

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 01-41133
) Chapter 7
TAMARA JO JOHNSON)
a/k/a Tammy J. Johnson) DECISION RE: MOTION FOR
Soc. Sec. No. [REDACTED]-3517) JUDGMENT ON THE PLEADINGS
)
Debtor.)

The matter before the Court is the Motion for Judgment on the Pleadings and supplement filed by the United States Trustee and Debtor's responses. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's interim findings of fact and conclusions of law under Fed.R.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Motion must be denied because the current record is insufficient to rule as a matter of law.

I.

Tamara J. Johnson ("Debtor") filed a Chapter 7 petition. She is a young widow with two minor-age sons. She is employed as a radiology technologist at an area hospital. According to her schedules, her take home pay, after deductions for payroll taxes and Social Security, is \$1,548.05. Debtor also receives \$728 per month from the State of South Dakota Retirement System as a benefit from her late husband's retirement account. She also receives, on behalf of each child, \$516 each (a total of \$1,032) from Social Security. Her family's monthly expenses total \$1,638.

Debtor has scheduled general, unsecured claims totaling

\$166,317.41. Many were for medical expenses incurred during her husband's illness; others arose from credit card charges. Debtor acknowledged in her schedules that some of the medical expenses may yet be paid by insurance. She has also listed a student loan creditor as a priority creditor for \$14,000, but the statutory basis for that priority is unclear. Debtor has already reaffirmed her home mortgage.

At the § 341 meeting of creditors, Debtor testified that she now receives \$728 per month from the State of South Dakota's retirement system and that she also receives \$1,000 in Social Security per month on her children's behalf. Based on this testimony and based on Debtor's household income and expenses as reported in her schedules, the United States Trustee calculated that Debtor had around \$1,100 in disposable income per month to fund a Chapter 13 plan. Thus, the United States Trustee moved to dismiss Debtor's case under 11 U.S.C. § 707(b) for substantial abuse.

In her response, Debtor acknowledged that she received \$500 in Social Security payments for her minor sons' benefit and that, after filing, she learned that she would receive the survivor benefits of \$728 from the state retirement system. She argued, however, that her sons' Social Security benefits cannot lawfully be used to pay her or her late husband's debts, but must be used

exclusively for the children's benefit. She also argued that the necessity for a new car and her children's grief counseling will increase her monthly expenses. Thus, she urged the Court to not dismiss her Chapter 7 case.

The United States Trustee filed a motion for judgment on the pleadings. She argued that even with an additional expense for her children's counseling, Debtor still has disposable income of \$1,000 a month to fund a Chapter 13 plan. The United States Trustee also urged the Court to follow its earlier decision in *In re Pamela E. Beauchamp*, Bankr. No. 97-50487, slip op. at 7 (Bankr. D.S.D. May 28, 1998).

In her response to the motion for judgment on the pleadings, Debtor again urged the Court to exclude her children's Social Security benefits from the calculation of her disposable income. She said the facts presented here are distinguishable from those presented in *Beauchamp*, and she again argued that the funds intended for their benefit should not be used to pay their late father's medical bills.

The United States Trustee supplemented her motion for judgment on the pleadings. Therein, she stated that Debtor actually receives \$516 for each of her children for a total of \$1,032 per month. Thus, when Debtor's monthly expenses are deducted, Debtor still has \$1,100 in disposable income to fund a plan. The United

States Trustee agreed that Debtor did not have the ability to fund a Chapter 13 plan if her children's Social Security benefits are excluded from the household income, but she continued to urged the Court to rely on *Beauchamp*. Debtor responded to the supplement by again urging the Court to exclude the Social Security benefits from her disposable income calculation.

II.

Applicable law - § 707(b). 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 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); *Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995)).

Use of children's Benefits in a § 707(b) disposable income calculation. Several courts have concluded that exempt funds may constitute disposable income in a Chapter 13 case. *Taylor v. United States (In re Taylor)*, 212 F.3d 395, 397 (8th Cir. 2000); *Koch*, 109 F.3d at 1288-90; *Bibb County Department of Family & Children Services (In re Hammonds)*, 729 F.2d 1391, 1394 (11th Cir. 1984) (a debtor may use AFDC payments to fund a Chapter 13 plan); *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 nondebtor spouse have been considered within the Chapter 13 debtor's disposable income, especially when the children's or nondebtor 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).

These courts 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 plan. See *Hagel*, 184 B.R. at 798. As stated in *Hammonds*, where the court held that AFDC payments, which are primarily designed to benefit a family's children, can be used to fund a Chapter 13 plan, "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 1396 (cite therein).

III.

The Court needs to receive evidence on two subjects. Therefore, the United States Trustee's Motion for Judgment on the Pleadings will be denied.

In a disposable income calculation under § 707(b), the law is clear that if a debtor is going to include his or her children's expenses in the household expenses, then benefits intended to pay for the children's expenses must also be included. Stated another way, a debtor may exclude children's benefits from a disposable income calculation only if the children's expenses are also excluded. The Court does not have before it that portion of

Debtor's household expenses that are attributable to her sons. That is, the record does not establish what portion of Debtor's expenses for food, clothing, utilities, etc., are for her sons' benefit. Only with that information can the Court apply § 707(b) without also factoring in the Social Security benefits that Debtor receives on her sons' behalf.

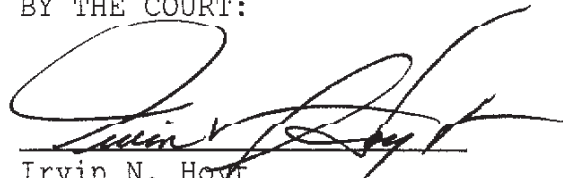
The United States Trustee's Motion for Judgment on the Pleadings will be denied so that Debtor may establish her sons' share of the household expenses at an evidentiary hearing. The Court cautions Debtor, however, that her testimony alone may not be sufficient. Her testimony should be supported by the family's actual financial records for expenses and other reliable evidence.

The present record is also not sufficient regarding the total amount of unsecured claims against Debtor. Her schedules indicated that some medical bills may yet be paid by insurance. Debtor and her attorney need to work with Debtor's insurance company(ies) to reassess all claims as scheduled to insure that each is correct. Debtor will then need to file an amendment to the schedules as may be necessary. Over five months have elapsed since this case was filed, so more accurate claims records should now be available. Only when the total amount of unsecured claims are better known can the Court accurately assess Debtor's ability to repay them through any disposable income she may have.

An order denying the United States Trustee's Motion for Judgment on the Pleadings will be entered. Assistant United States Trustee Bruce J. Gering and Debtor's counsel, Wanda Howey-Fox, shall confer and advise Nita Sarvis, Scheduling Clerk, regarding a mutually agreed date for an evidentiary hearing, which shall be no later than May 21 or 22, 2002.

Dated this 21st day of March, 2002.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Marla Nelson
Deputy Clerk



I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list

MAR 22 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By: MN

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

MAR 22 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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