

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Western Division

In re: )  
 ) Bankr. No. 95-50063  
BENJAMIN STANLEY KAISER, ) Chapter 13  
d/b/a Ben's Custom Wood and )  
Cabinetry, a sole ) MEMORANDUM OF DECISION RE:  
proprietorship, ) CONFIRMATION OF PLAN  
 )  
Debtor. )

The matter before the Court is the confirmation of Debtor's plan and the objections thereto filed by interested parties. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Debtor's plan cannot be confirmed because it does not appear to provide appropriately for Marilyn Kaiser's secured claim.

I.

Debtor and Marilyn S. Kaiser were divorced on January 6, 1995. Under the Judgment and Decree of Divorce and Findings of Fact and Conclusions of law entered that day, Debtor was awarded certain commercial property subject to the encumbrances against it. This property had a net equity of \$50,000.00. Marilyn Kaiser received the marital home subject to the encumbrances against it. This property had a net equity of \$30,000.00. Marilyn Kaiser also received a \$10,000.00 judgment against Debtor to "off-set the difference" in the equity between the two properties. No alimony was awarded to either party. Debtor was ordered to pay monthly child support.

Debtor filed a Chapter 13 petition and plan on March 14, 1995. Debtor's schedules listed Marilyn Kaiser as an unsecured claim holder for \$10,000.00. On May 1, 1995, Marilyn Kaiser filed a proof of claim for \$11,450.00 plus interest. On the proof, she described her claim as unsecured and non priority. Debtor did not object to Marilyn Kaiser's proof of claim.

Debtor's plan did not provide any special treatment for Marilyn Kaiser's claim. Her claim was included in the class of unsecured claims that was to receive 20% of their claim plus disposable income.<sup>1</sup>

Objections to the plan were filed by Trustee Rick A. Yarnall and Marilyn Kaiser. Marilyn Kaiser objected that Debtor's plan tries to avoid her claim that arises out of the couple's divorce decree and property settlement. She argues she was given a judicial lien on Debtor's property that cannot be avoided under 11 U.S.C. § 522(f). She further argues that the debt is non dischargeable under 11 U.S.C. § 523(a)(15).

The confirmation hearing was held May 15, 1995. Appearances included Trustee Yarnall, Robert M. Nash for Debtor, Jean M. Cline for Marilyn Kaiser, and John H. Mairose for Community First State Bank of Hot Springs, an unsecured claim holder. Trustee Yarnall and Attorney Nash reported that the Trustee's objections were resolved.

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<sup>1</sup> The plan is not clear on the disposable income provision but Trustee Yarnall has objected to insure that disposable income is paid to unsecured claim holders. 11 U.S.C. § 1325(b)(1).

Attorney Kline argued at the hearing that Marilyn Kaiser is a priority creditor under *Farrey v. Sanderfoot*, 111 S.Ct. 1825 (1991). Attorney Mairose conceded that Marilyn Kaiser may have a non dischargeable claim but argued that she does not have a priority claim under 11 U.S.C. § 507.

### III.

A Chapter 13 plan must provide for the full payment, over time, of all claims entitled to priority under § 507, unless the creditor agrees to different treatment. 11 U.S.C. § 1322(a)(2). Under § 507(a)(7), priority is given to allowed claims of a former spouse for alimony, maintenance, or support of the ex-spouse. See *In re Grady*, 180 B.R. 461 (Bankr. E.D. Va. 1995) (first reported decision in a Chapter 13 case on § 507(a)(7), as amended by the Bankruptcy Reform Act of 1994).

A Chapter 13 plan also must provide that each holder of a secured claim will retain his lien and receive the present value of his claim on the effective date of the plan, unless the creditor accepts other treatment or the debtor surrenders the property. 11 U.S.C. § 1325(a)(5).

If a Chapter 13 debtor completes his plan payments, he will receive a discharge. 11 U.S.C. § 1328(a). The debts that are discharged include all that were provided for by the plan except those governed for by § 1322(b)(5) [long-term debts whose default was cured through the plan]; the kinds specified in §§ 523(a)(5) [family support debts], 523(a)(6) [debts arising from a willful and malicious injury], or 523(a)(9) [tort claims arising

from the debtor's operation of a motor vehicle while intoxicated]; and any criminal restitution debt or fine. 11 U.S.C. § 1328(a). Section 523(a)(15), the new Code provision governing the dischargeability of family support debts, including property settlements if the debtor has the ability to pay them, does not apply in a Chapter 13 case.

