

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
DEANE & SHERYL HOFFMAN, ) CASE NO. BK96-82928  
)  
DEBTORS. ) CH. 7

MEMORANDUM

Introduction

On February 10, 1998, a Memorandum and Journal Entry were filed in this case, Filing Nos. 103 and 102. That Memorandum and Journal Entry are hereby vacated and this Memorandum and the contemporaneously filed Journal Entry are substituted therefor.

Hearing was held on February 4, 1998, on Motion for Turnover. Appearances: John Lingelbach for the debtors and Richard Myers for the trustee. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Background

On December 24, 1996, the debtors filed a Chapter 13 bankruptcy in the District of Nebraska. During the pendency of the case, the debtors paid \$15,662.00 from post-petition wages from personal services to the Chapter 13 Trustee. The Debtors filed a motion to convert the Chapter 13 case, in which a plan had not been confirmed, to a Chapter 7. The Court entered an Order for Relief under Chapter 7. The Debtors filed a motion for turnover of the amounts paid to the Chapter 13 Trustee, all of which had been forwarded to the Chapter 7 Trustee. James Stumpf, the Chapter 7 Trustee, filed a resistance to the Debtors' motion for turnover in which he contended that the particular equities of this case require that the disputed funds be distributed by the Chapter 7 Trustee for the benefit of the Debtors' priority and lien creditors.

Issue

Must post-petition, pre-confirmation payments to the Chapter 13 Trustee, made from personal service income of the

debtors, be returned to the debtors upon conversion to a Chapter 7?

### Decision

Sections 541(a)(6) and 348(a) and 348(f) of the Bankruptcy Code require that such funds be returned to the debtors upon conversion to Chapter 7.

### Discussion

The Bankruptcy Code, at 11 U.S.C. § 541(a)(6) excepts from the bankruptcy estate earnings from personal services performed after the commencement of the bankruptcy case. In direct contrast, Section 1306(a)(2) includes earnings from personal services performed by the debtor after commencement. Section 348(a) provides, in pertinent part, "[conversion] does not effect a change in the date of filing the petition". 11 U.S.C. section 348(a). The effect of these sections as read together is discussed in In Re Swift, 81 B.R. 621 (Bankr. W.D. Wash. 1987), which involved a nearly identical set of facts as the present case. In Swift, the court concluded that upon conversion from a Chapter 13 case, "the Chapter 7 case is deemed to have been commenced on the date of filing of the Chapter 13 petition, the wage[s] represent earnings and are therefore not included in the estate. Section 1306 is rendered inapplicable by the conversion,". Id at 622. See also In Re Bemish, 200 B.R. 408 (Bankr. M.D. Fla. 1995); Smith v. Strickland, 178 B.R. 524 (M.D. Fla. 1995). Koch v. Myrvold (In re Myrvold), 784 F.2d 862 (8th Cir. 1986) (Property inherited more than 180 days after the Chapter 11 petition date is not property of the Chapter 7 estate upon conversion from Chapter 11).

In the 1994 amendments to the Bankruptcy Code, Congress specifically dealt with the issue of property of the estate and the converted case. At 11 U.S.C. § 348(f)(1)(A), the statute now reads:

Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title--

(A) property of the estate in the converted

case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion. . .

Both prior case law and the specific statutory language define property of the estate in a case converted from Chapter 13 to Chapter 7. That property does not include wages earned post petition and does not include any amount the Chapter 13 Trustee has received from the debtor from wages or assets liquidated post petition.

The Chapter 7 Trustee has not advanced a compelling argument in support of his claim that it would be particularly inequitable in this case to deny the debtors' motion for turnover. Based on the provisions of the Code and case law, the debtors' motion for turnover should be granted.

#### Conclusion

The motion for turnover filed by the debtors is granted. Separate journal entry to be filed.

DATED: February 18, 1998

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

LINGELBACH, JOHN	492-9336
MYERS, RICHARD	492-9222

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
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DEANE & SHERYL HOFFMAN,	)	CASE NO. BK96-82928
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 7
	)	Filing No. 83
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: February 18, 1998
<u>Defendant(s)</u>	)	HEARING DATE: February
	)	4, 1998

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Turnover filed by the Debtors.

APPEARANCES

John Lingelbach, Attorney for debtors  
Richard Myers, Trustee

IT IS ORDERED:

Motion for turnover is granted. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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