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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**THOMAS JOHN WINGER II
and JULI WINGER**

Debtors.

Case No. **19-60874-13**

ORDER

At Butte in said District this 17th day of January, 2020.

In this Chapter 13¹ bankruptcy, after due notice, a hearing was held January 16, 2020,² in Missoula on confirmation of Debtors' Third Amended Plan filed at ECF No. 33 (the "Plan"). Appearances of counsel were noted on the record. The Trustee consented to confirmation of Debtors' Plan at ECF No. 36. Shasta Guthrie ("Guthrie") objects to confirmation on the following grounds:

1. She has an equitable claim, that does not give rise to a right to payment under § 101(5)(B), and therefore does not have a "claim";
2. The Plan is underfunded;
3. The Plan is not feasible (Debtors' income is inadequate to fund plan); and,
4. The Plan has not been proposed in good faith.

ECF No. 35, (the "Objection"). The Parties have set forth their positions in briefing at ECF Nos. 50, 51, 52, and 53. The parties agreed on the record at the hearing that the issue as to whether Guthrie has a claim is a legal issue. Thus, no testimony or evidence was offered.

¹Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

² A hearing was originally set for December 12, 2019. However, the Court on its own motion continued the hearing, and requested additional briefing from the parties. *See* Order at ECF No. 46.

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A. Undisputed Facts.

Thomas Winger (“Thomas”) and Shasta Guthrie are parties to a Marital Property Settlement Agreement dated July 9, 2007 (the “Agreement”). According to the Agreement Guthrie shall receive:

A life insurance policy for \$250,000 (Two Hundred Fifty Thousand and No/100 Dollars) on Petitioner, payable to Respondent or her estate, premiums paid by Petitioner. Petitioner shall provide proof of payment of the premiums for this policy and keep it current on pain of contempt, the policy to be maintained until Petitioner’s death.

ECF 51-1, Ex. A. At some point after the life insurance policy was obtained, it lapsed. Guthrie commenced an enforcement proceeding before the State District Court (“State Court”) in July 2018. Thomas was found in contempt, but was permitted additional time within which to procure a policy. From September 2018 until July 2019, the State Court granted a series of continuances and granted Thomas additional time to obtain a policy. Thomas alleges that after completing 18 applications, and medical testing on 7 different occasions, Thomas only qualified for term life policies from Prudential Life and New York Life. Guthrie allegedly rejected these policies.

During the same period, while Thomas was applying for life insurance, Debtors entered into a series of secured transactions. First, Debtors traded in a 2018 Chevrolet K2500, and acquired a 2019 Chevrolet Equinox with a loan in February 2019. Claim 2-1. Under this loan, payments are \$716.56/month. *Id.* Next, on June 22, 2019, Thomas traded in a 2017 Chevrolet K10, obtained a loan, and acquired a 2019 Chevrolet Silverado. Claim 3-1. The monthly payments for this vehicle are \$887.19. *Id.* And, also in June, Thomas obtained a loan and acquired a 2019 Montego Bay boat and trailer. Claim 14-1. The monthly payments for the boat and trailer are \$288.86. *Id.*

A hearing on the status of Thomas’ progress to obtain a life insurance policy was

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scheduled in State Court for September 9, 2019. Debtors filed their bankruptcy petition on August 30, 2019, and the September 9, 2019 hearing was vacated. Guthrie filed a proof of claim explaining:

It is creditor's position that she is entitled to an equitable remedy that does not give rise to a right to payment and therefore she does not have a claim as defined by 11 U.S.C. § 101(5)(B). She is filing this claim to protect her rights in the event that it is determined that she does have a claim as defined by that section.

Claim 17-1.

B. Guthrie's Claim.

The Court's analysis of Guthrie's claim begins with the Code's definition of "claim" which includes, "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." § 101(5)(B). As explained in *In re Young*, 214 B.R. 905, 910 (Bankr. D. Idaho 1997) citing *In re Aslan*, 65 B.R. 826, 831 (Bankr.C.D.Cal.1986), aff'd 909 F.2d 367 (9th Cir.1990), "If the only remedy allowed by law is non-monetary, then the equitable remedy is not considered a claim for purposes of bankruptcy and it survives the discharge of the debtor."

Guthrie contends that the narrow domestic relations exception to the subject-matter jurisdiction of the federal courts for proceedings for the issuance of a divorce decree, an order for child support, or for alimony under *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) applies here and this Court should defer to the State Court. Contrary to her arguments for purposes of this case, this Court must determine whether she has a "claim" as that term is defined under the Code. This determination falls outside the narrow exception Guthrie relies on.

Although not explicitly stated by Guthrie, her equitable remedy appears to be specific performance coupled with the hammer of contempt if she were before the State Court. However,

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if state law mirrors federal law, Thomas could avoid contempt by showing that although he had taken all reasonable steps to comply, compliance was impossible. *See Stone v. City & Cnty. of S.F.*, 968 F.2d 850, 856 (9th Cir.1992); *United States v. Rylander*, 656 F.2d 1313, 1318 (9th Cir.1981), rev'd on other grounds, 460 U.S. 752, 103 S. Ct. 1548, 75 L.Ed.2d 521 (1983). Or, alternatively, that Guthrie had refused the term life policies.

Further, if Guthrie has a right to specific performance under the Agreement, it is not absolute. First, specific performance may be necessary when pecuniary compensation for a defendant's failure to perform pursuant to the terms of a contract does not afford adequate relief. Mont. Code Ann. § 27-1-411(2). Further, the Montana Supreme Court has concluded, “we will not compel specific performance when it becomes oppressive upon the party required to specifically perform.” *Gandy v. Eschler* (1993), 261 Mont. 355, 361, 862 P.2d 1116 citing Mont. Code Ann. § 27-1-413. If Thomas had performed Guthrie would receive \$250,000 when he died. Alternatively, if he failed to comply, he would be in contempt, and an appropriate remedy may be jail or a judgment for \$250,000, as if he died today.

Any suggestion that the life insurance vehicle was tantamount to a payment guaranty, and so unique as to prevent any other remedy but specific performance is flawed. If Thomas had performed, and a life insurance policy was in effect on the petition date, Thomas' obligation to continue paying the premiums may be discharged under § 1328(a), after the completion of all payments because the obligation to pay the premiums could be construed as a debt under § 523(a)(15). Alternatively, Thomas' cause of death may not be covered under a policy exclusion. The record reflects Thomas is 65 and describes himself as obese. Ultimately, this Court does not have to identify how the State Court might resolve the issue, only that one alternative is a right to payment. A right to payment or judgment is one of the alternatives available to Guthrie under

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state law.

Under these circumstances, this Court is not persuaded that Guthrie would not have a right to payment of \$250,000 under the Agreement. A Montana marital property settlement agreement is enforced as if it is a contract. *In re Marriage of Bushnell*, 2014 MT 130, pages 8-9, citing Mont. Code Ann. § 40-4-201(5). Ordinarily an award of damages is the remedy for a breach of contract. This Court's analysis of the Agreement and conclusion that Guthrie has a claim is not tantamount to a modification of the divorce decree, or a violation of the narrow domestic relations exception to the subject-matter jurisdiction of the federal courts for proceedings for the issuance of a divorce decree, an order for child support, or for alimony under *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). Instead, it is a determination that Guthrie has a claim under § 101(5)(B) in this case. The claim amount is \$250,000.

C. Confirmation.

After reaching the conclusion that Guthrie had a \$250,000 claim, the Court inquired whether the parties would like a short recess to discuss any possible resolution of Guthrie's confirmation objections. While Debtors did not have the opportunity to present any evidence in support of confirmation, the Court noted that this case was filed on August 30, 2019. In the year preceding their filing, Debtors acquired two new 2019 vehicles and a 2019 Montego Bay boat and trailer, committing themselves to monthly payments on the foregoing of \$1,892.61. Under their proposed Plan, Debtors' would retain these items and make the payments, reducing the funds available to pay the unsecured class. Ordinarily, Chapter 13 debtors do not acquire brand new vehicles, a boat and trailer in the months leading up to their bankruptcy.

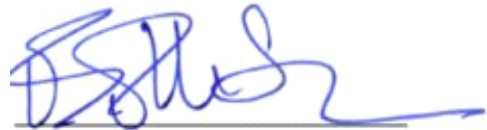
Counsel for Debtors indicated that Debtors have suggested mediation. Guthrie was not amenable to mediation. As noted earlier, Guthrie raises three objections to confirmation of

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Debtors' Plan, namely, that the Plan is underfunded, that the Plan is not feasible and that the Plan has not been proposed in good faith. The Court, on its own motion, continued the hearing on confirmation of Debtors' Plan to afford Debtors and Guthrie an opportunity to discuss settlement of Guthrie's objections.

IT IS THEREFORE ORDERED that any further modifications of Debtors' Plan shall be filed on or before **January 29, 2020**; if Debtors file an amended plan, any objections to that amended plan shall be filed on or before **February 5, 2020**; and the hearing on confirmation of Debtors' Plan, or any timely amendment thereto, shall be held **Thursday, February 13, 2020, at 9:00 a.m.**, or as soon thereafter as the parties can be heard, in the BANKRUPTCY COURTROOM, RUSSELL SMITH COURTHOUSE, 201 EAST BROADWAY, MISSOULA, MONTANA.

BY THE COURT:



Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana