
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

In re:

GREGORY MARSHALL and
MARLENE MARSHALL

Debtors.

Bankruptcy No. 01-36611

Chapter 12

**MEMORANDUM OPINION AND ORDER ON DEBTORS' COUNSEL'S
CHAPTER 12 FEE APPLICATIONS**

This matter comes before the Court on Debtors' counsel's applications for compensation seeking \$20,000 in fees and costs from this confirmed Chapter 12 estate. The Chapter 12 Trustee objects. The issue is whether counsel for an individual Chapter 12 debtor is required to be employed under 11 U.S.C. § 327¹ before fees and costs may be allowed under § 330, and if not, and fees and costs are allowed in this case, whether such fees and costs may be paid to Debtor's counsel under the confirmed Chapter 12 plan.

FACTS

Gregory and Marlene Marshall (collectively the "Marshalls") filed a Chapter 11 petition on November 7, 2001. Although the Marshalls qualify as family farmers under § 101(18)(A), at

¹ Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

the time the Marshalls filed for bankruptcy protection, Chapter 12 of the Bankruptcy Code was not in effect.²

On November 21, 2001, David T. Berry of Berry & Tripp (Berry & Tripp) filed an Application to Allow Debtor in Possession to Employ Berry & Tripp as Counsel at the Expense of Chapter 11 Estate During the Pendency of the Case, signed only by Mr. Berry. An Amended Application to Employ, signed by the Marshalls, was filed on December 3, 2001. Although the applications asserted that the applicants were disinterested, neither application was accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, as required by Fed. R. Bankr. P. 2014. Neither application was ever set for hearing, and Berry & Tripp was never appointed as counsel for the Debtor in Possession while the case was in Chapter 11.

The Court issued an order converting the case to Chapter 12 on September 30, 2002.³ After conversion, Berry & Tripp did not pursue appointment under either of the previously filed applications, nor did it file any further application seeking appointment either as the Marshalls' counsel or to represent the estate. Therefore, it is undisputed that Berry & Tripp was never employed as a professional person in Chapter 11 or 12 under § 327.

The Marshalls eventually proposed a Chapter 12 plan to their creditors. The Debtors' 1/29/2003 Amended Chapter 12 Plan of Reorganization (Plan) provided at ¶ 2.1.b.3 as follows:

² Public Law 107-17 retroactively extended Chapter 12 until October 1, 2001, at which point it expired.

³ On May 7, 2002, Public Law 107-170 reenacted Chapter 12 from October 1, 2001 to June 1, 2002. On May 13, 2002, Public Law 107-171 extended Chapter 12 from June 1, 2002 to January 1, 2003. The Marshalls' Motion to Convert Case to Chapter 12 was filed June 14, 2002.

COUNSEL FOR DEBTOR. Interim and final payments for approved fee claims of professionals employed pursuant to §327 of the Bankruptcy Code, net of any retainer, shall be paid as follows.

...

The Court may approve debtors legal fees and costs under applicable law without further notice or hearing in amounts equal to or less than \$20,000.00. Such Class 1 claim of Berry & Tripp, P.C. shall be paid through the Chapter 12 Plan by disbursements from the Chapter 12 Trustee until paid in full.

Plan, ¶ 2.1.b.3.

After a contested confirmation hearing, the Plan was confirmed by order entered March 12, 2003.

Berry & Tripp filed a variety of fee applications. Three applications were filed for time periods during the Chapter 11 case: an initial fee application filed September 27, 2002, for the period from October 4, 2001 to September 27, 2002, which sought \$9,525.62 in fees and costs; a supplemental application filed November 25, 2002, for the period October 11, 2002 to November 25, 2002, seeking \$7,114.20 in fees and costs;⁴ and an adjusted application filed June 4, 2003, limiting the amount requested during the period the case was in Chapter 11 to fees related only to conversion of the case from Chapter 11 to Chapter 12 seeking \$2,380.00⁵ (the "Chapter 11 Fees"). Post conversion supplemental fee applications were filed as follows: an application filed March 20, 2003 for the period from November 26, 2002 to March 20, 2003 seeking fees and costs totaling \$9,395.60;⁶ and a supplemental application filed June 4, 2003, seeking an

⁴ Both the September 27, 2002 and the November 25, 2002 applications indicated the case was a Chapter 11 case but stated that if the debtor's Chapter 13 Plan was not confirmed and the case dismissed or converted to Chapter 7, that fees be allowed under §§ 503(b)(2) and 330(a), and sought payment under § 1326(a)(2), an obvious error.

⁵ The June 4, 2003 application sought fees under § 330(a)(4)(B).

⁶ The supplemental application also requested appointment of counsel. The statutory basis for the fee request was §§ 330, 327, 503 and 1226.

additional \$1,240.00 in fees.⁷ The total of all applications, as set forth in an additional June 4, 2003 application, reflects that Berry & Tripp seeks \$2,380 in fees related to the Chapter 12 case but incurred while the case remained in Chapter 11, and \$17,849.80 in fees and costs incurred during the Chapter 12. Although collectively the fees and costs total \$20,229.80, the confirmed Plan allowed only for fees and costs of professional persons employed under § 327 up to \$20,000, which is the final request.

Duane H. Gillman, Chapter 12 trustee of the Marshalls' estate (the "Trustee"), filed an objection to the applications arguing that Berry & Tripp was never appointed under § 327 and no grounds for *nunc pro tunc* appointment exist. This Court entertained arguments from both sides at a hearing May 12, 2003. At the hearing, the Court disallowed fees and expenses during the Chapter 11 case because Berry & Tripp was not employed as counsel for the Marshalls as debtors in possession while this case operated under Chapter 11, and the Court found no basis under *In re Land*⁸ to make the appointment *nunc pro tunc*. The Court also noted the problematic issue of whether debtor's counsel must be employed under § 327 prior to requesting compensation for the representation of an individual debtor in Chapter 12 and requested briefing on the issue from both parties. Subsequently, Berry & Tripp has, in essence, amended its application during the Chapter 11 period to request only fees for time spent in trying to obtain conversion of the Chapter 11 case to a Chapter 12. Further, Berry & Tripp has changed the statutory basis for allowance of its fees from §§ 327 and 330(a)(1) to § 330(a)(4)(B). At a hearing on July 17, 2003

⁷ The statutory basis for this application was § 330(a)(4)(B).

⁸ 943 F.2d 1265, 1267 (10th Cir. 1991).

to consider the last in the series of applications, the fees were taken under advisement so that all matters could be resolved in a consolidated ruling.

DISCUSSION

Section 1222(a)(2) states that a Chapter 12 plan shall provide for all claims entitled to priority under § 507⁹ which, in turn, gives a first priority in distribution to administrative expenses allowed under § 503(b).¹⁰ Section 503(b)(2)¹¹ relates to compensation and reimbursement awarded under § 330(a). Section 330 then contains several provisions related to the compensation of officers. Section 330(a)(1) covers compensations to, among others, professional persons employed under § 327.¹² Section 330(a)(4)(B), added to the Code by The Bankruptcy Reform Act of 1994 (1994 Act),¹³ on the other hand, provides for compensation to a

⁹ Section 1222(a)(2) states as follows:
The plan shall –

. . .

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title. . .

¹⁰ Section 507(a)(1) states as follows:
The following expenses and claims have priority in the following order:
(1) First, administrative expenses allowed under section 503(b) of this title. . .

¹¹ Section 503(b)(2) states as follows:
After notice and a hearing, there shall be allowed, administrative expenses . . .
including –

. . .

(2) compensation and reimbursement awarded under section 330(a) of this title.

¹² Section 330(a)(1) states as follows:
After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 --
(A) reasonable compensation . . .

¹³ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

debtor's attorney for representing the interests of an individual debtor in a Chapter 12 or Chapter 13 case.¹⁴

The Trustee's objection to Berry & Tripp's Fee Application rests on the assumption that compensation to Berry & Tripp is allowed under § 330(a)(1), and therefore Berry & Tripp must have been appointed by the Court under § 327 before it can receive compensation. Since it is undisputed that Berry & Tripp was never appointed, and that the Court denied *nunc pro tunc* appointment, the Trustee argues that compensation should be denied. Berry & Tripp, on the other hand, asserts its compensation is provided for under § 330(a)(4)(B) and therefore an order appointing them was unnecessary and all Chapter 12 related fees, including those incurred while the case was a Chapter 11, should be allowed. Noting this change in the statutory basis for the allowance of the fees, the Chapter 12 Trustee, who initially did not challenge the reasonableness of the fees or that the expenses were actual and necessary costs, now asserts that all fees were incurred for the benefit of the estate, and accordingly excluded from allowance under § 330(a)(4)(B).

The Trustee's argument correctly points out that a Chapter 12 debtor is a debtor in possession under § 1203, enjoying the same rights and subject to the same obligations, with certain exceptions, as a debtor in possession under § 1106(a). However, unlike Chapter 11, Chapter 12 makes no mention of the debtor in possession's employment of professional persons

¹⁴ Section 330(a)(4)(B) states as follows:

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

under § 327.¹⁵ Case law exists, however, indicating that employment under § 327 is required prior to allowance of a Chapter 12 debtor's attorney's fees. The Trustee's brief directs the Court to *In re Burke*,¹⁶ wherein the court held that "[w]ithout court approval of employment under § 327(a), there can be no right to any compensation or reimbursement of expenses under § 330(a)"¹⁷ for Chapter 12 debtor's counsel. However, *Burke*, and other such cases, was decided prior to the 1994 Act, which changed the language of § 330(a) by, among other things, adding the language in § 330(a)(4)(B), and is therefore unhelpful.

Where the language of a statute is unambiguous and "the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."¹⁸ While a professional seeking compensation under § 330(a)(1) must comply with § 327 and obtain appointment by court order, the language of § 330(a)(4)(B) makes no reference to an appointment under § 327. Thus, an individual debtor's attorney seeking compensation under § 330(a)(4)(B) is not required to obtain prior § 327 approval in Chapter 12 and 13 cases.

The language of the statute links a Chapter 12 case "in which the debtor is an individual"¹⁹ to Chapter 13 cases with individual debtors which do not require § 327 approval. One bankruptcy court explains:

¹⁵ In § 1107(b), the Code specifically conditions a Chapter 11 debtor in possession's employment of professional persons under § 327. A similar section is noticeably absent from § 1203.

¹⁶ 147 B.R. 787 (N.D. Ok. 1992).

¹⁷ *Id.* at 796.

¹⁸ *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989).

¹⁹ § 330(a)(4)(B).

Unlike a debtor in a chapter 11 case, the chapter 13 debtor does not stand in the shoes of a trustee. Consequently, the attorney for the debtor is not employed as counsel to the trustee administering the estate. The employment of debtor's counsel is *not subject to prior approval* pursuant to 11 U.S.C. § 327, and compensation by the estate is not authorized under Section 331 or Section 330(a)(1).²⁰

A Chapter 12 individual debtor, like a Chapter 13 debtor, is similarly “not employed as counsel to the trustee administering the estate” and “employment of debtor’s counsel is not subject to prior approval” of the bankruptcy court. In fact, “section 330(a)(4)(B) provides a more liberal standard for attorneys representing debtors in a chapter 12 and chapter 13 bankruptcy proceeding.”²¹ In discussing § 330(a)(4)(B), the Third Circuit similarly explained that Congress recognizes “that this discrete class of debtors’ attorneys need to be excepted from the regular, more stringent standards for compensation.”²² The 10th Circuit BAP commented that § 330(a)(4)(B) “reinstated the ability for court’s [sic] to grant payment from funds of the estate to Chapter 12 and 13 debtor’s attorneys for representation of the debtor.”²³ Compensation for Chapter 12 individual debtor’s counsel is now exclusively authorized under § 330(a)(4)(B), rendering § 330(a)(1), at least in an individual’s case, inapplicable.

The anomaly in this case, however, is that although the allowance under the Code of fees sought by Berry & Tripp during the time it represented the Marshalls in the Chapter 12 case may not require appointment under § 327, payment under the Plan drafted by Berry & Tripp does.

²⁰ *In re Young*, 285 B.R. 168, 170 (Bankr. D. MD 2002) (emphasis added).

²¹ Danielle Friedberg, *The Ethical Ramifications of Section 330(A)(1) of the Bankruptcy Code*, 11 Am. Bankr. Inst. L. Rev. 289, 297 (2003).

²² *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000).

²³ *Double J Cattle Co. v. U.S. Trustee*, Nos. WY-97-029, 95-20112, 1997 WL 837762, at *12 n.7 (10th Cir. BAP Oct. 24, 1997).

Paragraph 2.1.b.3 of the Plan only allows payment from the confirmed Plan to professionals appointed under § 327. Berry & Tripp now argues, and the Court agrees, that the statutory basis for allowance of their fees is not § 327 but § 330(a)(4)(B). But changing the basis for allowance of the fees and costs does not change how fees are paid under the binding confirmed Plan.


CONCLUSION

Berry & Tripp's failure to obtain court authorization of employment under § 327 is not fatal to allowance of its fees and costs incurred during the Chapter 12 phase of this case. The Marshalls are individual family farmers and compensation of an individual Chapter 12 debtor's attorney is now governed by § 330(a)(4)(B) which does not require prior employment under § 327. Fees and costs of \$17,849.80 are allowable as necessary and beneficial to the Marshalls rather than the estate in the same manner that such fees for plan prosecution and stay lift defense are allowable as necessary and beneficial to the debtors rather than the estate in a Chapter 13 case. The \$2,380 in fees sought during the Chapter 11 case that related to conversion to Chapter 12, however, are not allowable under § 330(a)(4)(B) because they were not incurred in a Chapter 12 case. No payment of the allowed fees, however, is authorized under the express terms of the confirmed Plan. Therefore, it is hereby

ORDERED, that total fees and costs of \$17,849.80 are allowed, and it is further

ORDERED, that no payment may be made of the allowed fees under the confirmed Plan.

DATED this 20 day of July, 2003.



JUDITH A. BOULDEN
United States Bankruptcy Judge

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I transmitted a true and correct copy of the forgoing Memorandum Opinion and Order on Debtors' Counsel's Chapter 12 Fee Applications to the Bankruptcy Noticing Center for service upon the following on the ~~28~~ day of July, 2003.

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