

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-35031

BARBARA JARDET  
a/k/a BARBARA ANN CUNNINGHAM  
a/k/a BARBARA ANN HORNE

Debtor

JOHN P. NEWTON, JR., TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3204

BARBARA JARDET

Defendant

**MEMORANDUM**

**APPEARANCES:** JOHN P. NEWTON, JR., ESQ.  
Post Office Box 2069  
Knoxville, Tennessee 37901  
Plaintiff

R. DENO COLE, ESQ.  
Post Office Box 57  
Knoxville, Tennessee 37901  
Attorney for Defendant/Debtor

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, John P. Newton, Jr., Chapter 7 trustee for the bankruptcy estate of William L. Webb, Jr., objecting to the Debtor's discharge under 11 U.S.C.A. §§ 727(a)(2), (3), (4)(A), and/or (5) (West 1993). In the alternative, the Plaintiff objects to the dischargeability of a debt owed to Mr. Webb's bankruptcy estate pursuant to 11 U.S.C.A. § 523(a)(2)(A) (West 1993).

The trial of this adversary proceeding was held on March 24, 2003. The record before the court consists of ten exhibits admitted into evidence, along with the testimony of William Webb, Michael H. Fitzpatrick, the Chapter 7 trustee for the Debtor's bankruptcy estate, and the Debtor.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I), (J) (West 1993).

## I

On September 28, 1999, William Webb filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code, commencing case number 99-33928. The Plaintiff was appointed trustee in Mr. Webb's case and in the performance of his duties therein, he filed an adversary proceeding styled *John P. Newton, Jr., Trustee v. Barbara Jarde*, adversary proceeding number 01-3028 (the Webb Adversary Proceeding). In the Webb Adversary Proceeding, the Plaintiff sought relief to collect and/or avoid an alleged fraudulent conveyance of approximately \$37,701.00 pursuant to 11 U.S.C.A. § 548 (West 1993 & Supp. 2002). Mr. Webb alleged that he loaned at least \$37,701.00 to the Debtor in multiple transactions between March and September 1999. At the Debtor's direction, Mr. Webb deposited these funds into the Debtor's checking account at the Knoxville TVA Employees Credit Union. Mr. Webb alleges that the Debtor promised to repay him once

she refinanced her house, which occurred on April 11, 2000; however, the Debtor did not repay Mr. Webb, instead asserting that the funds were gifts.

The Plaintiff conducted discovery during the Webb Adversary Proceeding, and pursuant thereto, he served a subpoena duces tecum on the Debtor requesting the following documents: (1) bank account statements for all checking and/or savings accounts in her name from June 1998 through April 2001, (2) a credit application submitted by the Debtor regarding the mortgage loan she received from First Residential Mortgage Network, Inc. on or about April 11, 2000; and (3) a credit report produced to First Residential Mortgage Network, Inc. on or about April 11, 2000. The Debtor appeared for her deposition on August 27, 2001, but, she did not produce the requested documents.

The Debtor filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on October 15, 2001, the date upon which the court was scheduled to hear the trial on the Webb Adversary Proceeding.<sup>1</sup> The Plaintiff was stayed from proceeding with the Webb Adversary Proceeding after the Debtor's filing, so the Plaintiff filed the Complaint initiating this adversary proceeding in the Debtor's bankruptcy case on December 21, 2001.

In his Complaint, the Plaintiff asserts that the Debtor should be denied a discharge pursuant to § 727(a)(2) for transferring property with the intent to hinder, delay, or defraud creditors within one year prior to filing her Chapter 7 petition. Next, the Plaintiff asserts that the Debtor failed to keep or preserve recorded information from which her financial condition or business transactions

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<sup>1</sup> The Debtor filed her Voluntary Petition on October 15, 2001, together with the creditor matrix. Her statements and schedules were subsequently filed on November 8, 2001.

could be ascertained, justifying denial of discharge pursuant to § 727(a)(3). Additionally, the Plaintiff asserts that the Debtor should be denied a discharge for knowingly and fraudulently making false statements under oath regarding her case, which falls within the purview of § 727(a)(4)(A). Finally, the Plaintiff asserts that the Debtor has not adequately explained the disposition of assets no longer in her possession, and that denial of discharge is appropriate under § 727(a)(5). In the alternative, the Plaintiff asserts that the Debtor obtained the funds she received from Mr. Webb through false representations, false pretenses, or actual fraud, such that this debt is nondischargeable pursuant to § 523(a)(2)(A).

