UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE: **CASE NO.: 03-4454-3F3**

BARBARA JEAN THOMAS,

Debtor.
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon Application of the Firm of Pinkston & Pinkston, P.A. for Allowance of Attorneys' Fees as Attorney for Debtor and Reimbursement of Expenses (the "Application for Administrative Expense"). The Court conducted a hearing on the matter on February 11, 2004 and elected to take the matter under advisement. The Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed a Chapter 13 petition on May 1, 2003. (Doc. 1.) Debtor is represented by Pinkston & Pinkston, P.A. ("Pinkston & Pinkston"). On that same day Debtor granted David J. Pinkston a limited power of attorney (the "POA"). Paragraph 1 of the POA authorized Pinkston & Pinkston to endorse and deposit any refund check if the case was dismissed prior to Pinkston & Pinkston being paid in full. Paragraph 2 of the POA provided that "[i]f the refund check amounts to more than the fee to be paid, [Pinkston & Pinkston may] retain the sum of $2,035.00 or whatever amount is indicated in the most recently amended Chapter 13 plan of reorganization, from the proceeds of the trustee's check as the remaining balance of the fee I owe to the firm of Pinkston &

Pinkston, for bankruptcy work done on my behalf and immediately issue a check to me in the amount of the difference between the amount of the Trustee's check and the fee owed as aforesaid."

On May 16, 2003, Pinkston & Pinkston filed Disclosure of Compensation of Attorney for Debtor (the "Disclosure of Compensation") indicating that it was to be compensated $2,750.00 for its services in the bankruptcy case. (Doc. 11.) Debtor paid $715.00 prior to the filing of petition and agreed to pay the remainder through the Chapter 13 plan. (Docs. 11, 12.) Neither the Trustee nor any other party filed an objection to the Disclosure of Compensation.

The Court conducted a confirmation hearing on January 20, 2004. Because of Debtor's inability to proceed with confirmation, the Court announced that it intended to dismiss the case. However, the Court withheld entry of the order of dismissal and continued the hearing to February 11, 2004 to permit Pinkston & Pinkston to file an application for administrative expense. Pinkston & Pinkston filed the Application for Administrative Expense on January 20, 2004.

At the February 11, 2004 hearing, Pinkston & Pinkston filed Debtor's consent to the Application for Administrative Expense by which Debtor consents to the amount of the fees sought. The Chapter 13 Trustee (the "Trustee") appeared at the hearing and objected to the Application. The Trustee has $3,525.00 on hand. The Trustee requests expenses of $105.75.

BACKGROUND

In the Jacksonville Division of the bankruptcy court, Chapter 13 confirmation

hearings are held after the claims bar date. As a result, in some cases up to 6 months of interim plan payments accumulate in the Trustee's interim bank account. Upon confirmation, the funds are transferred to the Trustee's confirmed account and disbursed in accordance with the confirmed plan. Prior to January 1, 2004, if a Chapter 13 debtor was represented by an attorney and the case was dismissed or converted prior to confirmation, the Trustee sent any refund of accumulated interim payments to the debtor in care of his attorney. Upon receipt of the refund, the attorney would deduct the unpaid balance of his fee from the refund check and send the remainder, if any, to the debtor. Beginning January 1, 2004 and without notice to the local bankruptcy bar, the Trustee began sending refunds of accumulated interim payments directly to debtors.

CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. § 1326(a)(2), if a case is dismissed or converted prior to confirmation, the trustee must return any funds on hand to the debtor after deducting any unpaid claim allowed under 11 U.S.C. § 503(b). Section 503(b) provides that "there shall be allowed administrative expenses … including (2) compensation and reimbursement awarded under section 330(a) of this title." Section 330(a)(4)(B) provides that a court may allow reasonable attorney's fees to a Chapter 13 debtor's attorney.

The Trustee objects to the Application for Administrative Expense on the following bases: 1) the Application does not delineate specific services performed and hours expended to enable a determination as to whether the fees are reasonable and whether the services were actually performed; 2) Debtor failed to file an adequate claim for the mortgagee despite the fact that the case was filed to deal with a mortgage arrearage; and 3) Pinkston & Pinkston has represented Debtor in two previous Chapter 13

cases. Before addressing the merits of the Trustee's objection, the Court must determine whether a Chapter 13 trustee has standing to object to an administrative expense in a case that is dismissed or converted prior to confirmation.

If a Chapter 13 case is dismissed or converted prior to confirmation, the trustee's fiduciary duties to the unsecured creditors end. The Trustee's remaining duties, such as disbursing any remaining funds in accordance with the order of dismissal or conversion and filing a final report, are ministerial. Any remaining funds, after payment of 503(b) administrative expenses, are refunded to the debtor instead of creditors. Accordingly, the Chapter 13 Trustee does not have standing to object to a debtor's attorney's application for an administrative expense for attorney's fees in a dismissed or converted case.[1] However, because the allowance of an administrative expense for an attorney's fee will reduce or eliminate the refund to the debtor, the debtor has standing to object.[2] Additionally, in a confirmed Chapter 13 case, because a debtor's attorney's fee comes from the funds that would otherwise go to the unsecured creditors, the Trustee has standing to object.

The Court recognizes that the future success (confirmation) or failure (dismissal or conversion) of a Chapter 13 case is not always apparent at the outset. Accordingly, the Court sets forth the following suggestions to assist debtors' attorneys and the Trustee in dealing with attorney's fees. The Court recommends that debtors' attorneys specify in

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[1] The Trustee does not have standing to object to the allowance of an administrative expense for attorney's fees in a dismissed or converted case on the basis that the trustee's percentage fee could be imperiled. Upon review of 11 U.S.C. §§ 503(b)(2), 330(a), 326(b) and 28 U.S.C. § 586(e)(2), the Court concludes that a Chapter 13 trustee's percentage fee is not an administrative expense but is a fee collected from all payments received by the trustee under 28 U.S.C. § 586(e)(2) even before payments to creditors. As such, the full percentage fee in a dismissed or confirmed case is deducted before the payment of § 503(b) administrative expenses. See Keith Lundin, Chapter 13 Bankruptcy § 293.1 (3d ed. 2002).

the disclosure of compensation the amount of attorney's fees that are attributable to the work to be performed from a case's inception to the filing of the joint certification, from the filing of the joint certification to confirmation, and from confirmation to the completion of the case. If the Trustee objects to the amount of fees sought, the Trustee should file an objection within thirty days after the first date set for the meeting of creditors, setting forth a presumptively reasonable amount for attorney's fees for the work performed from the case's inception to the filing of the joint certification, from the filing of the joint certification to confirmation, and from confirmation to the completion of the case. The objection will put the debtor's attorney on notice of the requirement to maintain contemporaneous time records.[3] Alternatively, the debtor's attorney may amend the disclosure of compensation to reflect the amount set forth in the Trustee's objection. The Court will deem a complete and accurate disclosure of compensation to be an application for an administrative expense for attorney's fees and will deal with the application and any pending objections thereto at the time of dismissal, conversion, or confirmation. In the face of an objection, the Court will not grant an application for an administrative expense for attorney's fees unless the applicant has maintained contemporaneous time records.

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[2] A Chapter 7 trustee in a converted case may also seek review of the reasonableness of the debtor's Chapter 13 attorney's fees.

[3] Under federal law, attorney's fees are awarded based on the lodestar method of computation. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-718 (5th Cir. 1974). In determining whether an attorney's fee is reasonable, a court must determine the "lodestar", the product of the number of hours reasonably expended and a reasonable hourly rate. See John Deere Co. v. Deresinski (In re Deresinski), 250 B.R. 764, 768 (Bankr. M.D. Fla. 2000) (citations omitted). In order to apply the lodestar method an attorney must provide the court with contemporaneous time records detailing the dates, amounts, and specific services provided. See In re Newman, 2003 WL 751327, *3 (Bankr. M.D. Fla. 2003) citing In re First Colonial Corp. of America, 544 F.2d 1291, 1300 (5th Cir. 1977). Other courts have established a presumptively reasonable fee to avoid the need for attorneys to maintain contemporaneous time records. In the absence of any input or testimony from the Chapter 13 bar, the Court declines to establish a presumptively reasonable fee at this time. The Court sincerely hopes that the issue can be resolved without further judicial intervention.

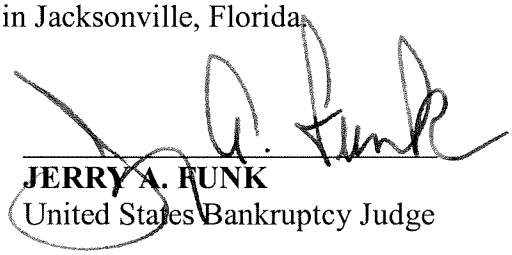
Application to the instant case

Because the Trustee does not have standing to object to the attorney's fees sought and Debtor consents, the Court finds it appropriate to grant the Application for Administrative Expense.

CONCLUSION

A Chapter 13 trustee does not have standing to object to the reasonableness of a debtor's attorney's fees in a dismissed or converted case. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED this 2 day of March, 2004 in Jacksonville, Florida.



JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:

Debtor
T. Eileen Dolaghan, Attorney for Debtor
Mamie L. Davis, Chapter 13 Trustee
United States Trustee