

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
VAN D. O'ROURKE)
JOAN F. O'ROURKE,) CASE NO. BK87-2259
)
DEBTORS) Chapter 13

MEMORANDUM OPINION

A hearing on objection to plan confirmation and on motion for relief to permit Conservator to proceed with a State court lawsuit was heard on November 25, 1987. Appearing on behalf of the debtors was Mary Powers of Omaha, Nebraska. Appearing on behalf of Conservator were Norman Wright and John Andreason of Omaha, Nebraska.

Debtors filed a joint Chapter 13 petition and plan. The plan provides for \$25 per month payment to the trustee for a three-year period. This payment will cover administrative fees and little else. Debtors propose to pay the creditor holding a security interest in their vehicle on a direct pay basis.

The Chapter 13 trustee has not objected to the plan but the Conservator of Bessie Stephenson objected on numerous grounds including good faith and alleged that Conservator would receive more in a Chapter 7 liquidation than in a Chapter 13 plan as proposed.

Evidentiary hearing was held, and this memorandum opinion constitutes the findings of fact and conclusions of law required by Rule 7052.

Facts

Debtor Joan O'Rourke is the daughter of Bessie Stephenson. Mrs. O'Rourke handled the financial affairs of Mrs. Stephenson for several years prior to a conservator being appointed for Mrs. Stephenson in August, 1983. In addition to handling many of Mrs. Stephenson's financial transactions, Mrs. O'Rourke provided housekeeper services and arranged for nursing care and meal preparation for Mrs. Stephenson.

While providing for Mrs. Stephenson, Mrs. O'Rourke transferred over \$100,000 from accounts in the name of Mrs. Stephenson only to accounts in the name of Mrs. Stephenson and Mrs. O'Rourke, to accounts in the name of Joan O'Rourke only and to accounts in the name of Joan and Van O'Rourke.

Mrs. O'Rourke used funds from these various accounts for the benefit of Mrs. Stephenson and for Mrs. O'Rourke's personal benefit and that of her family.

When the Conservator was appointed, Mrs. O'Rourke delivered \$40,000 to the Conservator but kept \$10,000 in her own accounts, which she testified was done at the request of her mother. Her testimony is that she spent the \$10,000, after the Conservator was appointed, on food, furniture and the expenses for her mother that were not paid by the Conservator.

Her testimony on this point is uncontradicted. She further testified that the remaining funds from all of the assets she took control of would be approximately \$100,000 and that those funds were spent for the care of Mrs. Stephenson in 1981, 1982 and 1983 in the approximate amount of \$23,000, \$35,000 and \$44,000 in each respective year. Although admitting that ordinary expenses for the care of Mrs. Stephenson were approximately \$12,000 per year, Mrs. O'Rourke claims income taxes and other expenses caused the totals to increase.

Mrs. O'Rourke is unemployed and claims in the schedules and her testimony that she has no assets. She is unable to provide receipts for the expenditures allegedly made on behalf of Mrs. Stephenson because she claims Mrs. Stephenson insisted all payments be made in cash.

Mrs. O'Rourke testified that all monetary transfers and all expenditures were with the consent and approval of Mrs. Stephenson, who was mentally alert and capable of such approval. This testimony is uncontroverted.

In 1986 the Conservator filed a lawsuit against Mrs. O'Rourke in the District Court for Lincoln County, Nebraska, alleging that Mrs. O'Rourke converted Mrs. Stephenson's assets to her own use although in a position of trust with regard to Mrs. Stephenson. Discovery proceeded in the civil matter and was halted by the filing of this petition. In addition to the civil lawsuit against Mrs. O'Rourke, Mr. O'Rourke was arrested on a criminal complaint for theft by deception. The charge was later dismissed prior to trial.

Mr. O'Rourke is employed at the Union Pacific Railroad and has been so employed for more than thirty years. His wages vary but have exceeded \$25,000 per year for many years. He admits funds of Mrs. Stephenson were used by his family but claims such

use was with permission of Mrs. Stephenson and, in most cases, was for her benefit. He acknowledges loans from Mrs. Stephenson in the early 1980's for \$15,000, which he has listed on the schedules, although he believes the statute of limitations has run on the obligation.

He has no written proof of his expenditures on behalf of Mrs. Stephenson.

The Conservator, Ruby Smith, testified in support of the objection. She is also a daughter of Bessie Stephenson. The original conservator was a bank in North Platte, Nebraska. It's counsel investigated some of the history of the financial transactions, but Mrs. Smith felt the investigation did not go deep enough and requested the appointment of another conservator. A North Platte attorney was then named conservator. While he was conservator, he employed Mrs. Smith's personal attorney to file the State court lawsuit on behalf of the conservatorship. At some point the lawyer withdrew as conservator, and Mrs. Smith was named conservator.

