UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 97-50487
	)	
PAMELA E. BEAUCHAMP	)	Chapter 7
fka Pamela E. Larimore	)	
Soc. Sec. No. 508-84-4140	)	MEMORANDUM OF DECISION RE:
	)	MOTION TO DISMISS FOR
Debtor.	)	SUBSTANTIAL ABUSE
	)	

The matter before the Court is the Motion to Dismiss for Substantial Abuse filed by the United States Trustee and Debtor's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that this case must be dismissed for substantial abuse.

I.

Pamela E. Beauchamp (Debtor) filed a Chapter 7 petition on October 6, 1997. In her schedules filed the same day, Debtor disclosed that she is a widow with two children, ages seven and five. She states she is disabled and receives alimony or support payments of $155.00 per month, Veterans Administration disability payments of $762.00 per month, Social Security survivors benefits of $450.00 per month, and Veterans Administration survivors benefits of $790.00 per month. She further states that the children receive monthly Social Security and Veterans

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Administration survivors benefits totaling $1,300.00. The family's total monthly income is $3,457.00. The family's total monthly expenses are $2,869.46. Expenses include $500.00 per month in "[e]xtra payment on home mortgage to catch up[.]"

On January 9, 1998, the United States Trustee filed a Motion to Dismiss for Substantial Abuse under 11 U.S.C. § 707(b). The United States Trustee alleged that Debtor was an individual with primarily consumer debts, Debtor had two secured creditors with claims totaling $73,442.76, Debtor had no priority creditors, Debtor had general unsecured creditors with claims totaling $25,666.56, and Debtor could repay all her unsecured debt in five years with a monthly payment of a little over $400.00. The United States Trustee also stated that based on Debtor's testimony at the § 341 meeting of creditors, her "extra" $500.00 per month mortgage payment would end in three months but that her health insurance had increased by $40.00 per month. When these adjustments to the household budget were considered, the United States Trustee alleged Debtor could repay all her unsecured creditors in three years with payments of just over $700.00 per month. The United States Trustee argued that it was substantial abuse for Debtor to seek Chapter 7 relief when she had the ability to repay a substantial portion of her debts and, therefore, that the case should be dismissed.

Debtor responded on February 2, 1998. She said her disability payment of $762.00 per month was currently being reviewed and may

decrease or cease. She also stated that the reaffirmation of certain secured debts may increase her monthly expenses and necessitate an amendment to her schedules.

An evidentiary hearing was held February 23, 1998. No testimony was presented. No schedules were amended. The only exhibit offered was the new disability rating by the Department of Veterans Affairs wherein Debtor was continued at a 50 percent disability. Her next evaluation is July 1998.

The Assistant United States Trustee contended in his argument that a portion of the children's government benefits should go to their support and that Debtor's disposable funds should be used to pay creditors. He cited *Bibb County Department of Family & Children Services v. Hope (In re Hammonds)*, 729 F.2d 1391 (11th Cir. 1984)(Chapter 13 debtor may use Aid to Families with Dependent Children (AFDC) benefits to fund a plan); *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793 (9th Cir. B.A.P. 1995)(Social Security payments are included in a Chapter 13 debtor's disposable income); and *In re Schnabel*, 153 B.R. 809 (Bankr. N.D. Ill. 1993)(exempt Social Security and pension payments constitute disposable income under Chapter 13). He further cited 20 C.F.R. 404.2040, which states the children's Social Security benefits are for the children's basic needs of shelter, food, clothing, and medical care.

Debtor's counsel argued that the children's funds should not

be used to pay their mother's creditors. He stated Debtor is required by state law to support her children and that Debtor has the funds to do so if she remains in Chapter 7. Conversely, if she were in a Chapter 13, Debtor's counsel argued that Debtor would have to impermissibly use her children's funds to repay her debts. Debtor's counsel discussed the relevancy of *Stuart v. Koch (In re Koch)*, 109 F.3d 1285 (8th Cir. 1997). He further stated a trust could be established for the children's funds, if necessary, so that Debtor could not access them for her personal use. He acknowledged that Debtor has used the children's funds in the past for family living expenses and that none are currently in savings accounts for the children.

The matter was taken under advisement.

II.

Substantial Abuse. Section 707(b) 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 unneedy debtors. *Koch*, 109 F.3d at 1288. "Substantial abuse" is not defined within the Bankruptcy Code. Therefore, to implement the section the Court of Appeals for the Eighth Circuit has held that the primary inquiry is whether the debtor has a substantial ability to pay creditors. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)). A debtor's ability

to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.*

Use of Children's Benefits. Several courts have concluded that exempt funds may constitute disposable income in a Chapter 13 case. *Hammonds,* 729 F.2d at 1394; *In re Blair*, 214 B.R. 257, 259 (Bankr. D. Me. 1997)(Veteran's disability benefits constitute disposable income in a substantial abuse equation); *Hagel*, 184 B.R. at 794; *In re Rogers*, 168 B.R. at 806, 809-10 (Bankr. M.D. Ga. 1993)(exempt Naval retirement benefits are disposable income in a substantial abuse analysis); and *In re Morse*, 164 B.R. 651, 654-57 (Bankr. E.D. Wash. 1994)(exempt Social Security benefits are disposable income for a substantial abuse calculation). Even exempt Social Security benefits paid to a debtor as the representative of a minor child or to a non debtor spouse have been considered within the Chapter 13 debtor's disposable income, especially when the children's or non debtor spouse's expenses are included in the debtor's financial picture. *In re Cornelius*, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995), and *Schnabel*, 153 B.R. at 818 (cites therein).

These courts conclude that disposable income under 11 U.S.C. § 1325(b)(2) includes all the household's income and that a Chapter 13 plan can include payments from property of the estate *or* property of the debtor. *Cornelius*, 195 B.R. at 835; *Schnabel*, 153

B.R. at 815. The courts also balanced the need for the exempt funds to meet the recipient's basic expenses with the fact that a Chapter 13 debtor can be expected to put forth his best effort in a Chapter 13. *Hagel*, 184 B.R. at 798; *Schnabel*, 153 B.R. at 818.

In *Hammonds*, the court held that AFDC payments, which are primarily designed to benefit the family's children, can be used to fund a Chapter 13 plan. *Hammonds*, 729 F.2d at 1393-95. "When the family unit is strengthened through the gradual elimination of any debt problems, the needs and desires of the children may, indeed, be satisfied and fulfilled." *Id. at 1394*. The court confirming the plan can insure that the funds are used appropriately and that the plan is feasible. *Id.* at 1395 (cite therein).

III.

Substantial Abuse. Debtor's schedule of expenses indicated she was paying an extra $500.00 per month to her home mortgage holder. Those "catch up" payments were completed at the time of the substantial abuse hearing. Her health insurance, however, had increased by $40.00 per month. Leaving all other income and expenses as stated, Debtor now has that $460.00 available to repay her general unsecured creditors each month just as she repaid her mortgage holder. Over a three-year plan, she can repay a substantial portion of her unsecured creditors. Over a five-year plan, she can repay all her unsecured creditors. Thus, to allow Debtor to receive a Chapter 7 discharge when that $460.00 is

available would be a substantial abuse of the bankruptcy process.

The Court acknowledges that some of the children's benefits were used for the extra $500.00 mortgage payment and that some portion of the present $460.00 deemed available to fund a Chapter 13 plan will come from the same source. The Court is only holding that the funds Debtor previously used to repay debt and meet monthly expenses should continue to be used for that purpose. All of the children's income has not been designated as disposable income.

Debtor will be given ten days to voluntarily convert her case to a Chapter 13 proceeding. If she chooses not to do so, her case will be dismissed.

Use of children's Social Security benefits. Debtor has previously used her children's Social Security and Veterans Affairs benefits to meet monthly household expenses. Therefore, it is difficult to find it fair to now allow her to save all her children's benefits and use only her income to meet the family's monthly expenses but not repay creditors. Whether all the children's benefits should be considered in a substantial abuse analysis, however, is a question that need not be answered here since the availability of funds previously used to repay debt has already rendered this case subject to dismissal under § 707(b).

If Debtor converts to a Chapter 13, she must file a plan that is fair and equitable, taking into consideration her income and expenses and her children's income and expenses and their savings needs. If the case trustee and creditors are not satisfied with the proposed plan, appropriate objections can be filed and resolved. The Court can then balance the needs of creditors with any concerns for the protection of the children and their benefits. *Hammonds*, 729 F.2d at 1395.

If Debtor does not file a notice of conversion on or before June 12, 1998, the United States Trustee may submit an order dismissing the case.

Dated this 28th day of May, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
MAY 28 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: AC
Date: 5-28-98

Case: 97-50487 Form id: 122 Ntc Date: 05/28/98 Off: 3 Page : 1
Total notices mailed: 4

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Trustee	Whetzal, Dennis C. PO Box 8285, Rapid City, SD 57709
Aty	Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321