UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 98-40099
	)	
ROBERT D. MENDELSOHN	)	Chapter 7
Soc. Sec. No. 354-36-8541	)	
	)	
and	)	
	)	MEMORANDUM OF DECISION RE:
SUSAN R. MENDELSOHN	)	UNITED STATES TRUSTEE'S MOTION
Soc. Sec. No. 349-36-7994	)	TO DISMISS UNDER § 707(b)
	)	FOR SUBSTANTIAL ABUSE
Debtors.	)	

The matter before the Court is the MOTION TO DISMISS FOR SUBSTANTIAL ABUSE filed by the United States Trustee and Debtors' response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This MEMORANDUM OF DECISION and accompanying ORDER shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the case should be dismissed because to allow it to continue would constitute a substantial abuse of the bankruptcy process.

I.

Robert D. and Susan R. Mendelsohn (Debtors) filed a Chapter 7 petition on February 17, 1998. They listed as assets a homestead with $14,100.00 in equity, small sums in checking and savings accounts, furniture and miscellaneous household goods, some books, jewelry, a term life insurance policy, and a small Individual Retirement Account. The value of the personalty listed was $4,185.00. All of it was declared exempt, including the homestead equity. Debtors' only secured creditor was the holder of their

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home mortgage.[1] They had no priority unsecured creditors. Creditors holding general unsecured claims were numerous. All appeared to be credit card companies or collection agencies. Debtors' total general, unsecured debt was $97,539.32. They lease one automobile, a 1997 Nissan Pathfinder.

According to their schedules, Debtor Robert Mendelsohn is a university professor who earns $3,957.40 per month (after income taxes, Social Security, and mandatory retirement contributions are deducted) or $47,488.80 on a twelve month contract. At his discretion, he also has deducted another $514.45 per month for life insurance and health insurance. Debtor Susan Mendelsohn is employed as a teacher by the federal Bureau of Indian Affairs. She earns $1,700.58 biweekly (after income taxes, Medicare insurance, mandatory retirement contributions, and union dues are deducted) or $35,712.18 total on a ten month (21 pay periods) contract or $2,976.00 per month (over twelve months). At her discretion, she also has another $108.66 deducted each pay period as a contribution to the federal employees' Thrift Savings Plan, a retirement savings option in which the federal government provides some matching funds. Debtors' total net monthly scheduled income was thus $6,933.40 per month or $83,200.80.

In 1996, Debtors' income was $86,224.00. In 1997, it was $99,790.00 and included unemployment benefits of $1,898.00 for

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[1] Testimony at the hearing indicated there were two separate mortgages on Debtors' home but that was not clearly set forth in their schedules.

Susan Mendelsohn and supplemental income from two sources of $5,471.00 for Robert Mendelsohn.

Debtors scheduled their monthly expenses at $7,863.00. Their expenses included a mortgage payment of $1,664.00 (which includes real estate taxes and property insurance), telephone expenses of $220.00, food for a family of five at $600.00, transportation costs of $350.00, life and auto insurance of $430.00, an auto lease payment of $399.00, college expenses for two children over age 18 of $1,200.00, religious "dues" and meals during travel to religious services in Sioux Falls of $275.00, and "set aside money for summer months when there is no income" of $1,700.00.

In their statement of financial affairs, Debtors disclosed that on April 26, 1997, they cashed in three certificates of deposit totaling $12,239.53. The only debt they intend to reaffirm is their home mortgage.

On May 18, 1998, the United States Trustee filed a MOTION TO DISMISS FOR SUBSTANTIAL ABUSE. She alleged that Debtors had understated their monthly income by $627.52 based on Debtor Susan Mendelsohn's pay stub and that no summer income for Debtor Robert Mendelsohn was included. The United States Trustee also alleged that the schedules indicate a possible duplication of a term life insurance expense, or in the alternative, an excessive expense for term life insurance, that their telephone expenses are excessive by $120.00, and that medical expenses and college expenses for their adult children should not be allowed. Finally, the United States Trustee argued that $1,700.00 summer income set aside was not actually

being done. Based on these allegations, the United States Trustee computed that Debtors had discretionary income of $2,734.52 to pay creditors, which would allow them to pay their creditors in full under a three-year Chapter 13 plan.

Debtors filed a response to the MOTION on June 8, 1998. They argued that since they are able to claim their adult children as dependents under the federal Income Tax Code, they should be able to claim the expenses associated with supporting their children. Debtors also filed an affidavit to supply some "background" information and to justify some expenses. For example, they stated they needed two term life policies on Debtor Robert Mendelsohn in case he left state employment. They outlined their medical expenses but did not state how the monthly average was computed, except to disclose that it included $35.00 per month for a health club membership for Robert. They stated they have three cellular phones, one for each of them and one for the children to share, and two telephone lines into the house. Debtors disclosed that they cashed in three Individual Retirement Accounts in 1997 to meet summer expenses. They also reported that their home mortgage holder had agreed to forego payments for July and August 1998. In the affidavit, Debtors also outlined needed home repairs and they explained why travel and meal expenses are connected to their total religious expenses.

An evidentiary hearing was held August 11, 1998. Appearances included Assistant U.S. Trustee Bruce J. Gering and Sean M. O'Brien for Debtors. Craig Baumann, a Certified Public Accountant in the

United States Trustee's office, established that Debtors' monthly take-home income is about $5,500.00 when their total yearly income is divided by 12. Income from Debtor Robert Mendelsohn's employment with the state of Minnesota was not included as it was not conclusive whether he would be re-employed by them. His calculations reflected Debtor Susan Mendelsohn's change in paid school days for the 1998-1999 school term, an increase in pay, and the discontinuation of her contribution to her employer's voluntary savings plan. It did not include the unemployment benefits she received the previous year during the months when school was not in session. Using Debtors' Schedule J, CPA Baumann showed Debtors have discretionary monthly income of over $900.00 if the family's telephone expenses are reduced by $170.00 (leaving one cell phone and one line to the home), one term life insurance premium of $200.00 is stopped, school expenses of $1,200.00 for the adult children are discontinued, Debtor Susan Mendelsohn's Thrift Savings Fund contribution of $108.00 is discontinued, and a summer "set aside" fund of $1,700.00 is discontinued. He did not propose any reductions in Debtors' other expenses. The CPA acknowledged that Debtors may incur additional taxes of about $30.00 per month if Debtor Susan Mendelsohn's Thrift Savings contribution is discontinued. Based on the accountant's calculations, over a 36-month plan Debtors could repay over $30,000.00 of their unsecured debt with this discretionary income and could pay over $55,000.00 with a 60-month plan.

Both Debtors testified. They presented several exhibits

II.

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 unneedy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997). "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.*

Several bankruptcy courts have addressed the question of whether support of adult children is an allowed expense in a Chapter 13 analysis.[3] Different results have been reached in light of the particular circumstances presented. In *In re Jones*, 55 B.R. 462 (Bankr. D. Minn. 1985), the court concluded that college and private secondary school tuition for the debtor's children were not "reasonably necessary" expenses under 11 U.S.C. § 1325(b)(2) where quality public education was available in the area. Excluded from "reasonably necessary" expenditures were luxury goods and services.

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[3] Neither the United States Supreme Court nor the Court of Appeals for the Eighth Circuit have directly addressed this issue.

Id. at 466. A similar result was reached in *In re Gyurci*, 95 B.R. 639 (Bankr. D. Minn. 1989), where the debtor had gotten into financial trouble due to an extravagant lifestyle and his decision to put his children through college by incurring substantial credit card debt at high interest rates. Substantial abuse was found because the debtor had some disposable income under his present budget and could generate additional funds to pay creditors by living a more modest lifestyle. *Id.* at 643. "[W]ith even a modest amount of rethinking lifestyle and expenses," the court found the debtor and his family could repay a substantial portion of their debt without hardship. *Id.* Another court, when looking at total household expenses, which included substantial monthly "allowances" for college-aged children, queried whether these expenses, though real, were provident. *In re Goodson*, 130 B.R. 897, 901-03. Several monthly expenses, including the allowances, were deemed improvident and unreasonable. *Id.* at 902-03. The case was dismissed for substantial abuse; the court would not condone the debtor's excesses. *Id.* at 903. Similarly, the case in *In re Mastromarino*, 197 B.R. 171 (Bankr. D. Me. 1996), was dismissed for substantial abuse where the debtor had been supporting his domestic partner and her minor children. Those expenses were disallowed since the debtor had no legal obligation to support them while he did have a legal obligation to pay his creditors. *Id.* at 178-79 (citing therein several cases discussing the support of non legal

dependents). Private school tuition for his own two children, which was ordered by a divorce court, was an allowed expense. *Id.*

A review of cases discussing educational expenses for minor and adult children was set forth in *In re Attanasio*, 218 B.R. 180, 231, n.77 (Bankr. N. D. Ala. 1998).[4] The majority of the listed courts concluded that a debtor does not have the right to file bankruptcy and force creditors to finance the private schooling. *Id.* at 231. Upon a review of those cases, the court in *Attanasio* cast a narrower eye and found that a general prohibition against such school expenses was not warranted under the Bankruptcy Code and that Congress had not preferred general creditors over a debtor's child's education, the support of adult dependents such as aging parents, or the support of a live-in mate's children. *Id.* at 231-34. Instead, the court held that a debtor cannot give income away to someone who does not need it. *Id.* at 233. Further, the spending on others should be for necessaries. *Id.*

In *In re Stallman*, 193 B.R. 491 (Bankr. W.D. Mich. 1996), the court disallowed a debtor's expenditures for his adult son, which included tuition, books, and some living expenses. The debtor was unable to provide a compelling reason for the support other than

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[4] Another recitation of cases that discuss this issue is set forth in the unpublished decision of *In re Wilkins*, Bankr. No. 96-35061, 1997 WL 1047545, slip op. at 4-5 (Bankr. D. Minn. March 26, 1997). The court in *Wilkins* adopted the "legal obligation to support" standard when a debtor proposes a budget that includes support of third parties. *Id.*

his personal choice. *Id.* at 496. Further, some of the debtor's and son's living expenses could be reduced without significantly depriving the debtor of necessities. *Id.* at 496-97.

In addition to the support of adult children, another issue in this case is whether voluntary contributions to employer-sponsored savings plan should be included in a substantial abuse analysis. That issue was recently addressed in *In re Norris*, 225 B.R. 329, (Bankr. E.D. Va. 1998). There the court held such contributions could not be made, though matched by the employer, because it would divert funds otherwise available to pay creditors. *Id.* at 333 (citing *In re Jarrell*, 189 B.R. 374, 379 (Bankr. M.D.N.C. 1995)).

III.

It is clear from Debtors' Schedule J, their testimony, and the United States Trustee's exhibits that Debtors have the ability to fund a Chapter 13 plan and repay a significant portion of their unsecured debt. Accordingly, their Chapter 7 case will be dismissed absent a voluntary conversion to Chapter 13.

Debtors simply live beyond their means and have not taken any steps to reduce excessive expenses so that they can pay their creditors. As shown by the United States Trustee, the temporary reduction of several voluntary expenses over three to five years would permit Debtors to substantially reduce their unsecured debt. While a newer car, participation in a savings plan, the ability to work at home, a move to a warmer climate, and cell phones may have legitimate purposes, such optional expenditures are not always

possible nor reasonable. Further, while Debtors' present jobs are not cast in stone, this family faces no more uncertainty than most that would justify supplemental term life insurance on Debtor Robert Mendelsohn, who has one policy through his employer, or Thrift Savings contributions by Debtor Susan Mendelsohn, whose employer provides other retirement benefits in addition to Social Security. Options such as these can be exercised when creditors have been paid.

While the Court will not dictate what belt tightening needs to be done, there are many ways it can and must be done. Debtors need to make obvious lifestyle changes. However, to date, they have shown no effort to do so. Accordingly, to allow this Chapter 7 case to continue would be a substantial abuse of the bankruptcy system where a Chapter 13 plan could be funded if Debtors incurred only reasonable expenditures.

An order dismissing the case will be entered in ten days if a motion for conversion to Chapter 13 has not been filed by Debtors under F.R.Bankr.P. 1017(d).

Dated this 10 day of November, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)

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: _____
Date: 11-10-98

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
NOV 10 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 98-40099 Form id: 122 Ntc Date: 11/10/1998 Off: 4 Page : 1
Total notices mailed: 6

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