

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT

BANKRUPTCY JUDGE

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January 21, 2004

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Assistant U.S. Trustee
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Spearfish, South Dakota 57783

Subject: *In re Tamara L. Murray,*
Chapter 7; Bankr. No. 03-50393

Dear Counsel:

The matter before the Court is the United States Trustee's Motion for Summary Judgment regarding its Motion to Dismiss for Substantial Abuse and Debtor's responses to each motion. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the United States Trustee's Motion to Dismiss will be granted unless Debtor voluntarily converts her Chapter 7 case to a Chapter 13 case.

Summary of facts. Tamara L. Murray ("Debtor") filed a Chapter 7 petition in bankruptcy on July 31, 2003. In her schedules, Debtor stated she has one priority creditor holding a claim for \$950 and several unsecured creditors holding claims that total \$8,799.66. She also listed three secured creditors whose claims were partially unsecured. Debtor stated she is married and has two teenage children. She also stated that her and her husband's combined monthly net is \$4,228.74¹ and that the family's total monthly expenses were \$4,836.84. Thus, according

¹ This sum reflects a \$20 increase in death benefits paid to the children that was effective in January 2004.

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to her schedules, the family's monthly expenses exceed their income by \$608.10.

On October 16, 2003, the United States Trustee filed a motion to dismiss Debtor's case under 11 U.S.C. § 707(b) for substantial abuse. He argued that Debtor had understated her monthly income and that the family's combined monthly income was actually \$4,805.72. The United States Trustee also noted that Debtor had included a \$100 tax expense on a mobile home and a \$517.64 monthly payment for the mobile home that will no longer be incurred after she surrenders the mobile home. The United States Trustee also challenged as unnecessary the family's expenditure of \$390.62 per month for a camper. With these expenses removed, the United States Trustee argued that Debtor's family's monthly expenses were actually \$3,828. After the United States Trustee prorated the family's expenses to Debtor based on the percentage of the family's total income that she contributes, he calculated that Debtor had disposable income of \$494.43 with which she could fund a Chapter 13 plan.

Debtor objected to the United States Trustee's motion to dismiss. She argued that her income is now less because she is no longer earning any substantial overtime. She also argued that Social Security benefits that are paid to her for her children's² benefit and that are paid to her husband for his daughter's benefit should not be recognized in determining her ability to pay her creditors. She also stated that the camper payment should not be deleted from their allowed expenses since doing so would essentially treat her husband as a bankrupt also, which he did not want to be.

On November 19, 2003, the United States Trustee moved for summary judgment. He argued that Debtor's response admits that the family's net monthly income is \$4,589.51. He also correctly recited this Court's position on the impact of a debtor's dependent's Social Security benefits when analyzing a family's income and expenses under § 707(b). He also continued to argue

² In her pleadings, Debtor often uses "children" but it is not always clear whether Debtor is referring to her son only or her son and her step-daughter.

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that the family's camper expense was not necessary. Thus, he urged the Court to conclude that Debtor had disposable income of \$323.44 per month with which she could pay her creditors in full through a Chapter 13 plan.

In her response, Debtor continued to argue that the Social Security benefits that family members receive cannot be considered by the Court as income attributable to Debtor. She also now claimed that the camper had substantial hail damage and that a deficiency claim would result if the family were forced to sell it. Debtor argued material questions of fact precluded summary judgment but she did not identify what those questions were.

Based on the present record, it appears that the total unsecured claims against Debtor are approximately \$24,923.93. This includes \$8,799.66 in scheduled unsecured claim holders and \$11,124.27 for the deficiency on the mobile home she intends to surrender to the secured creditor. Debtor also claims, in her last brief, that if the camper is surrendered to the secured creditor,³ a deficiency claim of \$5,000 will be incurred.⁴ Thus,

³ The camper is actually property of the bankruptcy estate that the Chapter 7 trustee controls. 11 U.S.C. §§ 363, 541(a), 544, 554, 704, and 725. Debtor has no present authority to surrender it the secured creditor. Although Debtor listed the camper on her schedule of property claimed exempt, she did not really declare it exempt. Debtor valued the camper at \$10,000 but she listed the value of the claimed exemption at "0.00." Thus, by valuing the interest she declared exempt at zero, Debtor failed to exempt any equity that may exist in the camper. *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 71-74 (B.A.P. 8th Cir. 2001). Likewise, Debtor did not declare exempt any equity that may exist in a 2001 pickup that was listed on her schedule of property claimed exempt.

⁴ Debtor's disclosures on the record regarding the camper have not been consistent. In her schedule of assets, Debtor stated that the camper was worth \$10,000 *with* hail damage. On her schedule of secured creditors, she stated the camper was worth \$12,900 and that the secured claim against the camper was

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when the record is considered in a light most favorable to Debtor, the total unsecured claims to be paid through a Chapter 13 plan are estimated by the Court, for the purpose of the United States Trustee's motions, to be \$24,923.93. To this, the Court estimates that another \$1,000 needs to be added to recognize the additional attorneys' fees that would likely be incurred if Debtor were in Chapter 13 and had to get a plan confirmed.

APPLICABLE LAW. Section 707(b) of the Bankruptcy Code permits the dismissal of a Chapter 7 case upon a showing that granting the debtor relief would be a substantial abuse of the Bankruptcy Code. The section is intended to promote fairness to creditors and prevent the use of Chapter 7 by non needy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997).

"Substantial abuse" is not defined within the Bankruptcy Code. In interpreting the section, the Court of Appeals for the

\$15,035.44, thus leaving a deficiency claim of \$2,135.44. In her response to the United States Trustee's Motion for Summary Judgment, she says that a surrender of the camper would create a deficiency claim of \$5,000. Her record regarding the camper gets even more problematic. On her Schedule H, Debtor said she did not have any co-debtors, thus indicating that she was the sole obligor on the camper note. However, in her response to the United States Trustee's Motion to Dismiss and in her brief regarding the United States Trustee's Motion for Summary Judgment, she states that her husband would be responsible for the debt if she did not pay it. Finally, the last discrepancy that the Court will note at this time is that Debtor stated on her schedule of expenses that the monthly camper payment was \$390.62. However, when she reaffirmed this debt with First Western Bank, the agreement now included the camper, a 1988 Chevrolet pickup, and a 1997 Pontiac Grand Am as the collateral and the monthly payment was set at \$389.80, though the agreement noted that the parties' original note and security agreement dated April 7, 2003, was "unchanged." Thus, the reaffirmation agreement does not reflect the information on Debtor's schedule of secured claims where the camper was listed as First Western Bank's only collateral.

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Eighth Circuit has held that the primary inquiry is whether the debtor has the ability to pay creditors under a Chapter 13 plan. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.* The analysis includes the expectation that the debtor will put forth his best effort in a Chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (Bankr. D.S.D. May 28, 1998)(citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995), and *In re Schnabel*, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993)).

DISCUSSION. The United States Trustee is correct that Social Security benefits that a family receives are considered under a § 707(b) analysis. It is not a new proposition. Case law that recognizes exempt sources of income when analyzing whether a debtor can fund a Chapter 13 plan is ample. *See, e.g., Taylor v. United States (In re Taylor)*, 212 F.3d 395, 397 (8th Cir. 2000); *Koch*, 109 F.3d at 1288-90; *In re Tamara J. Johnson*, Bankr. No. 01-041133, slip op. at 5-6 (Bankr. D.S.D. March 22, 2002)(cites therein); and *Beauchamp*, slip op. at 5-6.

The fact that [an income source] is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the [income source] is also disposable income for purposes of Chapter 13. . . . [T]he question of whether [an income source] is exempt or otherwise restricted by a federal antialienation provision is irrelevant in a Chapter 13 context.

Taylor, 212 F.3d at 397.

Contrary to Debtor's concerns, the United States Trustee is not arguing that Debtor's children's Social Security benefits must be used to pay her creditors, nor is that what the Court is holding. What is considered under § 707(b) is whether it would be a substantial abuse of the bankruptcy process to allow Debtor to receive a Chapter 7 discharge in light of her ability to fund a Chapter 13 plan. Here, Debtor's family has income in excess

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of expenses and thus there is adequate income with which she can fund a meaningful Chapter 13 plan. As this Court has stated, whether Debtor wants to convert her case to Chapter 13 is her choice. *Koch*, 109 F.3d at 1289 ("Chapter 13 relief is at the option of the debtor.") The Court only holds that based upon her ability to fund a Chapter 13 plan, Debtor does not need Chapter 7 relief and to promote fairness to her creditors, she will not be allowed to continue under Chapter 7 and receive a Chapter 7 discharge. *Id.* at 1288.

As discussed in *Beauchamp*, a child's survivor benefits from the government may be excluded from the § 707(b) analysis. When that is done, however, the child's expenses are also removed from the analysis since the benefits are to be used for the child's expenses. *Beauchamp*, slip op. at 7-8. Further, as discussed in *Beauchamp*, if Debtor decides to convert her case to Chapter 13, the Court can balance the needs of Debtor's creditors with any concerns that exist for the protection of Debtor's children and their benefits. *Id.* at 8 (cite therein).

The United States Trustee is also correct that a debtor's expenditures on nonessential or luxury items is considered under a § 707(b) analysis.

[N]ot all expenditures by a family take priority over paying creditors. When a debtor lives beyond his or her means and makes no effort to reduce non essential expenses and pay creditors, a substantial abuse of the bankruptcy process occurs.

In re Phyllis R. Bitterman, Bankr. No. 99-41111, slip op. at 7 (Bankr. D.S.D. June 27, 2000)(citing *In re Robert D. and Susan R. Mendelsohn*, Bankr. No. 98-40099, slip op at 10-11 (Bankr. D.S.D. Nov. 10, 1998)); see *Nelson*, 223 B.R. at 353 (appellate panel affirmed bankruptcy court's conclusion that a camper was luxury expenditure under a § 707(b) analysis); *In re Butler*, 277 B.R. 917, 920-22 (Bankr. N.D. Iowa 2002)(discussion of discretionary expenses). Here, Debtor argues that her family should be allowed to continue making monthly payments of \$390.62 for a camper. However, with just that \$390.62 (\$355.11 to creditors and \$35.51 for the Chapter 13 trustee's fees), Debtor

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could repay, over a three-year plan term, \$12,783.96 to her unsecured creditors, which equals almost 50% of their claims. Over a five-year plan, she could pay her unsecured creditors over 80% of their claims.

If the Court considers the record in the light most favorable to Debtor, she can pay approximately 24% of her unsecured claims over a three-year plan, sufficient to warrant dismissal of her case under § 707(b). This minimum payout is found by first dividing Debtor's monthly income contribution of \$1,285.28 by \$4,589.51, the United States Trustee's calculation of the household income (the present record indicates that sum is correct). Thus, Debtor contributes 28% of the family's total net income. The family's total expenses are \$3,828. Debtor's share of these expenses, when calculated based on the percentage of income she contributes, is \$1,071.84. When her share of the expenses is deducted from her net income, Debtor personally is left with \$213.44 each month to fund a Chapter 13 plan. Over a 36-month period, this would amount to \$7,683.84. From this, Debtor would need to deduct \$768.38 for Trustee Wein's commission and \$1,000 for estimated attorney fees, leaving \$5,915.46 for her unsecured creditors. This would yield a dividend of 23.73% for Debtor's unsecured creditors on their total claims of \$24,923.93. That is sufficient to deem relief for her under Chapter 7 a substantial abuse of the Bankruptcy Code.

An appropriate order will be entered.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 03-50393
) Chapter 7
TAMARA LEA MURRAY)
a/k/a Tamara Lea Rider) ORDER SETTING DEADLINE TO
Soc. Sec. No. 503-88-5771) CONVERT HER CASE TO CHAPTER
) 13
Tax I.D. No.) IN LIEU OF DISMISSAL
Debtor.)

In recognition of and compliance with the letter decision entered this day,

IT IS HEREBY ORDERED that unless Debtor voluntarily converts her Chapter 7 case to a Chapter 13 case on or before **January 26, 2004**, the United States Trustee's Motion for Summary Judgment will be granted and this Chapter 7 case will be dismissed under 11 U.S.C. § 707(b).

So ordered this 21st day of January, 2004.

BY THE COURT:

/s/ Irvin N. Hoyt
Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)