

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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WENDELL OLIPHANT, JOANN M.  
OLIPHANT  
Debtors.

Bankruptcy No. L-91-00553C

Chapter 13

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The above-captioned matter came on for hearing on July 18, 1996 on Debtor Wendell Oliphant's Motion for Hardship Discharge. Debtor appeared with Attorney Joseph Peiffer. Norwest Bank Iowa, N.A. was represented by Linda Kirsch. Carol Dunbar appeared as Trustee. After the presentation of evidence and arguments of counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2) (A), (J).

### STATEMENT OF THE CASE

Debtor Wendell Oliphant requests a hardship discharge. He asserts that he is unable to complete Chapter 13 plan payments due to his loss of income following the death of his wife who was his partner in long-distance trucking. In 1990 during Debtors' previous Chapter 7 case, Norwest obtained a consent judgment against Debtors in the amount of \$18,000 which provided that it would be nondischargeable in any future bankruptcy proceedings. Norwest objects to the Court granting Mr. Oliphant a hardship discharge. The Trustee previously filed a Motion to Dismiss based on Debtor's default in making Plan payments. Hearing on that Motion was continued pending disposition of Debtor's Motion for Hardship Discharge.

After hearing, the Court requested the parties address the question of the extent of Norwest Bank's interest in the denial of such a discharge through briefs due August 15, 1996. It requested input on whether Norwest's claim is nondischargeable in this case pursuant to the consent judgment or pursuant to 1328(c)(2). The Court asked the parties to address the extent of Norwest's interest in Debtor's requested hardship discharge if its debt remains nondischargeable.

### FINDINGS OF FACT

Debtors Wendell and Joann Oliphant filed their petition on March 25, 1991. Their Chapter 13 Plan was confirmed February 18, 1992. The plan called for total payments of \$34,800 over 60 months, to be completed in April 1996. To date, the Trustee has received \$28,400, leaving a delinquency of \$6,400. Payments made constitute 82% of the amount due under the confirmed plan.

Debtor Joann Oliphant died May 13, 1994. Prior to her death, she and her husband, Wendell, operated as tag team drivers in long-distance trucking. Mr. Oliphant became responsible for medical and funeral expenses of approximately \$11,000 arising from her death. He was unable to find a partner to drive with until February 1995, during which time his income was more than cut in half. After locating a driving partner, his income returned to approximately one-half of the total income both Debtors had at the time of plan confirmation.

The confirmed plan provides that unsecured creditors receive no distribution if Debtors' assets were liquidated under Chapter 7. Mr. Oliphant testified that the \$28,400 paid under the plan is larger than the value of Debtors' property at the petition date. According to the parties' briefs, Norwest has received approximately \$4,200 on its unsecured claim.

The parties appear to agree that Norwest's remaining claim is nondischargeable in this proceeding. Debtor states that it is nondischargeable according to the Claims Report. Norwest's brief states that it has no objection to the hardship discharge if the Court orders that its claim remains nondischargeable.

Debtor's brief requests a ruling finding that the IRS's secured and priority claims have been satisfied. He requests that the Court order the IRS to release its tax liens in compliance with the provisions of the confirmed plan.

### CONCLUSIONS OF LAW

Debtor requests discharge under 1328(b) which states as follows:

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under 1329 of this title is not practicable.

Debtor has the burden to prove that he meets the requirements of 1328(b). In re Nelson, 135 B.R. 304, 307 (Bankr. N.D. Ill. 1991). The three subsections of 1328(b) are to be read in the conjunctive. In re Dark, 87 B.R. 497, 499 (Bankr. N.D. Ohio 1988). Thus, in order to qualify for a hardship discharge, Debtor must persuade the Court that he satisfies each subsection of 1328(b). Id. The granting of a hardship discharge is discretionary with the court. Id. at 498.

This Court recently considered granting a hardship discharge in Chapter 13 in In re Williams, No. 93-11513KC, slip op. at 2-5 (Bankr. N.D. Iowa Aug. 8, 1996). This Court held:

The first subsection of 1328(b) requires that the circumstances leading to the debtor's failure to make payments be beyond the debtor's control. When confronted with a request for a hardship discharge under Chapter 13, bankruptcy courts have typically limited its application to catastrophic circumstances. "A catastrophe denotes a great and sudden disaster. It bears the sense of being outside the control of those whom it hurts." In re Weaver, No. Y87-00327S, slip op. at 8 (Bankr. N.D. Iowa Dec. 7, 1990) (considering hardship discharge in Chapter 12 under 1228(b), which is identical to 1328(b)). Reasons which are essentially economic do not generally support a hardship discharge under 1328(b). The circumstances must be "truly the worst of the awfuls -- something more than just the temporary loss of a job or a temporary physical disability." An unanticipated death precluding payments under a confirmed Chapter 13 plan has understandably been held to be such a catastrophic circumstance which is beyond the debtor's control to support granting a hardship discharge.

Williams, slip op. at 2-3 (citations omitted).

Courts have granted hardship discharges where a debtor or codebtor has died during the pendency of a Chapter 13 Plan. See In re Pecenka, No. 83-02223, slip op. at 1-2 (Bankr. N.D. Iowa Jan. 31, 1986), rev'd on other grounds, No. 86-2030 (N.D. Iowa Jan. 15, 1987) (granting a 1328(b) discharge where lengthy terminal illness and death of a codebtor dramatically reduced the ability of the surviving debtor to make plan payments); In re Graham, 63 B.R. 95, 96 (Bankr. E.D. Pa. 1986) (determining that debtor could not be held accountable for failure to complete payments when he died after paying \$5,174 of the \$5,600 required by his Chapter 13 plan); In re Bond, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984) (stating that the death of debtor, who died of cancer leaving two minor children, was certainly beyond her control); In re McNealy, 31 B.R. 932, 934 (Bankr. S.D. Ohio 1983) (finding that a debtor's death is not a circumstance for which the surviving codebtor should be held accountable).

The second subsection of 1328(b) mandates that unsecured creditors actually receive no less than they would have received in a Chapter 7 liquidation. This is a "best interests" test identical to that required for confirmation of a Chapter 13 plan in 1325(a)(4). Williams, slip op. at 3-4. Where unsecured creditors would receive no distribution in a Chapter 7 liquidation, any payment to them in a Chapter 13 plan generally satisfies this requirement. Id.; Nelson, 135 B.R. at 308.

The third prong of 1328(b) requires that modification under 1329 is not practicable. Under 1329, the modified plan must meet the statutory requirements for confirmation and may not extend the life of the plan beyond five years after the first payment on the original plan was due. See Nelson, 135 B.R. at 308. Modification is not "practicable" if there is no source of income to fund the modified plan. Bond, 36 B.R. at 51. One court has held that this prong was not satisfied where circumstances changed soon after confirmation but the debtor waited to request relief until it was too late to modify the plan. Nelson, 135 B.R. at 308.

The death of Debtor Joann Oliphant constitutes a catastrophic circumstance "for which the debtor [Wendell Oliphant] should not justly be held accountable" under 1328(b)(1). This is one of the few circumstances in which a Chapter 13 hardship discharge is appropriate. Debtors' plan was reasonably based on their dual income from continued tag team driving. Mrs. Oliphant's death was not anticipated at the time of confirmation. After her death, Mr. Oliphant's income was insufficient to make complete plan payments.

The Court also concludes that Debtor has met the best interests test of subsection (2). Unsecured creditors would have received no distribution had a Chapter 7 liquidation occurred. The second prong is met whether or not they have yet received any distribution from the Trustee. The parties agree that Norwest has received a distribution of approximately \$4,200 on its unsecured claim.

Debtor has succeeded in meeting the requirement of 1328(b)(3), that modification is not practicable. Under 1329, modified plans must meet the requirements of confirmation contained in 1325(a). One of the requirements is that secured creditors receive the value of their secured claim. 11 U.S.C. 1325(a)(5)(B). Another requirement is that Debtors be able to make all the payments under the plan. 11 U.S.C. 1325(a)(6). These requirements must be met within five years after the first payment was due under the original plan.

According to the Trustee's Report of Receipts, Debtor continued to make some of the plan payments after Mrs. Oliphant's death in May 1994. Between then and April 1996, he paid \$8,300 of the total due on the plan during that time of \$14,400. In Nelson, the Court refused to find that the debtor met the requirement that modification not be practicable where he had waited until it was too late to modify

the Chapter 13 plan. 135 B.R. at 308. In that case, Debtor sought a hardship discharge in 1991 based on events occurring in 1987 and 1988. Id. at 307. The circumstances of this case distinguish it from Nelson. Debtor's payments in the last two years of the term of the plan indicate some good faith effort to comply with the plan even after his wife's death. Considering his reduced income, earlier modification would not likely have produced any increase in distribution to unsecured creditors.

Modification is not practicable at this time because the five years required by 1329(c) for completion of payments under a modified plan has already lapsed. The Court concludes that Debtor has met the requirements of the final prong of 1328(b). Having met each of the three elements of 1328(b), Debtor is entitled to a hardship discharge. Norwest's remaining claim is excepted from discharge pursuant to the Claims Report and the consent judgment creating the claim.

### **DISMISSAL**

The Trustee has moved for dismissal based on delinquency in plan payments. Section 1307(c)(6) states that the court may dismiss a Chapter 13 case, "for cause, including . . . [a] material default by the debtor with respect to a term of a confirmed plan." Failure to make payments to the trustee under a confirmed plan may be considered a material default. In re Belanger, 60 B.R. 656, 656-57 (Bankr. D.R.I. 1986); In re Olson, No. L90-00423W, slip op. at 7-8 (Bankr. N.D. Iowa Oct. 14, 1994) (granting dismissal where debtors failed to make payments for over a year and their current employment situation made completion of the plan unlikely).

Some authorities do not consider simple failure to make payments under the plan an automatic ground for dismissal. Whether missed payments constitute a "material default" must be determined on a case-by-case basis. Dismissal under 1307(c)(6) is a matter for the Court's discretion.

Williams, slip op. at 5 (citations omitted).

The Court concludes that dismissal for material default is not appropriate in this case. Debtor has paid more than 80% of the amount due under the confirmed plan. The Court also takes into consideration the death of Mrs. Oliphant, the regularity of payments prior to her death and Debtor's attempts to continue payments thereafter. Secured and priority claims appear to have been satisfied. Unsecured creditors have received more than they would have in a Chapter 7 liquidation. In these circumstances, granting a hardship discharge is more appropriate than dismissal for material default.

### **RELEASE OF IRS LIENS**

As a final matter, Debtor's post-hearing brief requests a ruling requiring the IRS to release its liens according to the confirmed plan. Under 506, when a creditor has received the full amount of its allowed secured claim, no lien remains on the collateral. In re Hargis, 103 B.R. 912, 916 (Bankr. E.D. Tenn. 1989). "If the allowed secured claim is not fully satisfied in the chapter 13 plan due, for example, to a hardship discharge under section 1328(b) . . . , a lien will continue to exist after the case to the extent that the allowed secured claim has not been fully paid." Id. (citation omitted).

On this issue, the Court is unable to conclusively determine under the record as it now stands whether the entire allowed secured claim of the IRS has been satisfied. The Court is also unwilling to address this issue in the absence of full opportunity for the IRS to participate. Therefore, the Court will not at this time enter a ruling requiring the IRS to release its liens as Debtor requests.

**WHEREFORE**, Debtor's Motion for Hardship Discharge is GRANTED.

**FURTHER**, Trustee's Motion to Dismiss is DENIED.

**FURTHER**, the remaining claim of Norwest Bank Iowa, N.A. is excepted from discharge.

**FURTHER**, the Court declines to rule on release of IRS liens at this time, without prejudice to later considering the issue if it becomes necessary.

**SO ORDERED** this 29th day of August, 1996.

Paul J. Kilburg  
U.S. Bankruptcy Judge