

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION**

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**IN RE**

**Russell James Warren,**

**Case No. 02-10404**

**Debtor.**

**Chapter 13**

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**MEMORANDUM OPINION AND ORDER RE  
OBJECTION TO CONFIRMATION  
filed by AMERICAN EXPRESS CENTURION BANK**

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The Court conducted a hearing on American Express Centurion Bank's Objection to Confirmation on July 11, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

**I. FINDINGS OF FACT**

At issue in this case is the debtor's ownership of two mobile homes and an 81 acre tract of land on which one of the mobile homes sits. Russell Warren, ("Warren" or "debtor"), owns 81 acres of land in Baxter, TN, and a mobile home located thereon. Warren also owns a mobile home in Jackson, TN. The monthly mortgage payment on the 81 acres is \$555.00. The monthly mortgage payment on the Baxter, TN, mobile home is \$173.00. The monthly mortgage payment on the Jackson, TN, mobile home is \$219.00. Warren rents the lot on which the Jackson, TN, mobile home sits for \$110.00/month.

Warren purchased the 81 acres of land in Baxter in the early 1990s as investment property. The land is neither farmable nor commercially viable; however, the debtor felt the purchase of the land was safer than investing his money in the stock market. Warren lived in the mobile home located on the 81 acres on a full-time basis until 2001 when he was hired by Porter Cable/Delta in Jackson, TN. Because Baxter is approximately 200 miles east of Jackson, the debtor did not feel it was economically feasible to commute every day back and forth between Baxter and Jackson. After researching apartment rates in Jackson, Warren decided to purchase a mobile home to live in while he works at Porter Cable.<sup>1</sup> Warren travels to Baxter, TN, on the weekends. The debtor is divorced and does not have any dependents who reside on the Baxter property when he is not there. Warren testified that he anticipates remaining in Porter Cable's employment during the entire pendency of his chapter 13 plan.

Warren filed for chapter 13 relief on January 24, 2002. According to his amended schedule J, Warren has monthly net income of \$3,523.78 and monthly expenses of \$3,184.00. The monthly mortgage payments on the mobile home in Jackson, the mobile home in Baxter, and the 81 acres in Baxter as well as the monthly lot rental fee for the Jackson mobile home are included within his monthly expenses.

Warren has proposed a semi-monthly plan payment of \$418.00. The term of the plan is currently set at thirty-six months. After paying the filing fee, the Chapter 13 Trustee's fee and the debtor's attorney's fee, the debtor has proposed to pay one secured creditor through his plan,

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<sup>1</sup> Warren testified that he did not move the mobile home located in Baxter to Jackson because it is "unmoveable."

Bank of America, and his unsecured creditors. Bank of America holds a lien on the debtor's 1996 Jeep Cherokee with a monthly payment of \$207.00. Warren's total unsecured non-priority debt is \$65,749.24. The proposed distribution to unsecured creditors is currently estimated to be between 27% and 38%.<sup>2</sup>

Four of Warren's unsecured non-priority debts belong to American Express Centurion Bank, ("American Express"). According to the petition, American Express's claims are as follows:

1. \$2,301.84 on an American Express Platinum credit card account;
2. \$7,953.69 on an Optima credit card account;
3. \$9,039.62 on an Optima signature loan; and
4. \$13,844.54 on an Optima signature loan.

American Express filed an Objection to Confirmation of the debtor's plan on March 12, 2002. American Express alleges that the debtor, by paying \$728.00/month for the 81 acres and the mobile home in Baxter, TN, while residing in Jackson, TN, is not devoting all of his disposable income to his plan as required by 11 U.S.C. § 1325(b)(1). In response to American Express's objection, the debtor alleges that the mobile home in Jackson is merely a "temporary housing trailer" and not his permanent residence. The debtor also alleges that the 81 acres is not worth what he owes on it; therefore, if he were forced to sell or surrender the land, any deficiency balance would increase the amount of unsecured debt.

## **II. CONCLUSIONS OF LAW**

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<sup>2</sup> Warren's proposed chapter 13 plan includes the monthly mortgage payments on the 81 acres and the mobile home in Baxter, TN, as "Home Mortgage Claims" to be paid outside of the plan. The plan also includes the monthly mortgage payment on the Jackson mobile home as a "Long Term Secured Claim" to be paid outside of the plan.

Under the Bankruptcy Code, if the trustee or an unsecured creditor objects to confirmation of a chapter 13 plan, the plan may not be confirmed unless the unsecured creditors will receive 100% of their claims or, alternatively, the plan provides that all the debtor's disposable income will be paid into the plan for at least three years. 11 U.S.C. § 1325(b)(1).

For purposes of this test, "disposable income" is defined as

(2) . . . income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions . . . ; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2). Determining what is reasonably necessary "will be a fact question determined in the context of individual debtors and their dependents" on a case-by-case basis. 2 Keith M. Lundin, *Chapter 13 Bankruptcy*, § 5.36 at 5-101 (2d Ed. 1994); *In re Tibbs*, 242 B.R. 511, 516 (Bankr. N.D. Al. 1999). The majority opinion is that "reasonably necessary" "means 'adequate' but not 'first class.'" *In re Lindsey*, 243 B.R. 30, 32 (Bankr. E.D. Tenn. 1999). However, a court "is not expected to, and should not, mandate dramatic changes in the debtor's lifestyle to fit some preconceived norm for chapter 13 debtors." 8 *Collier on Bankruptcy* § 1325.08[4][b][ii], at 1325-54 (15<sup>th</sup> ed. rev. 1999). As several courts have recognized, a "fundamental purpose of the disposable income test is to 'prevent large expenditures by debtors for non-essential items which ultimately reduce the sum available to pay holders of unsecured claims.'" *In re Brooks*, 241 B.R. 184, 186 (Bankr. S.D. Ohio 1999) (citing *In re Hedges*, 68 B.R.

18, 20 (Bankr. E.D. Va. 1986)). For the reasons stated below, this Court finds that the debtor's proposed chapter 13 plan does not pass the disposable income test and that American Express's objection to confirmation should be sustained.

In the case of *In re Charles Edward Lindsey*, the debtors proposed to make payments on a 40-acre parcel of non-income producing investment real property through their chapter 13 plan. The Chapter 13 Trustee objected to this proposal. *C.E. Lindsey*, 243 B.R. at 157-58. The court sustained the trustee's objection and denied confirmation of the debtor's plan under the "disposable income" test. *Id.* at 158. In making this decision, the court held that:

Although investments may be financially prudent, they certainly are not necessary expenses for the support of the debtors or their dependents. Investments of this nature are therefore made *with* disposable income; disposable income is not what is left after they are made. Thus, the court may not and should not permit the debtors to use a Chapter 13 plan to retain and increase their equity in investment property at the expenses of their unsecured creditors.

*Id.* (citations omitted). If the debtor had proposed to make the payments on the land outside of his chapter 13 plan, the court's decision to deny confirmation would not have changed. *Id.*

In the case of *In re Cardillo*, 170 B.R. 490 (Bankr. D. N.H. 1994), the debtor proposed to pay \$900.00 per month for a lake condominium she owned and rented out as vacation property. The condominium, valued at \$70,000.00 and subject to a secured debt of \$91,000.00, generated \$500.00 per month in income for the debtor. At the time of the confirmation hearing, the debtor was leasing her primary residence for \$1,200.00 per month, but anticipated that the lease would not be renewed and she would have to find another home. The debtor alleged that she may have to move into the lake condominium. The debtor also argued that if the court forced her to sell

the lake condominium, the increase in the dividend to the unsecured creditors would be minimal once the deficiency claim of the mortgagee was added. *Id.* at 491.

The *Cardillo* court rejected all of the debtor's arguments and denied confirmation of her plan under the disposable income test. *Id.* at 492. In so doing, the court held that two residences were not reasonably necessary for the support and maintenance of the debtor. *Id.* In response to the debtor's argument regarding the minimal increase in dividend to unsecured creditors based on the addition of the deficiency balance, the court stated:

Even if this were true, which the Court doubts, under section 1325(b) of the Bankruptcy Code this Court must find that *all* disposable income is being applied to the chapter 13 plan. Based on the evidence before the Court, this Court is unable to determine whether, in fact, there would be a deficiency claim. To allow the debtor to keep the condominium . . . which has a negative cash flow of at least \$400.00 per month, and confirm the Plan, would be to approve a windfall to the debtor to the detriment of the debtor's creditors.

*Id.* at 491.

In the case of *In re Stanely Max Lindsey*, 243 B.R. 30 (Bankr. E.D. Tenn. 1999) the debtor made a similar argument regarding increased claims in an attempt to sway the court away from denying confirmation. *S.M. Lindsey*, 243 B.R. at 33. In that case, the debtor proposed to pay New Holland Credit Company \$610.00 per month on a tractor and baler. The debtor used the tractor and baler to bale hay and to care for two horses on a 195 acre farm leased by the debtor. *Id.* The farm generated \$25.00 in net income for the debtor each month.

The debtor argued that without the tractor and baler he would have to give up his farm and board his horses at a cost of \$300.00 to \$350.00 each month. In rejecting this argument and finding that the \$610.00 monthly payment to New Holland was not justifiable as a reasonably

necessary expense under § 1325(b), Judge Stair stated that "[e]ven with this [additional expense of \$300.00 to \$350.00 per month for boarding], an additional \$300.00 per month will be available monthly for creditors." *Id.* at 33.

In the case at bar, Warren testified that he purchased the Baxter property in the early 1990s as an investment and that it is neither farmable nor commercially viable. He has not made any significant improvements to the land since moving there nor does he have any dependents living on the Baxter property while he is not there. He does not have any livestock that will have to be boarded elsewhere if the Baxter property were sold or surrendered. Warren works full-time at Porter Cable in Jackson. He testified that he plans on remaining in that employment during the pendency of his chapter 13 case. Warren lives in Jackson on a full-time basis, only traveling back to the Baxter property on the weekends for leisure. Clearly, the Baxter land is an expense which is not necessary for the support and maintenance of the debtor.

Warren alleged that he owes more on the Baxter property than it is worth. No proof was presented to the Court as to the value of the land; however, even if it had been proven that the land was worth less than the debt owed on it, the Court would still deny confirmation of the plan under § 1325(b). Such an argument is not relevant to a disposable income analysis of the plan. Section 1325(b) requires a court to deny confirmation of a plan which does not devote all disposable income to the plan. Whether or not a deficiency claim arises after surrender of property is of no consequence to such a decision.

### **III. ORDER**

It is therefore **ORDERED** that American Express Centurion Bank's Objection to Confirmation is **SUSTAINED**. The Debtor shall have twenty days to submit an amended plan to which the creditors may file an objection.

**It is so ordered.**

**By the Court,**

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**G. Harvey Boswell**  
**United States Bankruptcy Judge**

**Date: August 14, 2002**

cc:

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