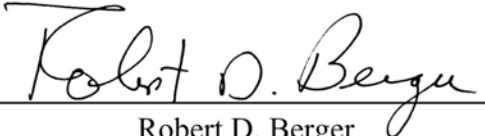




The relief described hereinbelow is SO ORDERED.

SIGNED this 12th day of January, 2016.


Robert D. Berger
United States Bankruptcy Judge

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

In re:

**GEORGE JOSEPH HARRIS,
Debtor.**

**Case No. 14-22359
Chapter 13**

ORDER DENYING CONFIRMATION OF DEBTOR'S PLAN

Debtor George Joseph Harris seeks confirmation of his Chapter 13 plan.¹ The Chapter 13 Trustee, William H. Griffin, appears pro se; Debtor appears through his attorney, Stephen G. Bolton; the creditor, Kristin K. Harris, appears pro se. Kristin K. Harris timely filed an Objection to Confirmation of Bankruptcy² which this Court treats as an objection to confirmation of George's plan as not proposed in good faith and objection to the bankruptcy petition as not filed in good faith.³ Kristin is George's former spouse. There is no objection to venue or jurisdiction over the parties.⁴

¹ Doc. No. 4.

² Doc. No. 25.

³ § 1325(a)(7).

⁴ This Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §§ 157(a) and 1334(a) and (b), and the Amended Standing Order of Reference of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's bankruptcy judges all matters under the

BACKGROUND

In her Objection, Kristin asserts various factual allegations:

1. That Debtor is gainfully employed by Union Pacific Railroad, has been so employed since June 20, 2002, and receives increases in income yearly, to include cost of living increases, overtime and bonuses;

2. That George owes to Kristin a \$13,113 civil (divorce) judgment arising from their divorce proceedings and various post-divorce proceedings wherein George was ordered to pay this sum as a debt and property equalization payment;

3. That George received a Workers' Compensation settlement (in reality it appears to be a FELA claim as George is a railroad worker⁵) after the parties' divorce but prior to the filing of this bankruptcy case; the division of the FELA claim was left somewhat unsettled in the divorce proceedings; and

4. That Debtor's child support obligation has been reduced by \$700 per month, that he has a paid for personal vehicle, and that discharging the divorce judgment will create an undue hardship on Kristin due to George's financial neglect and attendant effects.

The Court's review of documentation provided by the Debtor indicates that the net proceeds from the FELA claim were \$48,815.82 of which \$34,842.82 was deposited in George's bank account on December 31, 2013. The Court's review of Kristin's objection and her statements at the pretrial conference held in this matter indicate that Kristin's objection is that George's bankruptcy was not filed in good faith.⁶

Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order No. 13-1, *printed in* D. Kan. Rules of Practice and Procedure at 168 (March 2014). Furthermore, this Court may hear and finally adjudicate this matter because it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). There is no objection to venue or jurisdiction over the parties.

⁵ "A FELA award, which is the exclusive remedy for railroad employees injured on the job, is analogous to a Workers' Compensation award." *In re Albrecht*, 89 B.R. 859 (Bankr. D. Mont. 1988).

⁶ *See* § 1325(a)(7).

Kristin and George were married on September 13, 2002, in Johnson County, Kansas. They were subsequently divorced. A Decree of Divorce⁷ was filed with the Clerk of the District Court of Johnson County, Kansas, on October 23, 2012, after it was approved by State of Kansas District Court Judge Thomas Foster. At the time of the divorce, Judge Foster found that Kristin's monthly domestic gross income was \$3,387 and that George's was \$5,652. Attached to the Decree is the state court's Division of Assets and Liabilities⁸ wherein it is stated that an equalization payment of \$13,113 is owed by George to Kristin; judgment therefor was entered in Kristin's favor in the Decree. At the time of the divorce, in 2012, George and Kristin had two children, one born in August 1994 and the other born in April 2006. George was directed to pay to Kristin maintenance in the sum of \$677 per month for 27 months, subject to conditions. Monthly child support in the amount of \$1,408 was ordered to be paid by George to Kristin. Kristin was awarded 50 percent of George's Tier II Railroad Retirement as of April 21, 2011, as well as 100 percent of George's Vanguard Prime Money Market Fund. George was to execute necessary documents to effect the transfer of the latter account to Kristin. This Court has insufficient information to establish whether the requisite documents have been entered to effect these transfers. Regardless, it appears that these are property interests and not claims and, hence, are not subject to discharge. At a hearing before this Court, George's bankruptcy attorney provided some assurance that the necessary documents had been completed and filed as required.

The Decree also stated that “[t]he respondent [George] shall be set aside his interest in his individual pending personal injury claim. The petitioner [Kristin] shall be set aside any individual interest or claim she may be entitled to in that action.” This appears to be a reference to George's FELA claim that was pending at the time of the divorce. Judge Foster did not make

⁷ On January 28, 2015, this Court was provided a copy of the Decree for *in camera* review.

⁸ Since it was not attached to the Decree, this Court obtained a copy of this attachment from the District Court of Johnson County, Kansas, on September 25, 2015.

a determination as to what, if any, interest Kristin may have had in the FELA claim, and no one has presented arguments relating to such. Regardless, after the divorce and prior to the filing of George's bankruptcy, the FELA claim was liquidated and the net proceeds of \$48,815.82 were paid to George.

A primary financial aspect of the Decree that is relevant to the Court's review of this case pertains to the equalization payment, as mentioned above. The Decree states:

H. Equalization Payment. Petitioner shall be granted judgment in the amount of \$13,113.00 against respondent, to equalize the division of assets and liabilities herein. The Court shall retain continuing jurisdiction to enter orders regarding payment of said judgment in the event the parties are not able to agree on a reasonable payment plan.⁹

Kristin has filed a domestic support obligation priority proof of claim in the amount of \$13,113 in this case.¹⁰ An objection has not been filed to this proof of claim.

On February 3, 2014, post-divorce proceedings were held in the District Court of Johnson County before Judge Keven M.P. O'Grady. Judge O'Grady's rulings were memorialized by a journal entry filed with that court on April 1, 2014. The Journal Entry sets out in part:

WHEREUPON, the Court swears in the parties, hears arguments of counsel and receives evidence, and after being well and duly advised, finds and orders as follows:

1. Respondent's [George's] Motion to Alter or Amend Judgment or in the Alternative Motion to Modify and Review Child Support and Maintenance should be and is hereby denied.

2. The petitioner's [Kristin's] Motion to Enforce Judgment is sustained. Respondent [George] shall make contact with account holders and execute all documents necessary to transfer the VanGuard Prime Money Market Fund (R10-IRA) to petitioner's account.

3. The Court is issuing an Order to Appear to respondent [George] to show cause on February 10, 2014, at 9:30 a.m., what has been done to accomplish the transfer.

⁹ Decree of Divorce filed in the *Matter of the Marriage of Kristin K. Harris and George J. Harris* (the Divorce Proceeding), Case No. 11CV3462, at 7, submitted *in camera* to this Court.

¹⁰ Proof of Claim 4-1 filed November 11, 2014.

4. Respondent [George] shall make payments on the \$13,113.00 equalization judgment granted to petitioner [Kristin], in the sum of \$250 per month, beginning in February, 2014 through December, 2014. Beginning December, 2014, respondent [George] shall pay \$900.00 until principal and interest are fully paid. Statutory interest shall be assessed and will accrue effective September 13, 2013, the date of the filing of the Motion to Enforce Judgment. Respondent [George] will be subject to contempt if said payments are not timely made.

5. Pursuant to the Court's child support worksheet attached hereto and incorporated herein, the respondent's [George's] child support shall be and is hereby modified to \$823.00 per month, plus one-half of the enforcement fee (now \$10.00) for a total child support of \$833.00 per month, effective August 1, 2014.¹¹

Because of the emancipation of one of the parties' children, the child support obligation was reduced from \$1,408 to \$823 per month.

DISCUSSION

This Court has the authority and an independent duty to review proposed Chapter 13 plans for compliance with the applicable Code provisions and rules.¹² Kristin has filed a priority proof of claim for a domestic support obligation in the amount of \$13,113. George's plan does not provide for payment of this DSO as required under § 1322(a)(2). The proof of claim represents evidence of the validity and amount of the claim,¹³ although in the face of a proper objection, the ultimate burden of proof rests with the claimant (in this case, Kristin). Likewise, entitlement to priority status must be established by a preponderance of the evidence and without a presumptive validity for the status asserted.¹⁴ That said, Kristin's filing of a priority claim in conjunction with an objection to confirmation potentially requires the adjudication of the priority status of the proof of claim. The Court only notes this matter in passing as a potential bar to

¹¹ Journal Entry filed in the Divorce Proceeding on April 4, 2014, at 1-2, submitted *in camera* to this Court.

¹² See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277, 130 S. Ct. 1367, 1381 (2010).

¹³ Fed. R. Bankr. P. 3001(f).

¹⁴ See *Matter of Patch Graphics, Inc.*, 58 B.R. 743, 745 (Bankr. W.D. Wisc. 1986), determining the § 503(b) status of a post-petition debt.

confirmation of the plan, since there are other issues as to whether the plan is proposed in good faith and as to whether the bankruptcy itself was filed in good faith.

The parties were divorced on October 23, 2012. On December 29, 2013, George received the FELA recovery of \$48,815.82, a portion of which in the amount of \$34,842.82 was deposited in his bank account. One week later, on January 6, 2014, George paid \$14,607.80 to satisfy the secured obligation on his 2007 Dodge Ram truck.¹⁵ Less than two weeks later, on January 17, 2014, George purchased a 2013 Chevrolet Malibu, which was financed by Christ the King Parish Federal Credit Union with a \$25,000 loan.¹⁶ Between January 19 and March 21, 2014, the bank records provided by George reflect ATM withdrawals at local casinos in the aggregate of \$3,320.34. There were also a number of other ATM withdrawals, the purpose of which this Court is unable to discern, but some of which were on the same day or the day before the casino withdrawals. On February 3, 2014, in the midst of this activity, George and Kristin appeared at the above-referenced post-divorce court hearing. George filed this Chapter 13 case on October 1, 2014.

Through counsel, George has provided information with regard to the FELA claim recovery and disposition of those proceeds. This information includes the settlement disbursement sheet, copies of Commerce Bank statements from January through April 2014, and a handwritten and typed explanation of certain payments. The statements reflect a bank deposit in the amount of \$34,842.42. There is no explanation as to the almost \$14,000 difference between the deposit to the Commerce Bank account and the FELA settlement of more than \$48,000. The bank records show a check in the amount of \$14,607.80, a check which this Court

¹⁵ George claims this vehicle as exempt on his Schedule C (Doc. No. 1, at 22).

¹⁶ See Proof of Claim 3-1.

presumes satisfied the truck loan.¹⁷ In addition, George's cover letter indicates that he paid significant medical bills associated with the birth of his daughter, parts for his truck, and a credit card balance. The cover letter also indicates he paid back within a year of bankruptcy approximately \$20,000 to his parents for room and board accrued over a two-year period and for other expenses such as attorney's fees and court costs.

The FELA settlement was not disclosed on George's initial schedules filed with the Court, but was disclosed four months later by an amendment to the Statement of Financial Affairs filed on February 15, 2015. The amendment states, "Debtor settled a Union Pacific Railroad work related injury Claim in December of 2013 for approximately \$48,000."¹⁸ The approximately \$20,000 in payments to George's parents was not disclosed on the Statement of Financial Affairs. Parents are considered insiders¹⁹ and the repayment of debts to them within one year of bankruptcy is potentially an avoidable preference.²⁰ It is unclear whether FELA claims may be exempted in bankruptcy;²¹ regardless, the use of what would otherwise be exempt property to pay debts does not in and of itself affect the classification of a transfer as a preference.²²

George's Chapter 13 plan proposes to pay \$1,000 in attorney's fees to his bankruptcy counsel, and the balance of the plan payments of \$520 per month are to be used to pay off the 2013 Chevrolet Malibu car loan that was incurred less than one year prior to the petition date.²³ The plan does not provide distributions to general unsecured claimants, including Kristin, and

¹⁷ The clearance date for the check corresponds with the lien release date, January 6, 2014, for the 2007 Dodge Ram truck.

¹⁸ Doc. No.34.

¹⁹ See § 101(31)(A)(i).

²⁰ See, generally, § 547.

²¹ See *In re Jones*, 446 B.R. 466 (Bankr. D. Kan. 2011).

²² 5 COLLIER ON BANKRUPTCY ¶ 547.03[2] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015).

²³ Proof of Claim 3-1 reflects a balance on the petition date of \$22,492.82.

the plan does not list or treat Kristin as a priority creditor. Excluding Kristin's claim, the total general unsecured debt listed on Schedule F is \$1,949.

