



IT IS ORDERED as set forth below:

Date: November 10, 2008

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 08-67270

Gail Celeste Green,

CHAPTER 13

Debtor.

JUDGE MASSEY

ORDER DENYING OBJECTION OF TRUSTEE TO CONFIRMATION OF PLAN

A bankruptcy court may not confirm the plan of a Chapter 13 debtor if the Chapter 13 trustee or a creditor objects to confirmation based on the failure of the plan to provide that all of the debtor's "projected disposable income to be received in the applicable commitment period" will be used to pay claims of unsecured creditors. 11 U.S.C. § 1325(b)(1)(B). Disposable income is a defined term that in general means the debtor's "current monthly income" less reasonable and necessary expenses for the support of the debtor or dependents of the debtor, though the amounts of certain expenses may be limited as provided in regulations of the Internal Revenue Service. 11 U.S.C. § 1325(b)(2) and (3). The term "current monthly income" is defined in section 101(10A)

of the Bankruptcy Code to include the income of a debtor's spouse only in a joint case; current monthly income includes amounts paid by anyone, including a non-filing spouse, for a debtor's reasonable and necessary household expenses. Under section 1325(b)(4)(A)(ii), the "applicable commitment period" cannot be less than five years if the "current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12," is equal to or greater than the median family income of a household of the same size as debtor's household in the same state. Regular readers of the Internal Revenue Code may be intrigued by this necessarily abridged statement of the statutory intricacy forming the basis for understanding the issue here; others, perhaps not so much.

The issue presented is whether under section 1325(b)(4)(A)(ii), the gross income of a non-debtor spouse must be included in the calculations determining the applicable commitment period.

The term "current monthly income" is defined in section 101(10A) as follows:

(10A) The term "current monthly income"--

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if

not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

The gross income of Gail Celeste Green, the Debtor, during the six-month period preceding the filing of this case averaged \$2,050 per month. Ms. Green's spouse is not a debtor in this Chapter 13 case (so this is not a joint case), and she has no dependent. Her spouse's gross monthly income was \$3,750.00. In papers filed by Ms. Green, she computed her husband's monthly contribution to payment of her household expenses to be \$1,580, by subtracting certain of his personal expenses from his gross income. Debtor computes her current monthly income computed to be \$3,630 (the sum of \$2,050 and \$1,580). Her annualized current monthly income is \$43,560, an amount less than \$51,425, which was the median family income of 2-person household in Georgia in 2008. On this basis, Debtor contends that her applicable commitment period is 3 years.

The Chapter 13 Trustee in this case, Nancy J. Whaley, asserts that the phrase "current monthly income of debtor and debtor's spouse combined" in section 1325(b)(4)(A)(ii), means the gross income of the debtor plus the gross income of the debtor's spouse. The sum of Debtor's and her spouse's gross incomes is \$5,800, which multiplied by 12 is \$69,600, an amount greater than the median family income of a 2-person household in Georgia. On this basis, the Trustee objects to confirmation of Debtor's plan because it does not provide for an applicable commitment period of 5 years.

To resolve this dispute, the Court must determine the meaning of subpart (ii) of section 1325(b)(4)(A), which provides:

(4) For purposes of this subsection, the “applicable commitment period”--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

. . .

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals[.]

In her brief in support of her objection to confirmation, the Trustee initially argues without explaining her reasoning that the meaning she assigns to section 1325(b)(4)(A)(ii) is plain. She then readily concedes that the statutory definition of “current monthly income” seems to undermine her position because it includes the income of a debtor’s spouse only in a joint case. To resolve the conundrum, she argues that the Court should rely on two canons of statutory interpretation to determine “the meaning of this ambiguous provision,” thereby abandoning her short-lived argument that the meaning of section 1325(b)(4)(A)(ii) is plain in the way she suggests.

The first canon on which the Trustee relies is the “‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’ *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotation marks omitted)[.]” *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 449 (2001). The Trustee asserts that if the words “current monthly income . . . of the debtor’s spouse” did not include the income of a non-debtor spouse, the words “of the debtor’s spouse combined” would be mere surplusage.

