



requiring Sterk to pay Keeney restitution totalling \$500.00.

4. Keeney commenced a civil action against Sterk for the injuries and damages she sustained from the assault.

5. Trial on the civil action was scheduled for May 21, 1991. In negotiating a settlement to the action, Sterk threatened to file bankruptcy if Keeney did not accept his offer of settlement.

6. On May 18, 1991, Sterk executed a Confession of Judgment in which he confessed he was justly indebted to Keeney in the amount of \$41,259.00 for damages arising out of an intentional tort of assault occurring on or about July 4, 1989. The Confession of Judgment specified the \$41,259.00 in damages included emotional distress, pain and suffering, medical expenses and lost wages.

7. On May 23, 1991, a Judgment On Confession was filed against Sterk in favor of Keeney for \$41,259.16 plus interest thereon at the legal rate from August 17, 1990.

8. On May 29, 1991, Sterk filed a Chapter 13 bankruptcy petition. His bankruptcy schedules reveal he previously filed bankruptcy in August 1983 and received a discharge in December 1983.

9. The Debtor listed only three creditors on his schedules: \$37,000.00 owed to his mother, Martha Sterk Eengenber; \$2,900.00 owed to his attorney in the civil action; and \$41,300.00 owed to Keeney as a result of the entry

of the Judgment On Confession.

10. The Debtor's mother filed a proof of claim which states the \$37,000.00 debt was incurred from June 2, 1982 through March 11, 1991, and that she was a cosigner for the Debtor's obligations. Attached to the proof of claim was a \$37,000.00 promissory note executed by the Debtor on March 20, 1991. The note provides for 0% interest and is due March 20, 2021. Attached to the promissory note is a handwritten note in which the claimant, Martha Sterk Eengenberg, explains that she obtained the promissory note in conjunction with estate planning advice obtained from her attorney.

11. The court finds the \$37,000.00 promissory note was executed in contemplation of the Debtor's filing of bankruptcy. The Debtor testified the obligation allegedly owed to his mother resulted from his farm losses and he had quit farming in 1982. When questioned as to whether he scheduled this debt in his 1983 bankruptcy schedules, the Debtor testified he had not. In discussing his purported obligation to his mother, the Debtor testified he was to pay her back if he came into money.

12. The debt owed Keeney constituted 51% of the \$81,200 in scheduled debts.

13. The Debtor's Chapter 13 plan proposed 36 monthly payments of \$120.00. \$750.00 in Debtor's attorney fees were to be paid through the plan. Unsecured claims were to be paid

on a prorata basis.

14. After deduction of trustee fees and attorney fees, each creditor would receive payment of approximately 3.86% of its claim. For Keeney this would amount to \$1,594.18 of the \$41,300 scheduled debt.

15. Keeney filed an objection to confirmation on June 26, 1991.

### DISCUSSION

Keeney contends the Debtor's plan was not proposed in good faith. 11 U.S.C. § 1325(a)(3). Absent good faith the court cannot confirm the Chapter 13 plan. See Matter of Harris, 132 B.R. 166, 169 (Bankr. S.D. Iowa 1989). Although "good faith" is not defined in the Code, a court must determine whether a plan constitutes "an abuse of the provisions, purpose or spirit of Chapter 13." Id. at 170. A bankruptcy court must judge each case on its own facts and circumstances. Id.

The decision of In re LeMaire, 898 F.2d 1346 (8th Cir. 1990), is particularly instructive in this case. In LeMaire the Eighth Circuit denied confirmation in a case in which a Chapter 13 plan had proposed a 42% repayment of a civil judgment awarded to the victim of an intentional shooting by the debtor. The court noted that despite adoption of the "ability to pay criteria" and a narrowing of its good faith

focus, a bankruptcy court is to preserve the traditional totality of the circumstances approach with respect to the remaining factors set forth in its earlier decision of In re Estus, 695 F.2d 311 (8th Cir. 1982). LeMaire, 898 F.2d at 1349.

In considering whether a debtor has proposed a plan in good faith, factors such as the type of debt sought to be discharged, whether the debt is nondischargeable in Chapter 7, and the debtor's motivation and sincerity in seeking Chapter 13 relief are particularly relevant. LeMaire, 898 F.2d at 1349. The fact that a debt would be nondischargeable in Chapter 7 is closely linked to a debtor's motivation and sincerity. See id. at 1350. The Eighth Circuit was clearly influenced in LeMaire by what it viewed as a particularly strong public policy prohibiting the discharge of a debt resulting from a willful and malicious injury. See id. at 1353.

In his brief the Debtor in this case concedes the debt is question would have been nondischargeable in Chapter 7. While the nondischargeable nature of the debt is not per se evidence of bad faith under § 1325(a)(3), it is significant in light of circumstances surrounding the debt and the Debtor's bankruptcy filing. The Debtor scheduled only three creditors and this court rejects as duplicitous the scheduling of an obligation allegedly owed to the Debtor's mother. The Debtor did not

schedule this alleged debt in his 1983 bankruptcy, and it was not reduced to a promissory note until eight years after it was initially incurred and only two months before the Debtor filed bankruptcy. The Debtor's own testimony--that he was to pay off his debt to his mother if he came into money--reflects the uncertain nature of his financial arrangement with his mother. The Eighth Circuit has indicated the reduction of familial debts to a promissory note shortly before a bankruptcy filing may be suspect and a factor to be considered in a § 1325(a)(3) good faith analysis. See LeMaire, 898 F.2d at 1351 n.6. By scheduling this alleged "debt" owed to his mother, the Debtor has misled the Court regarding the number and amount of his obligations. The Court is certain the Debtor scheduled this "debt" in an attempt to conceal from the Court that his only significant creditor was Keeney.

When the "debt" owed his mother is disregarded, it becomes obvious the Debtor's single significant creditor is Keeney. In filing Chapter 13 the Debtor was motivated by the desire to discharge most of his largest, and otherwise nondischargeable, debt. The Debtor used the threat of filing bankruptcy to try and coerce a favorable settlement from Keeney. The Debtor filed bankruptcy only six days after entry of the Judgment on Confession. The timing of the bankruptcy filing indicates the Debtor intended to make no genuine effort to repay even a part of the debt.

The Court has reviewed the various Estus factors and notes the relevance of several of them in this case: the debt sought to be discharged is nondischargeable in Chapter 7; the Debtor has previously sought and obtained bankruptcy relief; and the Debtor's motivation in filing Chapter 13 was solely to discharge his largest single debt without making any effort at repaying it. See Estus 697 F.2d at 317. These factors, along with the Debtor's deception in scheduling an obligation allegedly owed to his mother, support the finding of an absence of good faith in the proposal of this Plan.

IT IS HEREBY ORDERED that the Debtor's plan was not proposed in good faith, § 1325(a)(3) and confirmation must be denied. The Debtor has fifteen days within which to submit a new plan or a motion to convert to a case under Chapter 7, or the case will be dismissed without further notice and hearing.

Dated this 21st day of January, 1992.

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RUSSELL J. HILL  
U.S. Bankruptcy Judge