

In the United States Bankruptcy Court

for the Northern District of Iowa

MARY E. KINSEL
Debtor.

Bankruptcy No. 94-61501KW
Chapter 13

ORDER RE AMENDED CHAPTER 13 PLAN

On January 11, 1995, the above-captioned matter came on for confirmation hearing on Debtor's Amended Chapter 13 Plan. Appearances were Attorney James Wagner for Debtor; Attorney James Sheerer for Creditor Clifford J. Kinsel; Attorney Paul Demro for Creditor Mary I. Kinsel; Attorney Mark Conway for Creditor Mercantile Bank; and Attorney Carol Dunbar, Chapter 7 Trustee. The matter was argued after which the Court took the matter under advisement.

Debtor filed the present Chapter 13 Petition on September 15, 1994. The original Plan seeks to pay \$315 per month for a period of 36 months. The original schedules list assets of \$204,000 with liabilities of \$92,000. The original Plan received objections after which Debtor voluntarily filed an amendment on November 18, 1994. It is this Amended Plan which came on for hearing on January 11, 1995.

The Amended Plan has four objectors. Creditor Clifford J. Kinsel asserts that he is a secured creditor. Mr. Kinsel is the former spouse of Debtor. The second objector is Creditor Mary I. Kinsel. A third objection was filed by Creditor Mercantile Bank of Northern Iowa. The final objection is lodged by the Chapter 13 Trustee.

At the time of hearing, a considerable record was made as to the impact of the underlying dissolution decree between Debtor and her ex-spouse, Clifford J. Kinsel, who is now a creditor in these proceedings. The decree of dissolution was entered in July of 1994. This decree sets out an analysis of the debts and assets of the parties and makes a distribution based upon that analysis. Under the dissolution analysis, the marital property consisted of assets of \$270,000 with liabilities of approximately \$121,000. The net worth was, therefore, almost \$150,000. While more conservative, the bankruptcy petition still asserts assets in excess of \$200,000 with liabilities of less than \$92,000.

Chapter 13 of the Bankruptcy Code requires the Court to apply a best interest of the creditors test. 11 U.S.C. 1325(a)(4). This best interest test mandates that the Court not confirm a Plan if the property to be distributed under the Plan is less than the amount each allowed unsecured creditor would be paid in a liquidation under Chapter 7. Educational Assistant Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987). The proposed payout under the present Plan is \$315 per month for 36 months for a total of \$11,340. In the original summary of schedules, unsecured creditors hold slightly in excess of \$26,000 in unsecured claims. It also appears, under the original schedules, that, based on the amount of assets available, a liquidation of the assets pursuant to the dissolution decree would result in a complete

payment to all unsecured creditors.

The Court understands, based on comments of counsel and subsequent briefs, that the value of certain of these assets is in dispute and it is disputed that the values are as originally set out in the dissolution decree.

Nevertheless, substantial problems under Chapter 13 exist in this proposed Plan. The Court will not address each specifically. However, based on the state of the record, this proposed Plan does not satisfy the best interest of creditors test. The potential amount of assets available, compared to the amount of creditors, indicates that a total payout of \$11,340 does not establish that the secured creditors are receiving treatment equal to that which they would receive under Chapter 7.

Secondly, Debtor proposes to pay the sum of \$315 per month for 36 months. Debtor presently has net income of approximately \$600 per month. A part of this Plan is to be purportedly paid through a liquidation of certain assets. At the present time, under the present Plan, it does not appear that this proposed Plan meets the feasibility test. While not abundantly clear, it appears that Debtor may not be making present payments until such time as some of these assets are liquidated. The liquidated funds would then be used, at least in part, to make payments under the Plan.

Third, it appears that Debtor proposes to utilize funds from a trust fund set up out of the sale of the parties' homestead as a funding mechanism for a portion of the Plan payments. This fund, pursuant to the dissolution decree, is to be set up as an alternative to child support as Debtor's ex-husband is incarcerated. The Court questioned whether it is appropriate under Chapter 13 to utilize such funds from a child support trust fund to fund a Chapter 13 wage earner plan.

Substantial other discussion was held on the record as to the feasibility of this Plan as required under 11 U.S.C. 1325. At the present time, the Court is satisfied that, as a minimum, the Amended Plan does not meet the requirements of 1325 in that it does not, based upon this record, meet the best interest of creditors test in that the Court is not satisfied that unsecured creditors under this Plan would receive at least as much as they would receive under a liquidation Plan in Chapter 7.

The respective creditors have asked the Court to alternatively dismiss this Chapter 13 or direct that it be converted to a Chapter 7. The Court, however, feels that Debtor should be allowed an additional opportunity to attempt to amend this Plan to conform to the requirements of Chapter 13 before consideration of a conversion order to Chapter 7.

WHEREFORE, the Court orders that:

1. The objections to this Amended Plan, on the grounds of best interest of creditors, is **SUSTAINED** and the Amended Plan is, therefore, nonconfirmable.

2. Debtor is granted until the close of the work day on February 28, 1995 within which to submit an Amended Plan addressing the objections of creditors.

SO ORDERED this 6th day of February, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge