

**August 11, 2005**

**Barbara A. Schermerhorn**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE ANNAMARIE WILKINS,  
also known as Anna Wilkins,

Debtor.

BAP No. KS-04-050

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ANNAMARIE WILKINS,

Appellant,

v.

JAN M. HAMILTON, Trustee,

Appellee.

Bankr. No. 01-42217-13  
Chapter 13

ORDER AND JUDGMENT\*

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Appeal from the United States Bankruptcy Court  
for the District of Kansas

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Before BOHANON, CORNISH, and BOULDEN,<sup>1</sup> Bankruptcy Judges.

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CORNISH, Bankruptcy Judge.

Debtor Annamarie Wilkins appeals an order dismissing her bankruptcy case without prejudice. For the reasons discussed below, we AFFIRM.

**I. Background**

The Debtor filed her Chapter 13 petition on August 16, 2001. Her Chapter 13 plan was confirmed by order entered November 27, 2001. The Order

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

<sup>1</sup> Hon. Judith A. Boulden, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

Confirming Plan provides, in relevant part:

The debtor shall devote to the Plan all disposable income during the first 36 months after the first payment is due under the Plan, and at least 36 monthly payments must be paid to the Trustee. The Debtor shall report to the Trustee any events affecting disposable income which are not projected on Schedules I & J, including but not limited to: tax refunds, inheritances, prizes, lawsuits, gifts, etc. which are received or receivable during the pendency of the case.<sup>2</sup>

At the Meeting of Creditors, the Chapter 13 Trustee (“Trustee”) instructed the Debtor not to gamble during her bankruptcy case.<sup>3</sup> On December 30, 2002, the Trustee filed a motion to dismiss the Debtor’s case on the ground that she had gambled while in bankruptcy. The Debtor opposed the motion to dismiss.

By minute order entered February 24, 2003, the bankruptcy court directed Debtor’s counsel to advise the Trustee whether the gambling activity was pre-petition or postpetition activity. The minute order further provided that “[Debtor’s counsel] is also to advise his client that she is not to expose her income to gambling, because any disposable [income] belongs to the bankruptcy [estate]. If she continues to gamble anyway, her case will be dismissed.”<sup>4</sup> The bankruptcy court set the matter for an evidentiary hearing on the issue of the Debtor’s gambling.<sup>5</sup>

At the evidentiary hearing, held October 23, 2003, the Trustee questioned the Debtor about her bank statements that showed ATM withdrawals at Harrah’s Prairie Band Casino in Mayetta, Kansas (“Harrah’s”), from January through June

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<sup>2</sup> Order Confirming Plan ¶ 4, *in* Appellant’s Appendix at 31.

<sup>3</sup> At oral argument, this Court learned that the Chapter 13 Trustee as well as the current and predecessor Bankruptcy Judge were all emphatic that Chapter 13 debtors in this district were not to gamble. We make no comment on the propriety of this anti-gambling directive, because the important issue is whether the Debtor was dissipating disposable income that should be paid to the unsecured creditors.

<sup>4</sup> Courtroom Minute Sheet, *in* Appellant’s Appendix at 36.

<sup>5</sup> Courtroom Minute Sheet, *in* Appellant’s Appendix at 37.

of 2003. The Debtor denied making the ATM withdrawals. She testified that her aunt, Betty Davis (“Ms. Davis”), had access to her ATM card, and Ms. Davis had made the withdrawals at Harrah’s. By minute order entered that same date, the bankruptcy court denied the motion to dismiss, stating: “[The] Court finds that because there is no evidence to refute the debtor’s story, the [motion to dismiss] is denied. Court also advises debtor that if anyone finds out the truth wasn’t told today the repercussions will be serious.”<sup>6</sup>

The Trustee contacted Ms. Davis and obtained an affidavit from her stating that she had not made the ATM withdrawals in question, had not gambled at Harrah’s since 2001, and had been known by her married name, Betty Hunt, since 1973.<sup>7</sup>

On March 19, 2003, the Trustee filed his Chapter 13 Trustee’s Motion to Dismiss with Prejudice Pursuant to 11 U.S.C. 349 and 11 U.S.C. 109(g) (“Second Motion to Dismiss”). The Debtor did not personally appear at the hearing on the Second Motion to Dismiss. The bankruptcy court granted the Second Motion to Dismiss, stating:

[T]he aunt claims the story concocted by [the Debtor] was a lie. So, this court finds that [the Debtor] did, in fact gamble, that is contrary to the Court’s admonitions and the admonitions given by the Trustee, and more importantly it’s a serious thing when you come to this Court and you lie.

....

Well, the other thing is that the judge before me made it very clear that he didn’t allow Debtors to subject their income to gambling. Although that may not buy [sic] us to an order of this Court, her decision to gamble after being told by the Trustee at the 341 meeting that that was not allowed, Judge would not allow it, at that time it was a different judge, but this judge also has the same opinion, again, so long as the Debtor - you know, a Debtor can spend the twenty or thirty or whatever is in the budget for recreation on gambling, that’s not what we’re talking about. We’re talking about, in this case, my recollection is the evidence was she spent \$900.00 over a very short

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<sup>6</sup> Courtroom Minute Sheet, *in* Appellant’s Appendix at 45.

<sup>7</sup> Affidavit, *in* Appellant’s Appendix at 69.

period of time. So I am going to dismiss this case. I'm not going to do it with prejudice, because 109(g) doesn't really allow it. I do think 105 may allow it, I really, I would be surprised if Congress would (indiscernible) having somebody stay in a bankruptcy proceeding who blatantly tells untruths to the Court. I'm not going to supersede 109, the statutory language by the 105, I don't really like to do that. I think Congress gave me the basis on which I can dismiss with prejudice under 109(g). This is a very close call, but I'm just going to dismiss this case, period, without prejudice.<sup>8</sup>

The bankruptcy court entered its written order on May 4, 2004, incorporating its rationale therein. After receiving an extension of time, the Debtor filed her notice of appeal on June 1, 2004.

## **II. Jurisdiction and Standard of Review**

This Court has jurisdiction over this appeal. The bankruptcy court's order is a final order subject to appeal under 28 U.S.C. § 158(a)(1).<sup>9</sup> The Debtor timely filed her notice of appeal under Federal Rule of Bankruptcy Procedure 8002, and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.<sup>10</sup>

A bankruptcy court's order dismissing a Chapter 13 case is reviewed for abuse of discretion.<sup>11</sup> "In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment."<sup>12</sup>

## **III. Discussion**

The bankruptcy court held that it would dismiss the bankruptcy case, but

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<sup>8</sup> Transcript of Hearing at 3, 6, *in* Appellant's Appendix at 152, 155.

<sup>9</sup> *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

<sup>10</sup> Fed. R. Bankr. P. 8001-02; 28 U.S.C. § 158(c)(1).

<sup>11</sup> *In re Armstrong*, 303 B.R. 213, 218 (10th Cir. BAP 2004).

<sup>12</sup> *United States v. Mitchell*, 113 F.3d 1528, 1531 (10th Cir. 1997).

not with prejudice under 11 U.S.C. § 109(g).<sup>13</sup> The Court will therefore review the dismissal under § 1307.<sup>14</sup> Although none of the conditions listed in § 1307

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<sup>13</sup> Unless otherwise noted, all statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

<sup>14</sup> Section 1307 provides:

[O]n request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28;
- (3) failure to file a plan timely under section 1321 of this title;
- (4) failure to commence making timely payments under section 1326 of this title;
- (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
- (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or
- (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

11 U.S.C. § 1307(c).

apply to the Debtor, the list is not exclusive.<sup>15</sup> A Chapter 13 case may be dismissed if, after considering the totality of the circumstances, the court determines that “under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the Chapter].”<sup>16</sup>

The Debtor argues that postpetition gambling does not rise to the level of an abuse of Chapter 13. She claims that it was improper for the Trustee to instruct her not to gamble, an activity that is legal in the state of Kansas and gaining in popularity across the country, and it was improper for the Trustee to conduct an investigation into her gambling activity. In her reply brief, she states: “The Trustee essentially says that it has the power to dismiss the case for actions demonstrating lack of good faith or abuse of the Bankruptcy system. *In re Gier*, 986 F.2d 1326 (10th Cir. 1993). However, he never cites such facts other than claiming that she gambled.”<sup>17</sup> This is not correct. The Trustee cited the Debtor’s gambling, the Debtor’s failure to devote all her disposable income to the Plan, and the Debtor’s false testimony to the bankruptcy court. The bankruptcy court, in considering the totality of the circumstances, relied on both the Debtor’s violation of the bankruptcy court’s prior order instructing her not to gamble during her Chapter 13 case and the Debtor’s false testimony when questioned about the ATM withdrawals at Harrah’s.

The use of budgeted recreation funds for gambling would ordinarily not, without more, constitute an abuse of the provisions, purpose, or spirit of Chapter 13. But in this case, there is more: the Debtor committed perjury. “Chapter 13 requires the debtor ‘to be honest, forthcoming, truthful, and frank.’ Whether the

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<sup>15</sup> *Gier v. Farmers State Bank (In re Gier)*, 986 F.2d 1326, 1329 (10th Cir. 1993).

<sup>16</sup> *Id.* (internal quotation omitted).

<sup>17</sup> Reply Brief at 3.

debtor has been forthcoming with the bankruptcy court and the creditors is properly considered in deciding whether dismissal for lack of good faith is appropriate.”<sup>18</sup> A bankruptcy court may dismiss a debtor’s case because of perjury.<sup>19</sup>

The bankruptcy court’s dismissal was not based on a clearly erroneous finding of fact or an erroneous conclusion of law. Nor does it manifest a clear error of judgment. We therefore affirm.

#### **IV. Conclusion**

The bankruptcy court’s order is AFFIRMED.

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<sup>18</sup> *In re Alt*, 305 F.3d 413, 421 (6th Cir. 2002) (citing *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)). *See also Gier*, 986 F.2d at 1330 (in dismissing Chapter 13 case, court considered, among other factors, that the debtor’s testimony was inconsistent with his plan); *Flygare v. Boulden*, 709 F.2d 1344, 1348 (10th Cir. 1983) (a debtor’s sincerity is a relevant factor in determining bad faith); *In re Armstrong*, 303 B.R. 213, 222 (10th Cir. BAP 2004) (the debtor’s sincerity was lacking; dismissal was warranted).

<sup>19</sup> *In re Hall*, 304 F.3d 743, 748 (7th Cir. 2002) (Chapter 11 case).