

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

In re:)	Chapter 7
)	
WILLIAM O. ALLISON, JR.)	Case No. 09-71737
DORA M. ALLISON)	
)	
Debtors.)	

ORDER

The male Debtor filed a Motion for Approval of a Reaffirmation Agreement on November 10, 2009, seeking approval of a reaffirmation agreement with HSBC Bank Nevada, N.A. - Suzuki regarding a 2005 Suzuki ATV. Although the Statement filed by Debtors' counsel pursuant to Bankruptcy Rule 2016(b) with the petition indicated that he had agreed "to render legal service for all aspects of the bankruptcy case" other than representation in adversary proceedings, the male debtor represented in a motion filed with the Court to approve the reaffirmation agreement that he was not represented by an attorney in connection with such matter. In any event, the Debtors' Schedules I and J filed with their petition represent that their living expenses exceed their income and therefore a presumption of undue hardship arises. A hearing was held before this Court on December 2, 2009, at which the Debtors appeared together with their counsel, who indicated that he was uncomfortable signing the attorney's certification with respect to the reaffirmation agreement because of concerns about whether it was truly in Mr. Allison's interest to do so or whether it created an undue hardship. There was no appearance on behalf of the creditor. Mr. Allison testified as to his ability to pay this debt and indicated his strong desire to reaffirm this debt. In response to questions from his counsel and the Court, Mr. Allison testified that the ATV was largely used by his father, who lives next door

to the Debtors, and that his father regularly helped him with making the monthly payment when his available cash ran short. He further testified that he believed that having the ATV helped his father, which was a comfort and help to him and that he believed that the reaffirmation agreement was in his best interest. The Court finds that Mr. Allison was in fact represented by counsel during the negotiation of the reaffirmation agreement. Based on such testimony and evidence presented, it is hereby

ORDERED

that the motion to approve the reaffirmation agreement as presently before the Court between the Debtor and HSBC Bank Nevada is DENIED because the Court concludes that 11 U.S.C. §§ 524(c), (d), and (k)(5) do not provide for the Court to approve a reaffirmation agreement when the debtor has been represented by counsel during the negotiation of the agreement except in the very limited situation that the attorney has certified that in his/her opinion the “debtor is able to make the payment” even though a presumption of undue hardship has been established. In such a situation it is the responsibility of the Court to determine whether the presumption of “undue hardship” has been “rebutted to the satisfaction of the court” pursuant to 11 U.S.C. § 524(m)(1), and then only if the creditor is not a credit union within the provision of 11 U.S.C. § 524(m)(2). The Code does not authorize the Court to relieve counsel for the debtor of counsel’s responsibility under such section when the attorney is not willing to certify but the client still wants to reaffirm. *See In re Calabrese*, 353 B.R. 925 (Bankr. M.D. FL 2006). If the attorney is not willing to certify in the first place, that is supposed to be the end of the matter and the reaffirmation agreement is not legally effective. The Court recognizes that these provisions create a very definite tension between an attorney’s role as counselor to his client and his role as

advocate to assist his client in accomplishing the client's lawful objectives. The way this section is constructed makes the attorney, in effect, a gate keeper against well intentioned but ill advised reaffirmations of existing obligations, at least in those situations in which the attorney is representing the debtor with respect to such matters. In the event Debtors' counsel does make the certification contemplated by § 524(k)(5) with respect to this obligation, the Court concludes that, even though it concurs in the reservations voiced by Debtors' counsel about whether reaffirmation of this debt is in the best interests of Mr. Allison, in light of the favorable action taken by the creditor in agreeing to waive accrual of interest during the remaining term of the obligation, the relatively small monthly payment involved, the financial assistance provided by Mr. Allison's father when needed, and the apparent importance of this matter to the family, the presumption of "undue hardship" has been rebutted to the Court's satisfaction. The Court points out, however, that neither failure of this Court to approve said agreement nor counsel for the Debtors to certify precludes Mr. Allison from continuing to make the payments or HSBC Bank Nevada from continuing to accept payments on this debt from the Debtors or precludes such parties from abiding by the terms of the modified obligation, which waives interest on the remaining balance owed on the obligation. 11 U.S.C. § 524(l).

The Clerk is directed to send copies of this Order to the Debtors; counsel for the Debtors; the Trustee; the office of the United States Trustee; and HSBC Bank Nevada, N.A. - Suzuki, c/o Bass & Associates, P.C., addressed to 3936 E. Ft. Lowell, Suite 200, Tucson, AZ 85712.

ENTER this the 4th day of December, 2009.

William F. Stone, Jr.

UNITED STATES BANKRUPTCY JUDGE