer substantial detrimental consequences were this debt to be discharged. Those consequences would outweigh the consequences to Robert if he had to pay the debt to her. The Court can conclude for the purposes of making a good faith analysis that Robert's debt to Billie would likely be excepted from his discharge in Chapter 7 under § 523(a)(15).

There was considerable testimony about the accuracy of Robert's schedules. He conceded that he omitted two closed bank accounts from his Statement of Financial Affairs, but stated that these omissions were inadvertent. He did not schedule "Daniel's truck," even though the vehicle was titled in Robert's name, asserting that it was so titled to keep the insurance costs down and that Robert and Billie always considered it to be Daniel's. There appear to be several other omissions, none of which is major or particularly troubling given that Robert was forced to file this case hurriedly in response to Billie's execution attempts. He has apparently been forthcoming with the Trustee and this Court concerning the omitted matters.

The Court also received a great deal of testimony about the "inaccurate" values used by Robert on his schedules. For example, the value of his homestead is scheduled as \$230,000. In the arbitration, the homestead was assigned a \$250,000 value. The only appraisal in the record is one made in support of a 2001 mortgage application setting the value at \$250,000. Given that the homestead is exempt and that the variance is not large, the Court does not find this "inaccuracy" significant. Another example is the plethora of testimony concerning the value of the Corvette. While it appears certain that the debtor has invested considerable sums in restoring the Corvette, those investments do not necessarily translate into dollar for dollar increases in value. Robert has offered the Corvette for sale on Ebay and received a bid of \$24,000.

He values the car here at \$22,000.<sup>25</sup> Again, because the car is exempt and because the discrepancy is minimal, the Court cannot conclude that there exists a pattern of deception in the preparation of his schedules.

### Conclusions of Law

The debtor bears the burden of proof by a preponderance of the evidence that his plan meets the requirements of § 1322 and § 1325.<sup>26</sup> Billie's main objection to confirmation is Robert's lack of good faith. Section 1325(a)(3) requires the Court to find that the plan has been proposed in good faith and not by any means prohibited by law.

The concept of good faith in the chapter 13 confirmation context is undefined in the Code, but numerous courts have addressed it. In determining whether Robert lacks good faith here, this Court looks to the "Flygare Factors."<sup>27</sup> The Tenth Circuit Court of Appeals' enumeration of these factors is best set out in *Mason v. Young (In re Young)*<sup>28</sup> where the Circuit states:

As a general matter, a determination of good faith must be made on a case by case basis, looking at the totality of the circumstances. [citation omitted]. "In evaluating whether a debtor has filed in good faith, courts should be guided by the eleven factors set forth in *Flygare v. Boulden*, 709 F.2d 1344, 1347-48 (10th Cir.1983), as well as any other relevant circumstances." *Robinson v. Tenantry (In re Robinson)*, 987 F.2d 665, 668 (10th Cir.1993) (footnote omitted). 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

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<sup>25</sup> The Trustee's appraisal of the Corvette is even less – \$18,900.

<sup>26</sup> See Hon. Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 301.80 (West 2005); *In re Davis*, 239 B.R. 573, 577 (10<sup>th</sup> Cir. BAP 1999) (The party who seeks a chapter 13 discharge bears the burden of proving good faith.).

<sup>27</sup> See *Flygare v. Boulden*, 709 F.2d 1344 (10<sup>th</sup> Cir. 1983).

<sup>28</sup> 237 F.3d 1168 (10<sup>th</sup> Cir. 2001).

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.<sup>29</sup>

Furthermore,"the weight given each factor will necessarily vary with the facts and circumstances of each case."<sup>30</sup>

Looking to the relevant factors in this case, the Court notes that the plan *as filed* offers Billie and the other unsecured creditors what is, at best, a paltry dividend. This is particularly so where the debtor has made as much as \$65,000 a year in the last several years, where he maintains several vehicles including a classic car, where he lives in a quarter-million dollar home, and where he has helped himself to a substantial portion of the couple's marital property and cannot account for all of it. Had the debtor amended his plan to contemplate the 24 per cent dividend discussed at final argument, the Court would be considerably less likely to weigh the first *Flygare* factor against him.

The debtor has been employed at Cessna for 41 years and the only known impediment to his continued employment is his looming retirement. As he is only 58, he can certainly hope to be employed for the duration of any contemplated plan.

The original duration of the plan was 36 months, contributing to the lean dividend proposed therein.

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<sup>29</sup> *Id.* at 1174-75, citing *Flygare*, 709 F.2d at 1347-48 (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir.1982)).

