UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
DAVID & MARIE BUTCHER,	)	CASE NO. BK91-82126
	)	Ch. 13
DEBTOR(S)	)	Filing No. 50, 56, 67

MEMORANDUM

Hearing was held on September 16, 1992, on the objection to plan filed by Ralston Bank. Appearing on behalf of the debtors was James Crampton of Omaha, Nebraska. Appearing on behalf of the Bank was Margaret Hershiser of Koley, Jessen, Daubman & Rupiper, P.C., Omaha, Nebraska.

Ralston Bank, a creditor holding an unsecured claim which is co-signed by a non-debtor, has filed an objection to the debtors' second modified plan. The plan provides that the debtors shall pay to the Trustee $147.25 per month for thirty-six months. The Trustee would pay Trustee fees and attorney fees of $500.00; then pay a secured debt to Ford Motor Credit in the total amount of $2,157.00 and, after all of the above payments, pay the Ralston Bank co-signed debt in the total amount of $1,723.00. No other unsecured debt would be paid.

The Bank objected on feasibility grounds and objects because it is the position of the Bank that its interest will be irreparably harmed by the plan.

It was clear during the trial that the funds available to the debtors after deducting from their net monthly income all of their necessary expenses would be less than the amount necessary to fund the plan. During the trial, and, by order of the Court, thereafter, the debtors amended their list of monthly expenses so that the net available for payment under the plan will adequately fund the plan.

Concerning feasibility, the Court cannot confirm a plan until it is satisfied that the debtor is capable of carrying out the provisions of the plan. 11 U.S.C. § 1325(a)(6). Although the debtor does not have to guarantee the plan's success, projected income and expenses must be realistically estimated. Distribution of income to creditors at the expense of basic necessities such as medical expenses, food and clothing may preclude confirmation of the plan. The Court may also look to past payment history, employment prospects, economic consideration such as inflation, or family circumstances. In

short, there is no preset criteria which a confirmable plan must meet.

Case law reveals certain factors which concern courts more than others. The predominant concern of most bankruptcy courts is whether the debtor has failed to provide for expenses which are bound to arise during the course of the plan. In In re Perskin, 9 Bankr. 626, 633 (Bankr. N.D. Tex. 1981), the court held "The cases addressing this issue generally hold that where debtor's plan is tightly constructed with little cushion for unexpected contingencies, Section 1325(a)(6) remains unsatisfied." Thus, in In re Washington, 6 Bankr. 226 (Bankr. S.D. Cal. 1980), the court refused to confirm a plan which had a $44.00 per month cushion, but did not include allowances for food, clothing or medical costs. Similarly, in the case of In re Lucas, 3 Bankr. 252 (Bankr. S.D. Cal. 1980), the court determined that a plan which provided $60.00 per month for medical care and clothing was not realistic.

In the case before the Court, the debtors who have three children to support have reduced their anticipated monthly expenses to enable them to modify the plan. From the original expense list, they have reduced food costs by $30.00, clothing by $25.00, medical and dental expenses by $30.00 and health insurance by $55.00. Their monthly expenditures under the modified plan total $1,946.00. After subtracting such amount from net income, the debtors are left with $154.37, out of which $147.25 must be paid to the Trustee under the plan. This leaves a very small cushion. However, during the six months this case has been pending prior to the trial and prior to the modifications of the expense budget, the debtors have kept current on all payments to the Trustee.

Although the money is tight in this case, as in most other Chapter 13 cases, the plan is feasible. There are a number of expenses shown on the expense list which could be reduced in case of an emergency. For example, the debtors have listed $200.00 per month on Schedule J for "recreation, clubs, and entertainment, newspaper, magazines, etc." They have also listed $40.00 per month for charities. These amounts have not been itemized but arguably could be reduced if the debtors are otherwise unable to meet plan obligations. In addition to the ability of the debtors to reduce expenses, this Court gives the debtors the benefit of the doubt on their ability to make payments because of the history of their payments. They were current with payments to the Trustee at the time of the trial and no evidence has been presented by either party which would lead the Court to believe that the debtors will be unable to meet their obligations under the plan in the future.

The second prong of the objection is that the creditor Bank, outside of a Chapter 13 bankruptcy, could proceed against the co-signer on the unsecured debt. However, because of the co-debtor stay of 11 U.S.C. § 1301(a), the Bank is prohibited from pursuing its rights against the co-debtor even though it will not receive any funds from the Trustee for approximately eighteen months. The Bank contends that this delay in either receiving payment or in being permitted to pursue its other remedies significantly impairs its ability to collect.

