

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:08-bk-3308-PMG

FIDEL ANTONIO PRIETO
and LAURA PRIETO,

Debtors.

Chapter 13

**ORDER ON TRUSTEE'S MOTION TO MODIFY
CONFIRMED CHAPTER 13 PLAN**

THIS CASE came before the Court for a final evidentiary hearing to consider the Motion to Modify Confirmed Chapter 13 Plan filed by Douglas W. Neway, as Chapter 13 Trustee. (Doc. 53).

In the Motion, the Trustee asserts that the payments made by the Debtors pursuant to their Chapter 13 Plan should be increased, because their monthly disposable income increased after the Plan was confirmed.

Background

The Debtors, Fidel Antonio Prieto and Laura Prieto, filed a petition under Chapter 13 of the Bankruptcy Code on June 10, 2008. The Debtors have one child.

On their Schedule of Current Income filed with the petition, the Debtors disclosed that Mr. Prieto was employed by Progress Energy as an electrical engineer, and that Mrs. Prieto was employed by Progress Energy as an administrative assistant. (Doc. 1, Schedule I).

On December 18, 2008, the Debtors filed a Second Amended Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income. (Doc. 36).

According to the Statement, Mr. Prieto earned gross wages or salary in the amount of \$8,011.00 per month, and Mrs. Prieto earned gross wages or salary in the amount of \$981.00 per month. Since the Debtors' annualized monthly income was greater than the applicable median family income in Florida, their disposable income was determined under §1325(b) of the Bankruptcy Code.

On December 18, 2008, the Debtors also filed a Second Amended Chapter 13 Plan. (Doc. 35). The Second Amended Plan provided for the Debtors to pay the Chapter 13 Trustee the sum of \$600.00 per month for months 1 through 6 of the Plan, and the sum of \$675.00 per month for months 7 through 60 of the Plan. Consequently, the Debtors proposed to pay the total sum of \$40,050.00 to the Trustee over the 60-month life of the Plan.

Of the total amount paid by the Debtors, the Plan provided that creditors holding general unsecured claims would receive pro rata distributions in the aggregate sum of \$17,006.50, after payment of administrative, priority, and secured claims. (Doc. 35, ¶ 2h). The Claims Register indicates that unsecured claims in the amount of \$139,970.34 had been filed by the claims bar date. Consequently, the Plan provided for distribution to unsecured creditors of approximately 12% of their claims.

The Debtors' Second Amended Chapter 13 Plan was confirmed on March 10, 2009. (Doc. 47).

On December 31, 2009, the Trustee filed the Motion to Modify Confirmed Chapter 13 Plan that is currently under consideration. (Doc. 53). In the Motion, the Trustee asserts that the Debtors had provided "financial information for the prior year that reflects an increase in monthly disposable income and accordingly, the confirmed plan payments should be increased."

The modified Plan proposed by the Trustee provides:

The Debtors shall pay to the Trustee the sum of \$600.00 for months 1 through 6; \$675.00 for months 7 through 9; \$691.00 for month 10; \$675.00 for months 11 through

19; \$1,055.00 for months 20 through 60. The additional funds will be provided to the unsecured claims as additional distribution to those timely filed and allowed.

(Doc. 53, Trustee's Proposed Modified Confirmed Chapter 13 Plan, ¶ 1). Essentially, therefore, the Trustee proposes to increase the Debtors' payments from \$675.00 per month to \$1,055.00 per month in the last 40 months of the Plan. According to the Trustee, the modification would result in a distribution to unsecured creditors of approximately 25% of their claims. (Transcript, p. 42).

In response, the Debtors contend that the modified Plan proposed by the Trustee would require them to make payments that exceed their monthly disposable income. (Doc. 55).

Discussion

Section 1329(a) of the Bankruptcy Code provides:

11 USC § 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan.

11 U.S.C. §1329(a)(1). "The policy underlying §1329 is to 'allow upward or downward adjustment of plan payments in response to changes in a debtor's circumstances which substantially affect the ability to make future payments.'" In re Wetzel, 381 B.R. 247, 251 (Bankr. E.D. Wisc. 2008)(quoting In re Nott, 269 B.R. 250, 252 (Bankr. M.D. Fla. 2000)).

Pursuant to §1329(a), a Chapter 13 Trustee may seek to increase the payments under a confirmed plan where the debtor's income increased after confirmation. In re Midgley, 413 B.R. 820 (Bankr. D. Or. 2009); In re Brown, 332 B.R. 562 (Bankr. N.D. Ill. 2005).

The criteria for approval of a proposed modification are set forth in §1329(b)(1). That section provides:

11 USC §1329. Modification of plan after confirmation

...

