

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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July 11, 1996

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Bruce J. Gering,
Assistant U.S. Trustee
230 South Phillips Avenue, Suite 502
Sioux Falls, South Dakota 57102

Subject: *In re Dale G. and Brenda L. Hermanson,*
Chapter 7; Bankr. No. 95-40711

Dear Counsel:

The matter before the Court is the fee application and supplement filed by Attorney Michael J. McGill, counsel for Debtors, and the United States Trustee's responses to them. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Attorney McGill is entitled to an allowance of \$800.50, less compensation of \$375.00 already received.

Summary of facts. Debtors filed a Chapter 7 petition and their schedules and statement of financial affairs on December 12, 1995. Their counsel, Michael J. McGill, disclosed that he had received \$540.00 (which presumably included the filing fee) in compensation from Debtors for bankruptcy-related services. The § 341 meeting of creditors was held January 10, 1996. Debtors filed some amended schedules on March 8, 1996. Debtors also received their discharge on March 8, 1996. Debtors' claimed exemptions were contested by Trustee Rick A. Yarnall and were settled by stipulation. There has been no other significant activity in the case.

On April 10, 1996, Attorney McGill filed an application for interim fees from the estate under 11 U.S.C. §§ 330 and 331. The United States Trustee filed an objection on April 29, 1996 on the grounds that § 330(a) did not provide for compensation to a Chapter 7 debtor's attorney. In the alternative, the U.S. Trustee argued that Attorney McGill had not provided a sufficient description of services on certain dates, that the itemization of

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services contained some apparent errors, that all expenses were not sufficiently described, and that some compensation sought was for services that benefited Debtors only, not the estate and, therefore, did not qualify as an administrative expense under 11 U.S.C. § 507.

A hearing was held May 21, 1996. Attorney McGill was directed to file a supplement to his application that addressed the U.S. Trustee's objections.

Attorney McGill filed the supplemental application on June 4, 1996. Therein, he sought \$692.00 for 6.92 hours of service at \$100.00 per hour, \$277.13 in expenses, and \$48.26 for sales tax. He also stated he had already received \$375.00 from Debtors so that the balance requested was \$642.39.

On June 4, 1996, the U.S. Trustee filed a response and stated that the supplement now provided sufficient details of the services and expenses. The U.S. Trustee stood on their objections regarding the applicability of § 330(a) to Chapter 7 debtors' attorneys and the fact that some services and related expenses benefitted Debtors only, not the estate.

Discussion. Attorney McGill, as a Chapter 7 debtor's attorney, generally is entitled to compensation for analyzing Debtors' financial condition, rendering advice and assistance to Debtors in determining whether to file a petition in bankruptcy, preparing the petition, the schedules of assets and liabilities, and the statement of financial affairs, and representing Debtors at the § 341 meeting of creditors. *In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5 (Bankr. D.S.D. July 1, 1992) (citing *In re Nu-Process Industries, Inc.*, 13 B.R. 136, 138 (Bankr. E.D. Mich. 1981)).

To receive compensation for other Chapter 7 services not related to the "basics" described above, a debtor's attorney generally must show how such services were necessary and helped preserve the estate, as required by 11 U.S.C. § 503(b)(1)(a). See *In re Brandenburger*, 145 B.R. 624, 628-29 (Bankr. D.S.D. 1992); *In re Rice*, Bankr. No. 93-40057, slip op. (Bankr. D.S.D. December 18, 1995); *Walgamuth*, Bankr. No. 91-50270, slip op. at 5; *In re Kauer*, Bankr. No. 88-30038, slip op. at 10-11 (Bankr. D.S.D. March 27, 1991); *In re McDaniel Enterprises, Inc.*, Bankr. No. 88-10199, slip op. at 4 (Bankr. D.S.D. April 9, 1991); *In re Marolf Dakota Farms Cheese, Inc.*, Bankr. No. 89-50045, slip op. at 8 (Bankr. D.S.D. October 19, 1990); *In re Hanson*, Bankr. No. 386-00136, slip op. at 7 (Bankr. D.S.D. March 8, 1989); and *In re Tri-County Water Assoc., Inc.*, 91 B.R. 547, 550 (Bankr. D.S.D. 1988).

