

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
DANIEL A. KERR) CASE NO. 15-12515
AMY J. KERR)
)
Debtors) **NOT FOR**
PUBLICATION

DECISION

On September 15, 2016.

Shortly after voluntarily dismissing this Chapter 13 case, the debtors filed a petition for relief under Chapter 7. The matter is before the court on the application for attorney fees filed by debtors' counsel¹ and the Chapter 7 trustee's objection thereto. The trustee's only objection to counsel's fees is that there are no funds from which they can be paid because, notwithstanding §1326(a)(2),² all the funds in possession of the Chapter 13 trustee are property of the Chapter 7 bankruptcy estate and must be paid to the 7 trustee. The matter has been submitted to the court on stipulations of fact and the briefs of counsel.

The only question presented by an application for attorney fees is: "What is the reasonable value of the 'actual, necessary services rendered' by counsel?" See, 11 U.S.C. §§ 330(a)(1)(A), 503(b)(2). Whether or not the estate has the money to pay the compensation sought is not relevant to that issue. For example, in a chapter 7 case, when the assets of an estate are not sufficient to fully pay all claims of a particular priority the solution is not to deny further claims, but, instead, to allow them and then pay all claims of the same priority – including administrative claims for fees – pro

¹Debtors are represented by the same attorney in both cases.

²A plan was never confirmed.

rata. 11 U.S.C. §§ 726(b); 507(a)(2); 503(b); 330(a). The Chapter 7 trustee's argument is substantially the same as the one rejected by the Seventh Circuit in In re Sweports, 777 F.3d 364 (7th Cir. 2015). There the court held that the dismissal of the case and the absence of an estate from which the fees sought could be paid did not moot counsel's application, and the court continued to have jurisdiction to decide the issues it presented. Id. at 366-367.

The Chapter 7 trustee does not challenge the necessity of counsel's services or the reasonableness of the fees sought. Much like the Bankruptcy Judge in Sweports, he is missing the "critical difference . . . between determining an entitlement to fees and ordering [their payment]." Id. at 365. As a result, he is using the fee application as a backdoor opportunity to obtain a determination concerning what is or is not property of the Chapter 7 estate or an order telling the Chapter 13 trustee to pay the funds in her possession to him. Those things require an adversary proceeding, and the trustee should use the front door. See, Fed R. Bankr P Rule 7001(1), (9). See also, Matter of Perkins, 902 F.2d 1254, 1258 (7th Cir. 1990) (a motion seeking relief which the rules require to be sought through an adversary proceeding should be dismissed). As in Sweports, the proper question before the court is counsel's entitlement to an award of fees; not whether there are assets from which such an award could be paid. The objection is overruled and, there being no objection to the necessity or actuality of counsel's services, or their reasonable value, counsel will be awarded the fees he seeks.

An appropriate order will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court