Unsecured creditors may object to a Chapter 13 plan on the grounds that it is not proposed in good faith²⁴ or to a Chapter 13 bankruptcy case itself if the action of the debtor in filing the bankruptcy petition was not in good faith.²⁵ Further, this Court has a duty to review plans for compliance with the applicable law. A plan may not be confirmed unless it has been proposed in good faith and not by any means forbidden by law. "Only if there has been a showing of serious debtor misconduct or abuse should a Chapter 13 plan be found lacking in good faith."²⁶ This Court will consider the totality of the circumstances to determine whether good faith exists; a similar test is applied to both § 1325(a)(3) and (a)(7).²⁷

A somewhat unique situation arises when divorce proceedings and bankruptcy intersect.²⁸ Within these confines, it is possible that if the Debtor's Chapter 13 plan were filed improperly to circumvent domestic relations orders or the bankruptcy paperwork were not fully completed, a finding of a lack of good faith in the proposed plan may exist.²⁹ Similar considerations apply to determine whether the Debtor's case itself was filed in good faith.³⁰ George argues that his obligation to Kristin is not a DSO excepted from discharge under § 523(a)(5),³¹ instead arguing that the debt is a non-DSO obligation to a former spouse to which the § 523(a)(15) exception to

²⁴ § 1325(a)(3).

²⁵ § 1325(a)(7); *see also* 8 COLLIER ON BANKRUPTCY ¶ 1325.08 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015).

²⁶ 8 COLLIER ON BANKRUPTCY ¶ 1325.01 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015).

²⁷ *In re Wark*, 2015 Bankr. LEXIS 4214, at *18-19 n.35.

²⁸ Robert D. Berger, *Bankruptcy & Divorce: A Marriage of Inconvenience*, THE JOURNAL OF THE KANSAS BAR ASSOCIATION, February 2014, at 30.

²⁹ *See* HENRY J. SOMMER & MARGARET DEE MCGARITY, COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 8.05[3][c] (2015).

³⁰ *See id.*, 8 COLLIER ON BANKRUPTCY ¶ 1325.08 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015).

³¹ To determine whether a debt is a DSO, the bankruptcy court should conduct "a 'dual inquiry' looking first to the intent of the parties at the time they entered into their agreement, and then to the substance of the obligation." *In re Okrepka*, 533 B.R. 327, 335 n.30 (D. Kan. 2015), quoting *In re Taylor*, 737 F.3d 670, 676 (10th Cir. 2013).

discharge applies. Although the Court does not resolve this aspect of the case, it is relevant to the Court's analysis since a DSO is not dischargeable under a full compliance Chapter 13 discharge.³² The distinction in this case is important because Kristin's debt comprises over 80 percent of the general unsecured debt that George seeks to discharge in this case.³³ When George filed this case on October 1, 2014, he was not eligible for a Chapter 7 bankruptcy discharge for less than one year.³⁴ While the determination as to both what is a DSO and whether a bankruptcy case or plan have been filed in good faith is made on a case-by-case basis, under these circumstances, the filing of a Chapter 13 case is indicia of a lack of good faith.

George's bankruptcy case was filed within ten months after he received the FELA settlement in excess of \$48,000, a settlement which initially was not revealed on the Statement of Financial Affairs. He paid in excess of \$14,000 to pay off a truck loan and then within two weeks incurred a \$25,000 loan to purchase a 2013 Chevrolet Malibu. George withdrew in excess of \$3,000 at casino ATMs. George paid back family members and friends significant sums of money within one year of the bankruptcy filing, which transfers were not disclosed. During this time frame, Kristin was seeking enforcement of her \$13,113 judgment and George was ordered by Judge O'Grady to make payments on that judgment or suffer contempt of court. George chose to use the money for other purposes. Aside from the debt owed to Kristin, George owes less than \$2,000 in general unsecured debt. George's proposed plan pays bankruptcy attorney's fees of \$1,000 and a secured auto loan that exceeds \$22,000 that was incurred the same year he filed bankruptcy. Based on these facts, it would appear that the sole or determinant purpose for

³² The § 523(a)(15) exception does not apply to a full compliance § 1328(a) discharge, although the exception applies to a Chapter 13 hardship discharge under § 1328(b), as well as Chapter 7 discharge.

³³ Actually, based upon the filed claims, Kristin's claim is more than 90 percent of filed unsecured claims.

³⁴ The Court notes that although George's original voluntary petition filed in this case failed to disclose a prior bankruptcy filing, he filed an amendment two months later to reflect a prior filing, a Chapter 7, on September 24, 2007, in which he received a discharge.

the filing of George's Chapter 13 bankruptcy (assuming that someone does not file a bankruptcy to discharge only \$2,000 of debt) is to avoid payment of Kristin's judgment. These facts strongly indicate that the case was not filed in good faith and that the plan was not proposed in good faith.

CONCLUSION

Confirmation of the Debtor's plan is denied. The Debtor has 30 days from the date of this Order within which to file an amended plan and to seek confirmation of same. Failure to file a confirmable amended plan within 30 days of this Order will result in the dismissal of this case; any dismissal by this Court under this Order or otherwise may be subject to conditions as set out in § 349.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS