

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF RHODE ISLAND**

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In re:

Chapter 13  
Case No. 12-10382

BRIAN DAVID KRIVITSKY

Debtor

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**DECISION AND ORDER ON CHAPTER 13 TRUSTEE’S MOTION TO CONVERT**

The Debtor, Brian Krivitsky, filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code (11 U.S.C. § 101, *et. seq.*) on February 8, 2012. Pursuant to the order confirming the Debtor’s amended Chapter 13 plan, the Chapter 13 Trustee was authorized to sell the residential real estate located at 6 Middlebrook Lane, Lincoln, Rhode Island (the “Residence”) in accordance with a Notice of Intended Sale to be filed with the Court to fund the plan and provide a 100% dividend to unsecured creditors in one lump sum.<sup>1</sup> On October 12, 2012, the Court entered a consent order filed by the Debtor, the Chapter 13 Trustee, and the prospective buyers of the Residence detailing the parties’ duties regarding the sale and establishing, among other things, a closing date no later than October 30, 2012.<sup>2</sup>

Just four days later, on October 16, 2012, the Chapter 13 Trustee filed a Motion to Convert the case to a case under Chapter 7 of the Bankruptcy Code,<sup>3</sup> relying primarily on Bankruptcy Code § 1307(c)(11), which provides for dismissal or conversion of a Chapter 13

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<sup>1</sup> Doc. #78, para 5, Summary of Disbursements.

<sup>2</sup> Doc. #113.

<sup>3</sup> Doc. #120.

bankruptcy case for “failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.” The Trustee contends that the Debtor failed to pay post-petition child support obligations to Jo-An Kaplan, the Debtor’s former spouse, and the Debtor’s case should be converted to one under Chapter 7.<sup>4</sup> The Debtor defends against the Chapter 13 Trustee’s motion, arguing that his “obligation to make child support payments has been hotly contested in [Rhode Island] Family Court for almost six years and has been appealed twice to the Rhode Island Supreme Court.”<sup>5</sup>

The Court held an evidentiary hearing on the matter on December 5, 2012. The Chapter 13 Trustee called Ms. Kaplan as his only witness, and the Debtor called William Balkun, his recently engaged Rhode Island Family Court [“RI Family Court”] attorney, as his only witness. Based on the testimony presented at the evidentiary hearing and the Court’s review of certain public records identified during the hearing, the Court renders the following findings of fact and conclusions of law.

Jurisdiction over this matter and the parties is vested in this Court pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

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<sup>4</sup> See Doc. ## 120-1 and 120-2. In his Memorandum of Law in support of the Motion to Convert Case to Chapter 7, the Chapter 13 Trustee also asserted, as grounds for conversion of the case, the Debtor’s alleged non-compliance with the previously mentioned consent order by refusing access to the Residence to the prospective buyers’ inspectors. The Debtor disputes this allegation. Although the Chapter 13 Trustee appended to his Memorandum what purports to be copies of e-mail communications from real estate broker Joe Santoro, at the hearing, the Chapter 13 Trustee neither introduced these e-mail communications into the record nor pressed this alleged conduct as a basis for conversion.

<sup>5</sup> Debtor’s Objection to Trustee’s Motion to Convert Case, Doc. #124.

### Findings of Fact

On May 15, 2006, the RI Family Court entered a final judgment of divorce dissolving the marriage of the Debtor and Ms. Kaplan.<sup>6</sup> Pursuant to the divorce decree, the RI Family Court entered an order requiring the Debtor to pay Ms. Kaplan \$200 per month in child support.<sup>7</sup> This original child support order was modified on December 10, 2007 to increase the Debtor's support payments to \$250 per week.<sup>8</sup> In an effort to obtain review of the modified order, the Debtor petitioned the Supreme Court of Rhode Island ("RI Supreme Court") for a writ of certiorari.<sup>9</sup> The RI Supreme Court granted the writ of certiorari on March 28, 2008 and ordered that the papers be retained in the RI Family Court to allow the hearing justice to "issue an appropriate decision, 'contain[ing] the necessary findings of fact and conclusions of law' on [Ms. Kaplan's] motion to modify [the Debtor's] child-support obligations."<sup>10</sup> In granting this writ of certiorari, the RI Supreme Court "specified that the December 10, 2007 order, requiring [the Debtor] to pay \$250 per week in support, 'remain[ed] in effect pending further proceedings before the RI Family Court and [the RI Supreme Court].'"<sup>11</sup> On November 20, 2009, the RI Family Court submitted a written decision in response to the RI Supreme Court's March 28,

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<sup>6</sup> In anticipation of an evidentiary hearing on the sale price of the Residence, the Debtor and the Chapter 13 Trustee filed a stipulation of agreed facts and each party filed a set of exhibits (Doc. # 96). One of the Trustee's exhibits was a decision by the Rhode Island Supreme Court, dated April 17, 2012, which outlines the history of the Debtor's appeal of a modified child support order entered by the RI Family Court. *See* Doc. #96-1, at p.3 [hereinafter referenced as *Krivitsky v. Krivitsky*, 43 A.3d 23 (RI Sup. Ct. 2012)].

<sup>7</sup> *Krivitsky v. Krivitsky*, 43 A.3d 23, 25 (RI Sup. Ct. 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

2008 order, in which the RI Family Court identified a “substantial change of circumstances to warrant a modification of child support based upon the increase in income of [the Debtor].”<sup>12</sup>

Following further proceedings in the RI Family Court, the case returned to the RI Supreme Court on September 27, 2010.<sup>13</sup> The RI Supreme Court subsequently denied the Debtor’s petition for certiorari, ruling that “the Family Court having satisfied our directive to render an appropriate decision with respect to [Ms. Kaplan’s] motion to modify [the Debtor’s] child-support obligation, the petition for certiorari is denied and dismissed and the writ previously issued is hereby quashed.”<sup>14</sup> Accordingly, the RI Supreme Court let stand the Debtor’s obligation to pay Ms. Kaplan \$250 per week in child support pursuant to the RI Family Court’s modified order.<sup>15</sup>

During the hearing before me on December 5, 2012, the Debtor’s own witness, attorney Balkin, testified that the Debtor is currently subject to an order to pay child support:

Mr. Parker<sup>16</sup> Mr. Balkin, regardless of any orders that have been entered on, in September of 2012, are you aware of, if Mr. Krivitsky is under an order of child support at this time?

Mr. Balkun I am.

Mr. Parker And is he under an order of child support at this time?

Mr. Balkun He is.

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<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.* at 28.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 31.

<sup>16</sup> Mr. Robert Parker is an attorney representing Ms. Kaplan in the RI Family Court proceedings. At the request of the Chapter 13 Trustee, attorney Parker handled the questioning of the witnesses at the December 5, 2012 hearing.

With respect to such support obligation, when questioned, Ms. Kaplan testified that the Debtor had not made a child support payment since he filed his bankruptcy petition in February of 2012:

Mr. Parker And since the filing of the Chapter 13 bankruptcy petition in February of 2012, has Mr. Krivitsky paid any child support to you whatsoever?

Ms. Kaplan No he has not.

While the Debtor makes much ado of a RI Family Court order entered on September 26, 2012 (Chapter 13 Trustee's Exhibit A) which the Debtor alleges was improvidently entered, the Debtor has not rebutted the fact that he was bound by an order of child support prior to his bankruptcy filing which was in effect as of the bankruptcy petition date and continues in full force and effect as of the date of this Decision and Order.

### **Discussion**

The Chapter 13 trustee has moved for conversion of this case on the grounds that the Debtor has failed to pay post-petition domestic support obligations. Under Bankruptcy Code § 1307(c)(11),

on 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— . . . (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

The language “first becomes payable after the date of the filing of the petition” is “limited to payments that first become due after the case is filed, and does not look to payment of prepetition arrearages.” COLLIER ON BANKRUPTCY ¶ 1307.04 (Alan N. Resnick & Henry J.

Sommer eds., 16th ed. rev. 2012). The term “domestic support obligation” is defined in Bankruptcy Code § 101 as follows:

[A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.

The child support order of the RI Family Court, by which the Debtor was bound prospectively from the date of the filing of his bankruptcy petition, falls squarely within the Bankruptcy Code’s definition of a “domestic support obligation.” The Chapter 13 Trustee has established by unrebutted evidence that the Debtor has not paid any child support to Ms. Kaplan

since the filing of his bankruptcy petition in February of 2012. The Debtor's failure to pay a domestic support obligation to his former spouse that was due post-petition is cause for conversion of this case to Chapter 7 under Bankruptcy Code § 1307(c)(11).

I find that conversion of this case is in the best interest of creditors and the bankruptcy estate. The order confirming the Debtor's amended Chapter 13 plan includes a provision authorizing the Chapter 13 Trustee to sell the Residence, subject to a Notice of Intended Sale to be filed with and approved by the Court, which would enable the Debtor to pay his creditors in one lump sum within a twelve-month plan period.<sup>17</sup> While the conduct of the Debtor in connection with the sale is a matter in dispute and one not pressed by the Chapter 13 Trustee at the hearing, it is undisputed that the sale of the Residence did not occur by the agreed-upon closing date of October 30, 2012, and the Purchase and Sale Agreement has expired. During the hearing counsel for the prospective buyers represented that the buyers were still interested in the purchase of the Residence, albeit at a different purchase price. It is evident that a conversion to Chapter 7, rather than this case lingering evermore in Chapter 13, will enable an expeditious sale of the Residence by a Chapter 7 trustee and a prompt disposition of the claims of all creditors.

The Debtor counters the argument in favor of conversion by asserting that Chapter 7 trustees, as a matter of policy, do not administer over-encumbered assets. Consequently, he argues that a Chapter 7 trustee would abandon the Residence because there is no equity in the Residence for the benefit of the bankruptcy estate when taking into consideration the outstanding mortgage indebtedness, the amount of the Debtor's domestic support obligations and related claims, and the amount of the Debtor's claimed homestead exemption. This argument fails

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<sup>17</sup> See Debtor's Amended Plan, Doc. #40; Order Confirming Chapter 13 Plan, Doc. #78.

because there is no evidence that the domestic support obligation claimants hold a lien against the Residence that encumbers the Residence; their claims are unsecured claims which may have priority over claims of other unsecured creditors. Thus, the policy to which the Debtor alludes is inapplicable, and the Court does not have any evidence before it to conclude that the Chapter 7 trustee would automatically abandon the bankruptcy estate's interest in the Residence. Moreover, the Debtor's argument is somewhat ironic because the Debtor has challenged the amount of attorney's fees awarded to Ms. Kaplan by the RI Family Court, and if he should prevail in this challenge before the state courts, even greater equity in the Residence will be created for the benefit of his creditors, including creditors with non-domestic support claims.<sup>18</sup>

In short, the role of a Chapter 7 Trustee to proceed expeditiously with a sale of the Residence, evaluate the claims filed in the case, and disburse the sale proceeds to creditors is precisely what is in the best interest of this bankruptcy estate and the Debtor's creditors. I find that the Chapter 13 Trustee has met his burden and established by unrebutted evidence that cause has been shown under § 1307(c)(11) for conversion of the case, and in light of the facts before me, conversion is in the best interest of the Debtor's creditors and this estate. The case is hereby CONVERTED to one under Chapter 7.



Diane Finkle  
United State Bankruptcy Judge

Dated: December 17, 2012

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<sup>18</sup> At the hearing the parties indicated that the Debtor has creditors with claims unrelated to domestic support obligations, and the claims register in the case lists several such creditor claims.