

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Chapter 13 Case
Daryl Alfred Plath, BKY Case No. 3-89-4179
Debtor. MEMORANDUM ORDER

This matter came before the Court on November 26, 1990 on application of Debtor's Counsel, G. Martin Johnson, for allowance of compensation and expenses. Objections were filed by Maribelle Plath, the Debtor's former spouse and largest unsecured creditor. G. Martin Johnson appeared in support of his application. Maribelle Plath appeared pro se. This is a core proceeding under 28 U.S.C. Sections 1334 and 157(a), and Local Rule 103(b). The Court has jurisdiction to determine this matter under 28 U.S.C. Section 157(b)(2)(A). Based upon all the files and records in this matter, and being fully advised in the premises, the Court now makes the following Order pursuant to the Federal and Local Rules of Bankruptcy.

FACTS

This hearing on objections to the final fee application of G. Martin Johnson (hereinafter "Johnson") follows a protracted, heavily contested Chapter 13 proceeding during which Maribelle Plath (hereinafter "Plath"), filed a series of objections to confirmation of four of the Debtor's five proposed plans of reorganization. At the final confirmation hearing on November 8, 1990, Debtor's Fifth Amended Chapter 13 Plan was confirmed.

Johnson's final fee application seeks approval of \$7,501 in attorney's fees and \$164.40 in expenses in connection with prosecution of this case, of which \$975 has been paid by the Debtor, leaving a remaining balance of \$6,690.40. On November 21, 1990, Plath filed her objection to Johnson's application on the basis that the fees requested are excessive because the preparation of five amended plans and various stipulations for settlement were duplicative and unnecessary. She also argues that payment of attorney's fees through the Chapter 13 trustee under the plan in this case discriminates unfairly against unsecured creditors by decreasing their distributions. Johnson argues that all services performed were necessary to the prosecution of this case, his fees are reasonable given its difficulty, and that payment to the Chapter 13 trustee under the Debtor's plan is required by 11 U.S.C. Section 1326(b)(1). He argues that Plath's considerable remaining animosity toward the Debtor from their dissolution proceeding adversely affected the Chapter 13 process, and that additional time he spent preparing for a contested confirmation proceeding was necessary to properly represent the Debtor.

ISSUES

1. Should the fee application of Debtor's Counsel be allowed under 11 U.S.C. Section 330(a)?
2. May the Court require the Debtor to pay attorney fees outside the plan?

DISCUSSION

1. Allowance of Fee Application. At the commencement of this case, Debtor's counsel filed his Statement of Attorney under 11 U.S.C. Section 329(a) and Bankruptcy Rule 2016(b), properly disclosing that the Debtor agreed to pay \$890 in connection with representation as might be necessary to confirm a plan of reorganization. The Debtor paid \$600 plus the \$90 filing fee at the time of filing. He has since paid an additional \$375. Regarding Plath's specific objections, Johnson spent approximately 3.5 hours, or six per cent of the total time billed for amendments to the Debtor's petition and schedules, 20.1 hours or 34 per cent for preparation and amendments to the Debtor's plans of reorganization (including confirmation hearings), and 16.1 hours or 27 per cent for negotiation and preparation of stipulations. Accordingly, 39.4 hours, or 66 per cent of Johnson's fee application is objected to by Plath as unnecessary or duplicative.

Attorney fee applications are reviewed under 11 U.S.C. Section 330(a).(FN1) Courts in this jurisdiction look to factors identified

(FN1) 11 U.S.C. 330(a) reads in pertinent part:

"After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to...the debtor's attorney-

- (1) reasonable compensation for actual, necessary services rendered by such...attorney...and by any paraprofessional persons employed by such...attorney...based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

- (2) reimbursement for actual, necessary expenses...."

in Johnson v. Georgia Highway Express (In re Johnson), 488 F.2d 714 (5th Cir. 1974) to determine the reasonableness of compensation under the above standard. Those factors are:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions presented;
- (3) The skill required to perform the service properly;
- (4) The preclusion of other employment by the professional person due to acceptance of the case;
- (5) The customary fee for similar work;
- (6) Whether the fee is fixed or contingent;
- (7) Time pressures imposed by the client or the circumstances;

- (8) The amount involved and the results obtained as a result of the services rendered;
- (9) The experience, reputation, and ability of the professional person;
- (10) The "undesirability" of the case;
- (11) The nature and length of the professional relationship with the client;
- (12) Awards in similar cases.

Clearly, the contested confirmation hearing required Johnson to spend additional time re-drafting plans of reorganization to reach a confirmable plan. The proposed Plan's treatment of Plath's interest in her former spouse's pension was not a question of settled law. During the pendency of this case, the Eighth Circuit reversed its earlier decision permitting the Debtor to treat Plath's interest in his pension as a property settlement, dischargeable as a debt in a bankruptcy proceeding.(FN2) Following reversal of that decision, Johnson amended the Debtor's plan to treat Plath's interest as her separate property and notified the

(FN2) *Bush v. Taylor (In re Taylor)*, 912 F.2d 989 (8th Cir. 1990).

Court that the Debtor would not continue litigation on this issue. None of the parties could have foreseen such a result.(FN3)

Johnson's legal duty in this case was to represent the Debtor in prosecuting his Chapter 13 case and to secure a confirmed plan of reorganization as soon as practicable.(FN4) This proceeding was more difficult and required greater skill on the part of Debtor's counsel than a consensual Chapter 13 prosecuted without significant bankruptcy court involvement. The expense and time involved in prosecuting this case were greater than those expected in an uncontested Chapter 13 matter, due in part to the number of amendments and stipulations drafted. However, nothing in the fee application suggests that Johnson deliberately inflated the time or effort expended in this case.(FN5) Johnson has successfully represented interests in bankruptcy in the past, and insofar as the Court is aware, has a good reputation in the bankruptcy community.

This case might qualify as an "undesirable" case within the meaning of the Johnson factors due to the adverse effect continued animosity between the Debtor and his ex-spouse had on counsel's ability to resolve disputes during the pendency of the case without need for bankruptcy court involvement.

The thrust of Plath's objections is her deeply felt dissatisfaction with her dissolution. The problems she perceives with the dissolution cannot be resolved in this bankruptcy proceeding. This Court has ruled as recently as January 9, 1991, that ordinarily it does not sit as a "de novo divorce jurisdiction" for the resolution of family law matters.(FN6) Family law matters

must

be resolved in the state court.

While Plath is dissatisfied with the result Johnson obtained,

a contested proceeding of necessity involves greater time and expense than when parties are able reach a consensual agreement. Accordingly, because the facts show that Johnson represented his client in a professional manner throughout the proceedings, he should not be penalized because representation of this particular (FN3) It should be noted that the 8th Circuit is at the present time the only circuit which has reached this result regarding a former spouse's interest in a pension plan.

(FN4) As a Minnesota attorney, Johnson is subject to Minnesota Rule of Professional Responsibility 1.2, which reads in pertinent part:

"(a) A lawyer shall abide by a client's decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter...

(b) A lawyer may limit the objectives of the representation if the client consents after consultation...." (Emphasis added.)

(FN5) To the extent that Plath's objections suggest that Johnson's drafting of various written stipulations and amendments were designed to pressure her to abandon legitimate interests, they are not well founded. G. Martin Johnson is not an alter ego for Daryl Alfred Plath. Minnesota Rule of Professional Responsibility 2.1 reads in pertinent part: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice...." There is no evidence that Johnson's reduction of various stipulations and amendment to writing was anything other than his concern that Plath would be unwilling to respond unless she was able to see the terms of a proposed document in writing.

(FN6) See Republic Leasing Corp. v. William Carragher (In re Carragher), Adv. Proc. No. 3-90-027 (Bankr. D.Minn. January 9, 1991).

client required more time and expense than he would have spent in an uncontested case.

2. Payment of attorney fees outside the Chapter 13 Plan.

Provision for payment of fees to professionals who represent Chapter 13 debtors is governed by 11 U.S.C. Section 1326(b)(1).(FN7) The claim of an attorney for representing a debtor in a Chapter 13 proceeding is among the administrative expense claims entitled to priority treatment under the Bankruptcy Code. 11 U.S.C. Section 507(a)(1). Accordingly, the attorney fees due Johnson must be paid under 11 U.S.C. Section 1326(b)(1).

NOW, THEREFORE, IT IS ORDERED:

1. The objections to the fee application of counsel for the Debtor are hereby overruled.

2. The request that attorney's fees be paid outside of the Chapter 13 Plan is denied.

Dated:

Dennis D. O'Brien
U.S. Bankruptcy Judge

(FN7) 11 U.S.C. Section 1326(b)(1) reads in pertinent part:
"(b) Before or at the time of each payment to creditors
under the plan, there shall be paid-
 (1) any unpaid claim of the kind specified in section
507(a)(1) of this title;...."