(b)(1) Section 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

11 U.S.C. §1329(b)(1). Pursuant to §1329, therefore, a proposed modified Plan should satisfy the general requirements for confirmation. In re Ludwig, 411 B.R. 632, 635 (Bankr N.D. Iowa 2008). The modified plan must satisfy the good faith requirement, for example, and must also satisfy the "best interest of creditors" test and the feasibility test. 11 U.S.C. §1325(a)(3),(4), and (6). See In re Wetzel, 381 B.R. 247, 254-55 (Bankr. E.D. Wisc. 2008).

By its terms, however, §1329 does not incorporate §1325(b) of the Bankruptcy Code. Consequently, the "projected disposable income" test, as set forth in §1325(b), does not expressly apply to modified plans under §1329. In re Hill, 386 B.R. 670, 676 (Bankr. S.D. Ohio 2008).

For purposes of evaluating a modified plan, therefore, the debtor's income and expenses are not calculated according to the method provided by §1325(b) and §707(b)(2) of the Bankruptcy Code. Instead, the debtor's actual income and expenses at the time of the proposed modification are used to determine whether the payments should be adjusted.

Since section 1325(b) is not one of the requirements for confirmation of a modified plan, and section 1325(b) is the section that incorporated the section 707(b)(2)(A) expenses, the court could then look at the debtor's actual ability to pay.

In re Kalata, 2008 B.R. 552856, at 6 (Bankr. E.D. Wis.)(Emphasis supplied). In fact, evaluating a debtor's actual, post-confirmation income and expenses is generally regarded as consistent with the requirements of §1325(a), which is expressly applicable to modifications under §1329(b)(1).

Confirming a modified plan that reflects a significant increase in available income and a commensurately increased payout to unsecured creditors comports with th[e] good faith requirement [of §1325(a)(3)]. See *In re Arnold*, 869 F.2d 240, 242 (4th Cir. 1989)("Congress . . . intended that the debtor repay his creditors to the extent of his capability during the Chapter 13 period. Certainly, Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors.").

In re Brown, 332 B.R. at 566-67. "A debtor's income and expenses may undergo changes for a variety of reasons and §1329 allows the court to consider such changes." In re Hill, 386 B.R. at 677. A Chapter 13 Trustee may seek modification of a confirmed plan "when the current payments are not in line with the reality of a debtors' then current disposable monthly income." In re Self, 2009 WL 2969489, at 6 (Bankr. D. Kan.).

Ultimately, of course, the decision regarding modification of a plan rests with the discretion of the Court. "[M]odifications have always been subject to court discretion, as limited by §1329." In re Hill, 386 B.R. at 678. "Although the disposable income test does not explicitly apply, courts have recognized that the 'debtor's changed income and expenses are factored into the bankruptcy court's good judgment and discretion.'" In re Wetzel, 381 B.R. at 252(quoting In re Sounakhene, 249 B.R. 801 (Bankr. S.D.Cal. 2000)).

Indeed, §1329's focus on a debtor's actual, post-confirmation income and expenses conforms to the recent decision of the United States Supreme Court in Hamilton v. Lanning, 130 S.Ct. 2464 (2010).

Consistent with the text of §1325 and pre-BAPCPA practice, we hold that when a bankruptcy court calculates a debtor's projected disposable income, the court may

account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.

Hamilton v. Lanning, 130 S.Ct. at 2478(Emphasis supplied). Hamilton v. Lanning, of course, dealt with confirmation of a debtor's initial plan under §1325 of the Bankruptcy Code, instead of modification of a confirmed plan under §1329. Nevertheless, the decision evidences the intent under Chapter 13 to determine a debtor's actual income and expenses during the life of his Chapter 13 plan for purposes of establishing his plan payments.

Application

In this case, the Debtors acknowledge that their income increased after their Chapter 13 Plan was confirmed. Their federal income tax returns indicate that they earned wages or salaries in the amount of \$117,289.00 in 2008, and that they earned wages or salaries in the amount of \$134,190.00 in 2009. (Trustee's Exhibit 3).

Further, on their initial Schedule of Income, the Debtors stated that their combined average income was \$6,842.76 per month as of June 10, 2008 (the petition date). (Trustee's Exhibit 4). The same wages or salary were reported on the Statement of Monthly Income filed with the Debtors' Second Amended Plan on December 18, 2008. (Doc. 36).

On an Amended Schedule of Income that was prepared for the purpose of disclosing their current financial situation, however, the Debtors stated that their combined average income is presently \$8,943.08 per month. (Debtors' Exhibit 1; Transcript, pp. 7, 9). Accordingly, the Debtors' current income exceeds their Plan-date income by \$2,100.00 per month.

Despite the increased income, however, the Debtors contend that they do not have any additional disposable income to contribute to their Plan, because they are incurring monthly expenses that consume all of their earnings.

Specifically, on the Schedule of Expenses filed on the petition date, the Debtors stated that their expenses at that time totaled the sum of \$6,242.76 per month. (Trustee's Exhibit 4). On the Amended Schedule of Expenses that was prepared for the purpose of disclosing their current budget, however, the Debtors state that their expenses presently total the sum of \$8,989.76 per month. According to the Debtors, therefore, their expenses have increased since the petition date by the sum of \$2,747.00 per month.

The increased expenses are attributed in large part to the following specific items:

<u>Description</u>	<u>Petition Date</u>	<u>Current</u>
Home Maintenance	\$200.00	\$400.00
Transportation	\$300.00	\$665.00
Recreation	\$90.00	\$200.00
Charities	\$0.00	\$150.00
Support for dependents	\$0.00	\$480.00
Utilities	\$95.00	\$340.00
Catholic School	\$386.00	\$495.00
Meals out (at work)	\$0.00	\$450.00

One notable difference involves the expense designated as "payments for support of additional dependents not living at your home." This expense increased from \$0.00 on the petition date to \$480.00 on the current schedule. Mr. Prieto testified that the payments represent monetary contributions to his mother and father-in-law who reside in other cities. (Transcript, pp. 18-19). Mr. Prieto does not contend that his mother and father-in-law are legal dependents of the Debtors. Rather, he asserts only that the Debtors pay their parents a monthly amount to supplement their social security and other income.

Another notable difference involves the expense designated as "meals out (while at work)." This expense increased from \$0.00 on the petition date to \$450.00 on the current schedule. The entry is in addition to the expenses for food and school lunches that are listed on the current schedule in the total amount of \$800.00. Mr. Prieto testified that the expense is included to account for the purchase of breakfast and lunch in his workplace cafeteria. (Transcript, p. 19).

Finally, the expense listed for recreation increased from \$90.00 to \$200.00, and the expense listed for charitable contributions increased from \$0.00 to \$150.00. Mr. Prieto did not fully explain why the noted entries appear on the list of current expenses, but not on the list of petition-date expenses. (Transcript, pp. 30-32).

The Court has considered the record, and determines that the Debtors' confirmed Plan should be modified.

The Debtors reside in a 3,200 square-foot pool home on a one-acre lot. (Transcript, pp. 13, 26). According to their schedules, the home is valued at \$438,400.00. (Doc. 1). The current expenses listed by the Debtors include monthly payments for a lawn service, a pool service, a health club, and satellite television. (Debtors' Exhibit 1; Transcript, pp. 13, 28, 31).

On December 18, 2008, the Debtors proposed a five-year Chapter 13 Plan that provided for payments in the amount of \$675.00 per month for months 7 through 60. The Debtors' Plan was based on a Statement of Income filed on the same day as the Plan. (Doc. 36).

After the Debtors' Plan was confirmed, their combined income admittedly increased by the sum of \$2,100.00 per month. The purpose of §1329 of the Bankruptcy Code is to allow the adjustment of plan payments in response to changes in a debtor's financial circumstances. In re Wetzel, 381 B.R. at 251. An increase in income of more than \$2,000.00 per month is a financial change that warrants modification of a plan.

The Trustee has proposed a modified Plan that increases the Debtors' payments from \$675.00 per month to \$1,055.00 per month for the last 40 months of the plan term. The amount of the proposed increase, therefore, is \$380.00 per month.

The Court is not persuaded that the Debtors' postconfirmation expenses have increased at a rate that prevents them from making the increased plan payments. Several items listed in their current expenses, for example, do not appear at all in the list of expenses originally filed with their Plan. The newly-listed items include charitable contributions of \$150.00 per month, voluntary payments to the Debtors' parents of \$480.00 per month, and lunch purchases in the amount of \$450.00 per month that are in addition to the \$800.00 expense for food that is otherwise scheduled. If only these newly-listed items are considered, therefore, the difference in the Debtors' total expenses is \$1,080.00 per month.

It is not necessary for the Court to reach any conclusion regarding whether the new or expanded expenses are listed simply to absorb the Debtors' increased income. See In re Self, 2009 WL 2969489, at 2, 8. For purposes of modifying the confirmed Plan under §1329, it is sufficient to find that the

Debtors' financial circumstances changed after the Plan was confirmed, and that the Debtors' current income and expenses permit them to make the increased payments under the modified Plan.

The decision regarding modification of a Chapter 13 plan rests with the discretion of the Court. In re Hill, 386 B.R. at 678. In this case, the Court determines that the increase in the Debtors' income by the amount of \$2,100.00 per month enables them to increase their payments to the Trustee by the sum of \$380.00 per month.

Accordingly:

IT IS ORDERED that:

1. The Motion to Modify Confirmed Chapter 13 Plan filed by Douglas W. Neway, as Chapter 13 Trustee, is granted as set forth in this Order.

2. The confirmed Chapter 13 Plan of the Debtors, Fidel Antonio Prieto and Laura Prieto, shall be modified to provide that the Debtors shall pay the Trustee the sum of \$1,055.00 per month for the remaining term of the Plan.

3. Within fourteen (14) days of this Order, the Chapter 13 Trustee shall submit an appropriate proposed Order confirming the Plan as modified.

DATED this 22 day of September, 2010.

BY THE COURT

/s/ Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge