

MAR 11 2014

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:) BAP No. OR-11-1448-PaJuKu
 2)
 3 DAVID REED and REBECCA REED,) Bankr. No. 10-38478-elp13
 4)
 5 Debtors.)
 6)
 7 _____)
 8 WAYNE GODARE, Chapter 13 Trustee,)
 9)
 10 Appellant,)
 11)
 12 v.) **M E M O R A N D U M**¹
 13)
 14 DAVID REED; REBECCA REED;)
 15 UNITED STATES TRUSTEE, PORTLAND,²)
 16)
 17 Appellees.)
 18 _____)

Submitted Without Oral Argument³
on March 11, 2014

Filed - March 11, 2014

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

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

19
 20 Appearances: Appellant Wayne Godare, Chapter 13 Trustee, pro se
 21 on brief; Brian D. Turner of Turner Uhlemann PC on
 22 brief for Appellees David Reed and Rebecca Reed.

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

27 ² The United States Trustee did not participate in this
 28 appeal.

29 ³ After examination of the briefs and record, and after
 notice to the parties, the Panel unanimously determined that oral
 argument was not needed for this appeal in an order entered
 October 21, 2013. See Fed. R. Bankr. P. 8012; 9th Cir. BAP
 Rule 8012-1.

1 Before: PAPPAS, JURY and KURTZ, Bankruptcy Judges.

2 Appellant, Chapter 13⁴ Trustee Wayne Godare ("Trustee"),
3 appeals the order of the bankruptcy court confirming the
4 chapter 13 plan of Appellees, Debtors David and Rebecca Reed
5 ("Debtors"). Because, in making its decision to confirm Debtors'
6 plan, the bankruptcy court relied on the Ninth Circuit's decision
7 in Maney v. Kagenveama (In re Kagenveama), 541 F.3d 868 (9th Cir.
8 2008), and because the rule of law announced in In re Kagenveama
9 has since been overruled by the Ninth Circuit sitting in Danielson
10 v. Flores (In re Flores), 735 F.3d 855 (9th Cir. 2013) (en banc)
11 ("Flores II"), we VACATE the bankruptcy court's order and REMAND
12 this matter for further proceedings.

13 **PROCEDURAL HISTORY⁵**

14 In an extensive amended memorandum opinion (the "Memorandum
15 Opinion") entered on August 9, 2011, the bankruptcy court decided
16 that Debtors' chapter 13 plan should be confirmed, and that
17 Trustee's objection to confirmation should be overruled. ER at
18 106-28. In particular, the bankruptcy court found that Debtors
19 were above-median income debtors for purposes of § 1325(b)(4), but
20 that they had negative disposable income per § 1325(b)(2)-(3) and
21 line 59 of Form B22C. Therefore, based on the rule announced in
22 In re Kagenveama, the court held that Debtors were not required to

23

24

25 ⁴ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
all Rule references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

27

28 ⁵ As discussed below, this appeal is resolved on a question
of law. Therefore, a full recitation of the facts, which are well
known to the parties, is unnecessary.

1 propose a five-year plan, as Trustee argued they must, and instead
2 confirmed Debtors' chapter 13 plan, which was to be completed in
3 forty-three months. Memorandum Opinion at 22, ER at 127. In the
4 Memorandum Opinion, the bankruptcy court explained how it had
5 calculated Debtors' projected disposable income⁶ and concluded it
6 was bound by In re Kagenveama concerning its determination of the
7 applicable commitment period in Debtors' case stating, "I conclude
8 that the Supreme Court's decisions [of Hamilton v. Lanning,
9 560 U.S. 505 (2010) and Ransom v. FIA Card Servs., N.A.,
10 131 S. Ct. 716 (2011)] did not effectively overrule
11 [In re] Kagenveama's holding regarding applicable commitment
12 period. Therefore, I am bound to follow that holding."
13 Memorandum Opinion at 22, ER at 127.

