**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. WW-06-1407-MoRK |
| JOHN VAN ETTEN, | Bk. No. 04-12950 |
| Debtor. | |
| JOHN VAN ETTEN, | |
| Appellant, | |
| v. | **M E M O R A N D U M**[1] |
| THE STATE OF WASHINGTON; K. MICHAEL FITZGERALD, Chapter 13 Trustee, | |
| Appellees. | |

Argued and Submitted on May 23, 2007
at Seattle, Washington

Filed - June 19, 2007

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Hon. Thomas T. Glover, Bankruptcy Judge, Presiding.

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Before: MONTALI, RIBLET[2] and KLEIN, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2]Hon. Robin L. Riblet, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

The bankruptcy court granted the debtor's motion to dismiss his chapter 13[3] case before his plan was confirmed, but also ordered his attorney and the chapter 13 trustee to retain, pending further court order, certain funds from the postpetition sale of debtor's residence. Contending that the funds held by the trustee constituted plan payments which must be returned to him under section 1326(a)(2), the debtor appealed. We REVERSE.

## I. FACTS

Appellant John Van Etten ("Debtor") filed a petition for relief under chapter 13 on March 5, 2004. Appellee K. Michael Fitzgerald[4] was appointed as the chapter 13 trustee ("Trustee"). No plan was ever confirmed.

Debtor filed a plan in which he proposed to use proceeds from the sale of his residence to pay administrative and priority claims in full. Thereafter, Debtor filed a motion to sell his residence, which the bankruptcy court granted on September 22, 2004. The order approving the sale provided that the sale proceeds be used to pay real estate commissions, real property taxes, costs of sale, the debt secured by the mortgage on the property, the debtor's exemption of $40,000.00,[5] and the balance

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[3]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

[4]Appellee did not file a brief in this appeal, nor did he appear at oral argument before us.

[5]The order also directed William Buchanan ("Buchanan"), Debtor's attorney, to deposit the $40,000 into an interest-bearing trust account until exemption issues were resolved or

(continued...)

to Trustee "to be distributed to [sic] according to the terms of the Debtor's Chapter 13 Plan, when it if [sic] confirmed." Order Authorizing Sale of Residence and Disbursement of Sale Proceeds, entered on the docket on September 22, 2004.[6] Trustee received $37,530.98 in non-exempt proceeds from the sale of the residence.

Debtor then amended his chapter 13 plan to state that the "Trustee received from the proceeds of the sale of the Debtor's residence the amount of $37,530.98. The Trustee, upon confirmation of the Plan, shall use these funds to pay allowed claims according to the terms of the Plan." Amended Chapter 13 Plan, entered on the docket on January 13, 2005.

The State of Washington filed a motion to dismiss Debtor's case because of his failure to file post-petition tax returns and to pay post-petition taxes. Trustee filed an objection to confirmation to plan and motion to dismiss case. Neither the Trustee nor the State of Washington requested the court to direct Trustee or Buchanan to distribute to creditors or retain the funds they were holding.

Shortly thereafter, Debtor filed his own motion for voluntary dismissal and requested that Buchanan be permitted to release to Debtor the purportedly exempt sale proceeds he was

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[5](...continued)
further court order. Debtor obtained permission from the court to use a portion of the $40,000 to pay state taxes and to purchase a vehicle. As of December 30, Buchanan held in trust $5,874.82 from the $40,000 initially placed in the account.

[6]Debtor did not provide in his excerpts a copy of this order, the underlying motion to sell his residence, his initial chapter 13 plan, his amended chapter 13 plan, or Trustee's objection to confirmation of plan. All of these documents are available on the bankruptcy court's electronic docket, however.

holding in trust. In response, Trustee filed a "Supplemental Motion for Order Directing Disbursement of Funds on Hand with Trustee." Without any citation to authority, Trustee requested that he be allowed to remit the $37,530.98 (minus Trustee's costs) he was holding to the Internal Revenue Service ("IRS") and to the State of Washington to pay priority taxes.[7] Debtor objected, noting that section 1326(a)(2) provides that if a chapter 13 plan is not confirmed, the trustee "shall return" to the debtor plan payments made by the debtor, after deducting administrative claims allowed under section 503(b).

The bankruptcy court held a hearing on all three motions to dismiss on June 14, 2006. Debtor did not provide a transcript of the hearing.[8] On October 10, 2006, the bankruptcy court entered an Order Dismissing Case and Directing Chapter 13 Trustee and William Buchanan to Hold Funds (the "Dismissal Order"), directing that:

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[7]Trustee did not state that the IRS or the State of Washington had levied the funds in his possession. At the oral argument in this appeal, Debtor's counsel stated that he is unaware of any levy by the IRS on the funds held by Trustee, although the IRS did file a motion for turnover of the funds after the court entered the order now on appeal. We were also told that the bankruptcy court is holding that motion in abeyance pending resolution of this appeal.

[8]Rule 8009(b)(5) and (9) require an appellant to provide the opinion, findings of fact or conclusions of law delivered orally by the court and to include a complete transcript of relevant proceedings as required by the rules of this panel. See 9th Cir. BAP Rule 8006-1. Accordingly, the record is inadequate as a matter of law. Sallie Mae Servicing, LP v. Williams (In re Williams), 287 B.R. 787, 792 (9th Cir. BAP 2002). Despite this deficiency in the record, we will not dismiss the appeal because it presents solely an issue of law, which we review de novo. Therefore, the transcript is not essential to our review.

> (2) The Chapter 13 Trustee shall hold, in custodio legis, all funds held in his trust account from the sale of the debtor's real property, and shall not disburse those funds even in response to a notice to withhold and deliver or other garnishment order from the Department of Revenue, without order of this court.
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> (3) The Chapter 13 Trustee shall release to the Debtor, from the funds that it is holding, $2,872.60, representing the payments that the Debtor made to the Chapter 13 Trustee from the operation of his business less the disbursements that the Chapter 13 Trustee has made during the course of this case.
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> (4) On September 22, 2004, this court entered an Order Authorizing Sale of Residence and Disbursement of Sale Proceeds. Paragraph 3 of that order directed William Buchanan to hold certain funds in trust. The court directs William Buchanan to continue to hold those funds in trust, pursuant to the terms of that Order, and not disburse any of those funds, even in response to a notice to withhold and deliver or other garnishment proceedings from the State of Washington, without further order of this court.

Order Dismissing Case and Directing Chapter 13 Trustee and William Buchanan to Hold Funds, entered on the docket on October 10, 2006.

On October 13, 2006, Debtor filed a timely motion for reconsideration of the Dismissal Order. The court entered an order denying the motion for reconsideration on October 30, 2006, specifically ordering that "the funds currently held by [Trustee and Buchanan] shall continue to be held pending entry of an order by this court after notice and hearing." Order on Motion for Reconsideration, entered on the docket on October 30, 2007.

On November 8, 2006, Debtor filed a timely notice of appeal of both the Dismissal Order and the Order on Motion for Reconsideration.

## II. ISSUE

Did the bankruptcy court err in directing Trustee and Buchanan to hold funds pending further order of the court even though it dismissed Debtor's chapter 13 case without confirming any chapter 13 plan?

## III. STANDARD OF REVIEW

This appeal presents solely an issue of law; no factual issues are in dispute. Accordingly, we review de novo. Churchill v. Fjord (In re McLinn), 739 F.2d 1395, 1398 (9th Cir. 1984).

## IV. JURISDICTION

An order dismissing a chapter 13 case is typically a final order. In re Salem, 465 F.3d 767, 771 (7th Cir. 2006). Here, however, the order incorporated terms which appear to require further court action: the proceeds from the sale of Debtor's residence are to be held pending further court order. Debtor is appealing this particular portion of the order, and not the dismissal itself. Consequently, we must determine whether the language somehow renders the order interlocutory.

"A disposition is final if it 'contains a complete act of adjudication, that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter.'" Brown v. Wilshire Credit Corp. (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007), quoting Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990) (emphasis in original). Here, the order reflects that the court intended to take further action with respect to the sale proceeds. While the Ninth Circuit has adopted a "pragmatic

approach" to finality in bankruptcy appeals (Bonham v. Compton (In re Bonham), 229 F.3d 750, 761 (9th Cir. 2000)), the order does not "finally determine[] the discrete issue to which it is addressed," the second requisite for determining that an order is final under the pragmatic approach.[9] Trustee requested that he be allowed to distribute the proceeds to the priority tax claimants, while Debtor requested that all proceeds held by Trustee and Buchanan be returned to him upon dismissal. The court granted neither request, instead directing that the funds be held pending further order. Therefore, as evidenced by the language of the order itself, the order is interlocutory.

Even though the order does not appear to be final, we can grant leave to appeal pursuant to Federal Rule of Bankruptcy Procedure 8003(c). Under 28 U.S.C. § 158(a)(3), an appellant must obtain leave of court to appeal an interlocutory order. Debtor did not do so. Nonetheless, if an order is interlocutory, and no motion for leave to appeal has been filed, we can consider a timely notice of appeal to be a motion for leave. See Fed. R. Bankr.P. 8003(c); Pfeiffer v. Couch (In re Xebec), 147 B.R. 518, 522 (9th Cir. BAP 1992). We do so here.

Granting leave to appeal is left to the discretion of the panel. Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995). Granting leave is appropriate when an appeal would materially advance resolution of the dispute and

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[9]The pragmatic approach to finality in bankruptcy cases requires that the order "1) resolve[] and seriously affect[] substantive rights and 2) finally determine[] the discrete issue to which it is addressed." Bonham, 229 F.3d at 761, quoting Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040, 1043 (9th Cir. 1997)).

minimize further litigation expenses. Id. In this case, granting leave to appeal is appropriate because we can finally dispose of the remaining issues as a matter of law, thereby foreclosing further unnecessary litigation. Leave to appeal is also appropriate because Debtor is being harmed by the trustee's retention of the proceeds in contravention of section 1326(a)(2), and delay in appellate review unnecessarily prolongs the harm. We therefore grant leave to appeal the interlocutory order.

## V. DISCUSSION

Section 1326(a)(2) states that "a payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan . . . If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title." 11 U.S.C. § 1326(a)(2) (emphasis added). The term "such payment" refers to section 1326(a)(1) which requires a chapter 13 debtor to begin "making the payments proposed by a plan within 30 days after the plan is filed." Cohen v. Tran (In re Tran), 309 B.R. 330, 337 (9th Cir. BAP 2004), aff'd, 177 Fed. Appx. 754 (9th Cir. 2006). If a debtor proposes to fund a portion of his chapter 13 plan with the proceeds from the sale or refinancing of his residence, those proceeds may constitute "payments" under section 1326(a). Id.

In this case, the initial plan filed by Debtor proposed to use proceeds from the sale of his residence to pay administrative and priority claims. The amended plan specifically identified the funds being held by Trustee ($37,530.98) and proposed to use them to pay allowed claims pursuant to the plan. In addition,

the order approving the sale of the residence stated that the non-exempt portion of the sale proceeds were to be distributed pursuant to Debtor's chapter 13 plan. Consequently, the proceeds from the sale of the residence held by Trustee constituted "payments" for the purposes of section 1326(a).[10] Id. As such, because Debtor's chapter 13 plan was never confirmed, Trustee was compelled by statute to return the proceeds to Debtor. Id.; 11 U.S.C. § 1326(a)(2).

Notwithstanding the unambiguous language of section 1326(a)(2) mandating chapter 13 trustees to return payments made by a debtor in conjunction with a plan following dismissal of an unconfirmed chapter 13 case, some courts have held that the funds held by the trustee following dismissal are subject to levy or other forced collection under state law. In re Doherty, 229 B.R. 461, 463 (Bankr. E.D. Wash. 1999); Massachusetts v. Pappalardo (In re Steenstra), 307 B.R. 732, 739 (1st Cir. BAP 2004).[11] These courts reason that despite the clear directive of section

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[10]In In re Witte, 279 B.R. 585, 587 (Bankr. E.D. Cal. 2002), a bankruptcy court held that funds from the sale of a chapter 13 debtor's residence were not "payments" proposed by a plan and section 1326(a)(2). In that case, however, neither the debtor's initial plan nor his amended plan proposed to use the sale proceeds to pay creditors; rather, both plans proposed to use debtor's disposable income to fund payments to creditors. Witte is therefore distinguishable, because both of Debtor's plans here proposed to use the sale proceeds to fund the plan.

[11]Most cases have held to the contrary: funds held by a chapter 13 trustee upon dismissal of case in which no plan has been confirmed must be returned to the debtor in accordance with the plain language of section 1326(a)(2). In re Bailey, 330 B.R. 775, 776 (Bankr. D. Ore. 2005); In re Davis, 2004 WL 3310531 (Bankr. M.D. Ala. 2004); In re Oliver, 222 B.R. 272, 275 (Bankr. E.D. Va. 1998); In re Walter, 199 B.R. 390, 392 (Bankr. C.D. Ill. 1996).

1326(a)(2), the bankruptcy estate terminates after dismissal and the automatic stay is no longer effective, thus subjecting the funds held by the trustee to garnishment or levy by creditors. Id. Here, no evidence exists that the priority creditors have attempted to levy the funds held by Trustee, so the holdings of these cases are inapplicable; instead, the reasoning of cases like Bailey is more persuasive. Even if the State of Washington had effected a levy of the funds, we question how state law levy statutes can preempt the plain language of section 1326(a)(2). See Bailey, 330 B.R. at 776 n.3. To the extent the state statutes conflict with the Bankruptcy Code, the Bankruptcy Code generally prevails pursuant to the Supremacy Clause of the Constitution. Id.; Baker & Drake, Inc. v. Public Service Commission of Nevada (In re Baker & Drake, Inc.), 35 F.3d 1348 (9th Cir. 1994). The language of section 1326(a)(2) is clear and unambiguous and its dictates must be followed.

In Beam v. I.R.S. (In re Beam), 192 F.3d 941 (9th Cir. 1999), the Ninth Circuit held that plan payments held by a chapter 13 trustee following dismissal of a case without a confirmed plan were subject to levy by the IRS. In so holding, the Ninth Circuit noted that section 1326(a)(2) conflicted with levying statutes contained in the Internal Revenue Code and held that 28 U.S.C. § 6334 ("IRC § 6334") superseded section 1326(a)(2). IRC § 6334(a) contains thirteen categories of property exempt from levy and IRC § 1334(c) specifies that no other property or rights shall be exempt from levy. The Ninth Circuit was "persuaded that Congress clearly intended to exclude from IRS Levy only those 13 categories." Beam, 192 F.3d at 944.

Because funds held by a chapter 13 trustee were not included in the list, the Ninth Circuit concluded that the provisions of IRC § 6334 trumped section 1326(a).

In the present case, no evidence exists that the IRS has attempted to levy the funds held by Trustee, so Beam is inapplicable. The pending motion by the IRS, which we believe will be rendered moot by our decision in this appeal, is not the same thing as a levy. In this case, Trustee simply seeks permission to pay priority creditors with the funds he is holding; levy and garnishment are not at issue. The plain language of section 1326(a)(2) dictates that the funds be returned to Debtor.

## VI. CONCLUSION

For the foregoing reasons, we REVERSE and remand for the bankruptcy court to order Trustee and Buchanan to turn over the funds they hold to Debtor.