

2/19/2014

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-13-1215-PaKuD
)
 CYNTHIA L. MESSER,) Bankr. No. 11-03007-RTB
)
 Debtor.)
 _____)
)
 CYNTHIA L. MESSER,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 EDWARD J. MANEY, Chapter 13)
 Trustee,)
)
 Appellee.)
 _____)

Argued and Submitted on January 23, 2014
at Tempe, Arizona

Filed - February 19, 2014

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

Honorable Redfield T. Baum Sr., Bankruptcy Judge, Presiding²

Appearances: David Allegrucci argued for appellant Cynthia L.
Messer; Andrew M. Dudley argued for appellee
Edward J. Maney, Chapter 13 Trustee.

Before: PAPPAS, KURTZ, and DUNN, Bankruptcy Judges.

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 Judge Baum entered the order in this appeal before his
retirement. The case was thereafter assigned to the Honorable
Eddward P. Ballinger Jr.

1 Chapter 13³ debtor Cynthia L. Messer ("Debtor") appeals the
2 bankruptcy court's decision declining to confirm her proposed
3 chapter 13 plan. Based on that ruling, Debtor proposed another
4 plan, which was confirmed, and she appeals that confirmation
5 order. We AFFIRM the decision of the bankruptcy court, albeit
6 for different reasons than relied upon by the court.

7 **FACTS**

8 On February 7, 2011, Debtor filed a chapter 7 petition. In
9 her schedule B, she disclosed her interest in an annuity, which
10 she valued at \$2,000, and which she claimed as fully exempt in
11 schedule C.⁴ The chapter 7 trustee objected to Debtor's claim of
12 exemption, that objection was sustained, and the exemption was
13 disallowed by the bankruptcy court.

14 On September 14, 2011, Debtor converted the case to
15 chapter 13; Edward J. Maney was appointed to serve as chapter 13
16 trustee ("Trustee").⁵ On October 10, 2011, Debtor filed her
17

18 ³ Unless otherwise indicated, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
20 Rule references are to the Federal Rules of Bankruptcy Procedure,
21 Rules 1001-9037, and all Civil Rule references are to the Federal
Rules of Civil Procedure 1-86.

22 ⁴ Debtor's schedules are not included in the record on
23 appeal. However, we have exercised our discretion to take
24 judicial notice of the pleadings and other papers filed in the
25 bankruptcy court's docket. Fed. R. Evid. 201; O'Rourke v.
Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58
(9th Cir. 1989).

26 ⁵ Debtor appealed the bankruptcy court's ruling denying the
27 annuity exemption. The Panel affirmed in an unpublished
28 decision. Messer v. Maney (In re Messer), 2012 WL 762828 (9th
(continued...)

1 proposed "Chapter 13 Plan and Application for Payment of
2 Administrative Expense." The plan proposed that she would make
3 forty-eight monthly payments to Trustee of \$355 each.

4 On January 23, 2012, Debtor filed a "Motion for Court to
5 Value Annuity Stream of Income," to which Trustee objected. The
6 bankruptcy court conducted an evidentiary hearing concerning the
7 value of Debtor's interest in the annuity on February 28, 2012.
8 At the hearing, Debtor called Kirk Hughes, a representative of
9 Settlement Capital, to testify. He indicated that his company
10 would purchase twenty-five of Debtor's future annuity payments
11 for a total of \$33,041.⁶ Trustee called Sebastian W. Manera, an
12 Arizona chapter 7 trustee, to testify. It is unclear whether
13 Mr. Manera offered any opinion of the liquidation value of the
14 annuity. However, he opined that, if he were to be the trustee
15 in a hypothetical chapter 7 case in which Debtor's annuity was an
16 asset, he would simply hold the chapter 7 case open long enough
17 to collect annuity payments in an amount sufficient to pay all of
18 Debtor's creditors in full.⁷

19 _____
20 ⁵(...continued)
21 Cir. BAP Mar. 9, 2012).

22 ⁶ The record includes scant information about the annuity.
23 However, from the bankruptcy court's Minute Entry/Order following
24 the valuation hearing, we can surmise that Debtor was entitled to
25 receive \$1,950 per month from the annuity, and that there
26 remained at least five more years of monthly payments due to her
27 as of March 2, 2012.

28 ⁷ While the value of the annuity discussed at the hearing
is critical to resolution of the issues, regrettably, the parties
did not provide a transcript of the evidentiary hearing.

(continued...)

1 In a Minute Entry/Order entered after the hearing, the
2 bankruptcy court indicated that it accepted Debtor's evidence
3 concerning the value of 25 annuity payments, but expressed
4 skepticism "about the significance of the cash out value of some
5 portion of the annuity." The court suggested there was a
6 "fundamental disconnect" between Debtor's request to determine
7 the value of the annuity in this fashion, and the § 1325(a) plan
8 confirmation requirements, noting that the court "seriously
9 doubt[ed] that evidence advances the debtor's ability to confirm
10 a plan."

11 On July 20, 2012, Debtor filed an Amended Chapter 13 Plan
12 and Application for Payment of Administrative Expenses ("Amended
13 Plan"). The Amended Plan proposed payments of \$355 per month for
14 months 1-10, and \$1,225 per month for months 11-48, for a total
15 of \$50,100. As of October 4, 2012, a total of \$40,317.73 of
16 unsecured claims had been filed in Debtor's case.⁸ As a result,
17 the Amended Plan payments were not sufficient to pay all creditor
18 claims and administrative expenses in full, and Trustee therefore
19 recommended to the bankruptcy court that the Amended Plan not be
20 confirmed. A confirmation hearing was held on November 8, 2012.
21 On January 8, 2013, the bankruptcy court entered an order denying
22

23 ⁷(...continued)

24 However, the parties to this appeal, as well as the bankruptcy
25 court, appear to agree upon the substance of Mr. Hughes' and
26 Mr. Manera's testimony as summarized herein. We therefore rely
upon their account of the testimony as accurate.

27 ⁸ As of May 8, 2013, the allowed creditor claims, excluding
28 secured claims and chapter 13 trustee compensation, but including
chapter 7 trustee expenses, totaled \$41,518.73.

1 confirmation of the Amended Plan.

2 On March 22, 2013, Debtor filed a motion to reconvert the
3 case to chapter 7, to which Trustee objected. However, on
4 April 19, 2013, the bankruptcy court entered a stipulated order
5 confirming another amended plan ("Second Amended Plan"). In the
6 Second Amended Plan, Debtor proposed sixty months of payments
7 rather than forty-eight, which increased the total to be paid in
8 from the \$50,100 proposed in the Amended Plan, to \$67,350, an
9 amount sufficient to pay all allowed claims in full.

10 On May 2, 2013, Debtor appealed this confirmation order.

11 JURISDICTION

12 The bankruptcy court had jurisdiction under 28 U.S.C.
13 §§ 1334 and 157(b)(2)(A) and (L). As explained below, we have
14 jurisdiction under 28 U.S.C. § 158.

15 ISSUE⁹

16 Whether the bankruptcy court erred when it denied
17 confirmation of Debtor's Amended Plan because, based on the value
18 of the annuity, that plan did not satisfy the "best interests of
19 the creditors" test under § 1325(a)(4).

20 STANDARDS OF REVIEW

21 A bankruptcy court's decision concerning confirmation of a
22 chapter 13 plan is reviewed for abuse of discretion. Bank of Am.
23 Nat'l Trust and Sav. Ass'n (In re Slade), 15 B.R. 910, 913 (9th
24

25 ⁹ Debtor initially also appealed the bankruptcy court's
26 order denying her motion to compel Trustee to pay certain
27 court-approved attorneys fees and costs. However, in her reply
28 brief in this appeal, she concedes that any issues concerning
them. We therefore do not review that order.

1 Cir. BAP 1981). This standard has two parts. First, we consider
2 whether the bankruptcy court applied the correct legal standard;
3 and second, we must decide whether the court's factual findings
4 supporting the legal analysis were clearly erroneous. United
5 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en
6 banc).

7 Rulings concerning confirmation of a chapter 13 plan present
8 mixed questions of fact and law. The bankruptcy court's factual
9 determinations are reviewed under the clearly erroneous standard,
10 while its legal determinations are reviewed de novo. Meyer v.
11 Lepe (In re Lepe), 470 B.R. 851, 855 (9th Cir. BAP 2012) (citing
12 Andrews v. Loheit (In re Andrews), 155 B.R. 769, 770 (9th Cir.
13 BAP 1993)).

14 The liquidation value of a debtor's assets for purposes of
15 the best interests of creditors test presents a question of fact.
16 United States v. Arnold and Baker Farms (In re Arnold and Baker
17 Farms), 177 B.R. 648, 653 (9th Cir. BAP 1994). As such, we
18 review the bankruptcy court's value findings under the clearly
19 erroneous standard. Varela v. Dynamic Brokers, Inc. (In re
20 Dynamic Brokers, Inc.), 293 B.R. 489, 493 (9th Cir. BAP 2003);
21 In re Arnold and Baker Farms, 177 B.R. at 653; Rule 8013. Such
22 review is "significantly deferential, requiring a 'definite and
23 firm conviction that a mistake has been committed.'" McDonald v.
24 Metz (In re Metz), 225 B.R. 173, 175 (9th Cir. BAP 1998) (quoting
25 Granite State Ins. Co. v. Smart Modular Tech., Inc., 76 F.3d
26 1023, 1028 (9th Cir. 1996), which in turn quoted from Concrete
27 Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for
28 S. Cal., 508 U.S. 602, 623 (1993)).

1 chapter 13 plan to be confirmed, "each of the requirements of
2 section 1325 must be present and the debtor has the burden of
3 proving that each element has been met." Barnes v. Barnes
4 (In re Barnes), 32 F.3d 405, 407 (9th Cir. 1994); Drummond v.
5 Welsh (In re Welsh), 465 B.R. 843, 847 (9th Cir. BAP 2012).
6 Debtor contends that the Amended Plan satisfied all requirements
7 for confirmation listed in § 1325(a).

8 Trustee does not dispute that the Amended Plan satisfied the
9 confirmation standards, except that set forth in § 1325(a)(4).
10 That section of the Code provides:

11 (a) Except as provided in subsection (b), the court
12 shall confirm a plan if -

13 * * * * *

14 (4) the value, as of the effective date of the
15 plan, of property to be distributed under the plan on
16 account of each allowed unsecured claim is not less
than the amount that would be paid on such claim if the
estate of the debtor were liquidated under chapter 7 of
this title on such date[.]

17 § 1325(a)(4).

18 Two separate calculations must be performed in order to
19 determine whether a debtor's proposed plan satisfies the best
20 interest of creditors test under § 1325(a)(4). First, the
21 bankruptcy court must measure "the value, as of the effective
22 date of the plan, of property to be distributed under the plan on
23 account of each allowed unsecured claim" § 1325(a)(4);
24 Jensen v. Dunivent (In re Dewey), 237 B.R. 783, 788 (10th Cir.
25 BAP 1999). Since plans usually involve monthly payments to be
26 made over time, the bankruptcy court must determine the present
27 value of the property to be distributed to unsecured creditors
28 through the plan - the stream of plan payments to creditors - as

1 of the effective date of the plan. In re Gibson, 415 B.R. 735,
2 737 (Bankr. D. Ariz. 2009); see also United States v. Camino Real
3 Landscape Maint. Contractors, Inc. (In re Camino Real Landscape
4 Maint. Contractors, Inc.), 818 F.2d 1503, 1505 (9th Cir. 1987)
5 (stating "'value, as of the effective date of the plan,' as used
6 in § 1129(a)(9)(C) and several other sections of the Bankruptcy
7 Code, 'indicates that the promised payment under the plan must be
8 discounted to present value as of the effective date of the
9 plan.'" (quoting H.R.Rep. No. 595, 95th Cong., 1st Sess. 408,
10 reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6364).

11 While there is no indication in the record that the bankruptcy
12 court considered anything other than the total amount of payments
13 Debtor proposed under her Amended Plan, as opposed to the present
14 value of those payments, Debtor has not challenged the bankruptcy
15 court's calculation in this appeal.

16 The second calculation under § 1325(a)(4) focuses on "the
17 amount that would be paid on such claim if the estate of the
18 debtor were liquidated under chapter 7 of this title on such
19 date." § 1325(a)(4); In re Dewey, 237 B.R. at 788. This
20 measurement computes the sum that would be available to each
21 unsecured creditor if a hypothetical chapter 7 liquidation of the
22 debtor's assets were completed on the effective date of the plan.
23 In re Gibson, 415 B.R. at 737. This sum is then compared to the
24 first calculation. In order for the plan to be confirmed, the
25 first sum - the chapter 13 plan amount - must be "not less" than
26 the second sum - the chapter 7 liquidation amount - as to each
27 specific unsecured creditor. This methodology insures the
28 unsecured creditors will fare no worse under chapter 13 than

1 under chapter 7. It is this second figure the parties dispute in
2 this appeal.

3 Trustee contends, under the facts of Debtor's case, and as
4 his witness so testified, in a hypothetical chapter 7 case
5 involving Debtor, a trustee would not sell Debtor's right to
6 receive payments under the annuity, but would simply collect the
7 future payments until enough funds had been received to fully
8 satisfy all unsecured creditor claims. Since the amount of
9 payments to be received by Debtor under the annuity greatly
10 exceeded to total amount she owed to her creditors, Trustee
11 argues, to be confirmed, any plan proposed by Debtor in this case
12 must pay her unsecured creditors in full.

13 In contrast, Debtor argues that in determining the
14 hypothetical liquidation value of the annuity, the bankruptcy
15 court should have adopted a cash-out, present day value of
16 twenty-five of the annuity payments. Because the Amended Plan
17 proposed payments in excess of this value, Debtor argues it met
18 the best interests test.

19 To support her argument, Debtor points to the term
20 "liquidated" in § 1325(a)(4). She contends that because
21 chapter 7 does not require liquidation on a specific date, and
22 would indeed permit a case to be held open while annuity payments
23 are collected by the chapter 7 trustee, then the court must
24 employ the term "liquidated" in its chapter 13 analysis in a way
25 chapter 7 does not. Debtor contends that § 1325(a)(4) requires
26 the bankruptcy court to compare creditor treatment under the
27 chapter 13 plan with the present value of the assets available
28 for liquidation in a hypothetical chapter 7 case on a specific

1 date - the effective date of the debtor's plan - rather than how
2 the assets might be liquidated in the course of an actual
3 chapter 7 case.

4 Here, the bankruptcy court denied confirmation of Debtor's
5 Amended Plan, presumably deciding that it did not satisfy the
6 best interests of creditors test. We believe the bankruptcy
7 court's conclusion was correct. However, we decline to endorse
8 either Trustee's or Debtor's positions concerning the application
9 of the test.

10 1. The Effective Date of the Plan

11 The starting point for a bankruptcy court's value
12 calculation for purposes of the best interest test is well
13 established in this circuit. Though the Code employs the phrase
14 "effective date of the plan" in several places, it does not
15 define it. However, the phrase has been interpreted to mean the
16 date the plan becomes binding on the parties. Countrywide Home
17 Loans, Inc. v. Hoopai (In re Hoopai), 581 F.3d 1090, 1100-01 (9th
18 Cir. 2009); Pak v. eCast Settlement Corp. (In re Pak), 378 B.R.
19 257, 265 (9th Cir. BAP 2007) ("[T]he most logical interpretation
20 of the 'effective date of the plan' is the date of plan
21 confirmation, as a chapter 13 plan is not binding on the debtor
22 and other interested parties until it is confirmed.") (subsequent
23 history omitted). Generally, a plan becomes binding on the
24 parties upon confirmation, although the plan may provide for a
25 specific date on which it becomes effective. In re Hoopai,
26 581 F.3d at 1101.

27 Because Debtor's Amended Plan did not include a specific
28 effective date, the "effective date of the plan" in this case is

1 the confirmation date. As a result, we consider whether the
2 amount Debtor proposed for payments in the Amended Plan to the
3 holders of allowed unsecured claims is at least equal to the
4 amount which would be paid on each claim if Debtor's estate were
5 liquidated under chapter 7, as of the date of the hearing on
6 confirmation of the Amended Plan.

7 2. Property of the Estate

8 Section 541(a)(1) provides that the commencement of a
9 bankruptcy case creates an estate comprised of "all legal or
10 equitable interests of the debtor in property[.]" As the Code is
11 applied here, then, all of Debtor's rights under the annuity,
12 including its payment stream, are property of the bankruptcy
13 estate. Put another way, the estate's interest in the stream of
14 payments from the annuity is not limited solely to the next
15 payment, or even to the payments which will be disbursed during
16 the pendency of the chapter 13 plan. See In re Myers, 200 B.R.
17 155, 159 (Bankr. N.D. Ohio 1996) (under § 541(a), all payments to
18 be received under the terms of a structured settlement were
19 property of the estate); Turner v. Dees (In re Dees), 155 B.R.
20 238, 240 (Bankr. S.D. Ala. 1992) (structured annuity benefits
21 from a wrongful death settlement accruing before and after the
22 filing of the bankruptcy petition are estate property);
23 In re Hartman, 115 B.R. 171, 175 (W.D. Ark. 1990) (full value of
24 debtor's vested interest in retirement plan is property of his
25 chapter 13 estate and must be considered in complying with the
26 requirements of § 1325). Moreover, the fact that assignment of
27 an annuity may be restricted by its terms does not prevent its
28 inclusion in Debtor's bankruptcy estate, nor does it render the

1 annuity valueless. See § 541(c); Shackleford v. United States,
2 262 F.3d 1028 (9th Cir. 2001) (affirming the district court's
3 conclusion that a non-assignable lottery annuity had a marketable
4 value, although it was considerably less than the Internal
5 Revenue Code tables provided).

6 Applying these principles to the facts, as property of the
7 bankruptcy estate, the entire value of Debtor's annuity was
8 property of her bankruptcy estate and was subject to valuation
9 for purposes of § 1325(a)(4).

10 3. Valuation

11 Of course, the value of Debtor's interest in the annuity is
12 the crux of the § 1325(a)(4) issue in this appeal. Trustee's
13 position is that because a chapter 7 trustee could simply keep a
14 case open long enough to collect annuity payments sufficient to
15 ensure full payment to unsecured creditors, then full payment to
16 creditors is required for a confirmable chapter 13 plan. Debtor
17 insists that the cash-out or present day value of the annuity, as
18 established by her expert, was equal to twenty-five annuity
19 payments. We disagree with both arguments, and hold that the
20 value of an annuity for purposes of § 1325(a)(4) analysis was the
21 present day value of the entire annuity as of the confirmation
22 hearing date.

23 The language of § 1325(a)(4) is instructive. The sum to be
24 compared with the value of Debtor's payments under her Amended
25 Plan is the amount that would be distributed on each allowed
26 unsecured claim if, hypothetically, Debtor's estate were
27 liquidated under chapter 7 "on such date." The inclusion of this
28 temporal designation - and its focus on a single date - requires

1 the bankruptcy court to fix the present value of Debtor's assets,
2 including her right to receive future annuity payments, to
3 complete the § 1325(a)(4) equation.¹⁰

4 There is surprisingly little case law examining this issue.
5 In In re Martin, 233 B.R. 436, 440 (Bankr. D. Ariz. 1999), the
6 debtor proposed to pay the "present value of a non-exempt
7 annuity" into her chapter 13 plan. Because the plan provided for
8 payments totaling more than debtor's non-exempt assets would
9 generate through a liquidation, the bankruptcy court found
10 § 1325(a)(4) was satisfied. The debtor determined the annuity's
11 value after receiving a third-party estimate of its cash value,
12 along with an offer to purchase it. It was this value she
13 utilized in preparing her schedules and plan. While a creditor
14 challenged the value of the remaining annuity payments, the
15 creditor offered no evidence to place the offer in question and,
16 therefore, the bankruptcy court found debtor's valuation to be
17 proper.

18 A case cited by Trustee supports this value approach as
19 well. In In re Myers, supra, the debtor was the beneficiary of a
20 structured tort settlement. In measuring the value of the
21 settlement for purposes of § 1325(a)(4), the debtor contended
22 that the present value of only the next periodic payment to be
23 made under the settlement should be considered. The bankruptcy
24

25
26 ¹⁰ The term "present value" is not defined in the Code.
27 Black's defines it as: "the sum of money that, with compound
28 date; future value discounted to its value today." Black's Law
Dictionary 1303-04 (9th ed. 2009) (emphasis added).

1 court disagreed, noting that under § 541(a), all payments to be
2 received by the debtor under the settlement were property of the
3 estate. As such, the court held that "the Chapter 7 liquidation
4 value [of the settlement] is the present value of all of those
5 payments, not merely the next one due." 200 B.R. at 159.

6 Finally, a leading bankruptcy treatise concurs with the
7 authorities cited above:

8 The best interests test under section 1325(a)(4)
9 requires that the property offered the holder of each
10 allowed unsecured claim have a present value, as of the
11 effective date of the plan, not less than the amount
12 that would be paid if the debtor's estate were
13 liquidated under chapter 7. The language of the
14 statute plainly means that the court is to ascribe a
15 liquidation value to all nonexempt property of the
16 estate, as that term is defined under section 541.

17 Vol. 8 COLLIER ON BANKRUPTCY ¶ 1325.05(2)(d) (Alan N. Resnick & Henry
18 J. Sommer eds., 16th ed. 2013) (emphasis added); see also Vol. 7
19 William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE, § 151:11, at
20 151-72 (3d ed. 2010) ("[l]iquidation in a chapter 7 case [for
21 purposes of the best interest of creditors test under
22 § 1325(a)(4)] involves the collection of all of the debtor's
23 nonexempt property and the reduction of that property to cash");
24 Hon. W. Homer Drake, Hon. Paul W. Bonapfel & Adam M. Goodman,
25 CHAPTER 13 PRACTICE & PROCEDURE § 9E:7, at 1017 (2012) ("the key
26 question is what the Chapter 7 trustee could obtain in a
27 liquidation sale. Thus, fair market value of property, rather
28 than its forced sale, governs").

Because § 1325(a)(4) requires a liquidation analysis of a
debtor's assets as of the confirmation date (i.e., the "effective
date of the plan"), under these facts, the bankruptcy court
should have determined the present value of the stream of annuity

1 payments to be made in the future to Debtor. In other words,
2 neither Debtor's approach to determining the liquidation value of
3 a discreet number of payments, nor Trustee's approach of
4 collecting future payments, properly valued Debtor's annuity in
5 this case. Instead, the Code required the bankruptcy court to
6 calculate the liquidation value of the entire annuity in order to
7 determine the outcome of the best interests of creditors test.

8 Trustee's position promoting a hypothetical liquidation of
9 Debtor's assets over many months is contrary to the Code.¹¹
10 Moreover, while Debtor's position on appeal is closer to correct,
11 her execution of the required methodology at the hearing was also
12 flawed. Although she perhaps determined through her witness the
13 present day value of the stream of some payments, § 1325(a)(4)
14 required her to prove up the liquidation value of all remaining
15 annuity payments, since the whole annuity was an asset of her
16 bankruptcy estate.

17 It does not appear the bankruptcy court necessarily relied
18 upon either Debtor's or Trustee's valuation. In valuing the
19 annuity, the bankruptcy court stated:

20 Even assuming that the debtor is correct in her
21 assertion that her "actual" allowable claims are
22 approximately \$30,000.00, her annuity alone will pay
23 her about \$117,000.00 over a 5 year period [the maximum
24 plan term]. Stated differently one apparent plan
method to pay her "actual" creditors in full would be
to commit 25% of her annuity payments to her plan over
a 5 year term. Considering the foregoing, the court is

25
26 ¹¹ Of course, it was not Trustee's burden to prove
27 valuation under § 1325(a)(4); the debtor bears the burden of
28 proving each element required for confirmation under § 1325(a),
including value of the assets in the hypothetical chapter 7
liquidation. In re Welsh, 465 B.R. at 847.

1 skeptical about the significance of the cash out value
2 of some portion of the annuity. Particularly
3 considering that the debtor and/or the estate do much
4 better economically by not cashing out the annuity and
5 instead using the same payment stream to pay creditors
6 and the debtor's allowable monthly expenses.

7 Minute Entry/Order, March 2, 2012 at 2 (parenthetical in
8 original) (emphasis added). And later, in denying confirmation
9 of the Amended Plan, the bankruptcy court referred to its prior
10 decision:

11 In that ruling, although the court accepted debtor's
12 evidence of value if the annuity were cashed out as
13 asserted by the debtor, the court also found that the
14 debtor had the ability in chapter 13 to "pay her actual
15 creditors in full." The court then noted that it
16 "seriously doubts that evidence advances the debtor's
17 ability to confirm a plan" referencing Section 1325
18 because of the ability to pay in full. Apparently,
19 nothing has changed. Because the debtor can pay her
20 creditors in full her plan must so provide.

21 Minute Entry/Order, December 20, 2012 at 1-2.

22 Regardless of the bankruptcy court's methodology, we
23 conclude that it correctly decided that confirmation of Debtor's
24 Amended Plan should be denied, because Debtor did not satisfy her
25 burden to show that the Amended Plan satisfied the § 1325(a)(4)
26 best interest of creditors test.

27 **CONCLUSION**

28 We AFFIRM the decision of the bankruptcy court.