



SO ORDERED.

SIGNED this 12 day of May, 2010.

**ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE**

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

IN RE:

BARBARA JEAN VOLLEN,

Debtor.

**Case No. 09-12460
Chapter 13**

**ORDER ON MOTIONS TO ALTER OR AMEND
MEMORANDUM OPINION OF MARCH 19, 2010**

The Court issued its Memorandum Opinion on March 19, 2010 wherein it overruled the chapter 13 trustee's legal objection to debtor's Line 13 marital adjustment on Form 22C, sustained the Trustee's objection to debtor's proposed applicable commitment period and her disposable income objection relative to the Line 19 marital adjustment.¹ The effect of the Court's ruling and the necessary adjustments to Form 22C was to transform debtor from a below-median income debtor to an above-median income debtor. The Court directed debtor to amend Form 22C and her plan

¹ Dkt. 40.

within 21 days or convert her case to chapter 7.

Both the debtor and trustee filed timely motions to reconsider, or to alter or amend, the Memorandum Opinion.² The Court treats the parties' motions as motions to alter or amend the judgment brought pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e).³ Grounds that warrant reconsideration or amendment of the judgment include (1) an intervening change in controlling law; (2) newly discovered evidence; or (3) to correct clear error or prevent manifest injustice, including instances where the court has misapprehended the facts, a party's position, or controlling law.⁴ It is not an appropriate vehicle for the movant to revisit issues already addressed by the court or to advance new arguments that could have been raised during the trial.⁵ Here, the Court considers both motions to be predicated upon the third ground, except to the extent they reargue the issues presented at trial or raise a new or alternative argument.⁶

The Trustee's Motion

The Trustee moves for reconsideration of the Court's previous order finding that, in order

² Dkt. 43 (Trustee's Motion to Reconsider filed March 26, 2010); Dkt. 48 (Debtor's Motion to Modify filed April 2, 2010). Both motions were filed within the 14-day deadline of Fed. R. Bankr. P. 9023.

³ The federal rules do not provide for a species of motion designated as a motion for reconsideration. The Courts typically consider such a motion as a motion to alter or amend under Fed. R. Civ. P. 59(e), if filed within the applicable time limit for such motions. *See Dimeff v. Good*, 281 B.R. 689 (10th Cir. BAP 2002); *Hatfield v. Bd. of County Comm'rs for Converse County*, 52 F.3d 858, 861 (10th Cir. 1995); *Van Skiver v. United States*, 952 F.2d 1241 (10th Cir. 1991), *cert. denied* 506 U.S. 828 (1992).

⁴ *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

⁵ *Id.*

⁶ Neither party suggests in their motion that there has been an intervening change in the controlling law nor presents new evidence that was previously unavailable, so the first and second grounds are inapplicable here.

to determine the applicable commitment period under § 1325(b)(4), a non-filing spouse's income need not be included in current monthly income ("CMI") except to the extent that the non-filing spouse contributes to the debtor's and her dependents' support. The Court based this conclusion on a close reading of § 1325(b)(4) and § 101(10A), concluding that CMI in a single debtor case cannot include the income of a non-debtor even though § 1325(b)(4) refers to the "current monthly income of the debtor and the debtor's spouse combined." This is because, by definition, non-debtors do not have CMI. Section 101(10A) refers to CMI being "the average monthly income from all sources that the debtor receives" plus any amount paid by another toward the debtor's support. The Court concluded that the only means of adjusting the amount of income reported by a debtor and her spouse on Form 22C, Line 11, was to deduct that part of the non-debtor's income not applied to the debtor's support. That deduction occurs on Line 13.

The Trustee claims to have unearthed another legal argument after the hearing. Setting aside the fact that this argument could have been presented in the first instance at trial, the Court finds that the argument simply holds no water. The Trustee's theory is predicated on her reading of § 707(b)(7), a statute that has nothing whatever to do with the issue before the Court. Section 707(b)(7) outlines the income parameters to be met before a judge, the United States Trustee or a party in interest may file a motion to dismiss a chapter 7 case for presumed abuse under § 707(b)(2). The Trustee states correctly that subsection (b)(7)(A) only allows a movant to seek a finding of abuse when the CMI of the "debtor and the debtor's spouse combined" exceeds certain median incomes. Section 707(b)(7)(B) states that in a case not a joint case, the CMI of the debtor's spouse is only omitted when they are separated at state law or living apart. What the Trustee misses here is that, by its terms, this subsection only applies for the purposes of subparagraph (A). It bears no

relation to the manner in which CMI is calculated, nor has it any application whatever to Chapter 13. Thus the Trustee's lengthy and complex argument about the differences and similarities of Forms 22A and 22C are of little use here. Ms. Vollen is not a chapter 7 debtor; she did not file a Form 22A. Subparagraph (B) of this statute is clearly limited in its application to a very narrow purpose, that of determining when a third party may initiate a § 707(b)(2) motion. It is of no import to the Court in the case at bar. Further, as the Trustee gives no citation to legal authority, the Court assumes no other court has trodden the Trustee's theoretical path. The Trustee's motion is denied.

