

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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RICKI DARLE ENGELBY  
MARY ANN ENGELBY

Bankruptcy No. 96-10008KC

*Debtor(s).*

Chapter 13

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### ORDER RE: FINAL CONFIRMATION HEARING

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This matter came before the undersigned on July 1, 1997 for final hearing on confirmation of Debtors' First Amended Bankruptcy Plan. The following were present at the hearing: Thomas McCuskey for Debtors, Martin McLaughlin for the IRS, and Carol Dunbar as Chapter 13 Trustee. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

#### FINDINGS OF FACT

Debtor Ricki Engelby runs a business involving the use of global positioning systems primarily in the agricultural area. He has recently completed a project with Monsanto and expects a final payment on that project of \$25,000. Mr. Engelby's business has no other currently existing contracts but he anticipates that his income will increase in the latter part of this year. Debtor Mary Ann Engelby works at a retirement center 40 hours a week earning \$7.00 per hour.

Debtors' First Amended Plan calls for monthly payments of \$350 during the first year, \$650 during the second year and \$950 during the third through fifth years. The Plan also anticipates a balloon payment of at least \$12,000 to the IRS at the end of the plan. Debtors have more than \$100,000 equity in their homestead. They indicate that, if necessary, they would refinance or sell their home to make Plan payments.

Schedules I and J show that Debtors currently have a shortfall in income of approximately \$100 per month. Debtors assert this will be remedied by increased income or cutting expenses. Debtors have not kept up with proposed plan payments in the first year of their plan. They are presently about \$2,000 in arrears on plan payments. They are also in arrears in paying business and personal expenses and have entered into a Stipulation with Brenton Mortgages, Inc. regarding their arrearages in mortgage payments. At the hearing, Mr. Engelby expressed his intention of paying arrearages in mortgage payments and personal and business expenses, and past due Plan payments, as well as current and future Plan payments and ongoing living expenses with the final \$25,000 payment from the Monsanto project.

Trustee filed an objection to confirmation. She pointed out that Debtors did not keep current with plan payments during the first year and objects that the Plan is vague. Trustee states that the IRS priority claim must be paid during the life of the Plan, not in a balloon payment after the Plan is completed. Intra-America Seed Services, Inc. joins in the Trustee's objections. It also objects that its claim is not

treated in the Plan and that 5% payment to unsecured creditors indicates a lack of the requisite good faith under § 1325(a)(3).

IRS objects to Debtors' proposal to pay its claim with a balloon payment and wishes to receive 9 percent interest on its claim rather than 8 percent proposed by Debtors. It asserts the plan is not feasible because Debtors have not shown their ability to make all the payments under the plan.

### CONCLUSIONS OF LAW

To be confirmed, a plan must meet the requirements of § 1325(a). 11 U.S.C. § 1329(b)(1). Under § 1325(a)(6), debtors have the burden to prove that their plan is feasible, i.e. that they "will be able to make all payments under the plan and to comply with the plan." Debtors must have a sufficiently stable income to regularly make payments under the plan. 5 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d § 115:4 (1994). In addition, if debtors are unable to meet living expenses, the plan fails the feasibility test of § 1325(a)(6) and cannot be confirmed. In re Wilson, 117 B.R. 714, 714 (Bankr. M.D. Fla. 1990).

Several factors affect the feasibility of a plan, including: the future earning capacity of the debtor, the future disposable income of the debtor, whether the plan provides for payment of interest to secured creditors, whether the plan provides significant payment to secured creditors,, the debtor's perseverance and motivation to execute the plan successfully, the type of employment the debtor is engaged in or may be engaged in, whether the plan includes a cushion for unexpected expenses, and whether the plan considers the possibility of inflation. See In re Olson, No. L90-00423W, slip op. at 7 (Bankr. N.D. Iowa Oct. 14, 1994) (citations omitted). When debtors are unemployed at the time of confirmation of the plan, they need only have a realistic expectation of income; their future income stream need not be a certainty. In re Compton, 88 B.R. 166, 167 (Bankr. S.D. Ohio 1988).

The Bankruptcy Code does not explicitly prohibit Chapter 13 plans which call for lump sum payments. In re Stone, 145 B.R. 38, 39 (Bankr. C.D. Ill. 1992). Courts tend to scrutinize such plans, however, in terms of feasibility of the plans. In re Hogue, 78 B.R. 867, 870 (Bankr. S.D. Ohio 1987). In In re Craig, 112 B.R. 224, 225 (Bankr. N.D. Ohio 1990), the debtor proposed to fund the plan with increasing payment amounts over five years plus a lump sum proposed to be collected after confirmation from a promissory note admitted to be uncollectible. The court found that the graduated payment schedule culminating in the lump sum payment did not meet the confirmation requirements of good faith and feasibility. Id. at 226. In Hogue, the debtors proposed to consummate their plans with sales of their residences at the end of their three to five year plans. 78 B.R. at 869. The court stated that it could not conclude that the plans satisfied the feasibility requirement because of the myriad of contingencies which could preclude the proposed sales or refinancing, particularly where they were postponed for three to five years. Id. at 874. It noted that the lump sum or balloon payment provision appeared to constitute little more than a delaying tactic. Id. n.11.

Mr. Engelby's business was started quite recently and does not have a history on which to base future projections of income. Debtors appear to be highly motivated to perform under a Chapter 13 Plan. The feasibility of their performance, however, is extremely problematical. Debtors have been unable to keep up with plan payments over the 18 months since their petition was filed. Because Mr. Engelby's business is in its infancy, it is difficult to conclude that it will produce sufficient income to fund the plan's initial payment amount, let alone the graduated payments proposed. Although paying a lump sum at the end of the term of the Plan is not precluded by the Code, neither is it encouraged. The

Court is unwilling to require the IRS to wait five years for payment of its priority claim based on Debtors' projections of future income and home equity.

Based on the foregoing, the Court concludes that Debtors have failed to prove that they "will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). Their future income stream is speculative. They have been unable to keep current in their Plan payments and are in arrears in mortgage payments and personal and business expenses at this point. The Plan does not meet the feasibility requirement of § 1325(a)(6) and cannot be confirmed.

WHEREFORE, confirmation of Debtors' First Amended Bankruptcy Plan is DENIED.

SO ORDERED this 14th day of July, 1997.

Paul J. Kilburg  
U.S. Bankruptcy Judge