<sup>30</sup> *Flygare*, 709 F.2d at 1348.

Clearly, the debtor is capable of at least a 48-month effort given his age, his apparent vitality, and the security of his job. Debtor is neither duty-bound nor entitled to retire at 65 or sooner.

As noted above, the inaccuracies and omissions contained in the schedules all appear to have been remedied to the satisfaction of the Trustee and were neither misleading nor grave. Billie and her counsel were well aware of the omitted bank accounts and indeed brought them to the attention of the Trustee. While this Court places particular emphasis on complete and accurate schedules and statements of financial affairs, some errors may be expected and, if they are minimal, forgivable in a hurried filing.

There appears to be no preferential treatment among creditor classes. Billie shares pro-rata with other unsecured creditors. Those assets to which she is exclusively entitled (the benefit plans) are not property of the estate that any creditor would have a reasonable expectation of sharing.

There are only two secured claims in this case: the first mortgage on the homestead and Billie's equity lien. The lien is modified only to the extent that Billie is precluded from foreclosure so long as Robert makes the scheduled monthly payment and refinances within 36 months. This treatment appears to comport with § 1322(b) and § 1325(a)(5).

The Court does not find the existence of any special circumstances. Similarly, the Court finds this to have been Robert's only bankruptcy case. The plan's administration would not unduly burden the Trustee.

This leaves the "motivation and sincerity" factor. It is here that this Court places considerable weight on Robert's pre-petition conduct. The conduct most worthy of consideration is *not* the lurid tapestry of slights and insults among the members of this broken family. This Court is neither authorized nor inclined to retry state court divorce cases. This Court is, however, required to evaluate debtor's conduct in light of

the surrounding circumstances and to determine whether that conduct is so egregious as to make his efforts to rearrange his affairs in bankruptcy lacking in good faith.

Robert's liquidation of the General Dynamics account is, on its face, inexcusable. He is unrepentant to this day, arguing essentially that it was still his money when he did it and that his doing so was merely a response to what he perceived to be a declining stock market. This argument wholly ignores the fact that Robert was *ordered by a judge* to do no such thing. This Court is not sympathetic to wilful violations of court orders. As KAN. STAT. ANN. § 23-201 (2003 Supp.) makes clear, this property was part of the couple's "marital" estate in which both had an interest until the state court made an equitable division of property. That Robert expended some of the funds on family obligations such as Daniel's school expenses and paying off Daniel's truck so he would have a road-worthy vehicle for college mitigates his actions. On the other hand, Robert's unbidden "repayment" of \$10,500 to his sister for undocumented loans from the 1970's places his good faith in considerable doubt. Likewise, his advance payment of a road assessment that could have been paid over 15 years is troubling. This payment benefits him by enhancing the value of the home awarded to him by the divorce court, a home which he may retain when he pays Billie her share of its 2003 equity. Presumably, his home will only appreciate in value, in part because of the marital property he converted.

Then there is the "money in a box" problem. Billie asserts that Robert knows all the tricks of the divorce "game" and that his purloining this cash is all part of a scheme to deny her a proper share of the couple's assets. Robert essentially responds that he had no choice but to keep his money hidden lest Billie attach it. And, in any event, he states he had nearly all of the money spent by the time this case was filed. While the Court is hesitant to conclude that Robert is a masterful schemer and manipulator of the system--

he appeared for a hearing in aid of execution with \$700 cash in his pocket (a once-in-a-lifetime occurrence for even the most seasoned collection lawyer), it can conclude that Robert took improper advantage of his superior access to the couple's assets.

Ultimately, the Court must decide, as Robert's counsel put it, how long he must suffer for his post-divorce, pre-bankruptcy actions. It does not appear that Robert is guilty of substantial asset manipulation in the days immediately prior to the February, 2004 bankruptcy filing. It does, however, appear that he kept the General Dynamics conversion secret until he had to reveal it on the couple's 2002 tax return, sometime in April, 2003. For reasons unknown, this contumacious conduct was never brought to the state court's attention. His plan contemplates paying Billie only a very small part of her share of the money he took and discharging the rest under Chapter 13's super-discharge. To find that this is an act in good faith would be to reward Robert's miscreant and contemptuous conduct. It cannot be good bankruptcy law or policy to encourage spouses to violate state court orders by letting them off the hook in Chapter 13.