The second canon of construction relied on by the Trustee is that ““where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972).” *Russello v. U.S.*, 464 U.S. 16, 23, 104 S.Ct. 296, 300 (1983). The Trustee contrasts section 1325(b)(3), which uses the term “current monthly income” in connection with the debtor only, with section 1325(b)(4)(A)(ii), which adds the words “and the debtor’s spouse combined.” She concludes that “current monthly income of the debtor and the debtor’s spouse combined” necessarily must be a greater amount than the current monthly income of the debtor alone and hence the greater amount must include all of the gross income of the spouse. To support her position, the Trustee relies on the unpublished Memorandum Opinion entered on September 17, 2008 in *In re Ariyaserbsiri* (Bankr. E.D. Tex., Case No. 07-41348), in which that court reached the conclusion advanced here by the Trustee based on similar reasoning.

Debtor’s response to the Trustee’s arguments is simple. It is that section 1325(b)(4)(A)(ii) does in fact have a plain meaning. Under section 101(10A), current monthly income includes the income of a spouse only if the spouse is also a debtor in the same (joint) case. This case is not a joint case. Therefore, a non-debtor’s spouse has no “current monthly income.” It follows that the calculation of the combined current monthly income of Debtor and her spouse is \$3,630 plus \$0 for a total of \$3,630. This interpretation is supported by all of the reported cases in which courts have considered the issue presented here. *In re Quarterman*, 342 B.R. 647 (Bankr. M.D.Fla. 2006), *In re Barnes*, 378 B.R. 774, 778 (Bankr. S.C. 2007), *In re Charles*, 375 B.R. 338, 342 (Bankr. E.D.Tex. 2007); *In re Shahan*, 367 B.R. 732, 736 -737 (Bankr. D.Kan. 2007), *In re Hall*,

2007 WL 445517, 3 (Bankr. C.D.Ill. 2007), *In re Grubbs*, 2007 WL 4418146 (Bankr. E.D. Va. 2007), *In re Coup*, 2008 WL 2388114, 4 (Bankr. N.D.Ohio 2008) (dictum), *In re Borders*, 2008 WL 1925190, 2 (Bankr..S.D.Ala. 2008) (dictum). The holding in the unreported case on which the Trustee relies, *In re Ariyaserbsiri*, *supra*, is perhaps the sole exception to the majority rule.

This Court adopts the majority rule. An individual who is not a debtor has no “current monthly income.” The sum of Ms. Green’s current monthly income of \$3,630 and zero is \$3,630. The product of \$3,630 and 12 is less than the median annual income for a 2-person household in Georgia. Therefore, the applicable commitment period is 3 years.

The Trustee’s arguments for wrenching out a different meaning of section 1325(b)(4)(A)(ii) are without merit. In the first place, her effort to make sense of the phrase “of the debtor’s spouse combined” in the separate case of a married debtor necessarily requires that the phrase “current monthly income” in section 1325(b)(4)(A)(ii) either have a double meaning or have no discernable meaning at all. The phrase would have a double meaning if “current monthly income” means what section 101(10A) says it means with respect to the debtor but means with respect to the debtor’s non-filing spouse the difference between the spouse’s gross income and the amount, if any, of household expenses of the debtor paid by the spouse. This methodology, which the Trustee did not advocate, would reach her arithmetical target of \$5,800, the sum of the gross incomes of Debtor and her spouse.

The problem with such a construction is that it requires making up a definition for the spouse’s current monthly income that not only conflicts with section 101(10(10A) but also has no independent traction in section 1325(b). It is a methodology that begs the question because it requires the creation of the definition to achieve the desired result.

In contending that the current monthly income of a debtor's spouse for purposes of section 1315(b)(4)(A)(ii) must mean the spouse's gross income, the Trustee commits the same error of logic. Furthermore, the arithmetic would remain a problem if Debtor's current monthly income is computed in accordance with section 101(10A). The combined incomes would exceed the gross incomes combined because the portion of the spouse's income used to pay the expenses of Debtor would be counted twice.

To avoid counting a portion of the spouse's income twice, the Trustee abandons section 101(10A) altogether by inventing a second definition for "current monthly income" of the debtor measured for purposes of section 1325(b)(4)(A)(ii) solely by the debtor's gross income. This definition is also not grounded in the statute and also is a function of the desired arithmetical result.

The Trustee's lexicology, instead of creating clarity, collapses in contradiction because section 1325(b)(4)(A)(ii) must have the same meaning in a case of an unmarried debtor that it has in a case of a married debtor. Under the Trustee's construction, a single debtor with gross income slightly less than the applicable median income would have current monthly income below the applicable median income, and thereby would pay for 3 years only, even if someone else regularly pays all of that debtor's household expenses. There is no principled way to attribute a range of chameleon-like meanings to the term "current monthly income" used in section 1325(b)(4)(A)(ii) so as to color the result based on the background of a debtor's marital or other circumstances.

By trying to shoe-horn the "current monthly income . . . of the debtor's spouse" into a meaning calculated to grab all the income of a non-debtor spouse, the Trustee ignores the

command of the first eight words of the very first section of the Bankruptcy Code, which states, “In this title the following definitions *shall apply*” 11 U.S.C. § 101. (Emphasis added.)

Where a statute defines a term applicable throughout the statute, courts have “no license to ignore such a direction. *Coluatti v. Franklin*, 439 U.S. 379, 392 n. 10, 99 S.Ct. 675, 684 n. 10, 58 L.Ed.2d 596 (1979).” *U.S. v. Ramirez-Ferrer*. 1995 WL 237041, 18 (1st Cir. 1995). The term “current monthly income” means in section 1325(b)(4)(A)(ii) what section 101(10A) says it means.

The Trustee’s arguments about surplusage and reconciling slightly different phrases in the same statute are exceedingly overblown. The canons on which the Trustee relies are not absolute. That is why the Supreme Court in *TRW Inc. v. Andrews*, *supra*, and *Russello v. U.S.*, *supra*, qualified the canons discussed with the phrases “upon the whole,” “if it can be prevented,” and “generally presumed.”

If the fact that zero is a number is ignored, it is quite true that the words “and the debtor’s spouse” in section 1325(b)(4)(A)(ii) would be surplusage in a case involving a married debtor filing alone. Why this should bother the Trustee is puzzling. After all, the word “combined” is, without qualification, surplusage in a joint Chapter 13 case, where the “current monthly income of the debtor and the debtor’s spouse” is the “average monthly income from all sources that . . . in a joint case the debtor and the debtor's spouse receive,” 11 U.S.C. § 101(10A), because there is nothing to combine. Even more to the point, the words “of the debtor’s spouse combined” are surplusage in a Chapter 13 case filed by an unmarried debtor. Thus, the existence of surplusage in section 1325(b)(4)(A)(ii) reflects poor drafting, not obscured meaning. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), which became effective on

October 17, 2005 and added the language in section 1325(b)(4)(A)(ii) under discussion, has achieved notoriety for drafting errors.¹

Finally, it can be presumed that Congress had in mind a policy that section 1325(b)(4)(A)(ii) was designed to help implement. The Trustee has not, however, explicitly articulated that policy. From the Trustee's standpoint, it would be logical to view the policy as requiring the economic unit that is the household to pay what it can afford to pay for a period determined by the gross income of the married couple. This view thus imagines the couple as a unit with financial lives and non-financial lives intertwined.

The difficulty with such a view is that not all marriages are stable in times of financial difficulty. Prolonging the length of a plan would prolong the financial pressures on the marriage, particularly where, as here, the spouse earning the most is not the debtor. Similarly, a debtor can be married and separated at the same time; the gross income of the spouse may have no impact on a debtor's ability to pay. Yet, section 1325(b) does not distinguish between a debtor who enjoys a happy, stable marriage and a debtor who is separated or whose marriage is threatened by the financial difficulties.

¹ See, e.g., Waldron and Berman, *Principled Principles of Statutory Interpretation: a Judicial Perspective after Two Years of BAPCPA*, 81 Am. Bankr. L.J. 195, 197 (2007) ("Although it would be unreasonable to expect complete, or nearly complete, uniformity in the interpretation of BAPCPA, the stark differences in how the new law is being interpreted throughout the nation's bankruptcy courts have compromised, if not crippled, any pretense of predictability in the analysis a court might apply in interpreting its many poorly drafted provisions."); *In re Kaplan*, 331 B.R. 483, 484 (Bankr. S.D.Fla. 2005) ("After reading the several hundred pages of text in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Reform Act"), one conclusion is inescapable. The new law is not a model of clarity.")

The statute clearly permits confirmation of a 3-year plan of an unmarried debtor with current monthly income below the applicable median, even if the debtor has a live-in companion who pays some of the debtor's household expenses and who has a gross income in excess of the median. In stark contrast, the Trustee's construction of the statute would reflect the intent of Congress to require a married debtor to make plan payments for 5 years, even at the risk of divorce and with no financial support provided by the spouse, merely because the sum of gross incomes exceeds the applicable median. This Court finds no evidence of such intent in the wording of section 1325(b), in Chapter 13 or in the Bankruptcy Code considered as a whole.

Based on this analysis, the Trustee's objection to confirmation of Debtor's plan is DENIED. The Clerk is directed to enter the standard order confirming the plan.

END OF ORDER