Mrs. Smith now spends considerable time taking care of her mother and attempts to conserve her mother's remaining assets by providing as much labor as she can so that outside help is not required. The monthly expenses now are less than \$1,000 per month, even though, in Mrs. Smith's opinion, more nursing care is provided than was the case in 1983 and previous years.

Mrs. Smith testified without contradiction that her mother was mentally alert and would understand what was going on at this trial. The State court authorized conservatorship is a proceeding to take control of the assets of the protected person and does not, in this case, imply mental incompetence.

Mrs. Stephenson did not testify and neither party indicated to the Court whether Mrs. Stephenson had ever been asked about the truthfulness of the statements concerning the use of her assets by Joan O'Rourke.

Discussion and Conclusions of Law

There is no factual dispute between the parties about the amount of money that Mrs. Stephenson had in 1980 and the amount given to the Conservator in 1983, and there is no factual dispute concerning the transfer of funds from Mrs. Stephenson to the debtors, individually and jointly.

The factual dispute which does exist concerns the use of the money, whether for the benefit of Mrs. Stephenson or not, and debtors' authority to use the funds for themselves, as well as Mrs. Stephenson. This dispute exists because it is the position of Conservator that Mrs. O'Rourke was in a fiduciary capacity with

Mrs. Stephenson and, therefore, even with Mrs. Stephenson's permission, her money could not be used for the personal benefit of Mrs. O'Rourke's family. The Conservator believes such use of funds is a conversion of Mrs. Stephenson's assets and in a Chapter 7 case the amount converted would be a nondischargeable debt under 11 U.S.C. § 523(a)(4).

Outside of bankruptcy, this dispute would be resolved in the pending civil lawsuit. The trier of fact could find a fiduciary duty on the part of Mrs. O'Rourke and could find that she had converted Mrs. Stephenson's assets to her own use. The trier of fact could then determine the amount of funds converted, and judgment could be entered against Mrs. O'Rourke. On the other hand, the trier of fact could choose to believe Mrs. O'Rourke's version and find no fiduciary duty and/or no conversion.

There is no claim in State court against Mr. O'Rourke, and it seems the only objection to his participation in the Chapter 13 plan is that he benefited from his wife's activities, and, therefore, the plan is not proposed in good faith.

If judgment were entered against Mrs. O'Rourke for conversion by a fiduciary, that judgment would be arguably nondischargeable in a Chapter 7 bankruptcy pursuant to 11 U.S.C. Section 523(a)(4).

But Section 523(a)(4) does not apply in a Chapter 13 case. A judgment creditor in a Chapter 13 case desiring to stop the discharge of its judgment, which would be nondischargeable in Chapter 7, must convince the Bankruptcy Court that the Chapter 13 plan is not filed in good faith and, therefore, should not be confirmed. Education Assistance Corp. v. Zellner, 827 F.2d 1227 (8th Cir. 1987).

Zellner is a recent Eighth Circuit decision discussing the interplay between the nondischargeability aspects of certain debts under Chapter 7 standards and the dischargeability of those debts in the Chapter 13 context. Although the debt in Zellner was a student loan, which would be nondischargeable in Chapter 7 pursuant to 11 U.S.C. Section 523(a)(8), the Court found it dischargeable in Chapter 13. The Zellner analysis applies to any Chapter 13 plan proposing to discharge obligations which are nondischargeable in Chapter 7 cases by operation of Section 523.

The Eighth Circuit in Zellner requires the Bankruptcy Court to analyze the proposed Chapter 13 plan for "good faith" on the following criteria:

- [1] whether the debtor has stated his debts and expenses accurately;

- [2] whether debtor has made any fraudulent misrepresentation to mislead the bankruptcy court;
- [3] whether debtor has unfairly manipulated the Bankruptcy Code.

Zellner at 1227 (citations omitted).

Applying the first standard to the instant facts, it appears that the joint debtors' expenses and debts are accurately stated. The debtors listed on the schedule of debts a \$15,000 debt to Mrs. Stephenson and listed as creditors, with no amount shown, the lawyers for the Conservator and the Conservator. Obviously, debtors acknowledged a claim by the Conservator but did not acknowledge amount. Furthermore, by separate memorandum decision this Court has previously ruled that the claim of Conservator is disputed, contingent and unliquidated.

Concerning the second standard, the debtors have answered questions about their use of the money not only at trial, but in a Rule 2004 examination and in a deposition taken for the State court case and admitted at this trial without objection. They admit the use of the funds but deny such use was without authorization or fraudulent. Debtors provide no written verification of the use of the funds, but, on the other hand, Conservator presented no evidence, such as testimony from Mrs. Stephenson or anybody else, that the funds were used for purposes other than those claimed by debtors.

