

#2581

signed 7-26-02

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

In re:

**SAMMY BRYANT SHEPLEY,
VICKIE M. SHEPLEY,**

DEBTORS.

**CASE NO. 01-42594-13
CHAPTER 13**

**ORDER SUSTAINING TRUSTEE'S OBJECTION TO PLAN PROVISION
FOR DEBTORS TO MAKE CAR PAYMENTS DIRECTLY TO CREDITOR**

This matter is before the Court on the Chapter 13 Trustee's objection to the debtors' proposal to pay the secured debt on their car directly to the creditor, outside of their chapter 13 plan. Trustee Jan Hamilton appears *pro se*. The debtors appear by counsel William E. Metcalf. The Court has reviewed the relevant materials and is now ready to rule.

When they filed for bankruptcy, the debtors owed about \$9,000 on their car. They estimated the value of the car to be about \$14,000, and they claimed it as exempt under K.S.A. 60-2304. No one objected to the exemption or sought additional time to object, so the car is exempt.¹

In their plan, the debtors propose to continue making their monthly payments on the car directly to the creditor. The trustee objects. To support their proposal, the debtors rely on the decision in *In re Aberegg*² and two sections of *Collier on Bankruptcy*.³ In essence, the debtors argue that they must be able to propose making any direct payments they may desire because nothing in the Bankruptcy

¹See Fed. R. Bankr. P. 4003(b); *Taylor v. Freland & Kronz*, 503 U.S. 638 (1992).

²961 F.2d 1307 (7th Cir. 1992).

³§§1322.02[3] & 1322.06[1] (15th ed. 2002).

Code prohibits direct payments. The only reason they offer for doing so here is because they would like to have a good credit relationship in the future with the creditor that has the lien on their car.

Although the *Collier* treatise suggests in a brief discussion of about one page that debtors are free to pay creditors outside their plans, Judge Lundin discusses the matter much more thoroughly over eighteen pages in his treatise on chapter 13, citing many more cases, and concludes the courts generally agree that debtors must ordinarily pay their creditors through the chapter 13 trustee and may pay them directly only when there is a significant reason to do so.⁴ The preference for payment through the trustee is supported by the difficulties of determining feasibility if the debtor pays creditors directly, and the impossibility of maintaining a viable chapter 13 program with adequate compensation of the trustee if all plans proposed that the debtor pay secured creditors directly.⁵ Judge Lundin also explains:

It is in the best interests of all creditors that payments be made through the Chapter 13 trustee, not directly by the debtor. Though creditors may experience some problems with the timing of payments because the Chapter 13 trustee disburses on a schedule different than the creditors' expectation, requiring that payments be made through the Chapter 13 trustee gives creditors information, control and leverage. The automatic stay remains in effect even when the plan permits some payments by the debtor directly to creditors. A creditor that is not receiving payments directly from the debtor is still prohibited from contacting the debtor after confirmation to determine what is wrong. If all payments are made through the Chapter 13 trustee, the status of the case and of the debtor's postconfirmation financial condition is more easily determined. The Chapter 13 trustee becomes an ally in the effort to police the case. Often the trustee will have information not available to individual creditors—for example, that the debtor has been sick or temporarily laid off and unable to make payments. If a creditor is not receiving its proper direct payments, the creditor will have to hire counsel and file its own motion for stay relief or to convert or dismiss. If the creditor is not receiving its proper

⁴1 Keith M. Lundin, *Chapter 13 Bankruptcy, 3d Edition*, §59.1 (2000).

⁵*Id.* at 59-2 to -3.

payments from the Chapter 13 trustee, the trustee will usually be out front representing all creditors with a motion to convert or dismiss.⁶

The Court notes that direct payment by debtors also interferes with the trustee's ability to become aware that the debtors are having trouble complying with their plans if they make their payments to him but fail to make their direct payments. Questions can arise about whether debtors have completed their plans and become entitled to a discharge since the trustee has no way to monitor their direct payments. In addition, debtors can more easily prefer a creditor (even if only for a short time) that they are supposed to be paying directly by making their direct payment when they are unable to make their plan payment as well.

In addition, the Court notes that *Aberegg* (essentially the only authority cited in the *Collier* discussion supporting the debtors' proposal) merely held that bankruptcy courts have discretion to confirm plans under which debtors propose to make direct payments to some creditors.⁷ Nothing in the decision suggests that *debtors* have unfettered discretion to decide which creditors they will pay directly. Obviously, the debtors must propose direct payments before the question will arise, but *Aberegg* indicates the bankruptcy court must decide whether to approve the proposal. The direct payment involved in *Aberegg* was for the debtors' home mortgage, a situation in which this Court has generally been willing to allow direct payment.

⁶*Id.* at 59-13.

⁷961 F.2d at 1309.

In *In re Barber*,⁸ this Court previously addressed the question whether chapter 13 debtors may make direct payments to a creditor despite the trustee's objection. There, the Court said:

[T]his Court's general rule is that chapter 13 plan payments must be made through the trustee. Exceptions are ordinarily made for current home mortgage payments (though arrearages must go through the trustee), for secured debts that would be paid off before the trustee could begin distributing money, and sometimes for lease payments. The debtors' proposal does not fall within these exceptions, and they have not given the Court an adequate reason to create another.⁹

This discussion applies to this case as well. Furthermore, the Court is not convinced that the debtors' relationship with their creditor should be any better if they pay the creditor directly than if they pay it through the trustee. The creditor already knows that they have filed for bankruptcy, and where payment comes from would seem to make no difference to the creditor.

For these reasons, the Court concludes that the trustee's objection to the debtors' proposal to pay their car loan directly must be sustained. In order to obtain confirmation of their plan (assuming it meets all other requirements), the debtors will have to amend it to show that they will pay the debt through the trustee.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of July, 2002.

⁸Case No. 94-41804-13C, Order Denying Debtor's Motion to Reconsider (Bankr.D.Kan. June 13, 1995), *aff'd sub nom. Barber v. Griffin (In re Barber)*, 191 B.R. 879 (D.Kan. 1996).

⁹*Barber*, slip op. at 2-3.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE