

IN THE UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
Eastern Division

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

**In Re:**

**In Proceedings Under Chapter 13**

**WILLIAM NIGHTINGALE  
JACQUELINE NIGHTINGALE**

**Case No.: 03-22539**

**Debtors.**

**JUDGE RANDOLPH BAXTER**

**MEMORANDUM OF OPINION AND ORDER**

Before the Court is the Motion of William and Jacqueline Nightingale, Debtors, for Hardship Discharge. The Motion is unopposed. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. The Debtors' Motion presents a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O). After the conclusion of a duly noticed evidentiary hearing, an examination of the evidence submitted and a review of the record, generally, the following factual findings and conclusions of law are rendered.

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The Debtors filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on September 19, 2003. The Debtors have paid approximately \$41,000 into their Chapter 13 plan, or a 67% dividend to unsecured creditors. In a Chapter 7, unsecured creditors would have received approximately \$18,000.00. At trial, the Debtor-wife testified that she is no longer able to work due to chronic pain following multiple foot surgeries. Her application for disability benefits was denied. That denial is currently on appeal, with no hearing date set as of the date of the evidentiary hearing before this Court.

Debtors filed two motions for moratorium, which were granted by this Court. To date,

Debtors have not filed an Amended Schedule I or J, to reflect any change in their income or expenses. Debtors allege that modification of their plan is impracticable because the loss of Debtor-wife's income leaves them with no disposable income, based on the schedules I and J as they were filed in 2003. At trial, the Debtor-husband testified that they have incurred substantial medical bills, but no specific figures were provided.

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The dispositive issue is whether the Debtors have met their burden to receive a hardship discharge pursuant to 11 U.S.C. § 1328(b).

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The statutory authority for the award of a hardship discharge is 11 U.S.C. § 1328(b), which provides:

(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title [11 U.S.C.S. §§ 707 et seq.] on such date; and
- (3) modification of the plan under section 1329 of this title [11 U.S.C.S. § 1329] is not practicable.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

The three requirements found in § 1328(b) are in the conjunctive, and requires the debtor to comply with each subsection. In re Dark, 87 B.R. 497, 499 (Bankr.N.D.Ohio 1988)(Baxter, J).

The granting of a hardship discharge is discretionary with the Court. Id. at 498; In re Krayeski, 1994 WL 118039, \*2 (Bankr.N.D.Ohio 1994)(Williams, J.)(court has discretion to grant a hardship discharge only after the thresholds contained in Section 1328(b)(1), (2), and (3) have been met). Chapter 13 debtors seeking hardship discharge bear the burden of proof, and must satisfy the bankruptcy court on all three elements set forth in the statute. 11 U.S.C. 1328(b); In re Spencer, 301 B.R. 730 (8th Cir.BAP 2003); In re Bandilli, 231 B.R. 836 (1st Cir.BAP 1999).

The requirement that modification of the plan be “impracticable” is met when the payment period of the plan has exceeded the five year limit set by § 1322(c)(court may not approve plan providing for payments over period longer than five years). In re White, 126 B.R. 542 (Bankr.N.D.Ill. 1991). As Collier provides, “[m]odification of the plan is thus a solution to the debtor's problems which is preferred by the Code. It should be attempted whenever it is feasible for the debtor, who could thereby preserve the normal Chapter 13 discharge.” 5 Collier on Bankruptcy, P 1328.01 [2][b][ii] at 1328-17 (15th ed. 1991).

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Herein, the Debtors have failed to meet their burden with respect to the third element found in § 1328(b), that plan modification is unfeasible. At the hearing on Debtors’ Motion, they presented three pieces of evidence: 1) Debtor-wife’s application for disability; 2) her request for a hearing on the denial of her application; and 3) a “work ability” form filled out by one of her treating physicians indicating that the Debtor-wife suffers from chronic pain associated with her foot surgeries. None of the offered evidence supports a conclusion that modification of the Debtors’ plan is unfeasible. Both co-debtors testified regarding their respective work histories, and the Debtor-husband testified regarding his current job and income, but neither offered

specific testimony with respect to their current expenses. Debtors' counsel made the conclusory statement that because Debtor-wife's income was more than their plan payment, it necessarily follows that modification would be infeasible. But there was no evidence before the Court regarding the Debtors' current expenses. Such conclusory statements are insufficient to satisfy the burden under § 1328(b) for a hardship discharge. See Dark, 87 B.R. at 498 (stating that "unsubstantiated and conclusory statements are insufficient" to satisfy the hardship discharge requirements.) Debtors never attempted to amend their schedules I and J to reflect their current income and expenses, nor does the record reflect a modified budget. Debtors' testimony at the evidentiary hearing also failed to provide the Court with sufficient evidence to conclude that the requirements of § 1328(b) are satisfied. Accordingly, Debtors' Motion for a Hardship Discharge is hereby denied, without prejudice.

**IT IS SO ORDERED.**

Dated, this 7<sup>th</sup> day of  
April, 2008.

  
**JUDGE RANDOLPH BAXTER**  
**UNITED STATES BANKRUPTCY COURT**