

The below described is **SIGNED**.

Dated: October 05, 2004

William J. Thurman

WILLIAM T. THURMAN
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

Francisco Villegas and Elsa P. Villegas,

Debtors.

Bankruptcy No. 03-40485

Chapter 13

**MEMORANDUM DECISION ALLOWING PRIVATE SCHOOL TUITION AS A
REASONABLE EXPENSE IN DEBTOR'S CHAPTER 13 PLAN**

A confirmation hearing on the Debtor's Plan ("Confirmation Hearing") was conducted on July 6, 2004 before the Honorable William T. Thurman in room 376, United States Courthouse, 350 South Main Street, Salt Lake City, Utah. Present at the hearing were Mrs. Villegas, the Debtor; Jory Trease, counsel for the Debtors; and Kevin Anderson, the Chapter 13 Trustee ("Trustee"). Representations were made, testimony was given, and arguments were had thereupon. The Court continued the hearing and directed both parties to submit position memos by August 20, 2004. Both the Debtors and the Trustee submitted their memos, which the Court has reviewed. Based upon the same, the pleadings, and other court papers on file and good cause appearing, the Court makes this Memorandum Decision,

which will constitute its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.¹

JURISDICTION

The Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L), and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

FACTS

Mr. and Mrs. Villegas (the “Debtors”) filed a Chapter 13 petition on December 12, 2003. They filed their Statement of Financial Affairs, Schedules, and Chapter 13 Plan on the same day. Included in their Schedule J of current expenditures was a line item for private school tuition for their two children in the amount of \$420.² The Trustee initially objected to this expenditure because the Debtors did not propose a 100% Plan. After testimony by Mrs. Villegas, however, the Trustee withdrew his objection. The Court took the matter under advisement and rescheduled the hearing for September 15, 2004.

¹ Incorporated into the Bankruptcy Code via Bankruptcy Rule 7052.

² On June 15, 2004, the Debtors amended their Schedule J to include a third child for private school, increasing total tuition to \$570.

DISCUSSION

Because the Debtors are only proposing a 32% Plan, they must satisfy the disposable income test of 11 U.S.C. § 1325(b), which requires that all income, less expenses that are reasonably necessary for the maintenance or support of the Debtors or their dependents, be contributed to the Plan.

The Court agrees with the Trustee that Private school expenses are presumed to not be reasonably necessary for a debtor's maintenance and support under § 1325(b). However, the Court finds that the Debtor may rebut this presumption through the establishment of compelling circumstances based on evidence that the public schools cannot adequately address a generally recognized physical or mental condition of the Debtor's minor child; or by the Debtor cutting back on other expenses and/or increasing the plan terms so that creditors receive the same distribution as if the debtor was not paying for private school.³ Each case must be reviewed on its own facts using this standard.

In this case, the Debtors have chosen to pursue a Chapter 13 Plan in order to repay their creditors 32% instead of filing a Chapter 7, which would discharge all of their debts and return 0% to the creditors.⁴ The Debtors also have chosen to pursue a plan for 55 months instead of the 36 month minimum in order to repay more to their creditors. The Court finds that these pursuits weigh in favor of a good faith effort on the part of the Debtors.

³ See In re Webb, 262 B.R. 685, 690 (Bankr. E.D. Tex. 2001); In re Burgos, 248 B.R. 446 (Bankr M.D. Fla. 2000); In re Watson, 309 B.R. 625 (B.A.P. 1st Cir. 2004).

⁴ See Debtor's Amended Chapter 13 Plan, dated August 30, 2004.

In addition to the foregoing elections, the Debtors have voluntarily reduced what typically would be considered reasonable expenses in other monthly areas to ensure that their creditors are not being adversely impacted by the continued private education of their children. For example, the Debtors have only 2 cars, one for each household, both of which are about 10 years old. In addition, the Debtors have surrendered their home and are each living with relatives to reduce living expenses.⁵

Finally, Mrs. Villegas testified that their children have always attended private school and that she feels that a private education curriculum is far superior to the local public schools. For example, Mrs. Villegas testified that private school has helped the children to stay away from such things as drugs and alcohol. The Trustee did not attempt to rebut this evidence. Thus, the Debtors have established compelling circumstances for retaining their children in private school instead of transferring them to a public school.

CONCLUSION

The Court finds concludes that the Debtors have proven both good faith and that the tuition for their children's private school is reasonable and necessary for their dependents. Based upon the foregoing, the Court concludes that the Plan should be confirmed. A separate order accompanies this Memorandum Decision.

END OF DOCUMENT

⁵ The Debtors have separated since the filing of their bankruptcy.

SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION ALLOWING PRIVATE SCHOOL TUITION AS A REASONABLE EXPENSE IN DEBTOR'S CHAPTER 13 PLAN** will be effected through the Bankruptcy Noticing Center to each party listed below.

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ORDER SIGNED