The Debtor's Motion

The Debtor's request to alter or amend the Memorandum Opinion is directed to three areas, all of which determine the amount of the marital adjustment, as amounts not regularly contributed to the household expenses of debtor or debtor's dependent and deducted from debtor's CMI: (1) the amount of Mr. Vollen's 401k loan repayments; (2) the amount of college expenses for the Vollen's daughter; and (3) the amount of mortgage payments that exceed the allowable standard deduction on Line 25B as a housing allowance and that build Mr. Vollen's equity in the home.

The Court first addresses the third item, a newly refined argument presented by the debtor for allowance of a marital adjustment for the home mortgage payments. Debtor now seeks a marital adjustment to the extent the regular mortgage payments build equity in the home. The Bankruptcy Code makes no distinction between home renters and home buyers for the marital adjustment. Nor does the calculation of CMI or the marital adjustment speak to amounts paid by a non-filing spouse that build equity in the family home. The adjustment or deduction made to a debtor's CMI is allowed only for those amounts the non-filing spouse pays that are *not* for the household expenses

of the debtor or the debtor's dependents."⁷ The home mortgage payments made by Mr. Vollen clearly are amounts paid on a regular basis for the household expenses of debtor, whether or not such payments also build equity in the home. In short, Mr. Vollen's equity does not enter into the calculation of debtor's CMI or the marital adjustment.⁸

In addition, confirmation of debtor's chapter 13 plan came before the Court with Form 22C completed in a fashion that resulted in debtor being a below-median income debtor and therefore, debtor did not have to complete Form 22C below Line 22. The debtor's request to allow a marital adjustment to the extent the monthly mortgage payment exceeds the amount of the standard housing allowance deduction on Line 25B (mortgage/rent expense as an above-median income debtor) seems to the Court to request an advisory opinion on an issue that was not before the Court when it first ruled on the Line 13 and 19 marital adjustment for a below-median income debtor. The Court declines to do so. The Court believes the appropriate procedural avenue is for debtor to re-file Form 22C as directed in its Memorandum Opinion to comply with the marital adjustment allowed by the Court on Lines 13 and 19. The Court can take up this new issue in the context of confirmation of the debtor's amended chapter 13 plan and amended Form 22C as an above-median income debtor.

With respect to the college expenses Mr. Vollen pays for their daughter, the Court noted in footnote 13 of its Memorandum Opinion the conflicting *amounts* claimed as a marital adjustment. But the Court ultimately disallowed a marital adjustment for the college expenses, finding that the amounts were regularly paid for their daughter's support and were included in debtor's CMI.⁹ Since

⁷ See 11 U.S.C. § 101(10A)(B).

⁸ And as the Trustee correctly notes, no evidence was presented at trial concerning what amount of the regular mortgage payments "builds" equity.

⁹ Dkt. 40, pp. 20, 23.

a marital adjustment was disallowed for those amounts paid, the Court did not reach whether \$226 or \$704 was the appropriate amount and need not do so now.

Finally, debtor suggests that the Court misapprehended the facts as it pertains to the amount allowed as a marital adjustment in footnote 12 for Mr. Vollen's 401k loan repayments. As noted there, debtor claimed an average monthly 401k loan repayment during the 6-month period prior to filing of \$33.35, but claimed a monthly 401k loan repayment of \$107.50 at confirmation. The Court notes that the marital adjustment is a related component of CMI and operates as a reduction in the amount of the debtor's CMI for those amounts paid by Mr. Vollen that are *not* for the household expenses of debtor or debtor's daughter.¹⁰ Unlike projected disposable income which this Court has concluded is a forward-looking concept, CMI is not. It captures the debtor's average monthly income for the historical 6-month period prior to filing. However, this Court recognizes that CMI as calculated on Form 22C and defined by § 101(10A) is a starting point for the calculation of projected disposable income and is subject to change upon showing a substantial change in circumstances.¹¹ Having reviewed Ex. 4, and debtor's motion to alter or amend, the Court has satisfied itself that Mr. Vollen did not make 401k loan repayments during the entire 6-month pre-filing period and therefore the average monthly payment reflected on Form 22C is artificially low. The Court will therefore allow a marital adjustment in the amount of \$107.50 for Mr. Vollen's average monthly 401k loan repayment and the Court's Memorandum Opinion is amended in this

¹⁰ See 11 U.S.C. § 101(10A)(B).

¹¹ See *In re Lanning*, 545 F.3d 1269 (10th Cir. 2008), *cert. granted Hamilton v. Lanning*, 130 S. Ct. 487 (U.S. Nov. 2, 2009) (No. 08-998).

limited respect.¹²

Conclusion

The Trustee's motion to alter or amend the Memorandum Opinion regarding the Court's conclusion on the Line 13 marital adjustment is DENIED. The Debtor's motion to alter or amend the Memorandum Opinion regarding the disallowance of the mortgage payments and college expenses of daughter as a Line 13 and Line 19 marital adjustment is DENIED. The Debtor's motion to alter or amend the Memorandum Opinion regarding the amount of Mr. Vollen's 401k loan repayment as a marital adjustment is GRANTED.

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¹² The Court also notes that the Trustee does not object to the \$107.50 figure claimed by the debtor. *See* Dkt. 52, ¶ 1.