III.

Marilyn Kaiser's judgment attached to Debtor's equity in the business property he received in the divorce action and became a lien against it. S.D.C.L. § 15-16-7. Her judgment cannot be voided under 11 U.S.C. § 524(a)(1) before discharge. Further, Debtor has not sought to avoid the judgment lien under 11 U.S.C. § 522(f).<sup>2</sup> Since Debtor had \$50,000.00 in equity in the property when he received it in the divorce, Marilyn Kaiser's claim should be fully secured.<sup>3</sup> As such, Marilyn Kaiser must receive the present value of her claim under the plan and retain her lien or the property must be surrendered to her. 11 U.S.C. § 1325(a)(5). Since the plan does not provide for such treatment, the plan cannot be confirmed.

Marilyn Kaiser does not have a priority claim under

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<sup>2</sup> Debtor may not prevail on a § 522(f) action under *Farrey v. Sanderfoot*, 111 S.Ct. 1825 (1991), or under South Dakota's homestead laws, especially where he is claiming the business property as part of his homestead and where the state court found there was \$50,000.00 in equity in the business property when Marilyn Kaiser's lien attached.

<sup>3</sup> Neither party filed a valuation motion under 11 U.S.C. § 506. That action may still be commenced, if necessary, to determine the correct value of Marilyn Kaiser's secured claim.

§§ 507(a)(7) and 1322(a)(2). The debt clearly arises from a division of property and was not intended as support. See *Williams v. Williams (In re Williams)*, 703 F.2d 1055 (8th Cir. 1983) (the crucial issue is the function the award was intended to serve). While this Court makes every effort to insure that a bankruptcy debtor fulfills debts created pursuant to a divorce or separation decree, the facts of this case do not permit a conclusion that the \$10,000.00 judgment was a support debt. The clear purpose of the \$10,000.00 was to equalize the parties' respective equities in the property each received in the divorce. Further, alimony or other support was not awarded to either party.

For whatever reason, Congress did not give Chapter 13 creditors the added protection of § 523(a)(15). Instead, if a Chapter 13 creditor holding a property division claim concludes that the debtor could fulfill a property division obligation but has chosen not to do so in his plan, the creditor may file an objection to the plan under § 1325(a)(3) for lack of good faith or move to dismiss the case for cause under § 1307(c).

The Court notes that Marilyn Kaiser's proof of claim incorrectly classifies her claim as unsecured, non priority. Debtor was entitled to rely on her classification. 11 U.S.C. § 502(a) and F.R.Bankr.P. 3001(f). However, the time for filing proofs of claims does not expire until July 19, 1995, and, therefore, Debtor may still amend her claim. Accordingly, the Court will not penalize her for that error. Had the deadline for proofs of claims passed, a different result may have been reached.

An order will be entered denying confirmation of Debtor's plan dated March 14, 1995. Debtor shall file and serve a modified plan within twenty days of entry of that order and notice the modified plan for hearing on the next available court date. Marilyn Kaiser should amend her claim promptly.

Dated this \_\_\_\_\_ day of June, 1995.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Western Division

In re: )  
 ) Bankr. No. 95-50063  
BENJAMIN STANLEY KAISER, ) Chapter 13  
d/b/a Ben's Custom Wood and )  
Cabinetry, a sole ) ORDER DENYING CONFIRMATION  
proprietorship, ) OF DEBTOR'S PLAN  
 ) DATED MARCH 14, 1995  
Debtor. )

In recognition of and compliance with the Memorandum of Decision Re: Confirmation of Plan entered this day,

IT IS HEREBY ORDERED that confirmation of Debtor's plan dated March 14, 1995 is DENIED; and

IT IS FURTHER ORDERED that Debtor shall file and serve a modified plan within twenty days and notice it for hearing at the next available court date.

So ordered this \_\_\_\_\_ day of June, 1995.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)