The Debtor argues that she has not engaged in fraudulent behavior or defrauded any of her creditors. She maintains that the funds she received from Mr. Webb were a gift, in that he knew that she did not have the financial means to repay him. The Debtor states that she did not misrepresent her financial condition to Mr. Webb, nor did she promise to repay him. Additionally, the Debtor argues that she did not knowingly and/or intentionally make material misrepresentations or false oaths in her bankruptcy statements and schedules. The Debtor acknowledges that there were inaccuracies in her statements and schedules, but she asserts that she explained her misstatements at her meeting of creditors, and she corrected her statements and schedules through amendments thereto. The Debtor contends that she has fully cooperated with the Chapter 7 trustee in her case and has provided records that he requested, thus entitling her to a discharge under § 727.

At trial, Mr. Webb testified that he deposited more than \$37,000.00 into the Debtor's bank account between March and September 1999. The Plaintiff introduced into evidence the Debtor's

bank statements for the period of March through September 1999, showing deposits totaling \$83,046.56. See COLLECTIVE TRIAL EX. 3. Additionally, the Plaintiff introduced deposit records evidencing that \$38,701.00 of this amount was deposited by him directly into the Debtor's checking account.<sup>2</sup> See COLLECTIVE TRIAL EX. 2. Mr. Webb testified that he loaned the money to the Debtor because she needed his help after being laid off from TVA, resulting in her unemployment. Mr. Webb also testified that the Debtor promised to get a second mortgage on her home to repay him, but that she has never repaid any portion of the money. Mr. Webb admitted that he had been romantically interested in the Debtor but stated that they had not dated, and in fact, because most of their relationship consisted of telephone conversations, they had only met each other in person a couple of times. Finally, Mr. Webb testified that he had not intended to give the Debtor the money as a gift, as he had always expected that she would repay him.

The Debtor, however, testified that she and Mr. Webb had met once at a club and that he had come to her house on several occasions when her children were at their father's house for the weekend. The Debtor testified that Mr. Webb gave her the money as a gift because he cared for her deeply and because he wanted her to be able to buy things for her children, even though he had met them only one time. The Debtor testified that at the time she received the money from Mr. Webb, she did not have any large unpaid debts, nor did she have large credit card balances. In fact, the Debtor testified that she used money received from Mr. Webb to buy stereos,

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<sup>2</sup> Mr. Webb testified that he had been in possession of approximately \$9,000.00 of the amount he loaned the Debtor, but that he got the remaining \$28,000.00 from credit card advances that he could not repay, leading him to file for bankruptcy on September 28, 1999. Mr. Webb's statements and schedules reflect credit cards and other loan obligations totaling \$51,697.24. See COLLECTIVE TRIAL EX. 1 (Statements and Schedules of William Webb: Schedule F - Creditors Holding Unsecured Nonpriority Claims).

computers, computer games, and other substantial purchases for her children, in addition to using the money to pay her monthly bills. The Debtor stated that she knew that Mr. Webb was interested in pursuing a romantic relationship with her, and she allowed him to give her money because she and her domestic partner, Greg Horne, were not living together at that time. The Debtor testified that she had never been employed by TVA, nor had she told Mr. Webb that she was laid off. Additionally, the Debtor testified that Mr. Webb knew that she did not have a job and had no way to repay him.<sup>3</sup>

In addition to the Debtor's bank statements for the March through September 1999 period, the Plaintiff also introduced into evidence copies of the Debtor's bank statements for March through October 2001, which indicate that a total of \$127,109.40 was deposited into the Debtor's checking account during this eight-month period. See COLLECTIVE TRIAL EX. 5. The Debtor explained that she personally does not get a paycheck, so she has no income; however, Mr. Horne supports her, so money deposited into the account came from his income.<sup>4</sup>

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<sup>3</sup> The Debtor lists seven other men in her schedule of nonpriority unsecured creditors. Six of these men filed suit against the Debtor prior to the commencement of her bankruptcy case seeking to recover the funds they provided the Debtor. She claims these men all gave her money as a gift and that she had no repayment obligation.

<sup>4</sup> The bank statements and checks introduced into evidence show that the checking account at the Knoxville TVA Employees Credit Union is in the name of "Barbara A. Jarde" and does not include a listing for Mr. Horne. See COLLECTIVE TRIAL EX. 3; COLLECTIVE TRIAL EX. 5; COLLECTIVE TRIAL EX. 9. The Debtor testified at her August 27, 2001 deposition and at trial that this has been her only checking account. See COLLECTIVE TRIAL EX. 6, page 13, lines 6-9. Apparently, however, she also has a savings account at the Knoxville TVA Credit Union. See COLLECTIVE TRIAL EX. 7 (Statements and Schedules of Barbara A. Jarde: Schedule B - Personal Property).

## II

Pursuant to 11 U.S.C.A. § 727, a Chapter 7 debtor receives a general discharge of his or her prepetition debts unless one of ten express grounds exists. Section 727 provides, in pertinent part:

(a) The court shall grant the debtor a discharge, unless—

. . . .

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

. . . .

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

. . . .

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

11 U.S.C.A. § 727. The burden of proof by a preponderance of the evidence falls upon the party objecting to discharge, as § 727(a) is liberally construed in favor of the debtor. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6<sup>th</sup> Cir. 2000); *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6<sup>th</sup> Cir. 1994); FED. R. BANKR. P. 4005.

## A

The Plaintiff objects to discharge first under § 727(a)(2)(A), which “encompasses two elements: 1) a disposition of property [including transfer or] concealment, and 2) a subjective intent on the debtor’s part to hinder, delay, or defraud a creditor through the act disposing of the property.” *Keeney*, 227 F.3d at 683 (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9<sup>th</sup> Cir. 1997)). The party objecting to discharge must prove actual, not constructive, intent to deceive by the debtor. *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998). Because of the inherent difficulties in proving the debtor’s intentions, the plaintiff may use circumstantial evidence, including evidence of the debtor’s conduct, to establish actual intent, and “[j]ust one wrongful act may be sufficient to show actual intent . . . [although] a continuing pattern of wrongful behavior is a stronger indication [thereof].” *Sowers*, 229 B.R. at 157. Additionally, it is not necessary for the plaintiff to prove that a debtor intended to hinder and delay and defraud

creditors, as proof of any one satisfies § 727(a)(2)(A). *Cuervo v. Snell (In re Snell)*, 240 B.R. 728, 730 (Bankr. S.D. Ohio 1999).

The Plaintiff asserts that the Debtor should be denied her discharge for transferring property with the “intent to hinder, delay, or defraud” her creditors. Specifically, the Plaintiff is concerned with a withdrawal from the Debtor’s checking account in the amount of \$5,800.00 on October 12, 2001, three days before the Debtor filed for bankruptcy. See COLLECTIVE TRIAL EX. 5 (October 2001 bank statement).

The Debtor admitted that she withdrew \$5,800.00 from her checking account on October 12, 2001; however, she explained that this money did not actually belong to her, but rather, belonged to her mother, Peggy Atkins, as the result of an insurance settlement. The Debtor testified that she was holding the insurance settlement for her mother, who did not want the money in her own account because she received social security and disability benefits. At trial, the Debtor stated that her mother had given the \$5,800.00 to the Debtor’s children for clothes, games, computers, and the like, but that she took this money out of her account prior to filing for bankruptcy on the advice of her bankruptcy counsel because it did not actually belong to her.<sup>5</sup> However, the Debtor has not produced any documentation, despite repeated requests therefor, to prove that this insurance settlement even exists.

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<sup>5</sup> At the Debtor’s meeting of creditors on November 20, 2001, N. David Roberts, Jr., the Debtor’s attorney, confirmed that he had instructed her to transfer Ms. Atkins’ insurance settlement proceeds back to her. See TRIAL EX. 10. Mr. Roberts no longer represents the Debtor.

Although the court does not find the Debtor's testimony regarding these funds particularly credible, the Plaintiff did not meet his burden of proof that the Debtor transferred this money with an actual intent to hinder, delay, or defraud her creditors. The lack of supporting documentation from the Debtor alone does not prove, by a preponderance of the evidence, that the Debtor possessed the requisite subjective intent to defraud, delay, or hinder her creditors when she withdrew these funds in and around the time that she filed for bankruptcy. Also, the Debtor's former bankruptcy attorney seemed satisfied that the funds did not, in fact, belong to the Debtor. Because § 727(a)(2) is strictly construed in favor of the Debtor, the court cannot justify denial of discharge upon the proof presented.

## **B**

The Plaintiff next objects to the Debtor's discharge under § 727(a)(2)(B). Whereas § 727(a)(2)(A) encompasses a debtor's prepetition acts, a debtor's postpetition actions fall within the scope of § 727(a)(2)(B), which requires proof that "(1) the debtor transferred or concealed property, (2) such property constituted property of the estate, (3) the transfer or concealment occurred after the filing of the bankruptcy petition, and (4) the transfer or concealment was made with the intent to defraud the bankruptcy trustee." *Sowers*, 229 B.R. at 156. Once a creditor establishes its case, the burden shifts to the debtor to provide the court with a convincing explanation for the concealment. *Royer v. Smith (In re Smith)*, 278 B.R. 253, 257 (Bankr. M.D. Ga. 2001). As with § 727(a)(2)(A), intent under § 727(a)(2)(B) may be established by evidence of a debtor's conduct. *Sowers*, 229 B.R. at 157.

Similarly, the Plaintiff bases this claim on a withdrawal that the Debtor made from her checking account, this time, in the amount of \$5,500.00 on October 22, 2001, seven days after the filing of her Voluntary Petition. See COLLECTIVE TRIAL EX. 5 (October 2001 bank statement). The Debtor testified that this sum represents the balance of the money that she was holding for her mother pursuant to the insurance settlement her mother received. Again, the Debtor testified that she took this money from her account and returned it to her mother upon the advice of counsel.<sup>6</sup>

Once again, the Plaintiff does not meet his burden of proof. The Plaintiff did not show that the Debtor subjectively intended to defraud, hinder, or delay her creditors by withdrawing these funds. As stated before, the Debtor's lack of supporting documentation does not, in and of itself, convince the court by a preponderance of the evidence that the Debtor withdrew this money with the required fraudulent intent necessary for a denial of discharge under § 727(a)(2)(B).

### C

As a third alternative, the Plaintiff objects to the Debtor's discharge pursuant to § 727(a)(3), which requires that the Debtor produce documentation "with enough information to ascertain [her] financial condition and track [her] financial dealings with substantial accuracy for a reasonable period past to present." *Wazeter v. Mich. Nat'l Bank (In re Wazeter)*, 209 B.R. 222, 227 (W.D. Mich. 1997) (quoting *In re Juzwiak*, 89 F.3d 424, 427 (7<sup>th</sup> Cir. 1996) (citations omitted)). This disclosure provides the trustee and creditors with "complete and accurate information concerning

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<sup>6</sup> It appears, however, from the Debtor's Statements and Schedules and the transcript from her meeting of creditors that her attorney was only aware of the one transfer that occurred prepetition. See COLLECTIVE TRIAL EX. 7; TRIAL EX. 10.

the status of the debtor's affairs and financial history." *Wazeter*, 209 B.R. at 227. However, trustees and/or creditors are not responsible for investigating and acquiring documentation, but rather, the burden is upon debtors to produce adequate and sufficient records. *Wazeter*, 209 B.R. at 227-28 (citing *Juzwiak*, 89 F.3d at 428).

Adequacy of a debtor's records is determined on a case-by-case basis. *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6<sup>th</sup> Cir. 1999). Judges have broad discretion to deny a discharge based on an inadequacy in the keeping of books and records. *Dolin v. N. Petrochemical Co. (In re Dolin)*, 799 F.2d 251, 253 (6<sup>th</sup> Cir. 1986). A debtor's records are usually measured against the type of books and records kept by a reasonably prudent debtor with the same occupation, financial structure, education, and experience." *Wazeter*, 209 B.R. at 227 (quoting *Wynn v. Wynn (In re Wynn)*, 205 B.R. 97, 101 (Bankr. N.D. Ohio 1997)). Examples of inadequate disclosures include production of withdrawal records without indicating the disposition of funds, failure to produce checking account statements, failure to provide any household bills, and failure to account for dissemination of assets or to estimate income. *See Dolin*, 799 F.2d at 253; *Strbac*, 235 B.R. at 884; *Wazeter*, 209 B.R. at 228; *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 356 (Bankr. N.D. Ill. 1988). Once the party objecting to discharge has met the burden of proving that a debtor's records are inadequate, the burden shifts to the debtor to prove that his failure to maintain records was justified under the specific circumstances of his case. *Strbac*, 235 B.R. at 883; *Wazeter*, 209 B.R. at 227. Intent is not an issue under § 727(a)(3). *Wazeter*, 209 B.R. at 227.

Both the Plaintiff and Mr. Fitzpatrick, in his capacity as Chapter 7 trustee in the Debtor's case, have repeatedly asked the Debtor to provide supporting documentation regarding her two October 2001 withdrawals/transfers totaling \$11,300.00, which she claims were actually property of her mother pursuant to an insurance settlement. Despite these numerous requests, the Debtor has never supplied any sort of supporting documentation to either party. It appears to the court that it would be fairly simple for the Debtor to provide some sort of documentation regarding an insurance settlement on behalf of her mother, and it is unreasonable that the Debtor has ignored these requests.

Similarly, Mr. Fitzpatrick testified that he has made numerous requests of the Debtor to supply him with details regarding the source(s) of the substantial deposits into her checking account from March through October 2001, and regarding the disposition of these funds. Mr. Fitzpatrick testified that the only explanations that he received were handwritten notations on copies of four checks and a handwritten notation regarding another unidentified check, which were transmitted along with copies of the Debtor's bank statements for that period. See COLLECTIVE TRIAL EX. 5. These documents were sent to Mr. Fitzpatrick by the Debtor's attorney representing her in her Chapter 7 filing. See COLLECTIVE TRIAL EX. 5 (January 3, 2002 Letter from N. David Roberts, Jr., Esq.).

When asked at trial why she had not produced these documents, the Debtor testified that she spent two nights making full explanations, which she gave to her former bankruptcy attorney, but he never gave them to Mr. Fitzpatrick. The Debtor did not retain copies of these notations, however, despite the time she spent preparing them. Additionally, the Debtor did not supply any

documentation, nor did she provide any explanations of the source(s) and/or disposition of the deposits at trial.

Finally, the Debtor testified that she does not keep her bank statements and/or copies of her cancelled checks. Instead, she stated that once she marks off the charges in her check register each month, she shreds the statements. Despite this contention, the Debtor has not used her check registers to provide the information sought by Mr. Fitzpatrick. And, interestingly, the Debtor did have her 1999 bank statements, which she gave to her attorney in the Webb Adversary Proceeding. As for the 2001 bank statements, the Debtor and interested creditors obtained copies from the credit union directly.

The Plaintiff has met his burden of proof that the Debtor has not maintained and/or provided adequate records. The Debtor has not provided enough documentation to Mr. Fitzpatrick or her creditors for them to ascertain the source(s) and disposition of the \$127,109.40 deposited into her checking account between March 1, 2001 and October 31, 2001, in which 422 checks cleared. Moreover, the Debtor has not met her burden of proof that her failure to maintain records was justified under the circumstances. It is entirely unreasonable that the Debtor did not maintain adequate records to provide this information. The Debtor testified that she has only a tenth grade education; however, she exhibited knowledge and intelligence sufficient to convince the court that she should have known the importance of maintaining her financial records. She apparently kept her 1999 bank records, which she provided to the attorney representing her in the Webb Adversary Proceeding. Nevertheless, she failed to maintain records for the period leading up to the filing of her bankruptcy case, and she has not made adequate attempts to re-create these

records. Finally, the court is not convinced that the Debtor actually spent two days preparing explanations for Mr. Fitzpatrick which she insists that her attorney then failed to forward. It seems unreasonable that the Debtor would put this much time and effort into preparing documents and then not keep a copy for her own records. Furthermore, it is unlikely that her attorney would forward some records, see COLLECTIVE TRIAL EX. 5 (January 3, 2002 Letter from N. David Roberts, Jr., Esq.), but not forward those specifically sought by the Trustee. Cause exists pursuant to § 727(a)(3) to deny the Debtor's discharge.

#### **D**

Additionally, the court is satisfied that the Debtor should be denied a discharge under the Plaintiff's next basis for objection, § 727(a)(4)(A). To satisfy § 727(a)(4)(A), the objecting party must prove: (1) that the debtor made a statement while under oath; (2) that the statement was false; (3) that the debtor knew that the statement was false when making it; (4) that the debtor had fraudulent intent when making the statement; and (5) the statement materially related to the bankruptcy case. 11 U.S.C.A. § 727(a)(4)(A); *Keeney*, 227 F.3d at 685; *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000).