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As amended in 1994, there is no provision under § 330(a) for awarding a Chapter 7 attorney any fees. This Court has not strictly applied the amended statute but instead has looked at other factors when a Chapter 7 debtor's attorney wants to be paid from the estate. See, e.g., *In re Lovaas*, Bankr. No. 95-40170, slip op. (Bankr. D.S.D. March 5, 1996) (Debtor's attorney allowed compensation from estate for services performed in Chapter 13 prior to conversion to Chapter 7).

There may be other considerations when a Chapter 7 debtor's attorney wants compensation for "helping the case trustee." See, e.g., *Rice*, Bankr. No. 93-40057, slip op. at 6-8. These considerations include:

1. Was the attorney formally employed by the estate as required by § 327(a)?

The standards for employment of estate professionals set forth in § 327(a) help insure that estate professionals do not represent competing interests. Court approval of estate professionals further helps the court control administrative expenses and "prevent those performing work without the necessary authority from being 'officious intermeddler[s] or gratuitous volunteer[s]'" *In re Sound Radio, Inc.*, 145 B.R. 193, 202 (Bankr. D.N.J. 1992). Further, do circumstances warrant a retroactive employment order? See *United States Trustee v. Grenoble Apartments, II* (*In re Grenoble Apartments*), II., 152 B.R. 608, 611. n.6 (D.S.D. 1993); *In re Engercy Co-op, Inc.*, 95 B.R. 961, 963 (Bankr. N.D. Ill. 1988).

2. Should the trustee or the trustee's attorney have performed the services that the debtor's attorney performed?

As the Court stated in *Rice*, Bankr. No. 93-40057, slip op. at 7, to compensate a debtor's attorney from the estate for any work that the case trustee should have done would foster "double dipping" from the estate. See *In re Urrutia*, 137 B.R. 563, 567 (D. P.R. 1990) (services by a debtor's counsel that are compensated from the estate should fall within the scope of duties performed by a debtor's attorney and should not duplicate or bypass the responsibilities of the trustee).

3. Were the services performed legal in nature?

Only professional services, not secretarial, should be compensated from the estate, regardless of the professional who is seeking compensation. See *Urrutia*, 137 B.R. at 567.

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When Attorney McGill's application and supplement and the U.S. Trustee's responses are considered in this case, the Court concludes that services on December 12 and 13, 1995, January 10 and 17, 1996, and March 9, 14, 16, and 29, 1996 benefitted only Debtors and not the estate. Therefore, compensation for those services and reimbursement for related expenses are not properly paid from the estate. [With two dates excluded, the Court adopts the list of these non compensable services and related expenses that are set forth in the U.S. Trustee's response to the supplemental application.]

The Court will allow Attorney McGill compensation for his time on March 1 and 5, 1996 for preparing an amendment to Debtors' schedules. The U.S. Trustee's objection to services on those dates will be overruled. Attorney McGill's time in insuring that the schedules are complete and accurate sufficiently benefits the estate and is, therefore, compensable. Postage of \$2.84 related to the amendments also will be allowed.

All other services itemized in Attorney McGill's supplemental application fall within the realm of those generally performed by a Chapter 7 debtor's counsel that benefit the estate. See *Walgamuth*, Bankr. No. 91-50270, slip op. at 5. Therefore, Attorney McGill will be compensated for them.

Summary. Attorney McGill will receive compensation for services and reimbursement of expenses for those requested in his supplement, excluding those discussed above. As calculated by the Court, Attorney McGill will receive \$487.00 for 4.87 hours of service at \$100.00 per hour, expenses of \$275.38, and sales tax of \$38.12 for a total allowance of \$800.50. When the \$375.00 Attorney McGill has already received on account is applied, Attorney McGill is entitled to an additional \$425.50 from the estate. Fees for all other services and expenses shall not be paid from the estate but shall be Debtors' personal responsibility from post-petition funds.

An appropriate order will be entered.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh
cc: case file (docket original)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUL 11 1996

Clerk
U.S. Bankruptcy Court, District of S.D.

Case: 95-40711 Form id: 122 Ntc Date: 07/11/96 Off: 4 Page : 1
Total notices mailed: 2

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Intereste U.S. Trustee, Shrivens Square, Suite 502, 230 S. Phillips Avenue, Sioux Falls, SD 57104-6321