IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	
	)	
RONNIE OWEN HAIRSTON	)	
and	)	CHAPTER 13
KATHALENE ANN HAIRSTON,	)	
	)	CASE NO. 7-04-00415
Debtors.	)	

ORDER

For the reasons stated in this Court's contemporaneous Memorandum Decision, it is

ORDERED

that Gwendolyn Hairston's Objection to the entry of the order of November 26, 2004 is hereby SUSTAINED and the order of November 26, 2004 quashing garnishment is hereby VACATED.

The Clerk is directed to send copies of this order and accompanying memorandum decision to Gwendolyn Hairston; the Debtors, Ronnie Owen Hairston and Kathalene Ann Hairston; Debtors' counsel, Michael D. Hart, Esq.; the Trustee, Rebecca B. Connelly, Esq. and Counsel for the Office of the United States Trustee, Margaret K. Garber, Esq., and to send copies of this Order to all other parties who were served with the November 26 order hereby vacated.

ENTER this 11th day of January, 2005

William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	
	)	
RONNIE OWEN HAIRSTON	)	
and	)	CHAPTER 13
KATHALENE ANN HAIRSTON,	)	
	)	CASE NO. 7-04-00415
Debtors.	)	

MEMORANDUM DECISION

The matter before the Court is the Objection filed by Ms. Gwendolyn S. Hairston, former wife of the Debtor, to an order entered by this Court on November 26, 2004 quashing a garnishment action filed by Ms. Hairston against the wages of the Debtor to collect past due pre-petition child support for which Mr. Hairston is liable to her. This Objection came on to be heard before the Court on December 20, 2004 and at that time both Ms. Hairston and Mr. Hairston testified. The Court at that time took the matter under advisement and since that time has requested written argument from Debtor's counsel to demonstrate why Ms. Hairston's Objection is not well taken. The Court has received a written response from counsel and has done its own research as to the governing legal principles. For the reasons set forth below, the Court concludes that Ms. Hairston's Objection should be sustained and the Court's order of November 26, 2004 quashing the garnishment should be vacated.

FINDINGS OF FACT

Debtors Ronnie Owen Hairston and Kathalene Ann Hairston jointly filed their Chapter 13 bankruptcy petitions February 2, 2004. The Debtors listed a debt of $7,000.00 to the

Department of Child Support Enforcement for the Commonwealth of Virginia on their Schedule E, but did not specify to which individual this debt was owed. Upon the Court's review of the proof of claim filed in the case by DCSE, it appears that DCSE was attempting to collect child support on behalf of Karen Claytor, not Gwendolyn Hairston. Gwendolyn Hairston was not listed as a creditor on any schedule or the mailing matrix. Along with their Schedules, the Debtors filed a Chapter 13 Plan, confirmation of which was ordered April 19, 2004. Ms. Hairston did not receive notice of the bankruptcy, the Chapter 13 Plan or of its confirmation. The Plan did not include any payment to Ms. Hairston by the Trustee or directly by the Debtors. The Plan also does not make any provision with respect to the Debtors' post-petition earnings other than the payment of $345.00 per month to the Chapter 13 Trustee and $568.00 per month to be paid directly by the Debtors on their mortgage. The Debtors joint gross monthly income was indicated to be $2,775 and their joint "take home" pay to be $2,213 per month.

On November 24, 2004, the Debtors filed an Application to Quash Garnishment which stated that the Debtors were subject to a garnishment issued by the City of Roanoke Juvenile and Domestic Relations Court in favor of Gwendolyn S. Hairston for pre-petition child support arrearages. The Application was granted by order of November 26, 2004. Ms. Hairston, upon receiving notice of the November 26 order and pursuant to its provisions, sent a letter to the Court dated December 2, 2004 objecting to entry of the order and stating that she had a court order dated October 30, 2002 ordering Mr. Hairston to pay $100.00 per week. In her letter she also stated that she had filed a "motion to amend wages to decide to increase" which was set for hearing in J & DR court on February 2, 2005. She enclosed an undated Order of Support ordering Mr. Hairston to pay support for two children and an Order of Support dated October 30,

2002 which terminated Mr. Hairston's obligation to pay current support but ordered $100.00 weekly payments to be applied to the arrearage.

A hearing was scheduled on the matter on December 20, 2004. The Debtors attended and were represented by counsel and Ms. Hairston attended pro se. At the hearing, Mr. Hairston testified that he owes some back child support for 2 children, now ages 25 and 21. He stated that the support had terminated at age 18 and 19. He thought child support was to end at that age, but he didn't know he was supposed to file a petition to terminate payments. Ms. Hairston testified that Mr. Hairston owes on two cases. She produced the court order she enclosed with her above letter to the Court. Additionally, she stated that she has filed a "motion to increase" and a "show cause" scheduled for February in state court.

The Debtors' counsel, Michael D. Hart, Esq. argued that since the amount due was for arrearages and not for current support, the stay should remain in effect. The Court reviewed the Bankruptcy Code, and finding no such distinction, wrote Mr. Hart a letter asking for additional argument as to why the automatic stay should be effective against Ms. Hairston's garnishment. Mr. Hart responded with further argument, to which the Court on December 29 responded further, clarifying the exact points on which it would like comment. On January 6, 2005, the Debtors filed an amendment to the list of creditors to add Ms. Hairston. On January 7, 2005, the Debtors filed an amended plan under which Ms. Hairston would be paid by the Trustee as a priority claim.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the

District Court on July 24, 1984. The Court concludes that an objection to its order purporting to enforce the provisions of the automatic stay in bankruptcy is a "core" bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(A) and (G).

While the issuance of an automatic stay pursuant to 11 U.S.C. § 362(a) is an innate characteristic of a bankruptcy case, at least as to any validly filed one, its application to a particular collection activity by a specific creditor is not always completely clear. The statute expressly sets forth certain activities which are not subject to the automatic stay. One of these exceptions is with respect to the "collection of . . . support from property that is not property of the estate." 11 U.S.C. § 362(b)(2)(B). The parties seem to be agreed that the debt which Ms. Hairston seeks to collect from Mr. Hairston is overdue child support payments which accrued prior to the bankruptcy case. Indeed, Mr. Hairston has no currently accruing child support obligation to Ms. Hairston. Counsel for the Debtor argues that the purpose of the statutory exception for the collection of support is to deal with a debtor's obligation for current support so that support claimants are not harmed by the filing of a bankruptcy petition. The wording of the statute makes no such distinction, however, between current support and delinquent support, and after inquiry from the Court counsel has been unable to provide any authority supporting his position. Accordingly, while the position advanced by counsel has a certain logical appeal to it, the Court will apply the wording of the statute as it exists and conclude that the automatic stay does not apply to the collection of any support "from property that is not property of the estate." Id.

The order confirming the Debtor's Chapter 13 Plan provided that he would pay the sum of $345.00 per month for a period of 60 months to the Trustee to distribute in

accordance with the provisions of the Plan and imposed an obligation on the Debtors to directly pay $568.00 per month on their mortgage. While the confirmed Plan did deal with a support obligation of the Debtor, such obligation was to a claimant other than Ms. Hairston, specifically, one Karen Claytor. As previously noted, Ms. Hairston was not listed as a creditor in the original bankruptcy schedules and apparently received no notice of the case or the proposed Chapter 13 Plan prior to the time it was confirmed. Accordingly, the Court believes that it is fully warranted in finding as a fact and concluding as a matter of law that Ms. Hairston's support claim was not "provided for by the plan" within the meaning of 11 U.S.C. § 1327(c).[1]

The correct determination of whether Ms. Hairston's garnishment of Mr. Hairston's wages is an effort to collect the debt from property of the estate appears to depend upon the proper interpretation and reconciliation of two subsections of Chapter 13 of the Bankruptcy Code. On the one hand, section 1306(a)(2) of the Code provides that for purposes of Chapter 13 "property of the estate includes . . . earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under Chapter 7, 11, or 12 of this title, whichever occurs first." On the other hand, section 1327(b) provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Courts have arrived at different conclusions as to how these provisions are properly reconciled. *Compare In re Reynard,* 250 B.R. 241, 246-49 (Bankr. E.D. Va. 2000) *with In re Leavell*, 190 B.R. 536, 540-41 (Bankr. E.D. Va. 1995). *See generally,* Lundin, K. M., 3 **Chapter 13 Bankruptcy, 3d**

[1] (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Edition §230.1 (Bankruptcy Press, Inc. 2004).

As Judge Lundin notes in his very helpful treatise on Chapter 13 bankruptcy, the language from section 1327(b) of the Code dealing with the vesting effect of the property of the estate in the debtor is derived from section 1141(b)[2] of the Code dealing with the effect of a Chapter 11 confirmation order. In either case the confirmation of a plan effects a vesting of property of the estate in the debtor. Therefore, the Court concludes that it may both properly and profitably take recourse to court interpretations of the effect of this language in Chapter 11 cases in reaching a conclusion as to its proper interpretation in Chapter 13. The Chapter 11 cases seem to be fairly uniform in holding that the language of § 1141(b) means that confirmation of a Chapter 11 plan, unless the plan or confirming order provides otherwise, terminates the bankruptcy estate and revests the property rights which comprised it in the debtor. *See In re Quality Truck & Diesel Injection Service,* 251 B.R. 682, 686 (S.D.W.Va. 2000), *In re Concrete Structures,* 261 B.R. 627, 644-45 (E.D. Va. 2001); *In re Poplar Run Five Ltd. Patnership,* 192 B.R. 848, 856 (Bankr. E.D. Va. 1995). Of course Chapter 11 cases do not have to deal with a statutory counterpart to § 1306(a)(2) in Chapter 13 expressly defining "property of the estate" to include post-petition earnings of the debtor. After giving due consideration to the reasoning of Judge Mayer in the *Reynard* case, this Court believes that the proper reconciliation of sections 1306(a)(2) and 1327(b) is that "property of the estate" for Chapter 13 purposes, unless either the plan or confirming order provides otherwise, includes post-petition earnings of the debtor only to the extent that those earnings are paid to the Chapter 13 Trustee or directly to creditors as

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[2] (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

provided in such plan or confirming order, but that otherwise such earnings are removed from "property of the estate" by virtue of section 1327(b). While the Court acknowledges the practical problems noted by Judge Mayer in his decision, such issues can be addressed by providing "otherwise" in the Chapter 13 Plan or order of confirmation and by expressly dealing with all pre-petition and expected recurring post-petition claims in the plan or order.

Because the Debtors' Chapter 13 Plan did not "provide for" Ms. Hairston's support claim, Mr. Hairston's post-petition earnings are not "free and clear" of her support claim as would be the case under the language of § 1327(c) if the Plan had so provided. Because the post-confirmation earnings of the Debtor, except to the extent necessary to fund the provisions of the Chapter 13 Plan, are his property and not "property of the estate", Ms. Hairston is not affected by the provisions of the automatic stay in her attempt to collect the child support to which she is entitled under Virginia law. The Court agrees with Judge Lundin[3] that the general concept of Chapter 13 as it relates to support is to make the support claimant a party to the case and allow such claimant an opportunity to protect his or her interests in the context of confirming a Chapter 13 Plan which should provide for the satisfaction of that claim. Any failure to protect the legitimate interests of such support claimants should be dealt with by filing an objection to the confirmation of the plan. Ms. Hairston so far has not had that opportunity. Therefore, until she does have it, she will be free to continue her support collection efforts against Mr. Hairston. At such time as Mr. Hairston may obtain confirmation of a modified Chapter 13 Plan appropriately dealing with both her claim and that of Ms. Claytor, payments to satisfy these

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[3] See Lundin, K.M., 3 **Chapter 13 Bankruptcy, 3d Edition,** *supra,* at pages 230-32 and -33.

claims will be a part of the confirmed plan and thereby be paid from property of the bankruptcy estate. An order sustaining Ms. Hairston's Objection and vacating the Court's earlier order quashing her garnishment will be separately entered.

This 11th day of January, 2005.

William F. Stone, IV
UNITED STATES BANKRUPTCY JUDGE