

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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January 10, 2001

Thomas P. Maher, Esq.
Counsel for Debtor
210 North Euclid Avenue
Pierre, South Dakota 57501

Bruce J. Gering,
Assistant United States Trustee
#502, 230 South Phillips Avenue
Sioux Falls, South Dakota 57104

Subject: *In re Alvina E. Iron Hawk,*
Chapter 7; Bankr. No. 00-30084

Dear Counsel:

The matter before the Court is the United States Trustee's request for a review under 11 U.S.C. § 329(b) of Attorney Maher's fees as Debtor's counsel. 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 Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that Attorney Maher's fees for services rendered in this case were reasonable and no adjustments will be made under § 329(b).

SUMMARY OF MATERIAL FACTS. Alvina E. Iron Hawk ("Debtor") filed a Chapter 7 petition and schedules on September 18, 2000. Debtor's assets included a small equitable interest in some tribal trust land, two vehicles, a trailer home, and limited personalty. All assets, except a car of minimal value, were declared exempt. Debtor scheduled a few secured creditors, whose claims were essentially unsecured, except for the trailer home mortgagee. She scheduled unsecured claims totaling less than \$1,000. Debtor is single and has five dependents. Her monthly income is \$1,700 and her monthly expenses total \$1,404.

Debtor was represented in the bankruptcy by Thomas P. Maher. Attorney Maher disclosed that Debtor agreed to pay him \$1,500 for

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the bankruptcy case. For the \$1,500, Attorney Maher agreed to analyze her financial situation, prepare the necessary petition, schedules, and statements, and represent her at the meeting of creditors.

On October 5, 2000, the United States Trustee filed a motion seeking a review of Attorney Maher's fees for reasonableness under § 329(b). She argued that Debtor's case was not sufficiently complicated to warrant fees of \$1,500.

Attorney Maher filed a response on October 16, 2000. He stated the \$1,500 fee included the \$200 filing fee, that he had received \$1,337 before the petition was filed, and that Debtor has agreed to pay the remaining \$163 before the meeting of creditors. He also said this case was unusual because it took longer to get all the necessary information from Debtor and because he had to investigate the status of two debt guarantees and the nature of Debtor's interest in the tribal trust land. Attorney Maher stated that the original fee agreement was for \$1,000 (plus the filing fee), but Debtor agreed to an increase when Debtor's original circumstances changed.

A hearing was held November 16, 2000. Appearances included Attorney Maher and Assistant United States Trustee Bruce J. Gering. At the hearing, Attorney Maher essentially renewed the arguments made in his response. He also presented an itemization of his services in this case. His hours totaled 16.30 from November 4, 1999, when he first met with Debtor in anticipation of filing, through November 15, 2000, when he negotiated with one of the secured creditors regarding a vehicle. Attorney Maher's costs, excluding the filing fee, were only \$3.60. Sales tax was \$83.22. The total documented fees (compensation, costs, and tax) were \$1,673.82. Debtor has now paid the full \$1,500 that she agreed to pay.

The case has proceeded without further activity. The case trustee has filed a report stating he has not found any assets from which to pay creditors' claims. Debtor received her general discharge of debts on December 20, 2000. The case will be closed following resolution of this fee matter.

APPLICABLE LAW. Section 329 governs a determination of whether fees for a debtor's attorney, from whatever source paid, exceed the reasonable value of the services rendered. The fees that are reviewable under § 329(b) and Fed.R.Bankr.P. 2017 include those paid to the debtor's attorney within one year before the petition for legal services in "contemplation of or in connection with the [bankruptcy] case," which may include post-petition

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compensation. 11 U.S.C. § 329(a); *Schroeder v. Rouse (In re Redding)*, 247 B.R. 474, 477-78 (B.A.P. 8th Cir. 2000). The sole purpose behind § 329(b) is to prevent overreaching by a debtor's attorney. *Id.* at 478.

A Chapter 7 debtor's attorney generally is entitled to compensation from the debtor's pre-petition assets for analyzing a debtor's financial condition, rendering advice and assistance to the debtor 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 the debtor at the § 341 meeting of creditors. *In re Dawson*, 180 B.R. 478, 479 (Bankr. E.D. Tex. 1994); *In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5 (Bankr. D.S.D. July 1, 1992). These are the services that aid the Chapter 7 debtor in performing his legal duties under the Bankruptcy Code and are necessary to the administration of the case. *Dawson*, 180 B.R. at 479.

Following a survey in this District of Chapter 7 cases filed in 2000 through October, the average fee charged was found to be between \$600 and \$800. A more precise average was difficult to calculate because not all of the attorneys' disclosures under § 329(a) clarified whether the filing fee was included in the sum they had received.¹

DISCUSSION. Based on the record before the Court, it appears that Attorney Maher's fees in this case reflect the work actually performed. The Court also concludes that Attorney Maher's fees are reasonable. The case was a bit out of the ordinary and warranted slightly higher fees because it took several months for Debtor to get the necessary information to Attorney Maher, the schedules and statement of financial affairs had to be redone, and a somewhat unique land title issue arose.

The only error that may have occurred in this case was that Attorney Maher may not have been aware that he may not take fees pre-petition for services to be performed post-petition (excluding the meeting of creditors). Doing so is contrary to the Bankruptcy Code, as explained in *Snyder v. Dewoskin (In re Mahendra)*, 131 F.3d 750 (8th Cir. 1997).

¹ The Local Bankruptcy Rules Committee is currently studying a possible "reasonable" fee standard for an average Chapter 7 case in this District.

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The Court recognizes that the Code's requirements, as interpreted in *Mahendra*, puts Chapter 7 debtors and their counsel between a rock and a hard place in reaching a workable fee arrangement. Both the Code and the *Mahendra* case, however, do not allow the Court to present any better alternatives than for a Chapter 7 debtor's attorney's pre-petition retainer/flat fee to cover only the usual services through the meeting of creditors and for any post-petition bankruptcy services to be paid from post-petition, non bankruptcy estate assets.² See generally *Gordon v. Hines* (*In re Hines*), 147 F.3d 1185 (9th Cir. 1998).

In this case, it does not appear that Attorney Maher ran afoul of *Mahendra*, regardless of whether he was aware of it. The services rendered by Attorney Maher pre-petition and those related to the meeting of creditors totaled \$1,111.50. When sales tax of \$66.69 and the \$200 filing fee are added, the \$1,378.19 total is relatively close to the \$1,337.00 he actually received pre-petition. Attorney Maher's post-petition services actually totaled \$275.50. A portion of that debt was essentially forgiven under the fee arrangement. Debtor's final payment of \$163, from non estate assets, will cover the balance.

An appropriate order will be entered.

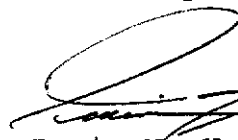
I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list.

JAN 10 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By RN

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

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

JAN 10 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

INH:sh

CC: case file (docket original; copies to parties in interest)

² This assumes that payment for the attorney's fees is coming from the Chapter 7 debtor. If someone else is paying the debtor's legal bills, the attorney must still disclose the fees and they must still be reasonable, as required by §§ 329(a) and (b) and Fed.R.Bankr.P. 2016(b), and the fees must still be reasonable, as required by § 329(b) and Rule 2017, but the property of the estate and conflict of interest issues raised in *Mahendra* may not be present.

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Total notices mailed: 4

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Aty Maher, Thomas P. 201 N. Euclid, Pierre, SD 57501

Trustee Lovald, John S. PO Box 66, Pierre, SD 57501

Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321