

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

**IN RE: CONNY FREDRIK FREDRIKSSON and
ANGELA RAY FREDRIKSSON, Debtors**

**3:04-bk-24833E
Chapter 13**

MEMORANDUM OPINION

On June 29, 2005, the Court heard an *Objection to Confirmation of Plan* filed by the Chapter 13 Trustee, David D. Coop (the “Trustee”) on May 23, 2005. Bart Ziegenhorn appeared on behalf of the Debtors, who were also present, and Mary Jane Pruniski appeared on behalf of the Trustee. At the close of the hearing, the Court orally ruled that the Trustee’s objection would be sustained, at least in part, because some of the Debtors’ expenses were excessive; however, the Court took under advisement to what extent the expenses must be lowered.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(L), and the Court has jurisdiction to enter a final ruling in this case. The following constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052 (made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014).

INTRODUCTION

The Trustee objects to the Debtors’ proposed plan on three grounds: (1) the Debtors allegedly failed to provide for the scheduled secured debt of the United States Federal Credit Union;¹ (2) payments to unsecured creditors are inconsistent with the Debtors’ disposable income in that Debtors propose to continue making payments on a pre-petition 401(k) loan; and (3) payments to

¹Debtors’ counsel and the Trustee represented that the Debtors have agreed to modify their plan to resolve this objection.

unsecured creditors are inconsistent with the Debtors' disposable income in that Debtors' Schedule J appears to reflect excessive expenses. The Trustee asserts that inappropriate or excessive expenses should be omitted and additional disposable income paid into the Debtors' plan for the benefit of unsecured creditors.

LEGAL STANDARD

Pursuant to 11 U.S.C. § 1325(b)(1)(B), a chapter 13 plan may not be confirmed unless:

the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

"Disposable income" is defined by § 1325(b)(2)(A) as "income which is received by the debtor and which is not reasonably necessary" "for the maintenance and support of the debtor or a dependent of the debtor . . .". As explained by Judge Keith Lundin in his treatise, *Chapter 13 Bankruptcy*, the disposable income test requires the court to judge a debtor's lifestyle choices. See Keith M. Lundin, *Chapter 13 Bankruptcy*, 3d Ed. § 165.1, at 165-7 to 165-9 (2000 & Supp. 2004). While the reported decisions vary widely, most courts find that while debtors are not required to live at the poverty level, they may not indulge in luxuries or an extravagant lifestyle. *Id.*

As one court explained, '[R]easonably necessary . . . [means] sufficient to sustain basic needs not related to . . . former status in society or the lifestyle to which [the debtor] is accustomed.' . . . [Section 1325(b)] contemplates some sacrifices or alteration in prepetition consumption levels.'

Id. at 165-7 (quoting *In re Jones*, 55 B.R. 462, 466 (Bankr. D. Minn. 1985) and *In re Gleason*, 267 B.R. 630, 633 (Bankr. N.D. Iowa 2001)). Although the burden of proof is generally placed on the debtor to persuade the court that the elements required for confirmation are met, § 1325(b) only applies upon objection of an unsecured creditor or the trustee. Accordingly, some courts have held

that the objecting creditor or Trustee has the burden of going forward with the evidence but the ultimate burden of persuasion remains with the debtor to prove that the disposable income test is met. *See Id.* at 165-3 and cases cited therein.

ANALYSIS

I. Debtors' Scheduled Income and Expenses and Offered Amendments.

The Debtors' proposed monthly plan payment is \$799. Pursuant to the Debtors' Schedule I, as amended on March 22, 2005, the Debtors' net monthly income is \$5,659. The Debtors' Schedule J, as amended on March 22, 2005, reflects the following monthly expenses:²

<u>Item</u>	<u>Amount</u>
Rent	\$1,120.00
Electricity	\$200.00
Water and sewer	\$18.00
Telephone	\$204.00
Cable and internet	\$105.00
Home maintenance	\$150.00
Food	\$450.00
Clothing	\$100.00
Laundry and dry cleaning	\$60.00
Medical and dental expenses	\$150.00
Transportation	\$315.00
Recreation, entertainment, etc.	\$160.00
Homeowner/renter's insurance	\$55.00

²All references to the Debtors' schedules in this Order refer to the schedules amended by Debtors on March 22, 2005.

Life insurance	\$86.00
Auto insurance	\$147.00
Furloughed pilot insurance	\$29.00
Rental of two storage units (one climate controlled) & hangar	\$470.00
401(k) secured loan	\$96.00
Business expenses	\$540.00
Daycare/Preschool	\$250.00
Personal grooming & hygiene products	\$75.00
Vet bills	\$80.00
TOTAL MONTHLY EXPENSES	\$4,860.00

At trial, the Debtors gave testimony regarding these expenses, and why they believe such expenses are reasonable and necessary. Debtors' counsel also explained that there were some other expenses that would need to be amended to reflect actual amounts. For instance, the Debtors rent two storage units totaling \$403 per month but do not rent a hangar; accordingly, \$67 may be subtracted from the rental units and hangar expense item. Mr. Fredriksson also testified that he no longer had Arkansas income taxes deducted from his paychecks since the Debtors now live in Tennessee, but that he had mandatory contributions to his 401(k) plan of \$375.45 per month deducted from his paycheck, which he failed to formerly list as an expense on Schedule J. The Debtors' schedules should be amended to reflect both of these amounts, and the Trustee shall have the opportunity to object to the 401(k) contributions, since such contributions were not previously reported to the Trustee and the Trustee's representative testified that they had no indication of any 401(k) contributions based on the documentation they had at the time of the hearing on this matter.

II. Expenses Which Are Not Reasonably Necessary.

Based on the Debtors' testimony, certain expenses must be further reduced. These include: electricity; the Debtors' itemized household expenses which encompasses home maintenance, personal grooming, transportation, recreation, preschool, veterinary bills, and other miscellaneous expenses; medical expenses; storage units; and repayment of a 401(k) loan.

A. Electricity.

Mr. Fredriksson testified that when he and his wife rented their apartment, they were told their electricity should average \$140 per month rather than the \$200 per month listed on Schedule J. He also testified that in late Spring, the electricity bills were about \$85 per month. Accordingly, the Court finds that no more than \$140 per month should be allowed for an average cost of electricity.

B. Itemized Household Expenses: Home Maintenance, Personal Grooming, Transportation, Recreation, Preschool and Veterinary Bills.

The Debtors also submitted as a trial exhibit a detailed list of itemized household expenses which differs somewhat from amounts listed on their Schedule J (the Court will refer to this list, attached hereto, as the Debtors' "**Itemized Household Expense List**")³. Having carefully reviewed the testimony given at the hearing on this matter, the Debtors' Itemized Household Expense List, and the Debtors' schedules, the Court finds the evidence as presented to be ambiguous as to which expenses on the Debtors' schedules the list is supposed to explain. It seems to be intended to itemize the home maintenance expense of \$150 and other expenses of \$405. However, some recreational and transportation expenses are also included on the Itemized Household Expense List

³The Court ignores the sales tax added to the Debtors' Itemized Household Expense List because it was added to the entire list, not just those items which are in fact subject to sales tax.

such as babysitting costs and car maintenance expenses even though there are separate entries for recreation and transportation on Debtors' Schedule J as well. Specifically, the recreational items on the Itemized Household Expense List do not match the \$160 per month listed on the Debtors' Schedule J for recreational expenses, and the transportation items on the Itemized Household Expense List do not match the \$315 scheduled for transportation expenses (other than car payments) on Schedule J. However, despite the Itemized Household Expense List's apparent contradictions with the Debtors' Schedule J, the Court is able to reconcile this list with the Debtors' Schedule J by making certain adjustments as set forth herein.

With respect to the recreational expenses listed on Schedule J, Mrs. Fredriksson explained that those would include their daughter's dance lessons which cost \$55 per month, babysitting, trips to the zoo, and similar activities. However, the recreational expenses included on the Debtors' Itemized Household Expense List only include \$42 for babysitting and do not list the dance lessons or an allowance for other recreational activities. Because the Debtors testified that the items on the Itemized Household Expense List were their actual expenses, and the Debtors included babysitting costs in this list, the Court accepts this list as replacing the \$160 recreational expenses on their Schedule J. In effect, the Court is allowing the Debtors to budget \$42 per month for recreational activities; they may choose to spend that on a babysitter, a trip to the zoo or whatever they like. Dance lessons, however, are not reasonable or necessary for a three year old.

With respect to transportation expenses, the Debtors were not questioned and did not testify, and accordingly, the Court has no information as to whether those expenses listed on the Itemized Household Expense List (which totaled \$46 per month and included future car repairs, car maintenance, car tags and taxes, and oil changes) are complete or reasonable and necessary. For

example, the Court notes that there is no allowance for gasoline. While the Court also notes that the \$315 listed on Debtors' Schedule J appears unreasonably high for transportation costs in addition to the \$46 per month listed on the Itemized Household Expense List, the Debtors may modify their transportation costs to accurately reflect what they spend, provided they do not overlap with any expenses they have included on their Itemized Household Expense List. If the Debtors amend their schedules to include additional transportation costs (such as gasoline), they must also provide the Trustee with documentation supporting such expenses, and the Trustee may in turn object to the amended scheduled amount for transportation costs.

With the exception of preschool and veterinary bills, which will be discussed below, other items on the Debtors' Itemized Household Expense List, including office and cleaning supplies, and personal grooming expenses, appear to be necessary ongoing expenses which are fairly reasonable in amount. Accordingly, the Court accepts these amounts as replacing the "home maintenance" and "personal grooming and hygiene products" items on their Schedule J.

The Debtors' Itemized Household Expense List also includes \$350 for preschool for the Debtors' three-year-old daughter, rather than the \$250 expense listed on the attachment to Debtors' Schedule J. Mrs. Fredriksson explained that the expense changed because her daughter was in a Mother's Day Out program but is now enrolled in a preschool. Although Mrs. Fredriksson does not work outside the home and can devote her time to taking care of her daughter, she testified that preschool was necessary for her daughter so that she could be "socialized" (*i.e.*, be around other children), and so that her daughter would be prepared for kindergarten. Regardless of its characterization as daycare or preschool, or the Debtors' stated purpose in seeking these services, the Court finds that \$350 a month for preschool is not a reasonable or necessary expense under these

facts.

Some of the Debtors' expenses must be reduced due to the way they were calculated. Specifically, the Debtors testified that they arrived at their monthly expenses by going through all of their actual expenses for the past three years, and arriving at an average monthly cost. Because the disposable income test found in § 1325 refers to "projected disposable income," it is not necessarily appropriate to calculate one's expenses in this manner. Expenses incurred in the past may or may not be indicative of expenses likely to be incurred or justified in the future. One expense that the Court finds should not have been calculated in this manner is veterinary bills. The Debtors' testimony revealed that the vet bills for the dog averaged out to \$80 a month because numerous tests were previously performed on the dog to determine what was wrong with him; the only *ongoing* medical expense for the dog, according to the Debtors, is the \$45 eye ointment they must purchase every other month. Accordingly, the actual veterinary expense is only \$22.50 per month, which is not unreasonably high given the Debtors' total income and expenses. (The Court does not intend to imply that higher veterinary bills would necessarily be deemed reasonable and necessary even if actually incurred.)

C. Medical Expenses.

Similar to the veterinary bills, the Debtors' testimony does not support a current monthly expense of \$150 for medical bills. Mrs. Fredriksson testified that the \$150 medical expense on Schedule J was calculated by adding up prior expenses, including expenses incurred when their daughter broke her arm. According to Mrs. Fredriksson, the family's only normal ongoing medical expenses would include co-pays for doctor visits and her disposable contacts. Neither debtor testified that they or their daughter had any significant medical issues which would cause them to

have many medical appointments. Also, disposable contacts are not a necessity; less expensive alternatives for vision correction are available, and accordingly, \$150 is not a reasonable and necessary expense for monthly medical expenses under these facts. The Court finds that \$50 per month would be a reasonable amount to budget for medical expenses.

D. Storage Units.

The Trustee also objected to the Debtors' listed expense of \$470 for the rental of two storage units (one of which is climate controlled), and a hangar. As mentioned above, Mr. Fredriksson testified that he does not rent a hangar, so this figure should be reduced by at least \$67, to \$403 per month. Mr. Fredriksson testified that the storage units were necessary to store their furniture and personal belongings which they cannot fit into their current apartment. He testified that a climate controlled unit was necessary to preserve their more treasured belongings. The Court finds that the Debtors should have an allowance of \$150 per month for temporarily storing their belongings while Mr. Fredriksson's work situation is further resolved. While the Court recognizes that due to uncertainty in the airline industry, the Debtors may think it unwise to establish a more permanent home or make a decision concerning maintaining or disposing of the furniture in storage, the Debtors cannot indefinitely store their belongings; this is clearly an expense incurred in an effort to maintain the lifestyle to which the Debtors were accustomed. The Court finds that a year from the date this Order is entered is a reasonable amount of time in which to establish a more permanent home, or sell the material trappings of the Debtors' former life; after that date, the \$150 storage allowance shall be added to the Debtors' disposable income.

E. 401(k) Loan Repayment.

The Debtors' Schedule J lists a monthly payment of \$96 for repayment of a loan secured by

Mr. Fredriksson's 401(k) retirement account. Repayment of a loan to oneself cannot be deducted as a reasonable and necessary expense for purposes of determining disposable income. Instead, this \$96 per month is disposable income which will be distributed under the terms of the Debtors' chapter 13 plan. *See In re Harshbarger*, 66 F.3d 775, 778 (6th Cir. 1995) (holding that 'it would be unfair to the creditors to allow the Debtors in the present case to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.') (quoting *In re Jones*, 138 B.R. 536, 539 (Bankr. S.D. Ohio 1991)).⁴

III. Expenses Which Are Reasonable and Necessary Based on Evidence Presented.

A. Rent.

The Court finds that some of the expenses to which the Trustee objected do not need to be reduced based on the evidence before the Court. With respect to the Debtors' rent, the only evidence the Court has is the testimony of the Debtors and Ms. Patricia Davis, a modification analyst in the Trustee's office, and a summary of available apartment types and range of costs from the Debtors' apartment complex. Ms. Davis testified that she did no independent research into the housing market in Memphis, but that she thought the apartment may be expensive due to its description as a "luxury" apartment with lots of amenities, such as a golf course. The Debtors testified that their apartment is a fairly basic two-bedroom apartment in a safe neighborhood where mostly college students reside; they were able to hook up their own washer and dryer in the apartment; and there

⁴The Court notes that while some bankruptcy courts have declined to follow the Sixth Circuit's decision in *Harshbarger*, it appears to represent the majority opinion, and with no ruling from the Eighth Circuit on this particular issue, this Court will follow *Harshbarger*. *See generally In re Shirley*, 2000 WL 150835, *4 (Bankr. N.D. Iowa 2000) ("The case law is fairly uniform in holding that voluntary contributions to pension, savings and investment type plans and accounts are not reasonably necessary for a debtor's support and maintenance during the three to five year term of a Chapter 13 plan.") (citations omitted).

is no golf course, and the Debtors do not golf. Mrs. Fredriksson testified that she shopped for less expensive apartments but could not find any that they could rent on a short-term basis that would also accept a pet. Mr. Fredriksson testified that a short-term lease was necessary because he expects he may be transferred to another location in the near future. Without additional evidence showing that the apartment is expensive by Memphis standards, the Court accepts the Debtors' rental expense as reasonable and necessary.

B. Cable, Internet and Telephone Expense.

With regard to the Debtors' cable, internet and telephone expenses, the Court finds these amounts to be reasonable given Mr. Fredriksson's testimony regarding his need for internet and cell phone use for his job, and his testimony that the internet service is part of their cable package.

C. Business Expenses.

The Debtors also listed \$540 per month for business expenses. Mr. Fredriksson testified that these expenses are incurred when he travels for the airline, and although he receives a per diem allowance from the airline, that per diem income is included in the income he listed on his Schedule I, and is not enough to cover his actual expenses. Mr. Fredriksson testified that his actual expenses of \$540 per month was calculated by multiplying \$36.25 per day for food, tips and miscellaneous expenses by 16, the average number of days he spends traveling. (Although this actually equals \$580, the Court accepts the \$540 figure listed on Debtors' schedules). The Court has reviewed the paystub entered into evidence, and finds a per diem allowance was included in the Debtors' monthly income listed on Schedule I – assuming this per diem is representative of what he receives on a regular basis (*i.e.*, he traveled approximately 16 days in January, the month represented by the paystub in evidence), the Court accepts the business expense of \$540 as reasonable and necessary.

CONCLUSION

In sum, while the Court found the Debtors' testimony credible, and the Court believes the Debtors do in fact incur the expenses they allege, the Court finds that some of the expenses are not reasonably necessary for a Chapter 13 debtor. Debtors simply cannot afford to maintain their previous standard of living while not paying their creditors. The Court finds that the Debtors' expenses, as adjusted by this Order, are as high as the Court will allow in a plan that does not pay 100% to unsecured creditors. If Mr. Fredriksson's income is reduced in the future, the Debtors are directed to make further adjustments to their expenses. Given the Debtor's current lifestyle and funds required to maintain it, the Court will not be inclined to allow a reduction in distribution to creditors.

The Debtors shall have twenty days to modify their Schedules I and J and chapter 13 plan in accordance with this order. An order will be entered in accordance with this Memorandum Opinion.



HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED: August 19, 2005

cc: Bart Ziegenhorn, attorney for Debtors
David Coop, Chapter 13 Trustee
U.S. Trustee

Home Maintenance: \$150.00			
What:	Cost:	How Often:	Monthly Cost:
Office:			
Computer ink	\$ 27.00	Every 2 months	\$ 13.00
Photo Paper	\$ 25.00	Quaterly	\$ 8.00
Regular Paper	\$ 6.00	Every 3 months	\$ 2.00
Virus Scan Software	\$ 78.00	Yearly	\$ 6.00
Stamps	\$ 37.00	6 months	\$ 6.00
Other Office Supplies (penns, whiteout, staples, sticky-notes, markers)	\$ 12.00	Quaterly	\$ 4.00
Cleaning Supplies:			
Toilet Tissue, Paper Towels	\$ 15.00	Every 2 months	\$ 7.00
Dishwasher Detergent	\$ 3.00	Quaterly	\$ 1.00
Detergent,	\$ 12.00	Every 2 months	\$ 6.00
Windex	\$ 1.00	Monthly	\$ 1.00
Oven Cleaner	\$ 3.00	Quaterly	\$ 1.00
Mops & Floor Cleaner	\$ 14.00	Quaterly	\$ 5.00
Vacuum Bags	\$ 6.00	Every 6 months	\$ 1.00
Trash Bags	\$ 5.00	Every 2 months	\$ 2.50
Bleach	\$ 1.00	Monthly	\$ 1.00
Dishrags, Towels, Spunches	\$ 3.00	Quaterly	\$ 1.00
Dust Cleaner	\$ 3.00	Quaterly	\$ 1.00
Fabric Softener	\$ 4.00	Every 2 months	\$ 2.00
Tub & Toilette Cleaner	\$ 5.00	Every 6 months	\$ 1.00
Potty Wipes	\$ 7.00	Every 2 months	\$ 3.50
Antibacterial Hand Sanitizer	\$ 2.00	Every 2 months	\$ 1.00
Soap & Liquidsoap	\$ 4.00	Every 2 months	\$ 2.00
Shampoo	\$ 6.00	Every 2 months	\$ 2.00
Pull-Ups (Training Pants)	\$ 14.00	Monthly	\$ 14.00
Other (\$405.00)			
Birthday Gifts and shipping (Concervative Estimates, Large Family)	\$ 200.00	Yearly	\$ 17.00
Christmas Gifts and Shipping (Concervative Estimates, Large Family)	\$ 300.00	Yearly	\$ 25.00
Shipping Packages	\$ 120.00	Yearly	\$ 10.00
Batteries	\$ 5.00	Every 2 months	\$ 2.50
Olivia Educational Books & Toys	\$ 20.00	Monthly	\$ 20.00
Gas for grill (2 tanks yearly)	\$ 40.00	Yearly	\$ 3.00
Camera DV Tapes (home movies, \$8.00 / tape x 7 tapes / year)	\$ 56.00	Yearly	\$ 4.00
Airfilters & Deodorizer (4 times / year x \$6.00)	\$ 24.00	Yearly	\$ 2.00
Light Bulbs	\$ 6.00	Yearly	\$ 0.50
Vitamins, Aspirin, Benadryl, Sudafed, Baby Cold Medicin,	\$ 70.00	Yearly	\$ 6.00
Toothpaste, Brushes	\$ 6.00	Quaterly	\$ 2.00
Pest Control (Do it your self, 2 Gallons yearly)	\$ 32.00	Yearly	\$ 3.00
AR County Taxes	\$ 204.76	Yearly	\$ 17.00
Haircuts Angela: \$130.00 x 3=\$390.00 Conny: \$20.00 x 6=\$120.00	\$ 510.00	Yearly	\$ 42.00
Plant Food, Gardening	\$ 3.00	Quaterly	\$ 1.00
Future Car Repairs, Tires, Brakes, Wipers(8 and 9 year old cars)	\$ 400.00	Yearly	\$ 33.00
Car Oil Change (\$25.00 x 2 cars x twice yearly)	\$ 100.00	Every 6 months	\$ 8.00
Car Tags & Taxes (\$27.75 x 2 cars)	\$ 55.55	Yearly	\$ 5.00
Dog Food	\$ 17.00	Every 2 months	\$ 8.00
Babysitter (\$7.00/h x 6hours / month)	\$ 42.00	Monthly	\$ 42.00
Makeup	\$ 20.00	Quaterly	\$ 6.00
Security System Subscribtion	\$ 15.00	Monthly	\$ 15.00
FFDO Program, Re-qualification & Quaterly Shooting cost at Range	\$ 400.00	Yearly	\$ 33.00
Vet Bill (Average Vet bills.) Not including \$45.00 Eye Ointment for life)	\$ 960.00	Monthly	\$ 80.00
Olivia Preschool	\$ 350.00	Monthly	\$ 350.00
Total:			\$ 827.00
Plus 9% tax:			\$ 74.43
Monthly Total:			\$ 901.43

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