

The relief described hereinbelow is **SO ORDERED**.

SIGNED this 25th day of April, 2022.




Robert D. Berger
United States Bankruptcy Judge

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

In re:

BENJAMIN DWAIN TRICKEY, JR.,

Debtor.

Case No. 20-20951

Chapter 7

**ORDER DENYING UST'S MOTION FOR SUMMARY JUDGMENT BUT
DIRECTING DEBTOR TO AMEND SCHEDULES I AND J, STATEMENT OF
CURRENT MONTHLY INCOME, AND MEANS TEST CALCULATION**

On May 19, 2021, the Court ruled that the United States Trustee's motion to dismiss this Chapter 7 case for abuse under 11 U.S.C. § 707(b)(3) would require an evidentiary hearing.¹ The UST now moves for summary judgment on his

¹ ECF 29.

§ 707(b)(3) motion, arguing that there is no genuine dispute as to the income of debtor Benjamin Trickey’s non-filing spouse and that such income renders this case abusive under § 707(b)(3), even if Trickey were to prevail at trial as to all remaining contested facts.² Trickey responds that there is a factual dispute as to the amount of his wife’s additional income, and that such additional income—which comprises child support and Social Security disability payments—ought not be considered in determining whether Trickey has the ability to pay his creditors.³ The Court will deny the UST’s motion for summary judgment but order Trickey to amend his Schedules I and J, his statement of current monthly income, and his means test calculation.

Trickey, a pharmacist, filed for bankruptcy under Chapter 7 on June 30, 2020. On his Schedule I, he listed his monthly income as \$9,443.96 plus an \$800 “contribution” from his non-filing spouse, Gissella Osborn. On his statement of current monthly income, Trickey listed his monthly income as \$10,929.14⁴ and that of Osborn as \$800. Trickey explained Osborn’s \$800 at his Rule 2004 examination⁵ in August 2021:

[M]y wife, as part of her divorce settlement with her ex-husband, part of the property settlement, got a terrible

² ECF 84; ECF 85.

³ ECF 88.

⁴ These figures are often different because Schedule I provides a real-time snapshot of income, whereas Official Form 122A-1, “Chapter 7 Statement of Your Current Monthly Income,” averages the debtor’s income over the six full months before he filed his bankruptcy petition.

⁵ Rule 2004 authorizes the bankruptcy court to order the examination of “any entity” on the motion of “any party in interest.” *See* Fed. R. Bankr. P. 2004(a).

[sic] thing where it's basically an annuity that she receives \$800 per month, approximately \$800 per month that is not income but it's a property settlement.⁶

Later in the examination, he elaborated:

[I]t's not child support. It's the -- it's the divorce settlement, property settlement that I mentioned earlier. It's in a -- basically, she gets approximately \$800 a month, and she uses it, and if something comes up that's needed in the house, it would -- she brings it into the house for -- if she needs groceries and we've either used all the grocery money that we had or I had to use it for other expenses, then she makes up that difference, and that's an \$800 amount that she has.⁷

In September 2021, Osborn sat for her own Rule 2004 examination. Osborn testified that she had received two retirement accounts in the property settlement with her ex-husband, and that one of those accounts provides her with monthly payments of \$840.⁸ (The other account contains around \$100,000, but does not generate monthly payments.) Osborn also testified that she receives \$1,200 per month in child support and \$1,900 per month in Social Security disability payments on behalf of the children.⁹

⁶ ECF 85-1 at 4.

⁷ *Id.* at 11.

⁸ *Id.* at 18-20.

⁹ *Id.* at 20, 22. Osborn testified:

My ex-husband retired, I believe, on disability. I'm not fully informed about that because he and I don't talk much, but I know he had to retire and get his Social Security disability, or something. I honestly don't know that because he did that process, I did not. But the kids, his dependents, were beneficiaries of that too

Trickey, who had not previously disclosed the child support and Social Security disability payments, amended his Schedules I and J, statement of current monthly income, and means test calculation in October 2021.¹⁰ However, despite Osborn's testimony, he continued to list her monthly "contribution" on his Schedule I, and her monthly income on his income statement, as only \$800. In the amended Schedules I and J, Trickey decreased his own monthly income by \$2,694.79, increased his monthly expenses by \$1,173, and calculated a monthly net income of -\$722.83. While Trickey's amended income statement (on which he continued to list his own monthly income as \$10,929.14, *see* 11 U.S.C. § 101(10A)) still generated a presumption of abuse under § 707(b)(2), Trickey claimed "special circumstances" of (1) a \$413 monthly student loan payment and (2) a \$4,179.14 monthly "Reduction in Income" on his means test calculation.¹¹ As to that reduction in income, Trickey submitted an unsworn declaration explaining that he had started a new job as a pharmacist in Arkansas with a base salary of \$81,536 per year.¹²

But that is because of their dad having filed for, I believe he filed for disability and retired, and the kids are part of the -- when you have minors, the minors get a Social Security payment as well, I think that's how it works. So the kids will get that until they turn 18, that's my understanding.

ECF 85-1 at 22.

¹⁰ *See* ECF 73; ECF 76.

¹¹ ECF 76.

¹² ECF 81-1 ¶¶ 4, 5. According to the declaration, Trickey "needed to look for work in Arkansas due to [his] elderly mother's declining health and her need for care" after he was "let go" from his previous job in August 2021. *Id.* ¶¶ 1, 3.

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056; Fed. R. Bankr. P. 9014(c). A fact is genuinely disputed if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Taylor v. Roswell Ind. Sch. Dist.*, 713 F.3d 25, 34 (10th Cir. 2013) (citation omitted). A fact is material if it might affect the outcome of the suit under the governing law. *Id.*

Ability to pay creditors is a primary factor in determining whether “abuse” exists under § 707(b)(3). See *In re Stewart*, 175 F.3d 796, 809 (10th Cir. 1999). Here, the UST argues that there is no genuine dispute as to abuse because there is no genuine dispute as to Trickey’s ability to pay:

Trickey understates his wife’s income by \$3,140 per month, even after she testified about it. There is no genuine issue of material fact on this point. Once adjusted, Trickey has monthly net income of more than \$2,400, even before consideration of numerous other items and dubious expenses that could raise that figure. It is therefore unnecessary to reach those other items.¹³

However, imputing additional income to Osborn would not necessarily increase Trickey’s net income (as calculated on Schedule J) by an equal amount. Rather, it would increase Trickey’s net income only to the extent it pays for the expenses in Trickey’s budget. Because the UST points to no evidence as to how Osborn’s additional income is being spent, a genuine dispute remains as to Trickey’s net income (and thus his ability to pay his creditors). In light of that genuine dispute,

¹³ ECF 85 at 14-15.

the Court will deny the UST's motion for summary judgment as to abuse under § 707(b)(3).¹⁴

However, the Court will also order Trickey to amend his Schedules I and J, statement of current monthly income, and means test calculation. As a debtor, Trickey has the duty to prepare his schedule of current income and expenditures “as prescribed by the appropriate Official Forms.” Fed. R. Bankr. P. 1007(b)(1); *see* 11 U.S.C. § 521(a)(1)(B)(ii); Fed. R. Bankr. P. 9009 (requiring use of Official Forms). As an above-median-income debtor in Chapter 7, Trickey is also obligated to file a statement of current monthly income and means test calculation, again “prepared as prescribed by the appropriate Official Form.” Fed. R. Bankr. P. 1007(b)(4); *see* 11 U.S.C. § 707(b)(2)(C); Fed. R. Bankr. P. 9009. And the appropriate Official Forms require a debtor to include child support received by his non-filing spouse. *See* Official Form 106I, line 8c; Official Form 122A-1, line 4. Trickey must therefore amend his Schedules I and J, statement of current monthly income, and means test calculation to include Osborn's child support.¹⁵ (To the extent Trickey argues that

¹⁴ The UST bears the burden of proving abuse by a preponderance of the evidence on his underlying § 707(b) motion. *See In re Smith*, 585 B.R. 168, 175 (W.D. Okla. 2018).

¹⁵ Although Schedule I also includes Social Security income received by a non-filing spouse, *see* Official Form 106I, line 8e, it is not clear from the record whether the Social Security disability benefits at issue belong to Osborn or to the children themselves. *Cf. Family Benefits*, Social Security Administration, <https://www.ssa.gov/benefits/disability/family.html> (last visited Apr. 25, 2022) (providing that ex-spouses and children may be eligible for disability benefits). If the Social Security benefits belong to Osborn, Trickey should include them on his Schedule I; if they belong to the children, Trickey should include them on his Schedule I to the extent they are available to pay the expenses listed on his Schedule J. *See* Official Form 106I, lines 8e, 11.

such child support is subject to a marital adjustment,¹⁶ he should do so in Part 1 of the means test calculation.) Trickey must also amend those documents to include the correct amount Osborn receives from the property settlement—i.e., \$840 rather than \$800. Finally, if Trickey’s tax liability has decreased as a result of his \$4,179.14 reduction in income, he must amend Part 4 of his means test calculation to reflect that decrease as well. With these amendments, a presumption of abuse may arise under § 707(b)(2).

For all of the foregoing reasons, the UST’s motion for summary judgment is hereby denied. However, Trickey is hereby ordered to amend his Schedules I and J, statement of current monthly income, and means test calculation as specified herein.

IT IS SO ORDERED.

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¹⁶ Part 1 of Official Form 122A-2, Chapter 7 Means Test Calculation, allows a debtor to adjust his current monthly income by subtracting any part of his spouse’s income not used to pay for the household expenses of the debtor or his dependents. This “marital adjustment” requires the debtor to “[s]tate each purpose for which the income was used.”