UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

SHIRLEY WILKINS, Debtor.

ORDER RE: MOTION OF U.S.TRUSTEE FOR DISMISSAL PURSUANT TO 11 U.S.C. SECTION 707(b)

BKY 96-35061

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At St. Paul, Minnesota, this _____ day of March, 1997.

This Chapter 7 case came on before the Court on January 13, 1997, for hearing on the motion of the United States Trustee for dismissal, pursuant to 11 U.S.C. section 707(b). The U.S. Trustee appeared by her attorney, Sarah J. Fagg. The Debtor appeared by her attorney, Brent J. Eilefson. Counsel agreed that the issues could be submitted on the affidavits supporting the motion and the Debtor's response, and their own legal arguments. Upon that record, the Court makes this memorandum order, pursuant to Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 9014.

The Debtor filed a voluntary petition for relief under Chapter 7 on September 10, 1996. Her Schedule I reveals that she is a single person, and has been employed as a custodian by Independent School District 191 for two years. From this employment, she has an average net monthly income of approximately $2,115.00.(FN1)

On her Schedule I, the Debtor lists four adult children as dependents. They range in age from 24 to 29. There is no evidence that any of them are physically or developmentally disabled. All of them reside outside the state of Minnesota and away from the Debtor. One of them, a son, is incarcerated in a state prison in Oklahoma.

The United States Trustee has moved for dismissal of this case pursuant to 11 U.S.C. section 707(b); she argues that it would be a "substantial abuse" of Chapter 7 to allow the Debtor's case to proceed to a grant of discharge.(FN2) The Debtor opposes the motion.

Under the caselaw precedent that governs this matter,

> . . . the debtor's ability to pay his debts when due as determined by his ability to

> fund a chapter 13 plan is the primary factor to be considered in determining whether granting relief [under Chapter 7] would be substantial abuse . . .

In re Walton, 866 F.2d 981, 984-985 (8th Cir. 1989). See also In re Huckfeldt, 39 F.3d 829, 831 (8th Cir. 1994); United States Trustee v. Harris, 960 F.2d 74, 76-77 (8th Cir. 1992); Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992).

This construction of section 707(b) essentially requires the Bankruptcy Court to analyze the issue as if this were a confirmation hearing in a hypothetical Chapter 13 case, in which the Debtor proposes a plan that provides that unsecured creditors are to receive nothing by way of distribution. The U.S. Trustee is deemed to be objecting to confirmation under 11 U.S.C. section 1325(b). This provision is the so-called "best efforts" test; it requires a debtor, upon challenge, to demonstrate that her plan proposes to pay off as much debt as possible during its administration.(FN3)

Essentially, the Court must determine whether the Debtor has "disposable income" within the statutory definition, such that she should be obligated to pay something to her unsecured creditors as the price of receiving a discharge in bankruptcy. Under section 1325(b), the existence of disposable income is determined by first fixing a level of expenditures necessary to maintain a modest lifestyle over the 36 to 60 months of the hypothetical plan, and then comparing that to the debtor's claimed budget and current income. In re Sitarz, 150 B.R. 710, 718 (Bankr. D. Minn. 1993); In re McDaniel, 126 B.R. 782, 782-784 (Bankr. D. Minn. 1991); In re Jones, 55 B.R. 462, 466-467 (Bankr. D. Minn. 1985).

The inquiry under section 707(b) differs a bit from that under section 1325(a), insofar as the burden of proof is concerned. Section 1325(b) imposes the burden of production on the debtor, once the trustee or a creditor has taken the simple procedural expedient of objecting to confirmation. In re Sitarz, 150 B.R. at 718 (upon objection under section 1325(b), debtor must prove that plan commits all of debtor's disposable income over three-year period). On the other hand, the last sentence of section 707(b) gives the debtor a presumption in favor of the case proceeding to discharge under Chapter 7. As do all presumptions, this one "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption . . . " Fed. R. Evid. 301.(FN4)

The U.S. Trustee has carried this burden and has rebutted the statutory presumption in favor of the Debtor. The Debtor's responsive evidence does not preponderate. The U.S. Trustee, then, has demonstrated "substantial abuse" within the meaning of section 707(b) and there are grounds for dismissal of this case.

The reasons are several, all based on the U.S. Trustee's contentions with the Debtor's monthly budget. As set forth on the Debtor's Schedule J, the budget totaled $2,961.00. For analysis, this must be reduced immediately by the sum of $1,000.00, corresponding to the line-entry for payment on the Debtor's "student loans." (This item must be set aside, because these obligations would either be subjected to treatment and payment as unsecured debts in a Chapter 13 plan or, apparently, discharged under Chapter 7.(FN5) This renders any previous obligation of monthly payment on their account legally irrelevant.)

As the U.S. Trustee points out, several other categories of stated expense must be reduced or eliminated in the determination of whether the Debtor has disposable income. These items fall into three general categories.

1. Personal Living Expenses. The U.S. Trustee takes issue with several of the Debtor's line-entries for day-to-day household expenditures, on the ground that their amounts are greater than that reasonably necessary to be expended for the Debtor's own maintenance. The argument is well-put, though a few of the U.S. Trustee's suggestions should be adjusted in some deference to the Debtor.

a. Telephone. The Debtor claimed a monthly expenditure for local and long-distance telephone service of $204.00. The U.S. Trustee argues that this amount should be limited to $50.00, the average monthly cost of local service and modest long-distance access in the Twin Cities market. The Debtor attributes the fourfold multiple to the fact that she maintains close ties with her children and other close family members, all of whom live out-of-state. The courts should defer to this sentiment, but only with a sense of balance; one suspects that the Debtor is bearing all or the great majority of the cost here, and it could be spread more fairly. Attributing this expense at $100.00 per month accomplishes this.(FN6)

b. Food and clothing. The Debtor states that she spends $600.00 per month on food and clothing for herself. She acknowledges, however, that she does not eat out often due to her work hours. Of this figure, she figures that she "regularly incur(s) $200 in clothing costs," though she does not itemize or corroborate this statement. All told, this is just too much for a single person; $300.00 per month for groceries, and $75.00 per month for clothing purchases, is ample to maintain the standard of living thatsection

1325(b)(2)(A) contemplates. The Debtor does require orthotic shoes for a foot condition, which cost her $20.00 per month on the average, exclusive of her other clothing needs. All told, then, this line-entry should be adjusted to $395.00.

c. Recreation. The Debtor states that she has "listed $150 per month in recreation, which [she] feel[s] is accurate." Of all the line-entries incorporated into this analysis by the format of Schedule J, this is the one least defensibly committed to a debtor's discretion. Given the ready availability of free and low-cost forms of personal amusement, education, and edification--through non-cable television, radio, libraries, community education, parks-and-recreation programs, and the like--this figure should be halved to $75.00.

2. Other Expense Categories. There are several other expense categories that the U.S. Trustee did not place into controversy, but which the Debtor did through her response. The Debtor's points on these items are well-taken, and prompt further adjustment to the outcome on the disposal-income inquiry.

a. Transportation expenditures. The U.S. Trustee did not object to the $75.00 expenditure that the Debtor attributed to her cost of transportation. The Debtor owns a 1983 Ford Aerostar van--which, as the Debtor protests in her response, "regularly incurs additional fix-up costs," and which she expects to have to replace. Given the 15-year age and apparent condition of the vehicle, this is reasonable; it is certainly foreseeable that she would have to bear the cost of a replacement at some point over the term of a hypothetical Chapter 13 plan, probably sooner rather than later. Given the persistence of seller incentives in the regional market for new and used vehicles, including low-down-payment financing, it is appropriate to fix an overall transportation expenditure at $375.00 per month for transportation--$275.00 to $300.00 for a car payment and $75.00 to $100.00 for the cost of operation. In addition, given financers' requirements for casualty insurance, one could attribute an increase in the Debtor's auto insurance payment, from her scheduled $57.00 per month to approximately $75.00.

b. "Contingency." In her affidavit, the

Debtor notes that she maintains no bank accounts, has no savings, and lives "paycheck to paycheck," with the result that "any unexpected costs" must come from her wages. In oral argument, her counsel insisted that she should be given some sort of budgetary credit for a "contingency" to cover emergencies. This, of course, is not a line-entry contemplated by Schedule J.(FN7) In the ordinary course, and on the advice of counsel, debtors account for the possibility of emergency expenditures by slightly increasing scheduled amounts for line-entries to encompass foreseeable "contingencies." Nonetheless, this debtor deserves a small amount of consideration here; the amounts she schedules for her various other needs are modest enough that they really do not incorporate such a "cushion." There is no evidentiary record on which to make a pointed finding on the issue, but on balance it is fair to allocate $50.00 to this budgetary need.

