

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 12 O'clock & 00 min. P.M.

Date 2-10-97

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

SR

In the matter of:)

ARTHUR MITCHELL HARDY)
(Chapter 13 Case 95-42178))

Debtor)

Adversary Proceeding
Number 96-4004

DORIS HARDY)

Appellant)

Civil Action
Number 496-274

v.)

ARTHUR MITCHELL HARDY)

Appellee)

**ORDER ON REMAND AND PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On November 12, 1996, Doris Hardy, appealing this Court's October 31, 1996, Order of Final Judgment moved for leave to appeal *in forma pauperis* ("IFP"). On January 30, 1997, the Honorable B. Avant Edenfield, Chief Judge, United States District

Court for the Southern District of Georgia, remanded the IFP issue to the bankruptcy court while retaining jurisdiction over the underlying appeal, CV 496-274. Pursuant to the Order of the District Court, these proposed findings of fact and conclusions of law are entered pursuant to Fed.R.Bankr.P. 9033. For the reasons stated herein, it is the recommendation of this Court that the motion of Ms. Hardy be granted.

Ms. Hardy's motion to proceed with her appeal *in forma pauperis* is governed by the provisions of 28 U.S.C. Section 1915 which provides in relevant part as follows:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

28 U.S.C. § 1915(a) (1994). By its express terms, the provision permits a court to authorize the prosecution of a debtor's appeal without pre-payment of costs subject to the

requirement that an affidavit be filed establishing that the debtor is "unable to pay such costs or give security therefor." A debtor is subject further to the proviso that an appeal may not be taken *in forma pauperis* "if the trial court certifies in writing that it is not taken in good faith." In other words, Ms. Hardy will be permitted to proceed *in forma pauperis* as long as she has demonstrated sufficient financial need and her appeal is taken in good faith and is not frivolous or malicious. See In re Hubka, 84 B.R. 161, 162 (Bankr.Neb. 1988).

Financial Condition

The burden of proof is on the affiant, although the case law is unclear as to the proof required or the economic factors that a court should consider. See In re Koren, 176 B.R. 740 (Bankr.E.D.Pa. 1995) ("[t]he only accurate general statement that can be made about the precise standards which an application for IFP status must meet is that no definitive standards have been developed by any court or commentator"). However, in the January 30 Order, Judge Edenfield reached a preliminary conclusion that Ms. Hardy's IFP statement showed "that she financially qualifies for IFP status" but remanded in part for this Court to review that finding *de novo* if anything in the record undermined his preliminary conclusion.

On that point, I have reviewed the record and it supports the facts contained

in Ms. Hardy's affidavit, which she signed acknowledging that false statements in the affidavit would subject her to penalty of perjury. Specifically, Ms. Hardy lists income of \$635.00/month, no employment, no savings, no valuable property, and one dependent. This statement is consistent with this Court's Memorandum and Order entered November 5, 1996, establishing from the evidence proffered at trial that Ms. Hardy's monthly disability income was \$653.00 and that she incurred \$1,125.00 per month in living expenses.

Ms. Hardy filed for bankruptcy in the Northern District of Alabama, Eastern Division, Case No. 95-40689, and included a copy of that petition within her Proposed Pre-Trial Stipulation filed on May 14, 1996. The information enclosed therein is also consistent with her *in forma pauperis* affidavit.¹ Additionally, this Court has no information arising out of the record in this case which would question the veracity of the any pleading, affidavit, or other document filed by Ms. Hardy. See *In re Burrell*, 150 B.R. 369, 373 (Bankr.E.D.Va. 1992) (denying debtor's IFP motion because he submitted three affidavits claiming a different income on each).

I therefore find that Ms. Hardy has made out a *prima facie* case of poverty

¹ Within her schedules, Ms. Hardy lists income of \$1,478.00, constituting \$653.00/month in pension benefits and \$825.00 in alimony, and expenses of \$1,125.00. Because the resolution of this adversary proceeding discharged the alimony obligation of Mr. Hardy, Ms. Hardy's monthly income has been reduced to \$653.00/month.

in her affidavit which supports the granting of this Motion. See Adkins v. E.I. Dupont de Nemours & Co., 335 U.S. 331, 339-40, 69 S.Ct. 85, 89, 93 LEd. 43 (1943) (holding that an affidavit of poverty and inability to pay is sufficient to support granting of IFP motion without a showing of absolute destitution). In paragraph "2" of her affidavit, Ms. Hardy lists current income of \$635.00 per month for disability. Her expenses are \$1,125.00 per month and while her income exceeded her expenses prior to her ex-husband's bankruptcy filing it clearly does not at this time. The affidavit further establishes that she has not been employed since 1990, that she has no checking or savings accounts, and that she owns no real estate, stocks, bonds, notes, automobiles, or other valuable property, excluding ordinary household furnishings and clothing. Accordingly, I recommend a finding that pursuant to 28 U.S.C. 1915(a) she is "unable to pay such costs or give security therefor."

Good Faith Appeal

Upon review of the record in this case and the basis for Ms. Hardy's appeal, I am unable to certify that her appeal is not taken in good faith. Instead, I find it to be a sincere, *bona fide* effort to seek review by a higher court. See In re Brooks, 175 B.R. 409, 413 (Bankr.S.D.Ala. 1994) (holding that court should grant IFP motion if movant qualifies and claim is not "wholly insubstantial"). The issues in her appeal involve a question of first impression, invoking provisions of Alabama law which have not been the

subject of previous adjudication in this district, as well as application of 11 U.S.C. Section 523(a)(15), a relatively new section of the Code added in 1994 which has been the subject of infrequent litigation in this district to date.

Because her affidavit establishes her financial inability to pursue this appeal and because as the trial judge I have not and will not certify that the appeal is not taken in good faith, I file these proposed Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 9033 recommending that Ms. Hardy's application to proceed *in forma pauperis* be granted.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 10th day of February, 1997.