

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

MICHAEL E. KOBOLD and  
SHELLY KOBOLD

*Debtor(s).*

Bankruptcy No. 95-52413XS

Chapter 13

### DECISION RE: CONFIRMABILITY OF PROPOSED PLAN

Debtors' proposed plan is before the court for consideration on confirmation. Hearing was held February 6, 1996. Robert W. Green, Esq. appeared for debtors Michael E. and Shelly Kobold. Michael C. Dunbar, Esq. appeared for the standing trustee, Carol F. Dunbar. The trustee filed written objection to the plan opposing confirmation. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

#### I.

The Kobolds filed their joint petition under chapter 13 on December 11, 1995. Their schedules show real estate having a value of \$40,000.00 and personalty having an aggregate value of \$3,975.00. The real estate is their home. It is subject to a mortgage held by the United States Department of Housing and Urban Development (HUD) in the scheduled amount of \$40,000.00. Kobolds claimed all of their property exempt under Iowa law. The time period for objection to exemptions has not expired. Debtors' schedules show no priority unsecured creditors. Debtors scheduled 23 non-priority unsecured creditors. Of the claims held by these creditors, 18 are joint debts totaling \$20,435.10 and five, totaling \$996.57, are owed solely by Michael Kobold.

Only Michael Kobold is employed. His monthly take-home pay is \$1,077 (Schedule I). The couple's monthly expenses total \$1,075 (Schedule J). These expenses include \$350 per month for their home. This is presumably their regular payment to HUD. The debtors' Statement of Affairs shows that for bankruptcy representation, they paid their attorney \$760 from earnings on July 20, 1995 for legal fees and the filing fee (docket no. 1, Statement of Affairs, response no. 9).

Debtors amended their petition on December 27, 1995 to disclose that Shelly Kobold had filed a chapter 7 bankruptcy case in this district on July 1, 1991 (docket no. 7). She obtained a discharge in that case. Id.

Kobolds' chapter 13 plan (docket no. 8) provides for direct regular payments to HUD on its secured claim. The plan provides for no payments to the standing trustee and no distribution to unsecured creditors. A Liquidation Analysis attached to the plan indicates that there would be no distribution to unsecured creditors in a chapter 7 case. For the purpose of this matter, I find this would be so.

Debtors admittedly have filed under chapter 13 because Shelly Kobold would not be entitled to a discharge if this were a case under chapter 7 of the Code. Her discharge in the prior case would preclude it. 11 U.S.C. § 727(a)(8). However, confirmation and completion of debtors' plan would provide her with a discharge. 11 U.S.C. § 1328.

#### II.

Standing trustee Carol Dunbar contends that debtors' plan does not meet the good faith criterion of 11 U.S.C. § 1325(a) (3) and should not be confirmed. The court's first concerns, however, are debtors' eligibility for relief and whether they propose a plan at all in that they offer no payments to the trustee for distribution to creditors. There is support for the

proposition that a proposal to pay creditors nothing is not a chapter 13 plan. Matter of Cook, 3 B.R. 480, 482 (Bankr. S.D. W.Va. 1980). Also, in the Eighth Circuit, a debtor with insufficient excess income over expenses to make payments under a plan is not eligible for chapter 13 relief. Tenney v. Terry (In re Terry), 630 F.2d 634, 635 (8th Cir. 1980).

Kobolds' excess income each month is \$2.00. However, this is calculated after the debtors' monthly payment to HUD, the prepetition creditor holding a lien on their home. From schedule J, it appears that the debtors pay HUD \$350 per month; the plan provides for continuing payments to HUD and for HUD's retention of its mortgage interest. Although the plan provides for direct payments to HUD by the debtors, rather than through the trustee, this is permissible if approved by the court. Section 1326(c) states that "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan." The standing trustee has not objected to debtors' direct payment to HUD. The Bankruptcy Code does not appear to prohibit direct payments by the debtor to unimpaired secured creditors, nor does the Code appear to require the court to confirm plans which provide for direct payments. As the direct payments to HUD are not at issue and because debtors propose to pay HUD according to the terms of their original obligation, the plan's proposal should not prevent confirmation. Is the direct payment nonetheless a payment "under the plan?" I think so. I find the legal culture's nomenclature of payments "inside the plan" and "outside the plan" confusing and counterproductive in the examination of confirmation issues. According to the Code, an entity other than the trustee may make payments to creditors "under the plan." 11 U.S.C. § 1326(c). Therefore, even the debtors' direct payment to HUD is a payment under the plan. As such, it makes this case different from both Terry, supra, and Cook, supra, chapter 13 cases in which no payments were being made to any creditors by anyone. I conclude that debtors' direct payments to HUD are under the plan, that debtors are eligible to file a case under chapter 13, and that their plan constitutes a plan under chapter 13.

### III.

The remaining issue is debtors' good faith in proposing their plan. In determining whether the plan has been filed in good faith, the court must examine "factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentations to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code." Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). The court must still consider the "totality of the circumstances" surrounding the good faith inquiry. Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1349 (8th Cir. 1990). These circumstances include the "debtor's motivation and sincerity in seeking chapter 13 relief" and whether the debts would be dischargeable in a chapter 7 case. Id.

"Good faith should be evaluated on a case-by-case basis in light of the structure and general purpose of Chapter 13." Id. at 1353. One purpose is to encourage debtors to attempt some payment of their debts. Id. (citing United States v. Estus (In re Estus), 695 F.2d 311, 313 (8th Cir. 1982)).

Although I find debtors have stated their debts and expenses accurately, and they have made no fraudulent misrepresentations, I find that the plan is not proposed in good faith. Shelly Kobold is not eligible for a chapter 7 discharge. None of her debts would be discharged in a chapter 7 case because of her filing approximately 4 years ago. This filing seeks to stay her present creditors from collecting their claims. It would provide her stay protection, and confirmation of this plan would provide her with a more generous discharge. The consideration for such benefits is an effort to pay creditors something on their claims. Here there is no such effort. This violates the spirit and intent of chapter 13. Debtors might argue that they have no excess income from which to make payments. However, the couple's schedule of current expenditures shows that they spend \$25 per month on entertainment and recreation. Moreover, they apparently have been able to set aside \$760 from Mr. Kobold's earnings to pay their attorney. I perceive this plan as an effort by debtors to obtain the expanded benefits a chapter 13 would offer without the concomitant effort to pay creditors. Debtors seek to unfairly manipulate the Code. I, therefore, conclude the plan does not meet the good faith requirement under 11 U.S.C. § 1325(a)(3).

IT IS ORDERED that confirmation of debtors' plan proposed December 27, 1995 is denied. Judgment shall enter accordingly.

SO ORDERED THIS 12th DAY OF FEBRUARY 1996.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to: Robert Green, Debtors, Carol Dunbar and U.S. Trustee.