

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID O. HOPKINS,)	
)	
Plaintiff,)	
)	
VS.)	NO: 98-CV-0797-PER
)	
KAREN FLOYED,)	BK. 98-31637
)	
Defendant.)	Adv. No. 98-3151

MEMORANDUM AND ORDER

RILEY, District Judge:

I. Introduction and Overview of Proceedings in Bankruptcy Court

David Hopkins and Karen Floyed are the parents of three minor children: Jacob Hopkins (born in 1982), Matthew Hopkins (born in 1984) and Joshua Hopkins (born in 1986). David and Karen were divorced via a Judgment of Dissolution of Marriage entered in December 1991 in the Circuit Court of St. Clair County, Illinois. In March 1993, the Judgment of Dissolution was registered in the Circuit Court of St. Louis County, Missouri, in accord with the Uniform Registration of Foreign Judgments Act.

In December 1993, the St. Louis County Circuit Court entered a Decree of Modification. The decree directed David to pay Karen \$744 per month in child support. Additionally, the decree

provided that David's income was subject to withholding without further notice if David became delinquent in child support payments, and this withholding would include "an additional amount equal to fifty (50%) percent of one month's child support ... until the delinquency is paid in full."

In February 1996, the St. Louis County Circuit Court entered an Order and Judgment of Contempt against David. The contempt order noted that Hopkins admitted concealing his whereabouts since August 1994 to evade his obligation to pay child support, acknowledged that he had been employed full-time since July 1995, and stipulated that he owed Karen \$18,207. Hopkins was ordered incarcerated in the St. Louis County Jail until he paid the back child support or otherwise purged himself of contempt. The contempt order pointed out that David also owed Karen for medical expenses incurred for the children and stated that David "shall be subject to wage withholding for 60% of his net wages." It is unclear what happened immediately following entry of the contempt order, but pleadings before this Court indicate that in September 1996, the St. Louis County Circuit Court issued a separate wage withholding/assignment order against David.¹

On May 27, 1998, David Hopkins filed a Chapter 13 bankruptcy

¹See Karen Hopkins' Answer filed in Bankruptcy Court on July 31, 1998 (T 3).

petition in the United States Bankruptcy Court for the Southern District of Illinois. At that time, David owed Karen \$12,464 in back child support. Several weeks later, David filed a "Complaint to Compel Release of Garnishment" in Bankruptcy Court. David alleged that: (a) Karen had a garnishment on his wages; (b) Karen was continuing to garnish his post-petition wages despite his requests to "release the garnishment;" and (c) his post-petition wages were property of the Chapter 13 estate. David asked the Bankruptcy Court to enter an order "releasing the garnishment of the above-described property of the estate" and awarding David attorneys' fees.

In July 1998, Karen answered David's complaint in Bankruptcy Court. Karen maintained that no "garnishment" had been filed. Rather, Karen explained, the St. Louis County Circuit Court had entered a wage assignment order, which she had no power to vacate.² Karen also filed a three-count counterclaim seeking to determine the dischargeability of three items of David's indebtedness. Count I alleged that David's indebtedness on the periodic child support was nondischargeable. Count II alleged

²Karen emphasizes (Doc. 5, p. 1) that the wage withholding is *not* a garnishment: "It is a totally separate mechanism created by the legislature of the State of Missouri pursuant to Section 452.350 R.S.Mo. solely for the collection of child support, maintenance and arrears of child support and/or maintenance."

that David's indebtedness for additional child support resulting from the children's medical expenses was non-dischargeable. Count III alleged that certain attorneys' fees and court costs were non-dischargeable.

On September 21, 1998,³ U.S. Bankruptcy Judge Gerald D. Fines issued an Order which denied David's "Complaint to Compel Release of Garnishment," allowed all three counts of Karen's counterclaim, and declared non-dischargeable in bankruptcy David's indebtedness for current and past child support plus \$2000 in attorneys' fees and \$268 in court costs (awarded or incurred in St. Louis County Circuit Court in connection with Karen's efforts to collect the child support).

In an accompanying five-page Opinion, Judge Fines found that Karen's failure to attempt to vacate the wage assignment order neither constituted "a willful act that would rise to the level necessary" to support sanctions/damages under **11 U.S.C. 362(h)** nor violated the automatic stay provisions of **11 U.S.C. 362(b)**. Judge Fines declined to grant the relief sought by David, who asked Judge Fines to vacate the wage assignment ordered by the

³The Opinion is filed-stamped Sep. 21, 1998 and was docketed on September 21, 1998, but the last line of the Opinion bears the date "October 21st, 1998." The accompanying Order similarly is file-stamped Sep. 21, 1998, but the first line of the Order says "entered on the 21st day of October 1998." The September date is correct, as David's notice of appeal was filed October 1, 1998.

St. Louis County Circuit Court.

On October 1, 1998, David Hopkins appealed Judge Fines' September 21, 1998 Order to this District Court under **28 U.S.C. 158(a)**. Section 158(a)(1) vests the United States District Courts with jurisdiction to hear appeals from final orders of U.S. Bankruptcy Judges. Jurisdiction being proper, and this matter having been fully briefed, this Court now rules on David's appeal.

**II. Standard Governing This Court's Review
of the Bankruptcy Court's Order**

Pursuant to **28 U.S.C. 158(a)**, this Court has jurisdiction over David's appeal from the Order entered by Judge Fines on September 21, 1998. This Court may affirm, modify, or reverse the Order, **FEDERAL RULE OF BANKRUPTCY PROCEDURE 8013**, in accord with the following standards.

Reviewing courts must accept a bankruptcy court's findings of fact unless they are clearly erroneous. The reviewing court must give due regard to the bankruptcy judge's opportunity to hear and weigh the credibility of the witnesses. Conclusions of law, however, are governed by de novo review. **FED. R. BANK. P. 8013; *In Re Image Worldwide, Ltd.*, 139 F.3d 574,576 (7th Cir. 1998); *Calder v. Camp Grove State Bank*, 892 F.2d 629, 631 (7th Cir. 1990).**

III. Analysis

David Hopkins presents three issues on appeal:

- A. Whether the Bankruptcy Court erred in holding that Karen Floyed did not violate the automatic stay provisions of **11 U.S.C. 362**;
- B. Whether the Bankruptcy Court erred in concluding that David's children were not adequately protected under David's Chapter 13 Plan; and
- C. Whether the Bankruptcy Court erred in holding that David was not entitled to (1) an order compelling Karen to release the "garnishment" and (2) damages, costs and attorneys' fees under **11 U.S.C. 362(h)**.

The Court considers all three issues, jointly discussing points A and C together, as these two issues involve overlapping facts and arguments.

11 U.S.C. 362(a) sets forth the general rule that the filing of a petition for bankruptcy protection automatically stays such matters asjudicial proceedings against a debtor, enforcement of judgments against a debtor, and actions to collect on claims against a debtor that arose before the bankruptcy petition was filed. But **11 U.S.C. 362(b)(2) (emph. added)** spells out an *exception* to the general rule of automatic stay:

The filing of a petition ... does not operate as a stay ... of the ... continuation of an action or proceeding for ... the establishment or modification of an order for alimony, maintenance, or support; or ... the collection of alimony, maintenance, or support *from property that is not property of the estate.*

On appeal, David asserts that his wage assignment does not fall within § 362(b)(2)'s "narrow exception to the automatic stay," because his post-petition wages are property of the estate under **11 U.S.C. 1306, 1327**. Judge Fines rejected this argument below, finding that David's earnings were *not* property of the estate under **11 U.S.C. 1327**. Whether the wages are (or are not) property of the bankruptcy estate is a legal conclusion, reviewed by this Court *de novo*.

Several provisions of the Bankruptcy Code shed light on this inquiry. The starting point is **11 U.S.C. 541(a)(1)**, which broadly defines the bankruptcy estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." More specific provisions offer further insight. **11 U.S.C. 541(a)(6)** provides that earnings from services performed by the debtor after commencement of the case should not be included in the bankruptcy estate. On the other hand, **11 U.S.C. 1306** suggests that in a Chapter 13 proceeding, earnings from service performed by the debtor after commencement of the case are included in the bankruptcy estate David filed a Chapter 13 petition. Thus, at first blush, it would appear that David's point prevails and his post-petition earnings were part

of the estate.⁴

But **13 U.S.C. 1327** injects a twist, because (as pointed out in the appellee's brief, (Doc. 5,p. 4), confirmation of the plan effects a change in the property of the estate.

§ 1327. Effect of confirmation.

...

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

Many federal courts have remarked that a tension exists between these various provisions of the Bankruptcy Code. For instance, in *Security Bank of Marshalltown, Iowa v. Nieman*, 1 F.3d 687, 689 (8th Cir. 1993), the Eighth Circuit confronted the issue of whether a Chapter 13 estate existed after confirmation of a Chapter 13 plan. The Court explained the apparent conflict between § 1306 and § 1327:

A survey of the cases addressing this issue reveals ... a split in authority about whether a bankruptcy estate continues to exist after confirmation of a Chapter 13 plan. We start by agreeing with *In re Clark*, 71 B.R. 747, 749 (Bankr. E.D. Pa.1987), that

⁴As Judge Fines noted (Opinion, p. 4), David would rather use those wages for other purposes than have those wages automatically go to Karen for child support.

... "we find neither § 1327(b) [nor] § 1306 to be models of clarity." There is a tension between these two sections. Section 1306 provides that property of the estate includes all property the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted. Section 1327(b) provides that upon confirmation of a plan under Chapter 13, all property of the estate is vested in the debtor. Courts differ based on their interpretation of 11 U.S.C. § 1306 and 11 U.S.C. § 1327. One line of cases holds that the Chapter 13 estate exists after confirmation and includes the debtor's property and earnings dedicated to the fulfillment of the Chapter 13 plan. [Citations omitted.] A second line of cases, however, holds that unless the Chapter 13 plan provides otherwise, confirmation of the Chapter 13 plan vests all property of the Chapter 13 estate in the debtor, ending the estate at that time. [Citations omitted.]

The Eighth Circuit ultimately joined the courts holding that the estate continues to exist after confirmation of the Chapter 13 plan, although property of the estate still may vest in the debtor following confirmation. ***Security Bank*, 1 F.3d at 689.**

David and Karen cite cases from these two distinct lines of authority to support their respective positions. The parties have cited, and this Court has located, no definitive Seventh Circuit pronouncement directly answering the issue presented by this appeal. The Seventh Circuit has addressed the apparent conflict between these Code sections and emphasized the effect of §1327(b):

It is true that the Bankruptcy Code says that all the

earnings of a Chapter 13 debtor are the property of the estate. 11 U.S.C.

§ 1306(a)(2). But it also says that "confirmation of a plan vests all of the property of the estate in the debtor" unless the plan provides otherwise, § 1327(b), which we think scotches any inference that Congress intended to render all Chapter 13 debtors legally incompetent to manage any of their property. We read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns as much of that property to the debtor's control as is not necessary to the fulfillment of the plan.

***In Re Heath*, 115 F.3d 521, 524 (7th Cir. 1997).**

Indeed, the Northern District of Illinois reversed a U.S. Bankruptcy Judge who reached the conclusion David Hopkins urges upon this Court. ***In Re Fischer*, 203 B.R. 958 (N.D. Ill. 1997).** Writing for the Northern District, Chief Judge Aspen found that a debtor's automobile(which was estate property *prior* to confirmation) vested in the debtor upon confirmation. For this reason, a city's attempt to immobilize/tow/destroy that vehicle did *not* affect property in the bankruptcy estate, and the city did *not* violate the automatic stay provisions of the Bankruptcy Code. ***Fischer*, 203 B.R. at 962-64.**

Acknowledging the tension between Sections 1306 and 1327 of the Code, Judge Aspen explained (***Id.* at 964**):

Although the pertinent statutes are not crystal clear, we are still constrained by their text, which suggests to us the following interpretation.... § 541 generally

sweeps the debtor's property into the estate upon the filing of a Chapter 13 petition. Prior to the plan's confirmation, § 1306(a) deems post-filing property as property of the estate. At the time of confirmation, § 1327(b) vests, or transfers, the property of the estate at that time in the debtor. After confirmation, § 1306(a) once again operates to deem property acquired by the debtor after confirmation as property of the estate. We believe that this interpretation reconciles the text of the governing statutes without contradicting the language of any provision and without fatally undermining any important policy considerations.

Having scrutinized the Bankruptcy Code provisions and the record now before it, this Court reaches the same conclusion reached by Bankruptcy Judge Fines. Section 1327 vests the property of the estate in the debtor, once the plan is confirmed. David Hopkins' plan had been confirmed. There is no evidence that the plan (or the order confirming the plan) contained language purporting to alter or delay the vesting provisions of § 1327(b). *See, e.g., In Re Talbot*, 124 F.3d 1201, 1207 (10th Cir. 1997); *Handeen v. Lemaire*, 112 F.3d 1339, 1349 (8th Cir. 1997). After confirmation, the wages vested in David (became his property) and were no longer part of the bankruptcy estate.

Because David's post-petition earnings were *not* property of the estate under 11 U.S.C. 1327, the wage assignment falls within § 362(b)(2)'s exception to the automatic stay. Karen was

not trying to collect property of the estate, and she did not violate the provisions of 11 U.S.C. 362. Specifically, she did not willfully violate any stay. Thus, David was not entitled to relief under **11 U.S.C. § 362(h)**.⁵ Indeed, David's entire third appeal point merits rejection, since it is premised on the theory that Karen willfully, intentionally violated the automatic bankruptcy stay, and this Court finds to the contrary.

Additionally, there is evidence now before this Court (submitted January 4, 1999 via a motion to dismiss appeal) that the much-disputed wage withholding order no longer is in force. On December 21, 1998, Karen's counsel was notified in writing by David Hopkins that David's employment with Angelica Textile Services has terminated. Accordingly, it appears that the state court wage withholding order no longer is in effect. Assuming *arguendo* that there were any merit to David's argument that the Bankruptcy Court erred in failing to vacate the St. Louis County Circuit Court wage withholding order, that argument appears now to be moot.

David's only other argument on appeal is that the Bankruptcy Court erred in concluding that David's children were not

⁵Section 362(h) provides that an individual injured by a "willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

adequately protected under David's Chapter 13 plan. David maintains that Karen (and the children) are protected under his Chapter 13 plan, which provided for 100 percent repayment of past due child support (with payments made to the Chapter 13 Trustee, who in turn forwards those payments to Karen) and post-petition child support (paid directly by David to Karen).

Bankruptcy Judge Fines rejected David's suggestion that this process would assure that David would honor his child support obligations (Opinion, p. 4):

In fact, the Court finds that there is an overriding policy consideration to provide a flow of proper child support payments to the minor children ... which must be considered. Even though [David] suggests a 100% Plan repayment of the child support arrearage now being paid via the withholding Order, the Court is aware that the security of a withholding Order for support payments ... would be seriously compromised were the Court to allow that Order to be vacated with reliance placed upon [David] to make voluntary payments, which he was either unable or unwilling to make in the past.

David takes issue with Judge Fines' conclusion as to David voluntarily making good on child support responsibilities. But David has identified (and this Court has discovered) no clear error in Judge Fines' factual finding that David had been unable or unwilling to make such payments voluntarily in the past. David has identified (and this Court has discovered) no clear error in Judge Fines' factual finding that David was likely to

prove unreliable in the future. In short, the Court is not persuaded by this avenue of attack on the Bankruptcy Court's Order.

IV. Conclusion

The Court finds no merit in any issue raised in David Hopkins' appeal. The Court **AFFIRMS** the September 21, 1998 Order of U.S. Bankruptcy Judge Gerald D. Fines. The Court **DENIES AS MOOT** Karen Floyed's January 4, 1999 motion to dismiss David Hopkins' appeal. (Doc. 6).

IT IS SO ORDERED.

DATED this 19th day of January, 1999.

/s/ PAUL E. RILEY
United States District Judge