

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Jason E. Ewing,

Debtor(s).

C/A No. 16-04391-HB

Chapter 13

**ORDER DENYING CONFIRMATION
OF CHAPTER 13 PLAN**

THIS MATTER comes before the Court for a confirmation hearing regarding the proposed Amended Plan¹ filed by Debtor Jason E. Ewing through his attorney V. Lee Ringler. Chapter 13 Trustee Wm. Keenan Stephenson objects, asserting Ewing's proposed plan does not include the projected disposable income that must be paid to unsecured creditors pursuant to 11 U.S.C. § 1325(b)(1)(B).

I. FINDINGS OF FACT

Ewing testified as the sole witness at the hearings and both parties presented documentary evidence.² Ewing filed for voluntary Chapter 13 relief on August 30, 2016. Ewing's spouse ("wife") did not join in his bankruptcy filing.

Ewing and his wife are both employed as federal correctional officers and earn roughly the same income. However, Ewing's income may fluctuate each pay period depending on whether he works Sunday shifts and/or holidays. Ewing provided pay advices for pay periods from January 24, 2016 through August 6, 2016 and testified regarding the details of his pay. Ewing is paid bi-weekly for a total of 26 pay periods each year.

¹ ECF No. 24, filed Oct. 31, 2016. Supporting documents: Amended Official Forms 122C-1 and 122C-2. (ECF Nos. 25, filed Oct. 31, 2016).

² An initial hearing was held on October 19, 2016, and continued to November 16, 2016.

Ewing also receives a monthly disability benefit from the Department of Veterans Affairs. He testified that the VA notified him that his benefits would be reduced. Copies of written correspondence from the VA submitted by Ewing state that it is proposing to reduce the current benefit of 40% to 10%. Another correspondence from the VA states that it has proposed to reduce Ewing's prior evaluation, dropping his overall rating from 60% to 50% and makes clear that it is only a proposal to reduce his benefits and the VA has "not carried out this action" and if it "decide[s] to carry out [its] proposed action, [Ewing] will receive written notification and at that time, [Ewing] will be given appropriate appellate rights." Ewing testified that he is challenging the proposed reduction of benefits and change in evaluation, but no resolution has been reached and the VA has not otherwise provided him with any update.

Ewing and his wife have been married for two years and have separate checking accounts. Their residence is solely owned by his wife and the mortgage is in her name only. Traditionally, Ewing's wife pays the mortgage and other household expenses from her account and Ewing provides her \$1,200.00 each month to contribute to these expenses.

There is no dispute that this is an above-median income case and the applicable commitment period under § 1325(b)(4) is five years. Ewing's Schedules and Statements list significant unsecured debt as of the petition date. For the purpose of calculating Ewing's monthly disposable income under § 1325(b)(2), the Trustee challenges various figures found on Ewing's Official Form 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period) and Official Form 122C-2

(Chapter 13 Calculation of Disposable Income).³ A chart summarizing the differences between Ewing and the Trustee’s calculations follows. Under the Trustee’s calculations, Ewing’s monthly disposable income is \$1,439.00, as opposed to negative \$1,031.15 calculated by Ewing.⁴ The Trustee’s calculations would require a considerably higher distribution to Ewing’s unsecured creditors.

	Ewing’s Calculation	Trustee’s Calculation	Trustee’s Explanation	Effect on Disposable Income
1. Ewing’s gross monthly income <i>(Line 2, Form 122C-1)</i>	\$5,746.17	\$6,042.00	Use year-to-date averages instead of the average of the 6 months immediately preceding the filing of the petition. (Trustee’s calculation for Ewing’s gross monthly income was made prior to Ewing’s testimony at the hearing.)	+ \$295.83
2. Ewing’s taxes <i>(Line 16, Form 122C-2)</i>	\$1,578.17	\$1,485.00	Use year-to-date total to average monthly tax amounts as well as prior tax deductions and exemptions, and the tax tables provided by the IRS and SC Department of Revenue, not just pay advices. Ewing’s pay advices indicate that an average of approximately \$1,210.00 is deducted each month for state and federal taxes. Trustee’s figure allows a higher amount.	+ \$93.17
3. Payment for IRS’s \$10,565.00 secured debt <i>(Line 33d, Form 122C-2)</i>	\$261.00	\$200.00	Trustee’s calculation gives a deduction only for the months the payment persists during the commitment period.	+ \$61.00
4. Ewing’s retirement deductions	\$361.07	\$292.00	Ewing’s pay advices do not support his figure because he makes a voluntary contribution of \$100.00 to his Thrift Savings Plan	+ \$69.07

³ Originally filed by Ewing at ECF No. 1, line 45 figure was -\$1,104.33; amended at ECF No. 14, line 45 figure was -\$1,749.07; amended at ECF No. 20, line 45 figure was -\$1,139.25; amended at ECF No. 25, line 45 figure is -\$1,031.15.

⁴ The sum of the numbers set forth in the “Effect on Disposable Income” column of the chart in Section I. is not equal to the difference between the parties’ asserted disposable income calculations because the Trustee’s asserted calculations include additional changes not disputed here.

(Line 41, Form 122C-2)			("TSP") retirement account each pay period and a mandatory contribution of approximately \$34.00 each pay period.	
5. Reduction of VA benefit <i>(Line 10 Form 122C-1 & Line 43, Form 122C-2)</i>	\$415.48	\$1,765.00	Lack of certainty as to the amount and timing of any reduction.	+ \$1,350.00
6. Wife's payroll deductions ⁵ <i>(Line 13, Form 122C-1)</i>	\$1,948.00 (Exs. A & F)	\$1,740.00	Same as 2. Ewing's figures include a \$137 deposit that should not be counted. Wife's pay advices indicate approximately \$1,132 is deducted each pay period, which includes the repayment of her TSP loan of approximately \$204.51 per pay period (<i>see</i> 7 below). Trustee's figure allows a higher amount.	+ \$208.00
7. Wife's TSP loan <i>(Line 13, Form 122C-1)</i>	\$443.00 (Ex. F)	\$236.00	Same as 3. It is undisputed that payments on this existing debt will end during the commitment period.	+ \$207.00
8. Wife's separate debt payments <i>(Line 13, Form 122C-1)</i>	\$1,695.00	\$1,033.00	Same as 3. It is undisputed that payments on some of these existing debts will end during the commitment period.	+ \$662.00

II. APPLICABLE LAW

A. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157.

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L) and this Court may enter a final order.

⁵ The total of the wife's payroll deductions is \$2,390.13 in Ewing's Official Form 122C-1. This figure includes wife's repayment of her TSP loan, which is treated separately in this Order for clarification.

B. PROJECTED DISPOSABLE INCOME

If a trustee or an unsecured creditor objects to the debtor's proposed Chapter 13 plan, § 1325(b)(1)(B) requires the debtor to devote all of his or her "projected disposable income" to pay unsecured creditors during the applicable commitment period. 11 U.S.C. § 1325(b)(1). A part of the disposable income analysis allows consideration of secured debts. When deducting and calculating a debtor's secured debt services the Code provides:

The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and
- (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

11 U.S.C. § 707(b)(2)(A)(iii). The court may also take into consideration additional expenses or a reduction in current monthly income if the debtor demonstrates special circumstances. 11 U.S.C. § 707(b)(2)(B).

With regard to calculating the debtor's projected disposable income for the purposes of confirming a reorganization plan, the Supreme Court determined that 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*, 560 U.S. 505, 130 S. Ct. 2464, 177 L. Ed.2d 23 (2010). The calculation is a two-step process: (1) the disposable income is calculated; and (2) the disposable income is projected into the future and any appropriate adjustment is made.

Subsequent to *Lanning*, the Fourth Circuit addressed the issue of “whether a debtor’s ‘projected disposable income’ must be equal to the debtor’s ‘disposable income’ for purposes of satisfying § 1325(b)(1)(B), or whether the projected disposable income should reflect changes that have occurred or that will occur and that are known as of the date of confirmation.” *In re Quigley*, 673 F.3d 269, 272 (4th Cir. 2012). In *Quigley*, the Fourth Circuit considered whether the debtor’s “projected disposable income” should take into consideration the debtor’s intention to surrender two vehicles to her secured creditors. *Id.* at 270. The Fourth Circuit relied on *Lanning* and the Supreme Court’s adoption of a “forward-looking approach” to conclude that “failing to account for [known decreases in a debtor’s expenses] and thereby denying the unsecured creditors payments that the [d]ebtor clearly could make would be just the sort of ‘senseless result’ that the *Lanning* Court rejected.” *Id.* at 274 (citing *Lanning*, 560 U.S. at 519, 130 S. Ct. at 2475). The debtor in *Quigley* attempted to distinguish *Lanning* by arguing it involved a change in income whereas the debtor’s case involved a change in expenses; however, the Fourth Circuit found that the principles articulated in *Lanning* applied equally to both situations. *Id.*