3. Support of Adult Children and Their Children. The last Schedule J line-entry to which the U.S. Trustee objected was the entry for $200.00 that the Debtor placed under "Payments for support of additional dependents not living at [her] home." The Debtor expends an average of this amount per month "'in support' to [her] children and grandchildren, including money to buy food, clothing, shoes, medicine, etc." Further, though she did not note it as such on her Schedule J, the Debtor gives $50.00 to $75.00 per month to her incarcerated son for his purchases at the prison commissary. As noted earlier, all of her own children are adults; she has a total of 14 grandchildren. There is nothing in the record to suggest that any of the Debtor's own children are incapable physically or mentally of supporting themselves and their own children.

A number of courts have addressed whether adult offspring, the children of adult offspring, or stepchildren can be considered to be dependents of the debtor within the contemplation of sections 1325(b)(2)(A), or 707(b). Predictably, the results have gone both ways. Under a wide array of rationales, some courts have allowed debtors to claim expenditures for the support or education of adult children. In re Messenger, 178 B.R. 145, 150 (Bankr. N.D. Ohio 1995) (provisionally denying section 707(b) motion to allow debtor to prove he had obligation, enforceable under West Virginia law, to support adult disabled child); In re Gonzales, 157 B.R. 604, 610 (Bankr. E.D. Mich. 1993); In re Riegodedios, 146 B.R. 691, 693 (Bankr. E.D. Va. 1992); In re Tefertiller, 104 B.R. 513, 515 n. 1 (Bankr. N.D. Ga. 1989); In re Wegner, 91 B.R. 854, 859 (Bankr. D. Minn. 1988) (Kressel, J.) The

sounder decisions, however, limit the scope of other persons for whom the debtor may be allowed to expend post-petition income to unemancipated minor children and, possibly, disabled adult offspring who are dependent de facto. E.g., In re Mastromarino, 197 B.R. 171, 178-179 (Bankr. D. Me. 1996); In re Richmond, 144 B.R. 539, 542 (Bankr. W.D. Okla. 1992); In re Henricksen, 131 B.R. 467, 473 (Bankr. N.D. Okla. 1991). Cf. In re Stallman, 198 B.R. 491, 495-497 (Bankr. W.D. Mich. 1996) (noting that debtor's expenditures for benefit of employed adult son were not allowable under circumstances of case at bar, but declining to apply "bright line" rule); In re Davidoff, 185 B.R. 631, 635 (Bankr. S.D. Fla. 1995) (applying 11 U.S.C. section707(a) to conclude that debtor who, inter alia, regularly expended substantial sums for support of several adult children, had not sought Chapter 7 relief in good faith).

The latter result comports with one of the most basic characteristics of the body of law this Court applies. Bankruptcy processes should maintain an equitable balance among the constituencies they affect. The constituency that sections 707(b) and 1325(b) serve is pre-petition unsecured creditors, in deference to their legal rights of payment under contract and law. In light of this purpose, the disposable income inquiry best maintains its balance if credit for "support" payments to third parties is limited to those to whom the debtor has a corresponding legal obligation. In re Mastromarino, 197 B.R. at 178-179; In re Richmond, 144 B.R. at 542.

Some of the predicate assumptions of this rationale may be in a state of flux.(FN8) However, these changes are barely nascent, indistinct, and certainly not amenable to recognition in a legal system for which the source of substantive governance is a statute enacted by a political institution. The outcome on this issue, then, is clear: the Debtor cannot be allowed to claim an expenditure for the support of any of her relatives, however, selfless she is and has been in furnishing it.(FN9)

The result of all of these reductions, strikings, and upward adjustments is a hypothetical monthly budget that includes $1,695.00 in expenditures.(FN10) Netting this against the $2,115.20 of income deemed to the Debtor, shows an income surplus of $420.20 per month.

Over the course of a 36-month plan, then, the Debtor could pay a bit over $15,100.00; over 60 months, the figure would increase to approximately $25,200.00. She schedules unsecured debt that totals approximately $47,400.00 This would result in a composition payment of 28 percent to 49 percent to unsecured creditors.(FN11)

In argument, the Debtor's counsel dismissed the prospect of such a return to creditors as insufficient to make out a case of substantial

abuse. The drift of this argument is, essentially, that it is somehow not fair to deprive a debtor of an unqualified and unlimited discharge unless creditors would receive something more than that in the hypothetical Chapter 13 case.

The law on this issue is rather sparse and unsettled. As a general proposition, the Eighth Circuit has reaffirmed its position that "the ability to fund a chapter 13 plan can be sufficient reason to dismiss a chapter 7 petition under section 707(b)." United States Trustee v. Harris, 960 F.2d at 77. The cases before the Eighth Circuit, however, have all involved debtors with the ability to fund high-percentage composition plans.(FN12) As a result, the decisions did not have to define "funding a Chapter 13 plan " with any more specificity than that.

Thus, there may yet be a bright line to draw in refining the Walton/Harris standard.(FN13) A case like the one at bar, however, is not really the one in which to draw it. Every month, judges of this Court confirm many Chapter 13 plans that provide for a composition payment to unsecured creditors of only 5 to 10 percent.(FN14) It certainly appears that affected creditors take even the little they get from those cases, and are satisfied.(FN15) Over 99 percent of the amount of the Debtor's scheduled debt is attributable to educational loans, all or almost all of which appear to be government-guaranteed and in the hands of the guarantor agency. A return of even 28 percent on this debt is nothing that the affected creditors would sneeze at. Proceeding to the unfettered discharge of it in the face of even a fractional hypothetical composition still would be a substantial abuse. See, e.g., In re Wilson, 125 B.R. 742, 746-747 (W.D. Mich. 1990) (hypothetical composition of 32 percent over three years and 52 percent over five years supported finding of substantial abuse); In re Roth, 108 B.R 78, 80 (Bankr. W.D. Pa. 1989) (ditto, for hypothetical composition of 43 percent over three years).

Therefore, the U.S. Trustee has proved up grounds for dismissal of this case under section 707(b). To save the Debtor the expense of an additional filing fee, and to bring about some continuity in the judicial administration of this case, the Debtor will have an opportunity to convert it to one under Chapter 13. If she does not timely avail herself, however, she will not have the option of seeking any form of bankruptcy relief under the auspices of her filing in this case.

IT IS THEREFORE ORDERED:

1. The Debtor may convert this case to one under Chapter 13, but if she elects to do so, she shall file all documents required under Loc. R.Bankr. P. (D. Minn.) 311(c), including new schedules, statements, and lists, and a plan of debt adjustment, no later than April 15, 1997.

2. If the Debtor fails to timely convert

this case pursuant to Term 1 of this order, the Court thereafter will order dismissal pursuant to 11 U.S.C. section 707(b).

BY THE COURT:

GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE

(FN1). On her schedule I, the Debtor asserted that her "total monthly income" was $1,775.00. At the U.S. Trustee's request, the Debtor produced current pay check stubs. After analyzing the information on these source documents, a member of the U.S. Trustee's staff determined that, correctly calculated on a monthly basis, and adjusted for discretionary deposits into a 401(k) plan, the Debtor's true net monthly income for the purposes of this case was $2,115.20. The Debtor does not take issue with this

(FN2).The text of the statute is:

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of [Chapter 7]. There shall be a presumption in favor of granting the relief requested by the debtor.

(FN3).The text of the statute is :

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of [a] plan [of individual debt adjustment], then the court may not approve the plan unless, as of the effective date of the plan --

(A)the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B)the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2)For purposes of [section1325(b)], "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended --

(A)for the maintenance or
support of the debtor or a dependent of the
debtor; and

(B)if the debtor is engaged in
business, for the payment of expenditures
necessary for the continuation, preservation, and
operation of such business.

(FN4).The remainder of Fed. R. Evid. 301 provides that the burden of persuasion "remains throughout the trial upon the party on whom it was originally cast." This is somewhat problematic in the context of a grant of discharge under Chapter 7. The Bankruptcy Code is set up for a perfunctory and "automatic" grant of discharge absent the sustaining of an objection to discharge. 11 U.S.C. section727(a); In re Khan, 172 B.R. 613, 622 n. 17 (Bankr. D. Minn. 1994). Such an objection must be timely commenced, Fed. R. Bankr. P. 4004(a), via a complaint in adversary proceedings, Fed. R. Bankr. P. 7001(4); further, in such proceedings, the complaining creditor "has the burden of proving the objection, Fed. R. Bankr. P. 4005. Because a debtor does not have to affirmatively prove up an entitlement to discharge at a trial in his bankruptcy case, it is not immediately clear where the burden of persuasion would fit in under section 707(b). Ultimately, however, the conundrum is no more than academic in the great majority of cases. The burden of persuasion is applied only as a "tie-breaker," where the evidence is in equipoise. That is not the case here.

(FN5).All four entries for "STUDENT LOANS" on the Debtor's Schedule F have the date notation of "1986-1988." If these debts "first became due" then, or by September 10, 1989, they were rendered dischargeable by operation of 11 U.S.C. section523(a)(8)(A). See discussion in In re Schirmer, 191 B.R. 155 (Bankr. D. Minn. 1996). These loans, totaling over $47,000.00, constituted virtually all of the Debtor's scheduled unsecured indebtedness.

(FN6).Creditors probably would carp at even this figure, perhaps with some justification, but one has to approach this issue with a little bit of heart.

(FN7).The reason is obvious: the inclusion of an undefined and undifferentiated expense like this would only result in debtors creating a paper record on which U.S. Trustees would bring much more section 707(b) litigation.

(FN8).In the current political climate, the most vulnerable one is the unspoken assumption that

government will always furnish an adequate social safety net to protect the needy. The family may yet have to reassume its immemorial role as the source-of-support-of-last-resort.

(FN9).This conclusion is neither easy nor savory. The impact on the Debtor's incarcerated son is particularly troublesome; there are not many other sources to which he can turn to get a small amount of physical comfort in stark surroundings. As noted, however, the congressional intent in this inquiry clearly is one of strong deference to creditors' interests. This requires even this act of mercy to be considered a discretionary expenditure.

(FN10).The budget is made up of the following expenditures, either uncontroversial or as adjusted:

Rent	$ 534.00
Electric and heating utilities	60.00
Telephone	100.00
Food	300.00
Clothing	95.00
Laundry and drycleaning	56.00
Medical and dental expenses	25.00
Transportation	75.00
Recreation	75.00
Automobile insurance	75.00
Automobile financing payment	300.00
	$ 1695.00

(FN11) These percentages are derived by reducing the totals by the Standing Chapter 13 Trustee's current 4.25 percent commission (factoring out at $641.75 and $1,071.00, respectively) and an attorney fee of $850.00 for the hypothetical case.

(FN12).Walton's debtor had the ability to pay more than two-thirds of his debt over three years, and all of it over five years. 966 F.2d at 985. Harris's could have paid all of his debt in about two years. 960 F.2d at 77. Finally, the debtor in Fonder could pay as much as 89 percent of his debt over three years, and could pay it in full over five years or less. 974 F.2d at 1000.

(FN13).But see In re Schmidt, 200 B.R. 36, 39 (Bankr. D. Neb. 1996) (interpreting Walton/Harris, line of cases to provide that "[n]either the percentage of debt that could be paid under a plan, the number of creditors holding unsecured claims, nor the amount of the debtor's net monthly disposable income are dispositive of the issue").

(FN14).Plans like this, of course, are motivated by the underlying debt structures. The debtors who propose such them almost invariably have

substantial arrearages in home mortgage obligations and/or outstanding financing for vehicle purchases. Given the ability to decelerate defaulted loans and to cure arrearages under 11 U.S.C. section 1322(b)(3) and (b)(5), and to restructure secured debt other than homestead mortgages under 11 U.S.C. section 1322(b)(2), these senior obligations invariably consume the majority of the Chapter 13 estate. One could not attribute overwhelming benevolence toward unsecured creditors to debtors like these.

(FN15).The undersigned has never heard an unsecured institutional creditor to complain of its due under such a plan, under any substantive provision of sections 1322 and 1325.