That said, the Court, and Billie, face a dilemma. Robert behaved badly. The plan he filed is plainly unconfirmable, not only because of his lack of good faith, but also because it does not recognize and allocate Robert's "raise" in disposable income when Ashley reaches majority and his child support obligation ends. That \$500 increase should be shared with the unsecured creditors. The dilemma arises out of the fact that Billie may be far more likely to receive a substantial portion of her unsecured property settlement claim in Chapter 13 than in the course of state law post-judgment collection activity. Robert's two largest assets, the home and the Corvette, are exempt. In order for Billie to realize on her equity lien, she will have to address the first mortgage. If Robert is put out of the house, he will have little incentive to pay it. If Robert remains in the homestead, his exemption will extend whatever equity remains over and above the first

mortgage and Billie's lien. Billie will have no right to those funds. She will have no right to execute on the Corvette. Her only ability to recover the "loan repayment" to Robert's sister, Ms. Swigart, would be by suing her, in Oklahoma state court, under that state's version of the Fraudulent Transfer Act. That would be time-consuming and expensive.

This leaves Billie with garnishment of Robert's wages. Under KAN. STAT. ANN. § 60-2310, she would be limited to one garnishment per month and her recovery (as to the property settlement) limited to 25 percent of his aggregate disposable earnings. Based on Schedule I, this would amount to approximately \$485 per month.<sup>31</sup> One assumes that repeated garnishments would make Robert's employment situation tenuous and seriously affect his ability to secure a refinance loan on his home to fund payment of Billie's lien. One also assumes that Billie's counsel will not process these garnishments for free, further adding to Billie's litigation expense and diminishing her recovery. If Billie's unsecured claim is in the range of \$96,000, it would take 198 garnishments and nearly 17 years to pay it – far beyond when Robert is likely to retire.

In Chapter 13 and under a plan which provided for a substantial dividend, say 25 percent, Billie could hope to recover in four or five years some \$24,000 in addition to the equity lien payments. Robert would be more likely to secure the refinance mortgage that will enable him to pay off her equity lien. Billie would not have received metaphysically perfect justice, but she would stand a good chance of receiving her home equity very soon and an additional \$24,000 or so in four years. In or out of bankruptcy, Billie will be entitled to her share of the benefit plans under the Qualified Domestic Relations Orders. If Robert failed to perform as the plan specified, his case could be dismissed or converted to Chapter 7 proceedings. Billie

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<sup>31</sup> Schedule I reflects net earnings of \$4,192 per month. Robert is paid bi-weekly. \$4,192 times 12 months is \$50,304. That amount divided by 26 weeks is \$1,934 per two-week period. Twenty-five percent of that amount is \$483.69. One's wages may be garnished by a particular creditor only once in a thirty-day period. KAN. STAT. ANN. § 60-2310(b).

would still have the right to challenge his discharge of the unpaid property settlement under § 523(a)(15).

It seems to the Court that the parties have utterly lost sight of what makes good financial sense. The combination of Robert's misconduct, his former divorce attorney's incompetence, Billie's intransigence, and the anger and resentment that attends most domestic proceedings is poisonous and expensive. None of the players appear to recognize the value of concluding this dispute, licking their wounds, and getting on with their lives. Instead they choose to litigate at length in this Court, attempting to fix what they failed to accomplish in domestic court. This Court declines to further enable this debilitating exercise until the parties wake up and, therefore, rules as follows.

Confirmation of the plan as filed is DENIED. The parties are ORDERED, with or without counsel, to meet and confer with the Chapter 13 Trustee concerning what amendments may be necessary to secure confirmation, keeping in mind this Court's musings in the preceding paragraphs. This meeting will be accomplished, the Trustee's schedule permitting, not later than 30 days from the date of this Order. Any such amended plan must provide for a substantial dividend to Billie. It must also provide for an effective default clause should Robert falter in his obligations. He should be given a time certain in which to accomplish a refinance and should be ordered to keep Billie fully informed of his progress in that connection. Further, the amended plan should provide for the Trustee to investigate and evaluate any transfers she deems questionable, whether under § 548 or § 544(b). Such an amended plan is to be filed not later than 45 days after the entry of this Order. In the meantime, Robert is to bring and remain current on his child support and maintenance obligations and, consonant with the policy of D. Kan. LBR 4001(a).2, this Court lifts the stay to permit the state court to enter and enforce an income withholding order in connection with post-petition support. Finally, this Court enjoins both Robert and Billie to make a good faith effort to resolve this financial

dispute in a businesslike manner, for their own good and the good of their children.

IT IS SO ORDERED.

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