C. MARITAL DEDUCTION FOR NON-FILING SPOUSE

“Current monthly income” is defined by the Code as “the average monthly income from all sources that the debtor receives” during the six months preceding the filing, with certain exclusions and adjustments. 11 U.S.C. § 101(10A). When calculating current monthly income, a debtor may deduct “any amount paid by any entity other than the debtor . . . on a regular basis for household expenses of the debtor or the debtor’s dependents . . .” *Id.*

Although a non-filing spouse has no legal obligation to repay the debtor's loans, inclusion of his or her income "is considered necessary in order to derive an accurate picture of the debtor's disposable income for the reason that some portion of it is likely to be applied to household expenses, thereby affecting the share of the debtor's income required for support." *In re Reeves*, 327 B.R. 436, 441 (Bankr. W.D. Mo. 2005). "Thus, a non-filing spouse's income may only be excluded from a debtor's disposable income analysis to the extent that the income is used to pay *non-household* expenses, i.e., expenses that are purely personal to the non-debtor spouse." *In re Montalto*, 537 B.R. 147, 149 (Bankr. E.D.N.Y. 2015) (emphasis in original).

The determination of what amount a non-filing spouse contributes on a regular basis for household expenses of the debtor or the debtor's dependents is fact specific and subject to interpretation. *In re Sale*, 397 B.R. 281, 288 (Bankr. M.D.N.C. 2007) (quoting *In re Travis*, 353 B.R. 520, 526 (Bankr. E.D. Mich. 2006)). Moreover, Courts must carefully scrutinize the debtor's marital adjustment calculation because of the impact it may have on the debtor's obligations in his or her bankruptcy case. *Id.* (quoting *Travis*, 353 B.R. at 527); see also *Simms*, 2011 WL 2604801, at *5 ("Generally such an adjustment, which in most cases will benefit an insider (spouse) of the debtor, should be strictly scrutinized by the court as it is susceptible to abuse." (citing H.R. Rep. 95-595 (1977))). While § 707(b)(2)(A)(iii) instructs how to calculate the debtor's secured debts, the Code does not make it directly applicable to calculations for a non-filing spouse's debts.

D. BURDEN OF PROOF

The burden of proof in the confirmation context for an objection under § 1325(b) is a shifting burden. The initial burden falls on the objecting party to articulate a *prima*

facie objection. The Trustee “is initially required to produce satisfactory evidence that Debtor is not devoting [his] ‘projected disposable income’ to [his] Plan.” *In re Martellini*, 482 B.R. 537, 541 (Bankr. D.S.C. 2012) (quoting *In re Barnes*, 378 B.R. 774, 777 (Bankr. D.S.C. 2007)). Once this burden is met, however, the ultimate burden is on Ewing to prove by a preponderance of the evidence that the plan complies with the confirmation requirements. *Id.* Further, “except in the situation where spouses maintain separate households, all of a non-filing spouse’s income is presumed to be dedicated to household expenses, and it is ultimately the debtor’s burden to prove which expenses are purely personal to the non-filing spouse.” *Montalto*, 537 B.R. at 149; *see also In re Vinger*, 540 B.R. 782, 786 (Bankr. D. Colo. 2015) (“The burden of proof to obtain confirmation is on the proponent of the plan. The burden of proof to demonstrate that a marital adjustment is appropriate is also on the plan proponent . . .” (citing *Montalto*, 537 B.R. at 148)); *In re Simms*, C/A No. 10-22579, 2011 WL 2604801, at *5 (Bankr. D. Md. June 30, 2011).

III. DISCUSSION AND CONCLUSIONS

The relevant inquiry before the Court is whether the Trustee has articulated a *prima facie* objection as to the calculations included in Ewing’s current monthly income and projected disposable income and, if so, whether Ewing’s calculations are supported by the record. *See Martellini*, 482 B.R. at 541.

A. EWING’S INCOME AND DEDUCTIONS

The Trustee and Ewing disagree as to the calculation of Ewing’s gross wages from employment. The disagreement is affected by the timing of payment and Ewing’s irregular shifts at work. From a review of the testimony and evidence submitted at the final hearing (including Ewing’s pay advices), the Court cannot determine that Ewing’s calculation of

his gross monthly income is incorrect based on the statutory formula for calculating “current monthly income” under the Code. *See* 11 U.S.C. § 101(10A).

Ewing’s current monthly income now includes a VA benefit. The evidence indicates Ewing has been notified that some future reduction is possible, but there has been no final determination and the ultimate amount or date of any reduction cannot be readily anticipated. Therefore, the record does not establish any “virtual certainty” regarding the amount or timing of any reduction. Trustee has adequately challenged Ewing’s calculations and Ewing has failed to show that a reduction to his projected disposable income is appropriately considered at this time. The Trustee concedes that should a reduction in VA benefits become certain, a reduction in plan payments may then be appropriate.

Regarding taxes and withholdings, the Trustee asserts that using the pay advices alone to calculate Ewing’s monthly tax withholdings is not accurate because it does not take into account any tax refund Ewing may receive and it is entirely within Ewing’s control as to which deductions he claims. Based on the Trustee’s approach of using year-to-date tax amounts, applicable deductions and exemptions, and the tax tables provided by the IRS and SC Department of Revenue, he calculated Ewing’s monthly tax liability to be \$1,485.00. Ewing asserts debtors should be allowed to make a good faith estimate and use that as the basis for the claimed tax withholdings. However, the Court was unable to recreate Ewing’s estimated withholdings from the evidence submitted, and his pay advices make it clear that Ewing’s monthly tax withholdings do not amount to the \$1,578.17 claimed. The Trustee has adequately challenged Ewing’s calculations and Ewing’s result is not supported by the evidence. Consequently, without more evidence regarding how

Ewing calculated the amount he asserts, the Court cannot determine that, based on the preponderance of the evidence, the amount of deductions claimed by Ewing is accurate.

Ewing's testimony and pay advices do not support the calculation that he has contributed \$361.00 each month to his TSP retirement account. Therefore, the Trustee's Objection is sustained with regard to these deductions.

The record indicates that Ewing owes \$10,565.00 to the IRS for a secured debt. Considering the amount per month necessary to repay this debt and the statutory formula provided by § 707(b)(2)(A)(iii), the Court can find no support for Ewing's claim for a deduction in the amount of \$261.00 per month.

B. MARITAL ADJUSTMENT

Ewing's calculations of his wife's separate debts and TSP loan assume that any debt service payment now existing can be counted for the full 60 months of the commitment period. The only evidence before the Court indicates that some of the wife's debt service payments will end during that period. The record does not contain sufficient evidence to show that any debt service that ends during the term of the plan will persist (e.g., that the wife will need to purchase a new vehicle once this vehicle is paid off, etc.). Therefore, the Trustee's objection based on the wife's debt service and the TSP loan is sustained because it is virtually certain that these debts will end and Ewing failed to prove by a preponderance of the evidence that the marital adjustment is appropriate for the full 60 months. *See Vinger*, 540 B.R. at 786. The Trustee agreed that "step" payments (payments at a lower initial amount then increasing at a fixed point in the future) could be appropriately proposed on the facts of this case.

As with Ewing's tax deductions, the Trustee contends the wife's payroll deductions should not be determined solely from her pay advices because they do not account for excessive withholding, which should result in income tax refunds, and which amounts are within her control. Instead, the Trustee contends it is more accurate to calculate this figure based on the wife's 2015 tax deductions, exemptions, and the tax tables provided by the IRS and SC Department of Revenue to compute the projected taxes. Ewing did not present any figures breaking down the sum of the wife's payroll deductions other than those reflected in her pay advices. The Trustee has presented a *prima facie* objection as to the calculation of the marital deduction and Ewing has failed to meet his ultimate burden of proof.

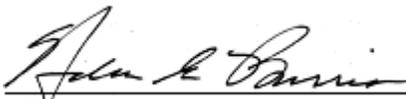
IT IS, THEREFORE, ORDERED that for the reasons stated above, the Trustee's Objection to confirmation is sustained. Ewing shall to file an amended plan in accordance with SC LBR 3015-2 within **twenty-one (21) days** from the issuance of this Order.

AND IT IS SO ORDERED.

**FILED BY THE COURT
12/12/2016**



Entered: 12/12/2016


US Bankruptcy Judge
District of South Carolina