A debtor's statements and schedules are executed under oath and penalty of perjury. FED. R. BANKR. P. 1008; OFFICIAL FORM 1 (Voluntary Petition); OFFICIAL FORM 7 (Statement of Financial Affairs); *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6<sup>th</sup> Cir. 1999); see also *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5<sup>th</sup> Cir. 1992). Statements made by a debtor at the meeting of creditors pursuant to 11 U.S.C.A. § 341 (West 1993 & Supp.

2002) are made under oath. See 11 U.S.C.A. § 343 (West 1993) (“The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title . . . .”); FED. R. BANKR. P. 2003(c). Similarly, testimony and statements given in a deposition, see, e.g., *Brumley v. Wingard*, 269 F.3d 629, 642 (6<sup>th</sup> Cir. 2001), and at trial, see, e.g., *Workman v. Bell*, 227 F.3d 331, 341 (6<sup>th</sup> Cir. 2000), are under oath.

A debtor’s knowledge that a statement is false can be evidenced by a demonstration that the debtor “knew the truth, but nonetheless failed to give the information or gave contradictory information.” *Hamo*, 233 B.R. at 725; *Sowers*, 229 B.R. at 158 (citing *Pigott v. Cline (In re Cline)*, 48 B.R. 581, 584 (Bankr. E.D. Tenn. 1985)). Fraudulent intent “involves a material representation that [the debtor knows] to be false, or . . . an omission that [the debtor knows] will create an erroneous impression.” *Keeney*, 227 F.3d at 685 (quoting *In re Chavin*, 150 F.3d 726, 728 (7<sup>th</sup> Cir. 1998)). Reckless disregard or indifference for the truth also demonstrates fraudulent intent. *Keeney*, 227 F.3d at 686; *Beaubouef*, 966 F.2d at 178. Intent may be inferred from the debtor’s conduct, and a continuing pattern of omissions and/or false statements in the debtor’s bankruptcy schedules exhibits reckless indifference. *Hamo*, 233 B.R. at 724-25; *Sowers*, 229 B.R. at 159. On the other hand, a debtor who mistakenly or inadvertently gives false information does not possess the requisite intent to satisfy § 727(a)(4). *Keeney*, 227 F.3d at 686; *Hamo*, 233 B.R. at 725. Generally, if a debtor amends his statements and schedules and/or reports omissions or misstatements prior to or during the meeting of creditors, courts do not find fraudulent intent. *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 647 (Bankr. E.D. Mich. 1999).

Statements are material for the purposes of § 727(a)(4) if they “bear[] a relationship to the [debtor’s] business transactions or estate, or concern[] the discovery of assets, business dealings, or the existence and disposition of property.” *Keeney*, 227 F.3d at 686 (quoting *Beaubouef*, 966 F.2d at 178). Likewise, “[a] claim . . . is material if it hinders the administration of the [bankruptcy] estate.” *Calisoff*, 92 B.R. at 355.

The Plaintiff asserts that the Debtor made several false statements and material misrepresentations/omissions that constitute cause for denying her discharge under § 727(a)(4), including the following:

- (1) she failed to accurately indicate the correct amount of cash in her bank account at the time she filed her bankruptcy petition and schedules;
- (2) she failed to disclose a \$1,500.00 payment made to an insider within one year of filing her bankruptcy petition; and
- (3) she testified at her meeting of creditors that her statements and schedules were true and correct, when in fact, they were not.

The court is convinced that these statements, together with others, constitute cause under § 727(a)(4) to deny the Debtor’s discharge. There are significant omissions in the Debtor’s statements and schedules. With respect to transfer of funds to her mother, the Debtor’s Statement of Financial Affairs states that “Debtor was in possession of [\$]5,000 proceeds of mother’s litigation settlement which was returned to her. Debtor claimed no ownership of funds[.]” COLLECTIVE TRIAL EX. 7 (Statements and Schedules of Barbara A. Jarde: Statement of Financial Affairs). However, there is no mention of the additional \$5,500.00 withdrawal/transfer occurring on October 22, 2001, in her bankruptcy statements and schedules, even though the Debtor did not

file her statements and schedules until November 8, 2001. Moreover, the October 12, 2001 withdrawal was \$5,800.00, not \$5,000.00.