Evidence was presented through testimony of a Bank officer that the experience of the Bank is not good with regard to collecting on obligations of co-debtors if the Bank is delayed from such collection process for a term of months.

Although Section 1301(a) prevents creditors from pursuing co-debtors for the life of the plan, it does not affect the co-debtor's liability for the debt. A creditor may obtain relief from the stay in order to pursue co-debtors if the plan does not provide for full payment of the debt, or if the creditor can prove that the stay will irreparably harm the creditor. Section 1301(c)(2)-(3). This plan provides for full payment of the allowed claim and, therefore, the creditor has the right to relief from stay or the right to obtain a denial of confirmation of this plan only under Section 1301(c)(3).

Few courts have addressed the issue of whether a long delay in payment by a Chapter 13 debtor on a co-signed debt is the equivalent of "irreparable harm" as that term is used in Section 1301(c)(3). However, the Bankruptcy Court in the case of In re Harris, 16 Bankr. 371 (Bankr. E.D. Tenn. 1982), did consider this very issue. In that case the bank alleged that it was irreparably harmed pursuant to the plan, because although it would eventually be paid, it was not receiving its payments on a timely basis pursuant to the terms of the note. The court found that although late payments are undesirable from the point of view of the bank, the fact that the bank would receive payments later than it desired or had contracted for was not sufficient in and of itself to rise to the status of irreparable harm.

In that case, the court had previously found that the debtor appeared to be able to make all payments under the plan and to comply with the plan. In this case, this Court has found in an earlier part of this memorandum that the plan is feasible.

Other than being forced to wait eighteen months to receive payment, the Bank has presented no evidence that it will be irreparably harmed. There is no evidence before this Court concerning the financial status of the co-debtor on the petition date or on the date of the trial. There is no evidence before this Court concerning the reason, if any, that the Ralston Bank either required or consented to take the co-debtor's signature in consideration for granting the original loan. Without evidence of the issues just mentioned, this Court would be required to speculate as to the current ability of the Bank to collect on the debt from the co-debtor if relief was granted in the same way

that the Court would be required to speculate as to the ability of the Bank to collect from the co-debtor eighteen months from now or later. Such speculation is not appropriate.

Section 1301 has been in the Bankruptcy Code since its adoption and effective date in 1979. Lenders are charged with the knowledge of federal law. The result of such charge is that they are deemed by this Court to be aware that if they grant a loan and take as security for such loan a co-signature of a person who actually receives no part of the loan proceeds, and the actual debtor files a Chapter 13 case, the lender will be prohibited from pursuing collection efforts against the co-debtor if the plan provides for full payment and is feasible. It is difficult to understand how the Bank can be determined to be irreparably harmed by the operation of the statute as it is now written and has been written for the last thirteen years.

It would be possible for the debtors to propose a different plan. That plan could provide for payment to Ford Motor Credit Company and Ralston Bank on a pro rata basis. It could provide for many other possibilities and payment plans. However, it does not so provide and it is not the practice of this judge to write plans for debtors. The debtor has submitted a modified plan which is feasible and meets all other requirements of the Code. The plan is confirmable, even though there might be another plan which the debtor could propose that would also be confirmable. The fact that the plan is detrimental to a creditor although it complies with the statutory provisions and is confirmable is not a valid ground for granting relief from the co-debtor stay and is not a valid ground for denying confirmation.

The objections are denied and the plan as modified may be confirmed.

Separate journal entry shall be filed.

Clerk shall provide a copy of this memorandum and journal entry to counsel for each party and the Trustee.

BY THE COURT:

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

Copies to:

James Crampton, Attorney
Margaret Hershiser, Attorney
Kathleen Laughlin, Trustee

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DAVID & MARIE BUTCHER,	)	CASE NO. BK91-82126 A
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DEBTOR(S)	)	
	)	CH. 13
	)	Filing No. 50, 56, 67
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	
	)	DATE:
Defendant(s)	)	HEARING DATE: September 16, 1992

Before a United States Bankruptcy Judge for the District of Nebraska regarding objection to plan and resistance.

APPEARANCES

James Crampton, Attorney for debtors
Margaret Hershiser, Attorney for Bank

IT IS ORDERED:

The objections are denied and the plan as modified may be confirmed.

BY THE COURT:

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