

December 4, 2001

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE JERRY R. MIRANDA and LOLA
J. MIRANDA, also known as Lola J.
Armijo,

Debtors.

BAP No. NM-01-044

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

JERRY R. MIRANDA and LOLA J.
MIRANDA, also known as Lola J.
Armijo,

Appellees.

Bankr. No. 00-11356
Chapter 13

ORDER AND JUDGMENT*

IN RE ERNEST MARTIN RIVERA and
JILL RIVERA,

Debtors.

BAP No. NM-01-045

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

ERNEST MARTIN RIVERA and JILL
RIVERA,

Appellees.

Bankr. No. 99-10346
Chapter 13

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

IN RE C. EDWARD ANDERSON, also known as C. E. Anderson, also known as Charles Edward Anderson, and S. JANE ANDERSON, also known as Sally Jane Anderson, also known as S. J. Anderson,

Debtors.

BAP No. NM-01-046

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

C. EDWARD ANDERSON, also known as C. E. Anderson, also known as Charles Edward Anderson, and S. JANE ANDERSON, also known as Sally Jane Anderson, also known as S. J. Anderson,

Appellees.

Bankr. No. 98-10524
Chapter 13

IN RE DAVID C. BONNER and CATHY J. BONNER, also known as Cathy J. Gann,

Debtors.

BAP No. NM-01-047

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

DAVID C. BONNER and CATHY J. BONNER, also known as Cathy J. Gann,

Appellees.

Bankr. No. 99-17081
Chapter 13

IN RE SAMUEL HORLICK and IRIS
O. HORLICK,

Debtors.

BAP No. NM-01-048

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

SAMUEL HORLICK and IRIS O.
HORLICK,

Appellees.

Bankr. No. 00-11129
Chapter 13

IN RE LORANDON D. BYRD, also
known as Brandon Byrd,

Debtor.

BAP No. NM-01-049

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

LORANDON D. BYRD, also known as
Brandon Byrd,

Appellee.

Bankr. No. 99-17234
Chapter 13

IN RE URSULA ROMERO,

Debtor.

BAP No. NM-01-050

KELLEY L. SKEHEN, Trustee,

Appellant,

v.

Bankr. No. 00-12922
Chapter 7

URSULA ROMERO,
Appellee.

IN RE ROBERT K. DEUTSAWE and
JOANN DEUTSAWE,
Debtors.

BAP No. NM-01-051

KELLEY L. SKEHEN, Trustee,
Appellant,

Bankr. No. 99-17141
Chapter 7

v.

ROBERT K. DEUTSAWE and JOANN
DEUTSAWE,
Appellees.

IN RE ROCHELLE R. C'HAIR,
Debtor.

BAP No. NM-01-053

KELLEY L. SKEHEN, Trustee,
Appellant,

Bankr. No. 99-15464
Chapter 13

v.

ROCHELLE R. C'HAIR,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before BOHANON, ROBINSON, and MICHAEL, Bankruptcy Judges.

ROBINSON, Bankruptcy Judge.

The standing Chapter 13 trustee appeals the orders of the bankruptcy court denying allowance of the ten percent fee provided by 28 U.S.C. § 586 on payments received from debtors in cases dismissed or converted prior to confirmation. For the reasons set forth below, we AFFIRM.

I. Jurisdiction and Standard of Review.

This Court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), (c)(1). Under this standard, we have jurisdiction over this appeal. The parties have consented to this Court’s jurisdiction in that they have not opted to have the appeal heard by the United States District Court for the District of New Mexico. *Id.* at § 158(c); 10th Cir. BAP L.R. 8001-1(a), (d). The appeal was filed timely by the standing trustee, and the bankruptcy court’s order is “final” within the meaning of § 158(a)(1). *See* Fed. R. Bankr. P. 8001-8002.

In reviewing an order of the bankruptcy court, an appellate court “reviews the factual determinations of the bankruptcy court under the clearly erroneous standard and reviews the bankruptcy court’s construction of [a statute] *de novo.*” *Taylor v. IRS*, 69 F.3d 411, 415 (10th Cir. 1995) (citations omitted).

II. Background.

The nine cases that are the subject of this appeal are Chapter 13 cases that were either dismissed or converted to Chapter 7 prior to confirmation of any Chapter 13 plan. The debtors in each case made payments to the standing trustee under the terms of their respective proposed plans. Upon dismissal or conversion, the standing trustee filed a motion for allowance of a percentage fee under 28 U.S.C. § 586(e) of all funds paid in by the debtors. Objections were filed by the debtors in each case. The bankruptcy court ruled against the

standing trustee, holding that when a Chapter 13 case is dismissed or converted prior to confirmation, the standing trustee is not entitled to collect her percentage fee from payments received. This appeal followed.

III. Discussion.

The issue on appeal is essentially one of statutory construction, which we review de novo. *FDIC v. Lowery*, 12 F.3d 995, 996 (10th Cir. 1993). “In interpreting statutes, we begin with the relevant language.” *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 151 F.3d 1251, 1257 (10th Cir. 1998) (en banc) (quoting *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990)), *rev’d on other grounds*, 526 U.S. 865 (1999). If congressional will “has been expressed in reasonably plain terms, “that language must ordinarily be regarded as conclusive.”” *Id.* (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))). We do not, however, read specific statutory language in isolation; we read statutes as a whole. *United States v. Morton*, 467 U.S. 822, 828 (1984). Accordingly, the meaning ascribed to a particular phrase must be consistent with the larger statutory context. *See Rake v. Wade*, 508 U.S. 464, 474 (1993) (“[S]tatutory terms are often ‘clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes [its] meaning clear’”) (quoting *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

The standing trustee argues that section 526(e)(2) of Title 28 is the relevant subsection concerning entitlement to a percentage fee in cases in which the Chapter 13 plan is not confirmed. That section is the means by which a standing Chapter 13 trustee can claim fees, authorizing the Attorney General to fix a percentage fee. The section provides:

Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under chapter 12 or 13 of title 11 for which such individual serves as standing trustee.

28 U.S.C. § 586(e)(2). This language specifies the amounts upon which the percentage fee shall be computed, but it is silent with regard to whether confirmation is a prerequisite to distribution, or what effect pre-confirmation dismissal or conversion may have on the standing trustee's entitlement to her percentage fee.

While we agree with the standing trustee that § 586(e)(2) is the relevant provision for calculation of the percentage fee, we agree with the debtors that it must be read in conjunction with the applicable provisions of the Bankruptcy Code. Section 1326 of Title 11¹ governs payments and disbursements associated with Chapter 13 plans. It provides:

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 confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable. 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). This statute unambiguously calls for the standing Chapter 13 trustee, if a plan is not confirmed, to return all payments to the debtor, less any administrative expense claim pursuant to § 503(b). The standing Chapter 13 trustee's percentage fee is not an administrative claim within the meaning of

§ 503(b). *In re Ward*, 132 B.R. 417, 419 (Bankr. D. Neb. 1991). Here, the Chapter 13 trustee concedes that § 326 does not govern compensation of standing Chapter 13 trustees, such that § 330(a) and § 503(b) concerning attorneys' fees and administrative expenses are inapplicable.

¹ Future references are to Title 11 of the United States Code unless otherwise indicated.

The Court notes that the parallel Chapter 12² section, § 1226(a), specifically calls for the standing Chapter 12 trustee, if a plan is not confirmed, to return all payments to the debtor, less any § 503(b) claim *and the standing trustee's percentage fee*. 11 U.S.C. § 1226(a). The Supreme Court has stated that when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress knew how to clearly express such allowance of percentage fees, and its failure to do so in § 1326(a) indicates Congress did not intend to allow such fees in Chapter 13 cases where plans are not confirmed.

The standing trustee argues that failure by Congress to modify § 1326(a) when Chapter 12 was enacted was an oversight, but she admits there is no legislative history to support this claim. Although Chapter 12 was modeled after Chapter 13, Chapter 12 differs from Chapter 13 in some respects. First, in a Chapter 12 case, the standing trustee may deduct a fee if the plan is not confirmed. The Chapter 12 debtor who makes preconfirmation payments risks losing the amount of the trustee fee even if the plan is not confirmed. But, this is an unnecessary risk, because Chapter 12 contains no provision requiring the debtor to make payments prior to plan confirmation. In fact, it is unlikely that many Chapter 12 debtors will make payments prior to confirmation of the plan, knowing that if the plan is not confirmed, the trustee will nevertheless deduct her fee. *See 5 Collier on Bankruptcy* ¶ 1226.01, at 1226-2 n.4 (Lawrence P.

² Because Chapter 12 was closely modeled after Chapter 13, H.R. Rep. No. 99-958, at 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5249, consideration of Chapter 12 cases in analyzing questions under Chapter 13 is appropriate.

King ed., 15th ed. 1990).

In contrast, the provisions of Chapter 13 require the debtor to begin making payments within 30 days after filing the plan. 11 U.S.C. § 1326(a)(1). Yet, this obligation to make preconfirmation payments does not pose a risk to the Chapter 13 debtor. Unlike Chapter 12, if the Chapter 13 plan is not confirmed and the case is dismissed or converted, the standing Chapter 13 trustee is authorized to pay unpaid administrative claims, but she is not authorized to deduct her standing trustee's percentage fee. 5 *Collier on Bankruptcy* at 1226-2 n.4. Thus, the distinction between Chapter 12 and Chapter 13 is appropriate. If a debtor is required to make preconfirmation payments, the debtor should not have to fund the standing trustee's fees out of those payments when the plan is not confirmed and the case is converted or dismissed. In fact, in cases involving a long delay in confirming the plan, such a rule could be punitive to the debtor.

Section 1326(b) provides further:

Before or at the time of each payment to creditors under the plan, there shall be paid—

. . . .

(2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28.

11 U.S.C. § 1326(b). This section expressly distinguishes between payments under a plan and the payment of a standing Chapter 13 trustee's percentage fee: "Before or at the time of each payment to creditors under the plan, there shall be paid . . . the percentage fee fixed for such standing trustee . . ." *Id.* The standing trustee's construction, however, ignores this statutory distinction and would effectively repeal the last sentence of § 1326(b)(2). *See Edge v. Maikoff (In re Edge)*, 122 B.R. 219, 221-222 (D. Vt. 1990).

The standing trustee was unable to cite any case law in support of her

construction of § 586(e). Although limited, case law supports the debtors' construction. The bankruptcy court in this case relied on *In re Ward*, 132 B.R. 417 (Bankr. D. Neb. 1991), in denying the standing trustee's request for percentage fees. In *Ward*, the standing Chapter 13 trustee sought compensation of fees as an administrative expense in a Chapter 13 case that was dismissed prior to confirmation. In reaching its conclusion that the trustee was not entitled to a claim for administrative expenses, the court noted that the only compensation a standing Chapter 13 trustee may recover is the percentage fee provided in § 586(e). *Ward*, 132 B.R. at 419. Moreover, "[i]f a case is converted or dismissed before confirmation of a plan, the standing trustee is not entitled to a percentage fee under § 586(e) and the bankruptcy court is prohibited from allowing such compensation by § 326(b)." *Id.*

In *Stahn v. Haeckel*, 920 F.2d 555, 558 (8th Cir. 1990), the Eighth Circuit Court of Appeals held that a bankruptcy court may in its discretion require a Chapter 12 debtor to make payments prior to plan confirmation, in spite of the punitive effect of subjecting the debtor to paying the trustee's percentage fee if the plan was not confirmed. In so ruling, the court noted that a standing trustee could only deduct a fee in a Chapter 12 proceeding, and that a Chapter 13 standing trustee may not deduct a percentage fee if the plan is not confirmed. *Id.* at 557.

The standing trustee argues that public policy and practical considerations support her interpretation of § 586(e)(2), urging that administrative costs should be borne by all debtors, regardless of whether their plan is confirmed. We are aware that the standing trustee performs "front-end" services in addition to disbursing funds to creditors and are mindful that the policy concerns regarding a standing trustee earning an adequate salary are

important. However, our foremost responsibility remains the interpretation of the statute in question. If rejecting the standing trustee's position adversely affects the compensation of standing Chapter 13 trustees as she suggests,³ a remedy must be sought in Congress, not the courts. *See Edge*, 122 B.R. at 221 n.4.

We note that the appellee brief filed by debtors Miranda raises the issue of interest on debtors' funds. This issue was not addressed below by the bankruptcy court order and will not be addressed by this Court.⁴

Accordingly, the order of the bankruptcy court is AFFIRMED.

³ With the creation of the U. S. Trustee System, the Attorney General sets a maximum salary for each standing trustee, which is based in large measure upon his caseload. The Attorney General then fixes the percentage fee to be charged by the standing trustee, which is intended to cover that trustee's maximum salary and actual expenses. Thus, what the statutory scheme attempts to do is to spread the actual costs of the trustee's services evenly amongst the cases filed in the districts in which the trustee serves, with the larger cases bearing a higher fee. Notably, any excess paid to the standing trustee must be paid over to the U.S. Trustee. *See 1 Collier on Bankruptcy* ¶ 6.11[1], at 6-60 to 6-63 (Lawrence P. King ed., 15th ed. 1990).

⁴ *See Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (it is a general rule that this court will not consider an issue on appeal that was not raised below).