There is no evidence that assets have been hidden by the debtors.

Debtors filed this Chapter 13 case to discharge a debt that is disputed and perhaps nondischargeable in Chapter 7 and to stop the accrual of attorney fees which had already involved several thousand dollars. A review of the debtors' actual financial condition, the testimony at trial, and the inability to defend the civil lawsuit because of inadequate finance, all lead this Court to determine that this filing is not an unfair manipulation of the Bankruptcy Code.

If Congress desired to make Section 523 applicable in Chapter 13 cases, Congress had the perfect opportunity in 1986 when it amended Title 11 by the addition of Chapter 12 and included Chapter 12 debts within the purview of Section 523. Therefore, the Court finds the plan was proposed in good faith. 11 U.S.C. § 1325(a)(3) (1987).

Conservator, in addition to arguing bad faith, claims the plan is not confirmable because it does not provide that all of debtors' disposable income will be applied to the unsecured claims

pursuant to 11 U.S.C. Section 1325 (b)(1)(B) (1987). That section is triggered by this objection and the plan will not be confirmed until amended to conform to this requirement.

Finally, Conservator claims that the plan violates Section 1325(a)(4) because under Chapter 7 the debt would not be dischargeable, and, therefore, under Chapter 7 the Conservator would receive more than the Conservator will receive under the Chapter 13 plan. This objection requires a Chapter 7 liquidation analysis. In Chapter 7 all non-exempt assets would be liquidated, administrative fees deducted and the balance distributed to holders of unsecured claims.

According to debtors' schedules, there are no assets subject to liquidation. Therefore, no distribution is available to creditors if debtors had filed in Chapter 7. Even if Conservator receives nothing from the Chapter 13 plan, Conservator is receiving "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7." 11 U.S.C. § 1325(a)(4) (1987).

The Conservator does not accept this analysis and argues that the "benefit" it would receive by Chapter 7 liquidation is the right to pursue the nondischargeable debt by State court action and, therefore, the Court should conclude that since the Conservator will not receive that "benefit", it is getting less under the plan that it would under Chapter 7.

In Zellner, the Court discussed this very issue and decided against the Conservator's position. At page 1225 of Zellner, the Court states: "The relevant issue is whether a creditor would in fact receive more in a Chapter 7 liquidation than it will under the proposed Chapter 13 plan. To determine this, the bankruptcy court must value the estate property, taking into account those assets that would be beyond the reach of creditors in a Chapter 7 liquidation. If any creditor would receive more in a liquidation, the plan may not be confirmed. Thus, even if the loan could not have been discharged under Chapter 7, that does not mean that [creditor] would actually have been paid in a liquidation."

This language is clear. The "benefit" of having a right to pursue a nondischargeable debt is not a factor in the Section 1325(a)(4) calculation.

Conclusion

What has occurred here is a family dispute. Two sisters have different ideas about the appropriate use of their mother's assets and so lawsuits get filed, criminal charges get filed and bankruptcy gets filed. The Court can do nothing about the family

problem--the facts. The Court can do nothing about the dischargeability question--the law, except review the facts in the face of the Zellner decision.

There is no "nondischargeability" issue with regard to Mr. O'Rourke. There is no evidence that he had a fiduciary relationship with Mrs. O'Rourke or that he converted Mrs. Stephenson's assets. The plan can be confirmed as soon as it is amended to include disposable income.

Mrs. O'Rourke has no assets and no income. Mrs. O'Rourke's sister, the current Conservator, apparently thinks Mrs. O'Rourke is hiding money someplace but presented no evidence of that. The bitterness between the sisters is apparent. Both felt their mother would understand the proceeding, but neither took her deposition.

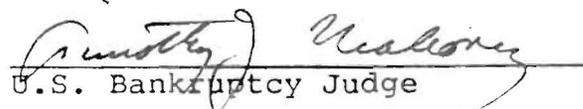
This Court has carefully reviewed the evidence in view of the Zellner standards. The actions of Mrs. O'Rourke are not applauded or condoned. However, even if the facts permitted the Court to find breach of a fiduciary duty and/or conversion, Congress decides by statute the specific types of obligations which should keep a Chapter 13 plan from confirmation and the evidence is insufficient to meet the Congressional standards for denial of discharge as narrowly defined by the Eighth Circuit.

Objection to plan overruled. Motion for relief from automatic stay overruled. Debtor to amend plan regarding disposable income within 21 days.

Separate Journal Entry will be filed.

DATED: January 27, 1988.

BY THE COURT:


U.S. Bankruptcy Judge

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