



SO ORDERED.

SIGNED this 24 day of July, 2007.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

SHIRLEY ELAINE WALKER,

DEBTOR.

CASE NO. 07-10498-7

CHAPTER 7

**OPINION DENYING TRUSTEE'S MOTION TO RECONSIDER ORDER
GRANTING DEBTOR'S APPLICATION FOR WAIVER OF THE CHAPTER 7
FILING FEE**

This Chapter 7 case came before the Court on July 19, 2007, for a hearing on the Trustee's Motion to Reconsider Order Granting Debtor's Application for Waiver of the Chapter 7 Filing Fee. Trustee Linda S. Parks appeared on her own behalf. The Debtor objected to the motion and appeared by James P. Rupper of Powell, Brewer & Reddick, L.L.P. The Court must determine whether to vacate the order granting a waiver of the Debtor's bankruptcy filing fee. For the reasons stated below, the Court concludes that the Debtor meets the qualifications for a fee waiver under 28 U.S.C.A. § 1930(f)(1), and

therefore, the Trustee's motion will be denied.

FACTS

Debtor Shirley Elaine Walker filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on March 14, 2007. On the same day, she filed an application for waiver of the Chapter 7 filing fee, and Linda S. Parks was appointed as acting Trustee of the Debtor's bankruptcy estate. The next day, the Court granted the application for waiver. A few weeks later, the Debtor appeared at the meeting of her creditors convened as required by § 341(a) of the Code. The content of the Trustee's questioning is unclear, but on the day of the meeting, the Trustee filed her motion to reconsider the fee waiver. Either the Debtor confirmed information the Trustee had already gathered, or the meeting produced new information that caused the Trustee to file this motion.

The Trustee claims that the \$768 the Debtor listed as income on her Schedule I is inaccurate because the Debtor failed to disclose several other sources of income. First, the Trustee claims that since the Debtor is living with her ex-husband, she is obliged to include his income on Schedule I. Second, the Trustee alleges that "just prior to filing the petition," the Debtor received over \$700 in income tax refunds. The actual date the Debtor received the refunds is unclear from the record. Finally, the Trustee argues that because the Debtor can pay her car payment of \$197 per month, she should be able to pay the filing fee.

As indicated, the Debtor objected to the Trustee's motion. In an affidavit submitted with the objection, the Debtor claims that she is in the same financial position

as when she submitted the application for fee waiver. She continues to work part-time at Pet Smart. The Debtor acknowledges that she is staying at her ex-husband's home, but claims the arrangement is temporary and resulted from her inability to afford a place to stay. She had described her living situation in similar terms on her fee waiver application. She had also reported on her "Chapter 7 Statement of Current Monthly Income and Means-Test Calculation" form that another person had been paying \$200 per month toward her household expenses during the six months before she filed for bankruptcy. In her affidavit, she explained that was the room and board her ex-husband has been providing her.

DISCUSSION

The option for individual debtors to request a waiver of the fee usually imposed for filing a Chapter 7 bankruptcy case was created by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.¹ The option appears at 28 U.S.C.A. § 1930(f), the relevant portion of which states:

(1) Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under Chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line . . . applicable to a family of the size involved and is unable to pay that fee in installments.²

Acting on the authority given by the provision, the Judicial Conference of the United

¹See Pub. L. No. 109-8, § 418, 119 Stat. 23, 108-09 (2005).

²28 U.S.C.A. § 1930(f)(1) (West 2006).

States has issued Interim Procedures advising courts how to handle fee waiver requests.³ First, the Procedures tell courts to use the poverty guidelines published by the Department of Health and Human Services to determine whether a debtor's income is less than 150 percent of the poverty line.⁴ The Procedures explain how to determine family size, specify which report of the debtor's income to compare to the poverty guidelines, and direct courts to consider the totality of the circumstances in determining whether the debtor is unable to pay the filing fee in installments.⁵ Finally, the Procedures put the burden squarely on the debtor to prove that the fee waiver is justified.⁶

When a trustee brings a motion to reconsider, the debtor carries the burden of proving by a preponderance of the evidence that the court justifiably granted the waiver.⁷ The Procedures briefly mention when an order granting a fee waiver may be vacated; however, they do not explain the process in detail.⁸ They merely say, "The court may vacate an order waiving the filing fee if developments in the case or administration of the estate demonstrate that the waiver was unwarranted."⁹ Although courts are normally

³See Judicial Conference of the United State Interim Procedures Regarding the Chapter 7 Fee Waiver Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (promulgated Aug. 11, 2005), *available at* <http://www.uscourts.gov/bankruptcycourts/jcusguidelines.html> (hereafter "Procedures").

⁴See Procedures, § II(A)(1).

⁵See Procedures, § II(A)(1) through (5).

⁶*Id.* at § II(A)(6).

⁷*In re Burr*, 344 B.R. 234, 236 (Bankr. W.D.N.Y. 2006).

⁸See Procedures, § III(B).

⁹*Id.*

somewhat reluctant to reconsider orders that have been issued, the form fee waiver order itself, in language echoing the part of the Procedures just quoted, explicitly advises the debtor that the granting of the fee waiver might be vacated later.¹⁰

Chapter 7 trustees are entitled to be paid a portion of the filing fee,¹¹ so they have a monetary stake in the outcome of a fee waiver application.¹² Because this case appears to be a no-asset one (like most of the Chapter 7 cases filed in this District), the Trustee will not be paid at all for administering the bankruptcy estate unless the fee waiver is vacated. Besides having a monetary interest in the filing fee, Chapter 7 trustees also have a duty to investigate the financial affairs of the debtor,¹³ a duty they need time to fulfill.¹⁴ On the other hand, a debtor's application for a fee waiver must be filed along with his or her Chapter 7 petition,¹⁵ and if the waiver is denied, the debtor must finish paying the filing fee no later than 120 days after filing the petition unless the court extends the time, for cause, to 180 days.¹⁶ Since debtors who have a waiver of the filing fee denied will

¹⁰See Official Bankruptcy Form 3B (dated "04/09/06").

¹¹See 11 U.S.C.A. § 330(b)(1) & (2) (Chapter 7 trustee entitled to \$45 from filing fee, plus \$15 from fees imposed by Judicial Conference of United States). Since April 9, 2006, the filing fee for Chapter 7 cases has been \$245. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 10001, 120 Stat. 4, 183-84. In addition, under the authority of 28 U.S.C.A. § 1930(b), the Judicial Conference has imposed a miscellaneous administrative fee of \$39 for all cases filed under the Bankruptcy Code, and a \$15 trustee fee for all Chapter 7 bankruptcy cases. If the waiver had not been granted, the total amount the Debtor would have owed for filing her case was \$299.

¹²*In re Stickney*, ___ B.R. ___, 2007 WL 1732379, *4 (Bankr. D.N.H. 2007).

¹³*Id.* at *3-4.

¹⁴*In re Markison*, ___ B.R. ___, 2007 WL 1202780, *6-7 (Bankr. D. Vt. 2007).

¹⁵Interim Fed. R. Bankr. P. 1006(c).

¹⁶See Interim Fed. R. Bankr. P. 1006(b)(2).

probably have trouble paying the fee that soon, the court must rule on waiver applications promptly to give such debtors as much time to pay as possible. Consequently, orders granting waivers will ordinarily be entered before the trustee has had time to investigate the propriety of the waiver.¹⁷

In this case, the Trustee filed her motion to reconsider the fee waiver on the day the meeting of creditors was held. The creditors' meeting is usually the first real opportunity for a trustee to elicit testimony about perceived inaccuracies in the debtor's application for a fee waiver. As a result, if the trustee has performed his or her due diligence inquiry at the creditors' meeting, the Court concludes it should entertain a motion to reconsider filed as soon as the one filed in this case.¹⁸

In this case, the Trustee cannot dispute that, considering just the Debtor's income, the Debtor qualifies under the first prong of the two-part test established by § 1930(f)(1). According to the Debtor's bankruptcy forms, her income is less than 150 percent of the poverty line. On Schedule I, she reported her net income as of the day she filed her Chapter 7 petition was \$768.26 per month, or \$9,219.12 per year. According to the United States Courts, 150% of the Department of Health and Human Services 2007 poverty guidelines for a family of one in Kansas is \$1,276.25 per month, or \$15,315 per year.¹⁹

¹⁷*Stickney*, 2007 WL 1732379 at *2-3; *Markison*, 2007 WL 1202780 at *6-8.

¹⁸See *Markison*, 2007 WL 1202780 at *6-8 (announcing intent to presume 60 days from petition date is sufficient time for trustee to seek reconsideration of fee waiver order).

¹⁹Available at <http://www.uscourts.gov/bankruptcycourts/povertyguidelines.pdf>.

Although the Debtor's income is below the poverty guidelines, the Trustee points out that the Debtor is living with her ex-husband and did not include his income on her Schedule I. On Schedule J, the Debtor reported her expenses were only 26 cents per month less than her income. Yet, if her ex-husband's financial information must be considered, she might not qualify for a fee waiver. The Court must determine whether the Debtor's living arrangement has any bearing on the accuracy of her filing. The Debtor did clarify her situation in the fee waiver application. Question 6 asked the Debtor to state her monthly expenses, and Question 7 asked, "Do you expect the amount in Question 6 to increase or decrease by more than 10 % during the next 6 months."²⁰ The Debtor marked the "Yes" box for Question 7. She then explained, "I have to find separate housing. My ex-husband is allowing me to stay at his home until I find separate housing and better employment." The Debtor also stated in the affidavit attached to her objection to the Trustee's motion:

1. I did not include the income of my ex-husband. . . . because I do not have a marital or special relationship with him. . . .
2. My former husband . . . has allowed me to stay with him because I could not afford a place to stay. He and I do not share expenses and he does not disclose his earnings to me.²¹

Further, the Debtor disclosed on her Chapter 7 means-test form that another person had been providing her with \$200 per month in housing expenses, and explained in her affidavit that this was a result of her ex-husband allowing her to live at his home. Absent

²⁰Docket No. 3, "Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments," filed on Debtor's behalf Mar. 14, 2007.

²¹Docket No. 17, Attachment #1, filed Apr. 28, 2007.

any evidence to the contrary, the Debtor's relationship to her ex-husband does not warrant the level of scrutiny the Trustee seeks. The Trustee has produced no evidence to contradict the Debtor's explanation of her living arrangement. Consequently, the Court concludes the Debtor's disclosures were open and truthful, and she did not have to include her ex-husband's income in her Schedules or her application for a waiver of the filing fee.

The Trustee also alleges that the Debtor received over \$700 in income tax refunds just prior to filing her bankruptcy petition. Both the objection and the Debtor's affidavit explain what became of the refunds, although they do not report when she received the refunds. The Debtor stated in her affidavit that she was entitled to a \$687 federal refund and a \$50 state refund, for a total of \$737. From this amount, she paid \$182 to H&R Block, probably for tax preparation and "rapid-refund" services. She paid the balance of \$555 to the attorney who helped prepare her Chapter 7 filing, and paid the attorney's remaining fee from her wages. On the application for the filing fee waiver, the Debtor reported that she paid the attorney a total of \$826.

The Judicial Conference's Procedures specifically state that a debtor is not disqualified from a fee waiver solely because he or she paid an attorney.²² However, the Procedures do not prohibit courts from using the payment as a factor indicating the debtor has the ability to pay the filing fee.²³ Ultimately, the Court must consider the totality of

²²Procedures, § II(A)(5).

²³*In re Nuttal*, 334 B.R. 921, 924-25 (Bankr. W.D. Mo. 2005).

the circumstances in order to determine the Debtor's fee waiver eligibility.²⁴ The Court may question the assertion that the Debtor was able to pay \$271 to her attorney from her wages, but could not come up with the \$299 filing fee. However, the totality of the circumstances includes the following facts: (1) the Debtor used her tax refunds (minus H&R Block's charges) to pay the attorney, (2) she works a part-time job at Pet Smart that nets her less than \$800 per month, (3) she reported on Schedules I and J that her monthly net income is 26 cents, even though her reported expenses are very low and she is temporarily receiving free room and board from her ex-husband, and (4) she has not been shown to have any other source of income. It would be a stretch to think she has sufficient money to pay the filing fee, even if allowed to do so in installments.

This Court recognizes the important role competent lawyers serve in helping clients navigate the Bankruptcy Code, particularly the new requirements of the BAPCPA. The Court sees no reason to penalize a debtor seeking a fee waiver for hiring an attorney, especially because filing without legal help is so frequently detrimental to a debtor's success in the bankruptcy system. Despite the economic impact waiving the filing fee imposes on Chapter 7 trustees, Congress chose to authorize fee waivers in § 1930(f)(1) without limiting that relief to debtors who have not paid for an attorney's help. While a debtor's ability to pay an attorney is some evidence the debtor could also pay the filing fee, the Court is convinced it cannot regard that evidence as conclusive proof in all cases.

Finally, the Trustee argues that because the Debtor's car payment is \$197 per

²⁴*Id.* at 923-25.

month, the Debtor must also be able to pay the filing fee. In *In re Nuttall*, the court said, “Congress has not set forth any guidelines as to what may constitute reasonable expenses . . . and, while the Internal Revenue Service’s guidelines are therefore not controlling . . . they do establish . . . a starting point in determining reasonableness.”²⁵ The *Nuttall* court looked at the IRS standards for expenses such as housing, utilities, and automobiles, and concluded the debtors’ expenses were reasonable since they were well below those standards.²⁶ This approach is not only fair, but also promotes consistency. Under the IRS guidelines, up to \$471 dollars per month should be considered a reasonable amount for automobile ownership expenses.²⁷ The Debtor’s \$197 per month car payment is well within the IRS standards of reasonableness.

CONCLUSION

The parties did not wish to have an evidentiary hearing on this matter, where the Court could hear direct testimony and evaluate the Debtor’s candor. Instead, the parties submitted their dispute for resolution based on the pleadings contained in the record. The Court has therefore based its decision on written representations the Debtor made in her fee waiver application, her bankruptcy schedules, and the affidavit attached to her objection to the Trustee’s motion, all signed under penalty of perjury. The Trustee’s position was supported only by argument.

²⁵334 B.R. at 924.

²⁶*Id.* at 924.

²⁷Since February 2007, the Executive Office of the United States Trustee Program has made the IRS standards available at <http://www.usdoj.gov/ust/eo/bapcpa/20070201/meanstesting.htm>.

The Debtor has carried her burden of showing that the fee waiver was justified, and the Trustee's argument to the contrary is tenuous at best. The Court holds that the Debtor satisfies the first prong of the fee waiver test set by § 1930(f)(1) because her income is less than 150 percent of the poverty line. Further, the Court holds that the Debtor satisfies the second prong of the test because she is unable to pay the filing fee in installments. The Debtor's Schedules I and J show a monthly net income of 26 cents. Interim Federal Rule of Bankruptcy Procedure 1006 requires a debtor to pay the filing fee when he or she files a bankruptcy petition unless the court allows the fee to be paid in up to four installments made within 120 days of filing the petition, although the debtor can get another 60 days to pay by showing cause for that extension.²⁸ The BAPCPA added the new possibility for a debtor who is unable to pay the fee at all, even in installments, to obtain a complete waiver of the filing fee.²⁹ This Debtor's fee waiver application, Schedules I and J, and affidavit supporting her objection to the Trustee's motion all show she is unable to pay the filing fee, and the Trustee has presented no evidence to overcome the Debtor's representations. The fee waiver under § 1930(f)(1) was appropriate in this case. The Trustee's motion to reconsider is therefore denied.

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²⁸Interim Fed. R. Bankr. P. 1006(a) & (b).

²⁹28 U.S.C.A. § 1930(f); Interim Fed. R. Bankr. P. 1006(c).