

Personal Receivership: an alternative to bankruptcy

by Ralph E. Johnson

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Note: With respect to the sample forms included in this article, Wisconsin Statutes sec. 802.04 now requires that "the caption of the action shall include the standardized description of the case classification type and associated code number as approved by the director of state courts". A list of civil case codes is provided on the Wisconsin Court System website, <http://www.wicourts.gov/about/filing/circuitcodes.htm>

Personal Receivership

An alternative to bankruptcy

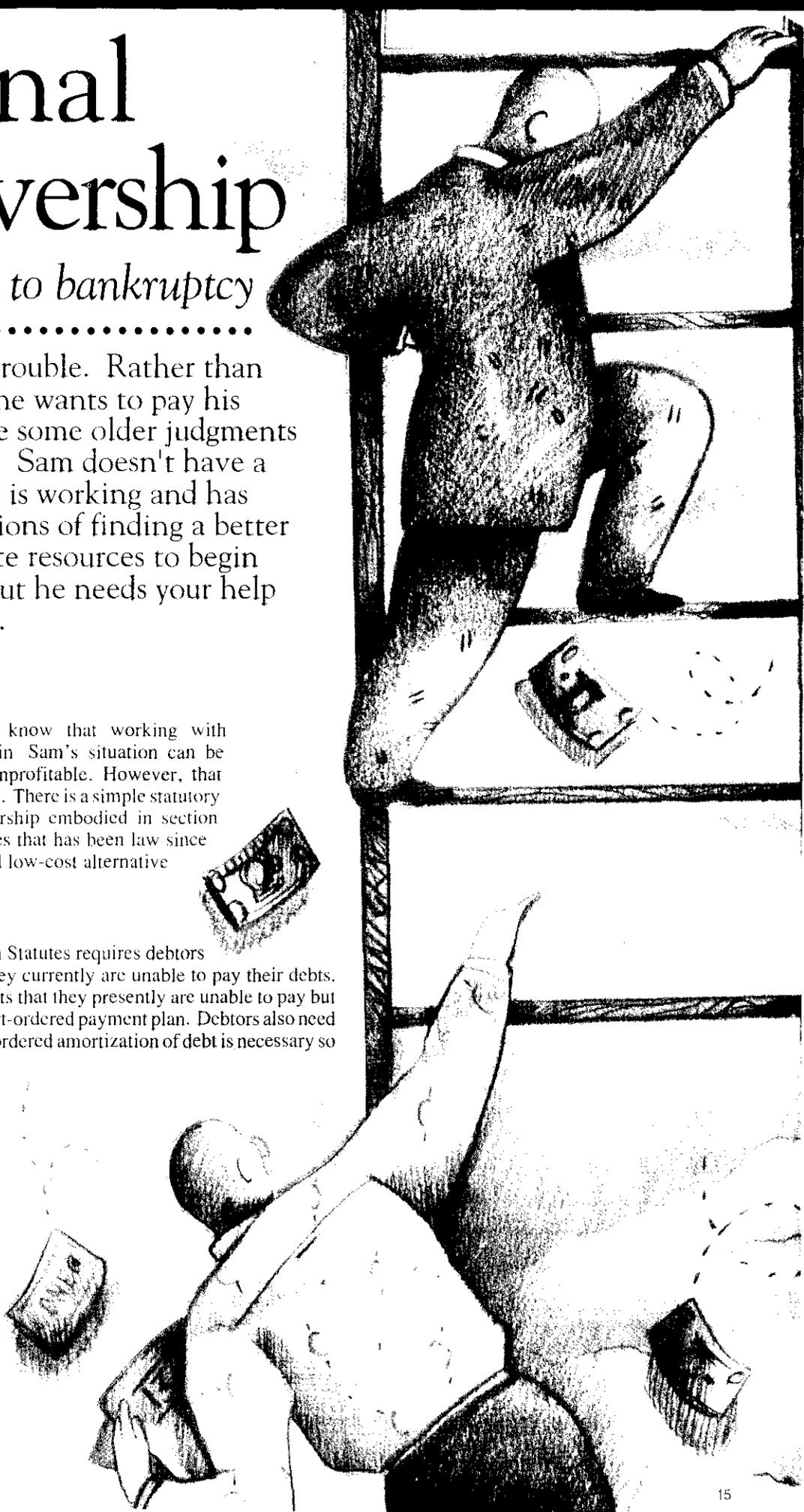
Sam is in financial trouble. Rather than file for bankruptcy, he wants to pay his debts, which include some older judgments impairing his credit. Sam doesn't have a lot of money, but he is working and has reasonable expectations of finding a better job. He has adequate resources to begin making payments, but he needs your help to climb out of debt.