Similarly, the Debtor failed to disclose a payment of \$1,500.00 made to her brother, Fred Atkins, on May 26, 2001. See COLLECTIVE TRIAL EX. 5 (Copy of check 4235); COLLECTIVE TRIAL EX. 7. The Debtor testified at trial that she told her attorney about this transfer, but he neglected to list it in her statements and schedules. Even assuming that this statement is true, at her meeting of creditors, Mr. Fitzpatrick asked the Debtor whether she read her statements and schedules prior to signing them and if they were true and accurate to the best of her knowledge when they were filed. See TRIAL EX. 10. The Debtor answered in the affirmative to both questions. See TRIAL EX. 10. It is the Debtor's responsibility to advise her attorney if there are any omissions in her statements and schedules before they are filed. If she did, in fact, disclose this transfer to her attorney, she should have alerted him that it was not listed. However, the court does not find the Debtor's testimony regarding her former attorney to be credible, based upon her responses to the following questions at the meeting of creditors on November 20, 2001:

TRUSTEE: In the last year have you made any other transfers of your assets [other than the \$5,000 transferred to your mother as her funds] for less than fair value? I'm not saying that that was your asset, but in the last year have you given away, junk [sic], sold, traded in, refinanced or otherwise gotten rid of anything you own?

DEBTOR: Would my home come under that Mr. Roberts?

DEBTOR'S ATTORNEY: She refinanced her house in April 2000, and she can't remember whether [sic] when she traded cars that was within a year or not.

TRUSTEE: Other than those two possible transfers, you've not made any other disposition of your assets in the last year?

DEBTOR: No sir.

TRIAL EX. 10, pages 3-4. At that time, the Debtor specifically chose not to disclose the \$1,500.00 payment to her brother.

Additionally, in her Statement of Financial Affairs, at her meeting of creditors, and at trial, the Debtor stated that she has not worked within the past three years and that she lives on the income of her domestic partner, Mr. Horne.<sup>7</sup> When asked at trial about the listing on the Uniform Residential Loan Application associated with the refinancing of her home mortgage indicating that the Debtor owned and operated a home day care center known as Weetot Lovin Care, from which she claimed to receive income of \$10,985.00 per month, the Debtor testified that it was false. See COLLECTIVE TRIAL EX. 4. The Debtor stated that the loan officer closing her loan told her that she had to list employment and a monthly income of her own, so they fabricated the daycare and monthly income therefrom. The Debtor testified that she knew the statements were false when she signed them, but that, at the time, she did not know the ramifications of falsifying her loan documents.<sup>8</sup>

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<sup>7</sup> At her meeting of creditors, the Debtor testified that Mr. Horne had been a mortgage investor at Bank of America and then worked for Delta Funding. See TRIAL EX. 10. At trial, the Debtor testified that Mr. Horne brought approximately \$30,000.00 per year into the household.

<sup>8</sup> The court finds that this testimony that the loan officer advised the Debtor to falsely represent her employment and income is not credible. First, the notion is inconsistent with standard business practices. Second, the Debtor testified that prior to refinancing her home, she had no prior dealings with First Residential Mortgage, whereby she could have established a relationship with the company, nor did she personally know anyone working there. Third, in her August 27, 2001 deposition, the Debtor agreed that she “walked in there as a stranger and wanted to borrow money to refinance [her] house and they agreed to do that based on [her] household income.” TRIAL EX. 6, page 18, line 24 through page 19, line 3. At trial, the Debtor testified that First Residential Mortgage had called her about refinancing her home and that until the closing, she only dealt with the company over the telephone. The Debtor’s inconsistent testimony weighs heavily against her credibility.

Along these lines, the Debtor did not disclose income received from other sources in her bankruptcy statements and schedules. At her August 27, 2001 deposition, the Debtor testified as follows:

Q: What type of income source do you have per month?

A: The gentleman I live with. . . . [H]e's my domestic partner.

. . . .

Q: So he has income. Do you get child support for your two children?

A: My children's father, he draws disability and so do they.

Q: So they have some disability income?

A: Yes.

TRIAL EX. 6, page 6, line 21 through page 7, line 10. However, the Debtor's statements and schedules contain only two references to Mr. Horne. First, there is a handwritten notation on her Statement of Financial Affairs that "funds came from domestic partner" with which she made payments to creditors within 90 days of filing. COLLECTIVE TRIAL EX. 7 (Statements and Schedules of Barbara A. Jarde: Statement of Financial Affairs). Next, there is a notation on her statement of income that "Debtor is supported by her domestic partner" but there is no monetary figure for this income. COLLECTIVE TRIAL EX. 7 (Statements and Schedules of Barbara A. Jarde: Schedule I - Current Income of Individual Debtor(s)). Additionally, the Debtor failed to list any disability income received from her ex-husband on behalf of her children, despite the instruction to list "Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above." COLLECTIVE TRIAL EX. 7 (Statements and Schedules of Barbara A. Jarde: Schedule I - Current Income of Individual Debtor(s)).