14 Trustee filed a timely notice of appeal on August 17, 2011.
15 ER at 129. Trustee then filed a motion before this Panel to
16 suspend briefing in the appeal because a pending, related appeal
17 to the Ninth Circuit in Danielson v. Flores (In re Flores) might
18 yield a decision impacting the issues in this case. See Motion to
19 Suspend the Briefing Schedule, BAP dkt. 4. The Panel granted
20 Trustee's motion, extended the briefing deadlines, and ordered the
21 parties to file supplemental briefing once Flores was decided.
22 BAP dkt. 5.

23 On August 31, 2012, a three-judge panel of the Ninth Circuit
24 decided the Flores appeal and determined that the court's decision
25

26 ⁶ The bankruptcy court's calculation of Debtors' projected
27 disposable income in the Amended Memorandum Opinion was not
28 challenged on appeal by Trustee. See Trustee's Op. Br. at 6
(stating the issue of the appeal was limited to the bankruptcy
court's determination on the applicable commitment period).

1 in In re Kagenveama was controlling. Danielson v. Flores
2 (In re Flores), 692 F.3d 1021 (9th Cir. 2012) ("Flores I").
3 However, on December 19, 2012, the Ninth Circuit granted rehearing
4 en banc. 704 F.3d 1067 (9th Cir. 2012). Sitting en banc, the
5 court then reversed course, determined In re Kagenveama and
6 Flores I had been wrongly decided, and held that the applicable
7 commitment period is a "temporal" requirement, and that, under
8 § 1325(b)(1)(B), a bankruptcy court may confirm a plan "only if
9 the plan's duration is at least as long as the applicable
10 commitment period provided by § 1325(b)(4)." Flores II, 735 F.3d
11 at 862. Under § 1325(b)(4)(A)(ii), the applicable commitment
12 period for above-median income debtors is "not less than 5 years".

13 Given the decision in Flores II, the appeal is now ripe for
14 disposition.

15 JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
17 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

18 ISSUE

19 Whether the bankruptcy court erred in confirming Debtors'
20 chapter 13 plan by applying a rule of law that has been overruled.

21 STANDARD OF REVIEW

22 "Whether a chapter 13 plan should be confirmed involves mixed
23 questions of fact and law, where factual determinations are
24 reviewed under the clearly erroneous standard, and determinations
25 of law are reviewed de novo." Meyer v. Lepe (In re Lepe),
26 470 B.R. 851, 855 (9th Cir. BAP 2012) (citing Andrews v. Loheit
27 (In re Andrews), 155 B.R. 769, 770 (9th Cir. BAP 1993)). A
28 bankruptcy court's interpretation of the Bankruptcy Code is

1 reviewed de novo. Flores II, 735 F.3d at 856 n.4 (citing Samson
2 v. W. Capital Partners, LLC (In re Blixseth), 684 F.3d 865, 869
3 (9th Cir. 2012)).

4 **DISCUSSION**

5 No extensive analysis of the issue on appeal is necessary.
6 Because Flores II overruled In re Kagenveama on the applicable
7 commitment period issue, and because the bankruptcy court relied
8 on In re Kagenveama in determining the applicable commitment
9 period in Debtors' case, the bankruptcy court applied an incorrect
10 rule of law in deciding that Debtors' plan should be confirmed.
11 We must therefore vacate the bankruptcy court's order confirming
12 the Debtors' chapter 13 plan and remand this case to the
13 bankruptcy court for further proceedings in light of Flores II.
14 See Mele v. Mele (In re Mele), 501 B.R. 357, 364 (9th Cir. BAP
15 2013) (deciding that vacating and remanding to the bankruptcy
16 court was required when, during the appeal, the rule of law
17 applied by the bankruptcy court was superseded or overruled).

18 **CONCLUSION**

19 For the reasons set forth above, we VACATE the bankruptcy
20 court's order confirming Debtors' chapter 13 plan and REMAND this
21 case to the bankruptcy court for further proceedings in light of
22 Flores II.