Ralph E. Johnson

General practitioners know that working with consumer debtors in Sam's situation can be burdensome and unprofitable. However, that need not be the case. There is a simple statutory procedure of personal receivership embodied in section 128.21 of the Wisconsin Statutes that has been law since 1937. It can be an effective and low-cost alternative for many debtors.

Section 128.21 in practice

Section 128.21 of the Wisconsin Statutes requires debtors to file a verified petition that they currently are unable to pay their debts. Debtors only need to list the debts that they presently are unable to pay but would be able to pay under a court-ordered payment plan. Debtors also need to petition the court that a court-ordered amortization of debt is necessary so that creditors no longer will harass or issue garnishment, attachment or execution. Debtors' petitions must state that they will be able to make future regular payments that would amortize the indebtedness over a period of not more than three years.¹ Debtors also need to file an affidavit of debts to be included in the amortization.² The court needs to draft and sign an order for the amortization and appoint a trustee in the proceeding. In most cases, the order also should contain a wage assignment that provides budgeting assistance for the debtor and protection for the creditor.



concluded that: 1) most debtors desired to pay their debts and avoid bankruptcy; 2) garnishments are a precipitating cause of wage earner bankruptcies; 3) most wage earners have the ability to pay if given time; and 4) interest charges would be saved by the proposed amortization proceedings.

These recommendations included the procedure whereby wage earners, without being adjudicated bankrupt, could obtain the court's protection for the purpose of amortizing their debts free from creditor harassment. This proposal did not become law but did become the theory of Wisconsin Statute section 128.21.⁹

The only significant amendment to section 128.21 occurred in 1969. It removed restrictions on refiling a petition to allow wage earners to use the statute.¹⁰ Legislative Council notes¹¹ and comments by Professor Garrison,¹² the principal drafter, indicate that section 128.21 is a remedial statute to be construed liberally and used widely. Considering its simplicity and effectiveness, there is no reason for this proceeding not to be used extensively.

Concerns for the future

The legislature or appellate courts need to resolve several issues to make using this proceeding more effective for debtors and creditors. The first major issue is the scope of the stay on proceedings under section 128.21(1). The court must order that proceedings to enforce the executions, attachments or garnishments be stayed during the pendency of proceedings. A broad reading might suggest that actions such as proceeding to judgment on an undisputed debt or proceeding with a utility cut-off would be stayed if either debt were included in the plan. My experience is that filing the amortization petition effectively and customarily allows those actions to be stayed.

There also is a substantial issue as to the setting of claims that may be in dispute. In particular, there is a question of unmatured interest on loans and judgments amortized in a section 128.21 proceeding. It would be equitable and fair to allow the debtor to fix the claim as that being what is due at the filing of the petition. This best would accomplish the legislative intent for the debtor who otherwise would need to resort to bankruptcy. It also likely would afford creditors a better position than they otherwise would have in that they would face either an uncollectible debtor or a bank-

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Receivership

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rupt one, if interest were allowed and the debtors used the statute less.

There should be no differentiation between secured and unsecured creditors since secured creditors have a choice of remedy with the right to realize their security in these proceedings.¹³ However, as a practical matter this plan more likely will be used for unsecured debts since workout plans and bankruptcy proceedings are effective in altering rights of secured creditors.¹⁴

Considering that section 128.21 mandates a trustee's fee, allowing post-petition interest would defeat the purpose of encouraging debtors to use these proceedings - in many cases, it would make the proceeding too expensive for debtors to use. The debtors likely would be thrust into situations where they would pay the creditors little, if any, of the debt. It also is logical to construe the statute to stop interest charges, since debtors' contractual obligations already are suspended by operation of the law.

Conclusion

Attorneys counselling consumer debtors needing debt adjustment options should consider the availability of section 128.21 amortization proceedings as an alternative to Chapter 7 and Chapter 13 bankruptcy. This program is not right for every situation, but it is available and should be used in many instances. It is a very simple proceeding to set up and administer in a manner that is both good law practice and of great benefit to debtors and creditors.

An amortization under section 128.21 can benefit those who have sufficient income to pay current bills but need time to pay off past due amounts. Paying past due bills normally should improve debtors' credit ratings. If debtors fail to complete the plan or make scheduled payments, the amortization will be dismissed and the debtors still will owe whatever is unpaid. Debtors still will be in a better position than they were prior to entering the plan and will not have a bankruptcy on their records. Creditors also are in a better position because of the likelihood of some payments being made where none may have been received otherwise.

Endnotes

¹Wis. Stat. § 128.21(1).

²Wis. Stat. § 128.21(3).

³*Id.*

(continued on next page)

Order

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH (No.)

(county) COUNTY

In The Matter of the Voluntary Amortization of the Debts of:

ORDER

(Debtor's name),

Debtor _____ Case No. _____

UPON READING AND FILING the petition of the (debtor)(s) named above.

IT IS HEREBY ORDERED that petitioner be allowed to proceed with the amortization of (his/her/their) debts pursuant to the provisions of section 128.21 of the Wisconsin Statutes, and the trustee hereinafter named is directed to notify creditors and submit a plan for such amortization.

IT IS FURTHER ORDERED that (name of trustee) be appointed trustee in this proceeding. Said trustee is further directed to propose an equitable plan for the amortization of the debts of petitioner and submit the same to the court for approval thereof.

IT IS FURTHER ORDERED that upon filing of this order and until the dismissal of these proceedings, no execution, attachment, activation of wage assignment or garnishment may be levied or enforced by creditors of the above-named debtor, unless such creditor is not included in the plan.

IT IS FURTHER ORDERED that the employer of the above debtor, (client), (name of employer), henceforth, until further order of the court, deduct (amount) each week from (his/her/their) payroll checks and mail said sum directly to the trustee named above, all pursuant to the assignment authorized by debtor in the petition filed herein.

Dated this ___ day of (month), 19(year).

BY THE COURT:
(Circuit Court Judge)

Report of Trustee

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH (No.)

(county) COUNTY

In The Matter of the Voluntary Amortization of the Debts of:

REPORT OF TRUSTEE

(Debtor's name)

Debtor _____ Case No. _____

NOW COMES, (trustee's name), who reports as follows:

1) On (date), notice of this proceeding was mailed to all creditors listed in the petition filed previously. A copy of that notice is attached to this report.

2) Pursuant to section 128.21 of the Wisconsin Statutes and in accordance with notice given creditors, a meeting of creditors was held in the office of (trustee's name), trustee, at (address, city, state), at (time), on (date).

3) This plan is feasible and I recommend it be approved with payments to me of \$(amount) (weekly/monthly), beginning (date).

4) That attached, marked Exhibit A, is a list of creditors with the amount owing as determined by me.

THEREFORE, I request that the plan be approved and the restraining order be continued so long as the debtor(s) make(s) regular payments in the manner outlined above.

(Trustee's signature)

STATE OF WISCONSIN)

COUNTY OF (county))

(Trustee), being first duly sworn on oath, deposes and says that he or she is the trustee, above-named; and that he or she has read the above and foregoing report and finds the matters therein to be true.

(Trustee's signature)

Subscribed and sworn to before me this ___ day of (month), 19(year).

(Notary's signature)

Notary Public, (name) County, Wisconsin

My commission expires: (date).

Petition and Final Report

STATE OF WISCONSIN CIRCUIT COURT (county) COUNTY
BRANCH (No.)

In The Matter of the Voluntary Amortization of the Debts of:

PETITION AND FINAL REPORT

(debtor's name), Case No. _____

Petition:

(Trustee's name) respectfully reports to the court as follows:

- 1) That your petitioner is the duly appointed trustee in the above-entitled amortization.
- 2) That the above-named debtor paid \$(amount), which was disbursed by your trustee as listed in Exhibit A attached to this report.

WHEREFORE, your petitioner prays that an order be entered by the court dismissing the above-named amortization for the reason that all claims have been paid in full.

(Trustee's signature)

STATE OF WISCONSIN)
COUNTY OF (county name))

(Trustee's name), being first duly sworn, on oath deposes and says that he or she is the trustee above-named; and that he or she has read the above and foregoing report and finds the matter therein to be true.

(Trustee's signature)

Subscribed and sworn to before me this ___ day of (month), 19(year)

(Notary's signature)

Notary Public, (county name) County, Wisconsin
My commission expires: (date).

Order

STATE OF WISCONSIN CIRCUIT COURT (county) COUNTY
BRANCH (No.)

In The Matter of the Voluntary Amortization of the Debts of:

(Debtor's name), ORDER
Case No. _____

Upon reading and filing the petition of (trustee's name), trustee, and upon the records and files herein,

IT IS ORDERED that the final account of the trustee, (trustee's name), be accepted as final and the amortization of the debts of (debtor's name) be dismissed; and that the wage deduction ordered previously be discontinued.

Dated this ___ day of (month), 19(year).

BY THE COURT:
(Judge, Circuit Court)

(continued from previous page)

⁴Wis. Stat. § 128.21(4).
⁵See Wis. Stat. § 701.01(8). "Trustee" is defined as a person holding in trust title to or holding in trust power over property. "Trustee" includes an original, added or successor trustee.
⁶11 U.S.C. 1325 provides that confirmation

of a Chapter 13 plan only shall be made if the plan provides that all the debtor's projected disposable income is to be applied to payments made under the plan.

⁷1937 Wis. Laws, Chapter 431 No. 706.
⁸30 Stat. 544 (1898); 11 U.S.C.(a)(1) et seq. (1926). Report to the President on the Bankruptcy Act and its Administration in

the Courts of the United States (1931), contained in Sen. Doc. No. 65, 72nd Congress, 1st Sess., strengthening procedure in judicial system.

⁹See Garrison, *Wisconsin New Personal Receivership Law*, 1938 Wis. L. Rev. 201. See also Comment, *Wisconsin's Personal Receivership Statute - Evaluation and Recommendation*, 1968 Wis. L. Rev. 210.

¹⁰1969 Wis. Laws, ch. 289 §§ 14, 15.

¹¹Legislative Council of Wisconsin, Notes in regard to request to amend Wis. Stat. section 128.21 in 1969:

"Prefatory note: This bill makes three substantive changes in Ch. 128 of the Statute, which is entitled 'Credit Actions.' As presently constituted, the chapter deals with assignment for the benefit of creditors, involuntary receivership proceedings, and debt amortization plans by wage earners. The changes made by this bill are as follows...

"Chapter 128 allows a poor but honest debtor to call upon the protection of the Court while he or she pays off his or her creditors under a predetermined plan. This proceeding has much merit, because the only other alternative open to a harassed debtor is the federal bankruptcy law. If the debtor goes bankrupt, the creditors will suffer a loss. Thus, debtors should be encouraged to use this proceeding. This bill removes the limitations upon use currently existing in the statute. As amended, any wage earner can qualify. The repayment plan can stretch over 4 years if necessary, and the proceeding can be reused without waiting 4 years after dismissal of the previous plan."

¹²Quote from Garrison, *Wisconsin New Personal Receivership Law*, supra at 208. "It can readily be seen what a tremendous burden of interest is borne by wage earners in an effort to settle with their creditors and avoid Bankruptcy. In comparison, with these burdens the cost to an indebted wage earner of applying to the Court for relief under the proposed provision, would be slight. The filing of the Petition would stop the running of all interest charges."

¹³Wis. Stat. § 128.21(4).

¹⁴11 U.S.C. 1322(b)(2), known as the Chapter 13 "cramdown" provides that the debtor's plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." ■

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