Additionally, the Debtor indicated in her statements and schedules that as of the petition date, October 15, 2001, she had \$100.00 in her checking account. At her meeting of creditors

on November 20, 2001, the Debtor testified that she had a balance of \$400.00 in her checking account on the date she filed her bankruptcy petition. However, according to the bank statement for October 2001, the Debtor had a beginning balance of \$2,124.20 and an ending balance of \$574.65. COLLECTIVE TRIAL EX. 5 (October 2001 bank statement). Although the statement does not provide a daily balance, it does show the date for each deposit, the date each check cleared the bank, and the date each miscellaneous debit was deducted from the account. COLLECTIVE TRIAL EX. 5 (October 2001 bank statement). Using these dates, the court determined that after applying all deposits and deductions from the Debtor's account from October 1, 2001, through (and including) October 15, 2001, the Debtor had \$1,356.81 in her checking account at the close of business on October 15, 2001. At trial, the Debtor testified that her \$100.00 figure included checks that she had written but that had not cleared on October 15, 2001. Nevertheless, even counting checks that cleared within five days of October 15, 2001, the Debtor still had \$1,194.86 in her account, and counting all remaining checks that cleared for the month of October, the Debtor had \$901.48 in the account.<sup>9</sup>

The Debtor failed to include transfers of property and income sources in her statements and schedules. Additionally, she misrepresented the amount of money in her checking account at the time she filed her petition, and she misrepresented the nature of the funds moving in and out of her checking account each month. Moreover, the Debtor has done nothing during the course of her bankruptcy case to cure these glaring inaccuracies and/or omissions. The Debtor was given ample opportunity to correct the deficiencies in her statements and schedules at her meeting of creditors,

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<sup>9</sup> These last two assumptions do not include any miscellaneous debits deducted or deposits credited to the checking account after October 15, 2001, since the Debtor's testimony was that she had checks that had not cleared.

yet, she continued to perpetuate their inconsistencies, falsely testifying that she had not made any additional transfers when, in fact, she had given \$1,500.00 to her brother. Furthermore, the Debtor could have amended her statements and schedules at any time; however, she did not.

Her statements and schedules were executed under oath, and, in fact, the Debtor testified under oath at her meeting of creditors that they were true and correct. The court believes that the Debtor was aware of these failures and misrepresentations when she filed her statements and schedules and when she testified at her meeting of creditors. Likewise, the court finds that the Debtor's actions infer fraudulent intent, especially in light of her testimony at the meeting of creditors when she could have corrected the inaccuracies in her statements and schedules, but she chose to continue her misrepresentations. These omissions and inaccuracies were material to the Debtor's bankruptcy case, in that it was impossible for creditors and the Chapter 7 Trustee to ascertain the true nature of her financial status. Further, the Debtor's continued omissions and misrepresentations hindered Mr. Fitzpatrick's administration of her bankruptcy estate. The court finds that the Debtor is not entitled to discharge pursuant to § 727(a)(4).<sup>10</sup>

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<sup>10</sup> Because the court has determined that the Debtor shall be denied discharge pursuant to § 727(a)(3) and (4), it is not necessary to address the Plaintiff's objection to the Debtor's discharge pursuant to § 727(a)(5) or to address the Plaintiff's § 523(a)(2)(A) argument.

### III

In summary, the court finds that the Debtor's discharge shall be denied pursuant to 11 U.S.C.A. § 727(a)(3) and (4). A judgment consistent with this Memorandum will be entered.

FILED: April 1, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-35031

BARBARA JARDET  
a/k/a BARBARA ANN CUNNINGHAM  
a/k/a BARBARA ANN HORNE

Debtor

JOHN P. NEWTON, JR., TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3204

BARBARA JARDET

Defendant

**J U D G M E N T**

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, it is ORDERED, ADJUDGED, and DECREED that the Plaintiff's Complaint objecting to the discharge of the Defendant Barbara Jardet is SUSTAINED. The Defendant's discharge is DENIED pursuant to 11 U.S.C.A. § 727(a)(3) and (4) (West 1993).

ENTER: April 1, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE