

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

IN RE: JERRY L. AND CLARITA H. WARREN,)
Debtors) CASE NO. 7-02-02141-WSA
)
) CHAPTER 7
)
) MEMORANDUM DECISION
)

FINDINGS OF FACT

The matter before the Court is the Debtors' Motion to obtain this Court's approval of their request to incur debt in the amount of \$17,685.81 to be repaid with interest at the rate of 6.90% per annum over a term of 60 months to purchase a 1994 Buick to replace a 1990 Subaru used by Mrs. Warren for her transportation needs and which the debtors assert has become unreliable. The warrens are presently operating under a Plan confirmed on October 15, 2002 which requires them to make 60 monthly payments to the Trustee in the amount of \$378.70 each. From these payments the Trustee makes payments of \$30.50 per month for 36 months on the Subaru and is to make a distribution to the general unsecured creditors of at least 20% of their claims. In their original Schedules I and J the Debtors reported combined net income of \$3,082 per month and expenses of \$2,651.08 per month, respectively, netting an excess of \$430.92 to be available to make the Plan payments of \$378.70 per month. The Motion was heard on May 18, 2005 and at that time the Debtors filed amended Schedules I and J, reporting combined net income of \$3,463.10 per month and the same expenses of \$2,651.08 per month, resulting in a difference of \$812.02 per month available to make the existing Plan payment of \$378.70 and the proposed new obligation of \$348.92 per month, a combined total of \$727.62.

The Trustee filed an objection to this Motion and after the hearing held on May 18 continues to oppose it. In response to questioning from the Trustee at this hearing, Mr. Warren testified that some of their monthly expenses average out to something less than the amounts noted in Schedule J, which reflects no change in the amounts listed between the original and the one filed at the hearing. If this testimony is accurate, then the income available to service these obligations is somewhat greater than the \$812 figure reported in the new schedules. The Debtors' Motion was filed on May 6, 2005 along with a motion to shorten notice for a hearing on May 18. The motions were served on the Trustee, the Office of the United States Trustee and all creditors, of the latter of whom none appeared. The male Debtor testified and at the conclusion of such testimony the Trustee stated that she was prepared to state her position on the merits of the Motion to incur debt. Accordingly, the Court will grant the motion to shorten notice. The Court took the Motion under advisement to review the new schedules, the Plan and other documents in the case file, and to consider the arguments of the Trustee and counsel for the Debtors.

The Court finds based on the evidence that the Debtors have the financial ability to make the payments on both the proposed debt and the monthly payment due under their confirmed Plan. While the Court believes that the Debtors would be wiser either to purchase and finance a less expensive automobile having lower projected routine operating cost than the one they propose to purchase or to defer such purchase until after their Plan payments have been satisfied, it will not attempt to substitute its judgment for what the Debtors themselves have decided is best for them by denying the Motion on financial grounds, especially as no party in interest has raised an objection on that ground, when the Court has found that they have the financial ability to make this purchase..

CONCLUSIONS OF LAW

This Court has jurisdiction of this case 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 determination of a debtor's motion to incur debt which is opposed by their Chapter 13 Trustee is a "core" bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(D).

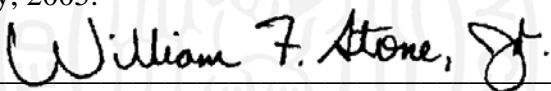
The Court has found that the Debtors have the ability to pay the necessary monthly payment on the proposed debt, based on their indicated level of expenses, without critically impairing their ability to perform under the confirmed Plan. Accordingly, if the Plan payment remains the same, the Court sees no reason not to approve the Motion before it. Based on the significant improvement in the female Debtor's income, however, the Chapter 13 Trustee believes that some of this good fortune should be shared with the creditors during the remaining term of the Plan. The Bankruptcy Code provides that a Chapter 13 plan can be modified after confirmation as follows:

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –
(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

11 U.S.C. § 1329(a). The Fourth Circuit Court of Appeals has held that a chapter 13 debtor's plan payments can be increased over the debtor's objection after confirmation when the debtor has had a substantial and unexpected increase in his income since the time of such confirmation. *In re Arnold*, 869 F.2d 240 (4th Cir. 1989). In that case the debtor's income increased from a reported \$80,000 per year at the time of plan confirmation to \$200,000 per year at the time of the hearing on a creditor's motion to modify the plan to increase the payment obligation. The bankruptcy court's action of modifying the plan to increase the monthly payment amount from \$800 to \$1,500 per month was upheld both by the District Court and the Court of Appeals.

Whether the female Debtor's increase in net income since the time of plan confirmation is of a kind which would qualify as both "substantial" and "not anticipated at the time of the confirmation hearing"¹ is not only uncertain, but also not before the Court presently. If the Trustee were to seek an increase in the payments required under the Plan, to grant the Motion before the Court might prejudice such a request because most of the Debtors' present disposable income would already be committed to service of the new debt obligation. Accordingly, the Court will conditionally grant the Debtors' Motion to incur debt if the Trustee fails to file within fifteen (15) days of this date a motion pursuant to 11 U.S.C. § 1329(a) to modify the Debtors' payment obligation to the Trustee under the terms of the confirmed Plan. If such a motion is filed and noticed within such time for a hearing, the Debtors' Motion will be preliminarily denied and continued for a final hearing at the time and place of the hearing on the Trustee's motion to modify the Plan. An order in accordance with the decision herein made will be entered contemporaneously with the signing of this order.

This 25th day of May, 2005.


UNITED STATES BANKRUPTCY JUDGE



¹ The test adopted by the Fourth Circuit from a bankruptcy court decision in the case of *In re Fitak*, 92 B.R. 243 (Bkrcty. S.D. Ohio 1988) is "whether a debtor's altered financial circumstances could have been *reasonably anticipated* at the time of confirmation by the parties seeking modification." 869 F.2d at 243, quoting from *Fitak*, 243 B.R. at 250. See also *In re James*, 260 B.R. 368, 374 (Bkrcty. E.D.N.C. 2001).