

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN RE:)	CASE NO. 04-51955
)	
Joseph P. Olivera, Jr. And Patricia Susan)	CHAPTER 7
Lee,)	
)	JUDGE MARILYN SHEA-STONUM
DEBTOR(S))	
)	ORDER RE: MOTION TO DISMISS

This matter is before the Court on the Motion of the United States Trustee for Region 9 (the "UST") to Dismiss the above-captioned bankruptcy case pursuant to section 707(b) of the Bankruptcy Code [docket # 11] (the "Motion to Dismiss") and the objection (the "Objection") of Joseph Olivera ("Mr. Olivera") and Patricia Lee ("Ms. Lee" and together with Mr. Olivera, the "Debtors") to the Motion [docket ## 14 and 15]. The Court held a hearing on the Motion and the Objection on September 14, 2004. Appearing at the hearing were Gregory Plesich, counsel for the Debtors, and Derrick Rippy, Trial Attorney for the UST. Prior to the hearing counsel filed Stipulations of Fact (the "Stipulations") [docket # 18].

Jurisdiction

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). Based upon the statements of counsel, the Stipulations and the evidence presented during the hearing, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

The Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on April 14, 2004. The Debtors reside in a 900 square foot house in Cuyahoga Falls, Ohio and support, at least partially, Ms. Lee's sons, ages 20 and 17.

The Debtors are employed at Alltel Communications, Inc. (and have been for fifteen years). Mr. Olivera earns approximately \$60,000 per year and Ms. Lee earns approximately \$40,000 per year. Stipulation of Facts, ¶ 7. Over the course of their employment with Alltel, the Debtors have managed to accumulate two Alltel 401(k) accounts in the amounts of \$14,236 and \$8,233, respectively, and two Alltel Profit Sharing Plans in the amounts of \$46,717 and \$38,652, respectively. Stipulation of Facts, ¶ 10. At the time of the hearing, the Debtors had not claimed an exemption in either the 401(k) accounts or the profit sharing plans.¹

Ms. Lee testified that when she began working at Alltel fifteen years ago, she earned significantly less than she is currently earning. At that time she was a single mother of two young sons. Ms. Lee testified that during this time she was earning around \$13,000 per year and incurring approximately \$5,600 in child care expenses. According to Ms. Lee this started the “vicious cycle” which led her to her current financial situation. Ms. Lee testified that many of the debts listed on the Debtors’ Schedule F are carryovers from this time (before she married Mr. Olivera in 1996). Schedule F identifies approximately \$51,000 of the \$88,317

¹ The day after the conclusion of the hearing, the Debtors filed an amended schedule C claiming an exemption with respect to each of the 401(k) accounts and profit sharing plans [docket # 19].

Mr. Plesich apparently spent very little, if any, time with the Debtors in reviewing their exemptions prior to the filing of this case. Not only does it appear that Mr. Plesich failed to counsel the Debtors with respect to their exemptions, it seems that he did not counsel them respect to chapter 13 of the Bankruptcy Code. Mr. Plesich indicated to the Court that he does not do chapter 13 work. If Mr. Plesich chooses not to provide the full complement of bankruptcy services, he should be wary of taking on debtor clients who have income in excess of \$100,000. As a part of this Order, the Court is advising Mr. Plesich to attend the half-day seminar regarding the basics of Chapter 13 to be presented by the Chapter 13 Trustee’s office on February 25, 2005 if he plans to continue representing debtors before this Court.

in unsecured nonpriority claims as claims against Ms. Lee. Sixteen of the nineteen claims listed on Schedule F are consumer credit card debt. Stipulation of Facts, ¶ 2.

Ms. Lee testified that to try to make ends meet, in 2001, she began working a second job as a cashier at Giant Eagle earning approximately \$400 per month. In early 2004, Ms. Lee quit her second job because the demands of a second job were taking their toll on her health.

Ms. Lee testified that her eldest son, Nathan Lee, attends Kent State University. According to Ms. Lee, her son recently lost his job and she is helping him with expenses, including monthly car payments on a 2001 Chevy Cavalier (Ms. Lee co-signed the loan) and car insurance payments, cumulatively totaling approximately \$291 per month. Ms. Lee is also assisting with the cost of books and other miscellaneous items, including certain dental work that her son required. According to Ms. Lee, these expenses are not listed on her amended schedules.

Ms. Lee's younger son, Brandon Lee, is currently working part time in construction, but, as Ms. Lee testified, he is not earning enough to be completely financially independent. Ms. Lee's younger son is driving a 1986 Pontiac which requires frequent repairs. Therefore, Ms. Lee is paying expenses for her youngest son which include, *inter alia*, repair bills (*see* Exhibits B-D²), and car insurance bills in the amount of \$125 per month. According to Ms. Lee, these expenses are not listed on her amended schedules.

Debtors' initial schedules I and J list net monthly income and expenses of \$6,340 and \$3,123, respectively. Stipulation of Facts, ¶¶ 3, 5. The Debtors' amended schedules I and J

² Exhibit B is a Repair Order dated January 18, 2004 from Paris Automotive Repair & Tech Service ("Paris") regarding a 1986 Pontiac in the amount of \$357.35. Exhibit C is a Repair Order dated February 20, 2004 from Paris regarding a 1986 Pontiac in the amount of \$402.24. Exhibit D is a Repair Order dated June 2, 2004 from Paris regarding a 1986 Pontiac in the amount of \$62.55. The Repair Orders total \$822.14

list net monthly income and expenses of \$5,487 and \$4,743, respectively. Stipulation of Facts, ¶¶ 4, 6. Although the Debtor's amended schedules show \$744 in excess income each month, Ms. Lee testified that there are additional expenses, largely those related to the support of her sons which are not listed on the schedules.³

The Debtors prepared a spreadsheet, submitted to the Court as Exhibit 3, which purportedly details all of the Debtors' income and expenses from November, 2003 through June, 2004. According to this spreadsheet, the Debtors have some income in addition to their salaries. Over the 8 month period covered by the spreadsheet, the Debtors had "other income" of \$4,655.40. This income is not listed on the Debtors' amended schedules. The spreadsheet shows that the Debtors' monthly income ranges from \$5,685.36 to \$9,323.99 and their monthly expenses range from \$5,153.52 to \$9,240.82. According to the spreadsheet, the Debtors had excess income in May 2004 of \$531 and in June 2004 of \$320, but the Debtors' expenses exceeded their income in the months of March and April, 2004 by \$58.24 and \$524.96, respectively. Ms. Lee testified that there is never any extra money at the end of the month.

The spreadsheet lists expenses for "Insurance Payments-Patty" of approximately \$300 per month. No testimony clarified whether this category of expenses includes the car insurance payments being made by Ms. Lee on behalf of her sons. Similarly, the category of "Auto Maintenance" contains an entry in the amount of \$873 in January 2004. No testimony clarified whether that amount includes any of the repair bills paid by Ms. Lee on behalf of her

³ On amended Schedule I, the Debtors subtract from their gross income savings of \$152 per month which Ms. Lee testified is used to pay the taxes listed on their amended Schedule J. This is double counting. Therefore, from a review solely of the Debtors' amended schedules, it appears that the Debtors have monthly excess income of \$896 (\$744 plus \$152).

son.

In addition, the Debtors have reaffirmed their obligations with respect to three vehicles: a 2003 Dodge Truck (driven primarily by Mr. Olivera), a 2003 Honda Motorcycle (driven primarily by Mr. Olivera) and a 2001 Chevrolet Cavalier (driven by Ms. Lee's eldest son). The Debtors' Statement of Intentions indicates they also intend to reaffirm the obligation with respect to the 2000 Dodge Cirrus (driven primarily by Ms. Lee). The Debtors' amended schedules and their spreadsheet show monthly payments in the approximate amount of \$990. This amount does not appear to include the monthly payment on the 2000 Dodge Cirrus.

Discussion

The UST argues that the Court should dismiss the Debtors' chapter 7 petition as a substantial abuse of the system, because the Debtors earn a combined income in excess of \$100,000 and have a monthly surplus over their expenses (not including those of their grown children) of at least \$744 with which a chapter 13 plan could be funded. The UST argues that the expenses of Ms. Lee's adult (or nearly adult) children should not be allowed to reduce the amount of the Debtors' disposable income available for funding a chapter 13 plan. Further, the UST argues, even if the Debtors were allowed to apply some of the children's expenses to reduce their disposable income, say \$600 per month, the Debtors would still have excess income of at least \$150 per month.

Section 707(b) of the Bankruptcy Code provides:

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 this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

The term “substantial abuse” is not defined in the Bankruptcy Code, however, the Sixth Circuit Court of Appeals has determined that a finding of “substantial abuse” can be predicated upon a showing of either a lack of honesty or a want of need. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). The UST argues that these Debtors are not needy of a discharge of their debts in exchange for a liquidation of their assets.⁴ Because of the statutory presumption in favor of granting the debtors a discharge, the UST bears the burden of proof on this issue. *See Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 431 (6th Cir. 2004); *In re Regan*, 269 B.R. 693, 696 (Bankr. W.D. Mo. 2001).

To determine whether debtors are “needy,” courts analyze the debtor’s ability to repay debts out of future earnings. *In re Krohn*, 886 F.2d at 126. In addition, courts may consider certain other factors, including, whether the debtor enjoys a stable source of income, whether the debtor’s expenses can be reduced significantly without depriving the debtor of adequate food, clothing, shelter and other necessities, and whether the debtor’s financial situation is the result of an unforeseen catastrophic event. *In re Behlke*, 358 F.3d at 437.

The debtor’s ability to repay debts out of future earnings, alone, may be sufficient to warrant dismissal. *Id.* at 438. For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. *In re Krohn*, 886 F.2d at 126. One method of determining whether debts can be repaid out of future earnings is to evaluate whether debtors can fund a chapter 13 plan. *In re Behlke*, 358 F.3d at 435.

Chapter 13 plans are funded with disposable income. Disposable income is defined as “income which is received by the debtor and which is not reasonably necessary to be

⁴ The UST has not challenged the Debtors’ honesty or good faith.

expended for the maintenance or support of the debtor or a dependent of the debtor.” 11 U.S.C. § 1325(b)(2)(A).

The outcome in this case is driven largely by whether the expenses for the support of a debtor’s adult (or almost adult) children can be deducted in determining disposable income.

Most courts answer this question on a case by case basis.

Some courts have determined that a debtor's expenses to support his or her adult children, parents or grandchildren are reasonably considered in calculating the debtor's disposable income. See, e.g., *In re Smith*, 269 B.R. 686, 689-90 (Bankr.W.D.Mo.2001) (expenses of 20- year-old daughter living at home and attending college); *Howell v. The Education Resources Inst. (In re Howell)*, 1996 WL 1062559, *4 (Bankr. N.D.Ala. Jan.5, 1996) (mother); *In re Gonzales*, 157 B.R. 604, 609-11 (Bankr.E.D.Mich.1993) (19- and 21-year-old children attending college); *In re Tefertiller*, 104 B.R. 513, 515 n. 1 (Bankr.N.D.Ga.1989) (21-year-old daughter); *In re Wegner*, 91 B.R. 854, 859 (Bankr.D.Minn.1988) (adult children and grandchildren); *In re Tracey*, 66 B.R. 63, 67 (Bankr.D.Md.1986) (mother).

Other courts have declined to find individuals, although arguably dependent upon the debtor, to be "dependents" under the Bankruptcy Code, even in the face of a legal or familial relationship. See, e.g., *In re Beharry*, 264 B.R. 398, 404 (Bankr.W.D.Pa.2001) (second wife's minor child); *In re Cox*, 249 B.R. 29, 32 (Bankr.N.D.Fla.2000) (mother, fiancé and fiancé's children); *In re Haddad*, 246 B.R. 27, 37 (Bankr.S.D.N.Y.2000) (mother); *In re Duncan*, 201 B.R. 889, 893, 897 (Bankr.W.D.Pa.1996) (six members of household); *In re Mastromarino*, 197 B.R. 171, 178-79 (Bankr.D.Me.1996) (domestic partner and her four children); *In re Richmond*, 144 B.R. 539, 542 (Bankr.W.D.Okla.1992) (grandchildren); *In re McKean*, 81 B.R. 9, 11 (Bankr.W.D.Tex.1987) (co-tenant and co-tenant's daughter).

In re Meler, 295 B.R. 625 (D. Ariz. 2003).

As a general rule, except where the support is demonstrated to be excessive or of an unreasonable level, the support of one's children--even when they are over the age of minority--or other family members will be deemed a legitimate expense for purposes of computing disposable income in this District, absent extraordinary circumstances or bad faith. Cf. *In re Meyer*, 173 B.R. 419, 426 (Bankr.D.Kan.1994)(reasonable expenses for education and support of adult children may be deducted when determining disposable income)(and cases referenced therein). The computation of disposable income is made based upon the income and expenses as of the date of trial, not as of the date of the petition. See *In re Jodoin*, 209 B.R. 132, 142 (9th Cir. BAP 1997); see also *In*

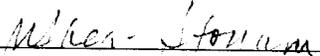
re Pino, 268 B.R. 483, 498 (Bankr.W.D.Tex.2001).

In re Rushlow, 277 B.R. 216 (Bankr. D. Vt. 2002). This Court agrees that, except where the support is demonstrated to be excessive or of an unreasonable level, the support of an adult or almost adult child is a legitimate expense for purposes of computing a debtor's disposable income.

In this case, the Debtors are not living extravagantly, nor are Ms. Lee's sons. The Debtors are merely attempting to put Ms. Lee's sons on a path which will lead them beyond a minimum wage, paycheck-to-paycheck lifestyle. Based on the testimony of Ms. Lee, the Court finds that the excess income that appears to exist on the Debtors' amended schedules and spreadsheets disappears when the expenses for the support of Ms. Lee's sons are subtracted. The expenses of her adult (or almost adult) children are reasonable and constitute legitimate expenses for purposes of computing the Debtors' disposable income.

Therefore, the Court finds that the Debtor's excess income is illusory. The Debtors are spending their money on things which are, at least on the evidence presented in this case, reasonably necessary to be expended for the maintenance or support of the Debtors and their dependents. The Debtors do not have disposable income with which to fund a chapter 13 plan. The UST has not met its burden of proving that granting the Debtors the relief they requested would be a substantial abuse pursuant to § 707(b). The Motion to Dismiss is not well taken and it is denied.

IT IS SO ORDERED.



MARILYN SHEA-STONUM
Bankruptcy Judge



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of December, 2004, the foregoing Order was sent via regular U.S. Mail to:

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