

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

IN Re:

CASE NO. 04-9388-GLP-3P3

IRIS LAVERN HINTON

Debtor.

**FINDINGS OF FACT AND CONCLUSIONS OF
LAW**

This case is before the Court upon the objection to confirmation of the debtor's Chapter 13 plan, filed by Select Portfolio Servicing, Inc. On June 28, 2005, the Court held a Chapter 13 confirmation hearing at which time the parties were instructed to submit findings of fact and conclusions of law. Based upon the evidence presented and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The debtor, Iris Lavern Hinton (the "Debtor"), filed a Chapter 13 petition on September 24, 2004. This is the Debtor's 6th bankruptcy case since 1997.
2. The Debtor's mortgage on her principal residence matured in November 2002. (D's Ex. 2).¹ The Debtor filed the instant bankruptcy case primarily to save her home.
3. Select Portfolio Servicing, Inc. (the "Creditor"), the holder of the mortgage, filed a proof of claim indicating that the total amount due on the mortgage is \$102,336.33, with a principal balance of \$72,894.30 and a pre-petition arrearage of \$29,968.29.
4. The Debtor is proposing a sixty (60) month plan, in which the Creditor's claim will be paid in full over the life of the plan with 11% interest per annum. More specifically, the Debtor's plan proposes to pay the Creditor payments of \$1,000.00 per month, for months one through thirty-six, and \$4,064 per month, for months thirty-seven through sixty.

¹ According to the terms of the Debtor's mortgage, the entire balance must be paid by November 15, 2002. This is referred to as the "maturity date."

5. The Debtor is a self-employed, landscape contractor. She testified that the lower payment amount for months one through thirty-six, as outlined in her plan, is necessary given her current amount of income. She further testified that she recently obtained a new job, which will enable her to afford the \$3,064 increase in plan payments during the last 24 months of the plan.

CONCLUSIONS OF LAW

The Creditor argues that the Debtor's plan should propose a larger payment over the first thirty-six months of the plan. The Debtor contends that the proposed payment terms and modification are proper. The issues before the Court are whether the Debtor's modification to her mortgage is permissible and whether the plan payments are feasible.

According to 11 U.S.C. § 1322(b)(2),

Subject to subsections (a) and (c) of this section, the plan may - modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

The language of § 1322(b)(2), stated succinctly, prohibits a debtor from modifying the rights of a holder of a secured claim, secured by the debtor's principal residence. For example, this Code section prevents a debtor from, *inter alia*, bifurcating a home mortgage into a secured claim and an unsecured claim pursuant to § 506.

However, there are exceptions to the general modification prohibition of § 1322(b)(2). 11 U.S.C. § 1322(c)(2) states that

Notwithstanding subsection (b)(2) and applicable nonbankruptcy law - in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is

due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

According to this provision of the Code, a debtor may modify the rights of a holder of a claim secured only by the debtor's principal residence if the last payment of the debtor's mortgage is due before the expiration of the plan and the proposed modification is consistent with § 1325(a)(5). *See, e.g., American General Finance, Inc. v. Paschen (In re Paschen)*, 296 F.3d 1203 (11th Cir. 2002) (holding that § 1322(c)(2) unambiguously provides that mortgages that mature prior to the final payment on a Chapter 13 plan are subject to modification, notwithstanding the general modification prohibition of § 1322(b)(2)).

In the present case, the Debtor's plan proposes to pay \$1,000.00 per month, for months one through thirty-six, and \$4,064 per month, for months thirty-seven through sixty. The Debtor's proposed modification is permissible because the mortgage matures before the expiration of the debtor's Chapter 13 plan, *see* § 1322(c)(2), and because it is consistent with the requirements of § 1325(a)(5).² However, notwithstanding that the proposed modification is permissible under § 1322(c)(2) and § 1325(a)(5), the Creditor contends that the Debtor's proposed plan payments are not feasible.

According to 11 U.S.C. § 1325(6), the court shall confirm a plan if "the debtor will be able to make all the payments." In essence, it must be feasible for the debtor to be able to make all of his or her plan payments. In the present case, the Debtor's plan proposes to pay the Creditor payments of \$1,000.00 per month, for months one through thirty-six, and \$4,064 per month, for months thirty-seven through sixty. The Creditor argues that it is not feasible for the Debtor to make all of her plan payments given the substantial increase in plan payments beginning in month thirty-seven. The Debtor, however, testified that the lower payment amount for months one through thirty-six is necessary given her current amount of income. She further testified that she recently obtained a new job, which will enable her to afford the \$3,064 increase in plan payments during the last 24 months. The Creditor did not offer any evidence, but rather only

argues that such a payment increase is not feasible. The Court finds that the Creditor failed to prove by a preponderance of the evidence that the Debtor will be unable able to make her plan payments. The Court will confirm the plan.

A separate Order will be entered consistent with these Findings of Facts and Conclusions of Law.

DATED this 9 day of September, 2005 at Jacksonville, Florida.

/s/ George L. Proctor
George L. Proctor
United States Bankruptcy Judge

Copies Furnished To:
The Debtor
Eileen Dolaghan
Mamie L. Davis
Scott Weiss

² Section 1325(a)(5)(B)(ii), if elected, requires that the secured creditor receive "the value [of the secured claim], as of the effective date of the plan." In the instant case, the Creditor did not object and it appears that the proposed distribution satisfies this requirement.