UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 01-33390
	)	
Anthony Earl DeMore	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 01-3227
	)	
Mary A. DeMore,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Anthony Earl DeMore,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court after trial upon Plaintiff, Mary A. DeMore's ("Mary" or "Plaintiff") Complaint to Determine Dischargeability of Certain Debts ("Complaint") [Doc. #1] and the Answer of Defendant, Debtor Anthony Earl DeMore ("Anthony" or "Defendant") [Doc. #3]. The issue is whether Anthony's obligation to pay certain joint debts owed to third parties, ordered in a state court decree of divorce from Mary, is nondischargeable under 11 U.S.C. §523(a)(15)[1].

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings under Section 523(a)(15) are core proceedings. 28 U.S.C. § 157(b)(2)(I).

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Plaintiff's complaint also asserted a claim under 11 U.S.C. § 523(a)(5); however, it was abandoned at trial. The Judgment Entry granting the parties' divorce [Plaintiff's Trial Exhibit 1, p. 2, ¶ 7] states that both parties waived claims for spousal support, and that the assumption and distribution of all debts is a property division not in the nature of spousal support. The state court's findings and characterization of the obligations assumed by Defendant are entitled to deference. *See Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 401 (6th Cir. 1998); *Bullock v. Hodge (In re Hodge*), 265 B.R. 908, 912 (Bankr. N.D. Ohio 2001). Plaintiff is not now asking this court to look behind that language, nor does the court find any basis from the evidence at trial to do so.

The court has reviewed the entire record of the case, and considered all the evidence, exhibits, and arguments of counsel. Based upon that examination, and for the following reasons, the court finds that Defendant cannot discharge the debts in issue. Pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052, this memorandum constitutes the court's findings of fact and conclusions of law.

Summary of Facts:

I. The Divorce Decree and the Obligations

Mary and Anthony were married in the early 1980s. On October 19, 2000, the Erie County, Ohio Court of Common Pleas, Domestic Relations Division, filed its Judgment Entry ("JE") [Plaintiff's Trial Exhibit 1] granting the parties' divorce. The JE was entered by the domestic relations court upon the agreement of the parties and their counsel. The JE sets forth the parties' agreement regarding custody and support of their two minor children, Anthony R. DeMore ("son"), d.o.b. 3/14/84 and Carlee N. DeMore ("daughter"), d.o.b. 12/13/88. Mary is designated as residential custodian of their daughter. Anthony is designated as residential custodian of their son and is required to pay child support to Mary for their daughter.

The JE also sets forth the parties' agreement regarding their financial obligations and the division of marital property. The documents evidencing the debts in issue are not in the record. It can be reasonably inferred from the JE and the parties' testimony that they are joint debts.

The JE ordered the sale of the parties' former marital residence, with the parties to split any gain or loss on sale and to cooperate in efforts to sell it. [JE, p.10, ¶ 21]. Pending sale, Anthony was awarded exclusive use of the home. [*Id*.]. In turn, the JE required Anthony to make the monthly mortgage payments on the home to first mortgage holder GMAC Mortgage Corporation ("GMAC") until the property was sold. The JE also required each party to pay one-half of the monthly mortgage payment on the home to second mortgage holder Vacationland Federal Credit Union ("VFCU") until the property was sold. Anthony testified

that the monthly mortgage payment to GMAC was $580, with the payments on both mortgages totaling approximately $683 per month.

Anthony testified that the debt to GMAC is approximately $65,000. His bankruptcy schedules show the debt to GMAC as $64,798.18 and the value at commencement of the case of the real property mortgaged to GMAC and VFCU as $60,000. [Defendant's Trial Exhibit 1, Schedule D]. There is no other evidence of the value of the real property in the record. Mary testified that the total debt to VFCU was $12,000, and that she has reached an agreement with and is paying VFCU, where she used to work, for her half of the debt. Anthony's bankruptcy schedules show the debt to VCFU as $12,500.59. [*Id*.].

Anthony testified that he lived in the home, with the parties' son, until November 23, 2001. This was more than a year after the JE was entered. The parties tried unsuccessfully, once, to sell the home voluntarily and cooperatively; there is some dispute as to how voluntarily and how cooperatively. Now, according to both parties' testimony, a mortgage foreclosure case is pending in state court. Anthony testified that he fell too far behind on the payments during a time when he was off work due to injury, and that at some point GMAC would only take a lump sum to cure the default, which he did not have. The status of the foreclosure case, or even who is the plaintiff, is unclear from the record, although it can reasonably be inferred from Anthony's testimony that GMAC commenced the foreclosure since he has not made the required mortgage payments or otherwise been able to cure the default.

Anthony was also awarded the parties' 1996 Sea Ray Boat ("Boat"). [JE, p.10, ¶ 19]. The JE in turn required him to pay the installment debt to National City Bank ("NCB") for the Boat. [JE, p.10, ¶ 20]. Mary testified that she had wanted to sell the Boat for three years or so, but that Anthony loved and wanted to keep the Boat. Anthony testified that there was approximately a $28,000 balance on the NCB debt for the Boat, and estimated the value of the Boat at $20,000 to $22,000. Anthony's bankruptcy schedules show the debt to NCB as $28,600 and the value of the Boat at filing as $25,000. [Defendant's Trial Exhibit 1]. He testified that he has not made any effort to sell the Boat. In his bankruptcy schedules, Anthony indicated his intention

to surrender the Boat. [Defendant's Trial Exhibit 1, Debtor's Statement of Intentions]. The record does not show the status of NCB's efforts, if any, to repossess and dispose of its collateral.

There was a dispute at trial over whether Mary had effectively taken over possession of the Boat in the summer of 2001. Anthony said he did not use the Boat in 2001, as there was an unpaid storage fee. Mary acknowledged that she paid a substantial marina bill of $1,049 and had the Boat in the water at least once. Upon Anthony's accidental discovery that she had the Boat in the water, Mary testified that she had the Boat taken out, and did not use it again. There were some discussions of unknown timing between Mary and Anthony to the effect that she would be willing to bring the payments to NCB on the Boat current and then take them over, upon the condition that she get title to the Boat. Mary testified that Anthony refused to give her the title to the Boat, and that he would not agree to such an arrangement unless she took over payments on the mortgage debts as well. Mary further testified that she does "not have a problem paying the obligation" if she could have the Boat and "would consider it if I could afford it." She acknowledged, however, that she has no savings and that monthly payments to NCB on the Boat debt were $325. Mary further testified that she has not talked to NCB about the Boat or the debt, although she indicated an interest in seeing if "we could work something out."

The testimony at trial showed Anthony did not make any payments to GMAC or NCB after the JE was entered.[2] He testified that he made one or two payments to VFCU "in the beginning," then did not make any more. In fact, he testified that he had stopped making payments on the Boat debt in May, 2000, so that there was already a default when the JE was entered in October, 2000.

On May 25, 2001, Anthony filed his voluntary chapter 7 petition. He has now received his bankruptcy discharge. As a result of the discharge, NCB, VFCU and GMAC are now prohibited by 11 U.S.C. § 524 from attempting to collect their debts or any deficiency after sale of their collateral directly from Anthony. These

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2 Anthony testified that he tendered one check to GMAC, however the payment was refused due to the account delinquency.

creditors would not, however, be prohibited by either Anthony's discharge in bankruptcy or the JE from pursuing Mary directly to collect from her any deficiency remaining after disposition of their collateral. Mary testified that she had negotiated a "rewrite" of the VFCU note. Her understanding is that, as a result of this "rewrite", the VFCU debt against her, only, is released, and that her total debt to VFCU is $6,000. She made her first payment on the new debt to VFCU in January, 2002. But the new note is not in evidence, and it is not clear from Plaintiff's testimony whether, by its terms, VFCU has now agreed not to pursue Mary for Anthony's now-discharged half of the original VFCU debt, beyond what she is now paying pursuant to the "rewrite."

II. The Parties' Financial Conditions

Both parties testified about their respective financial situations, focusing on their past, current, and probable future incomes and liabilities. It does not appear from the record that either party has other significant personal property, exempt or otherwise, that could be liquidated to help pay the debts in issue. The JE reflects that Anthony received $9,000 from Mary's pension; there is no evidence what happened to these funds.

Anthony is 43 years of age and is presently employed. He works as a cement mason. While his work tends to vary on a seasonal basis, he estimated that his gross income was $43,000 in 2001. Anthony testified that his current income, after withholding of taxes and union dues, is approximately $2,200 a month. This is an improvement over his monthly income at the time he filed his chapter 7 petition.

Anthony was seriously hurt in an accident on March 2, 2000, before the JE was entered. His wrist was injured, he required surgery and he was off work for a lengthy period of time without income because the accident happened at home, not at work. His chapter 7 bankruptcy filing appears to be one of the difficult consequences of his accident. Anthony testified that he has been told by doctors that he might need a bone graft and more surgery on his wrist in the future, an obvious concern for a cement mason by trade. But there was no medical evidence presented and potential future medical problems and earnings impairment are now speculative. Again, in 2001, the year after his accident, Anthony's income rebounded to more than $40,000.

At the time of trial, Anthony and their son were living rent free with Anthony's fiancé, who is also currently employed. There was no evidence of her income. Anthony said that he helps out with the household monthly expenses, but understands that he is not legally obligated to do so. There was also no evidence of their son's income or circumstances, but the court notes that shortly after trial he turned eighteen, and that Anthony's financial responsibility for him ends upon the sooner of his graduation from high school or his nineteenth birthday. Anthony testified that their son is now a senior in high school.

Anthony received his bankruptcy discharge on September 28, 2001. He discharged over $86,000 in unsecured debt, including substantial medical expenses and credit card debt. As a result, Anthony testified that, at the time of trial, his only fixed monthly expenses are for gas, truck insurance, his son's car insurance, and child support for their daughter. Mary testified that his child support payment is $27.80 per week. His truck debt only had one remaining payment at the time of trial, and otherwise he has no debts outstanding. Anthony acknowledged that his financial situation has been substantially helped by the discharge, which is, of course, its purpose in providing a fresh start. He estimated his current monthly expenses at $1500, some $1200 to $1300 less than reported on his Schedule J at the commencement of his case. A conservative estimate of Anthony's disposable income is thus $700 a month at the time of trial. There was no evidence that his disposable income is likely to change materially one way or another in the future, and his legal obligation to support his son will be ending soon.

Mary is currently employed as a mortgage broker. She has been a loan officer or mortgage broker for 21 years. Mary testified that she earned over $50,000 in income in 2001; however, her income is strictly commission based and has been suffering recently in the current economy. Mary testified that she essentially has no savings and maintains a modest disposable income. She has not remarried, and is the sole support for their 13 year old daughter apart from Anthony's $27.80 in weekly child support. She has been paying $1,039 a month in rent, for

a two bedroom apartment for herself and their daughter, since turning over sole use of the marital home to Anthony. She also has a $450 a month car payment on a 1999 Mercury Sable, a $205 per month payment on the VFCU debt, and $30 to $50 monthly payments on other installment debt. She must also pay additional business expenses of $400 to $600 per month for her business VISA and business cell phone, debts that must be paid in full every month and that are not reimbursed.

Mary further testified she has been named as a defendant in the foreclosure action and her professional reputation has been damaged. She has also continued paying her ongoing debts and the debts she assumed in the JE, including half of the VFCU debt. Because Mary works in the financial services industry, she believes that if she had to file for bankruptcy her employment could be jeopardized, especially if she had to change jobs. At the very least, a poor credit rating, or even a blemish on her credit report could impede her career advancement.

Law and Analysis:

I. 11 U.S.C. § 523. Exceptions to Discharge

The issue is whether Anthony's obligations undertaken in the JE to pay the joint debts of marital creditors GMAC, NCB and VFCU are dischargeable under 11 U.S.C. § 523(a)(15), which states:

> (a) A discharge under 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
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> > (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–
> >
> > > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the

> maintenance or support of the debtor and, if the debtor or a dependant is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The parties agree that the debts in issue are not support obligations under Section 523(a)(5), a predicate to application of Section 523(a)(15). Mary then has the burden of proving that Anthony incurred the obligations in the course of a divorce or that they arose in connection with a divorce decree. If so established, the burden of proof shifts to Anthony to prove by a preponderance of the evidence that he is entitled to discharge his obligation to Mary to assume these debts. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998).[3] This burden can be met by proving either that he cannot pay the property settlement obligations or that the benefits of their discharge to Anthony outweigh any detriment to Mary if they are discharged. *Id.*

The language of the JE raises the question whether the debts in issue were incurred in connection with a divorce decree within the meaning of the qualifying language of Section 523(a)(15). The JE provides that Anthony "shall assume" or "shall pay" the debts to third parties in issue, without specific hold harmless or indemnification language running in Mary's favor. Some courts have held that, in the absence of such hold harmless language, debts to third party creditors are not actually new obligations to the former spouse incurred in connection with a divorce decree within the meaning of Section 523(a)(15). *See, e.g., Belcher v. Owens (In re Owens)*, 191 B.R. 669, 674 (Bankr. E.D. Ky. 1996).

The Bankruptcy Appellate Panel for the Sixth Circuit reached a different conclusion in a case also construing Ohio law. In *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998), a debtor's

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The court recognizes that other courts have allocated the burdens of going forward and proof differently. The court will, however, follow the burdens articulated in Molino. The two exceptions are structured in the nature of affirmative defenses, with the evidence and ability to prove them most logically resting with the debtor.

obligation to pay a joint third party creditor arose in a separation agreement incorporated into an Ohio domestic relations court's divorce decree, which lacked any hold harmless language in favor of the non-debtor spouse. The bankruptcy appellate panel held that the divorce decree nevertheless created a debt to the spouse within the qualifying language of Section 523(a)(15). The bankruptcy appellate panel ruled that the non-debtor spouse still had a new right to payment and new enforcement rights upon debtor's breach of the obligations in the divorce decree, even without express hold harmless language in her favor.

The same result follows in this case, which also involves a JE issued by an Ohio domestic relations court. The JE does not contain hold harmless language in favor of Mary (or in favor of Anthony as to obligations undertaken by Mary), but there is nothing in the JE itself or otherwise in Ohio law that would not give Mary (or Anthony) the right to a remedy to enforce the new obligations outside of bankruptcy. The court finds that Mary has therefore established through the JE that Anthony's obligations to pay GMAC, NCB and VFCU constitute debts incurred by the debtor in connection with a divorce decree within the scope of Section 523(a)(15). As explained above, the burden accordingly shifts to Anthony to prove that one of the exceptions in Section 523(a)(15) applies to these debts.

A. 11 U.S.C. § 523 (a)(15)(A) - "Ability to Pay Test"

Under the ability to pay test the court must first determine the amount of disposable income, if any, the debtor has available to pay the debt. *In re Barnes*, 218 B.R. 409, 411 (Bankr. S.D. Ohio 1998). Although courts have taken different approaches in applying this test, the majority have applied the same disposable income analysis used in a chapter 13 case under 11 U.S.C. § 1325(b)(2). *See, e.g., In re Koenig*, 265 B.R. 772 (Bankr. N.D. Ohio 2001). In making this calculation, a debtor's income and expenses are generally gauged at the time of trial. *Id.* Under the disposable income test as derived from chapter 13, a marital obligation will be discharged under Section 523 (a)(15) only if repaying it reduces a debtor's current income below the what is reasonably necessary for the support of the debtor or his or her dependents. *Hammermeister v. Hammermeister (In re Hammermeister)*, 270 B.R. 863, 875 (Bankr. S.D. Ohio 2001). Further, the court

may consider a debtor's future earning potential, *Koenig*, 265 B.R. at 776 (citing *Newcomb v. Miley* (*In re Miley*), 228 B.R. 651, 655 (Bankr. N.D. Ohio 1998)), as well as support provided by a new spouse or spousal equivalent. *Cleveland v. Cleveland* (*In re Cleveland*), 198 B.R. 394, 399 (Bankr. N.D. Ga. 1996).

As explained above, Anthony's current income and living arrangements leave him with disposable income conservatively estimated at $700 per month. He is certainly not living a lavish lifestyle, but he is also benefitting from both his bankruptcy discharge of other debts not in dispute as well as his current living arrangement with his fiancé. There is no indication that his income will change for the worse in the near future, as the medical concerns raised were too speculative to rely upon as a basis for finding that he does not now have an ability to pay the debts in issue. Also, the parties' son is close to emancipation, and while Anthony may very well continue help provide him with support, he will no longer be legally obligated to do so under the JE.

The biggest impediment to determining whether Anthony has an ability to pay the assumed debts is articulating the amount of the debts he might have to pay. All three were secured debts, and the creditors will not even look to Mary for payment unless there is a deficiency that arises upon disposition of their collateral.

As to the home, the only evidence of value is from Anthony's bankruptcy schedules, which show a property value of $60,000 and secured claims of VFCU and GMAC totaling approximately $78,000. It could be expected that costs of foreclosure and accruing but unpaid interest will increase the debt, and that on a forced liquidation the sale price will be less than the value scheduled by Anthony, but there is no evidence of what those impacts might be. On the record, then, the projected deficiency would be approximately $18,000, although Mary is paying one half of the total VFCU debt, as she was obligated to do by the JE. If Mary's one half of the VFCU debt is subtracted from the projected deficiency, the total projected deficiency on the home which Anthony might arguably be required to pay under the JE is approximately $12,000, an amount that Anthony could reasonably repay in a period of 17 to 21 months while still supporting himself in basic fashion.

Even if the deficiency becomes larger, there is still a realistic ability to pay it over a reasonable period of time given Anthony's age and demonstrated income earning capacity.

This analysis in some respects begs the question what exactly the obligation undertaken by Anthony in the JE requires of him. He agreed and was ordered to make the monthly mortgage payments to GMAC while he occupied the home. He did not do so. The home was to be sold, with any loss or gain shared equally by the parties, including Mary. The JE clearly contemplates, however, that the home would be sold cooperatively at fair market value, not liquidated under distress conditions at a foreclosure sale. But the only reason the prospect of a forced sale has arisen at all is because Anthony did not make the mortgage payments he was ordered to make by the domestic relations court.

This court cannot rewrite the state court JE and change or shift the liabilities of the parties, such as holding that by his breaches Anthony is now obligated to pay all of any deficiency that arises on sale of the home. *See Krein v. Hanagan (In re Krein)*, 230 B.R. 379, 387 (Bankr. N.D. Iowa 1999); *Kopp v. Marro (In re Marro)*, 1999 B.N.H. 44, 1999 Bankr. LEXIS 1897, 11 (Bankr. D.N.H. 1999). That can only be done by the state court, to which the parties will undoubtedly have to return. But whether Anthony's obligation to Mary under the JE insofar as the GMAC and VFCU debts might ultimately be determined by the state court to be payment of half any deficiency; payment of the whole deficiency; payment of an amount that sums to the mortgage payments he never made until merger of the mortgage debts into a state court decree of foreclosure; or some combination of these amounts, the court finds that Anthony has not met his burden under Section 523 (a)(15)(A) of proving that he cannot pay the assumed debts as to the home while continuing to support himself in the future. *See Findley v. Findley (In re Findley)*, 245 B.R. 526, 529 (Bankr. N.D. Ohio 2000) (the court notes a similar lack of clarity in what being required to perform an obligation in a divorce decree ultimately means to the debtor).

With respect to the Boat, the JE simply required Anthony to assume the debt to NCB in exchange for possession of the Boat, with no sale required and no different allocation of any gain or loss other than to

Anthony. The debt to NCB has been in default since mid--2000. As with the home, NCB will likely not pursue Mary personally to collect the debt unless there actually is a deficiency after disposition of the Boat. At the time of trial, the projected potential deficiency evidenced in the record ranges from $6,000 to $8,000 based on Anthony's testimony. That sum could also realistically be repaid out of Anthony's $700 monthly disposable income over a 9 to 12 month period of time. So the court finds that Anthony has not proved that he is unable to pay the assumed obligation to NCB for the Boat under Section 523(a)(15)(A).

The court recognizes that the burden of paying the assumed obligations cannot only be considered by evaluating them in isolation from one another. Anthony testified at trial that the total of the monthly payments on the three debts would be $1000, and that he does not have the ability to make these total payments now. He assumes, however, a non-default state of affairs, which does not now exist. Anthony's maximum total exposure would be more likely to be the deficiency, which totals approximately $21,000 on the trial record. He is employed and expected to be employed in the foreseeable future, but does not have executable property. So the most any creditor will be able to extract from him involuntarily, be it Mary or another creditor, will be the amount of his wages that can be legally garnished. Garnishment of Anthony's wages at their current level would still leave him with income sufficient to support himself. And with a current projected $700 monthly disposable income, debts at that level could still be reasonably and voluntarily repaid on some negotiated basis over a three to five year time frame while Anthony continues to support himself in basic fashion. Whether viewed separately or together, Anthony has not proved he is unable to pay the assumed obligations.

B. 11 U.S.C. § 523 (a)(15)(B) - "Balancing of Detriments Test"

Section 523(a)(15)(B) itself provides no guidance as to how the court should determine and balance the interests of the parties. The only guidance from the Sixth Circuit Court of Appeals is in an unpublished opinion that endorses a test balancing the parties' standards of living as affected by the discharge or nondischarge of the obligations in issue. *Patterson v. Patterson*, 1997 U.S. App. LEXIS 33664; 1997 WL 745501 (6th Cir. 1997). Ultimately the court must make an equitable determination comparing the relative

financial condition of the parties. The debts in issue will be discharged only if the debtor's standard of living will fall "materially below" the non-debtor spouse's standard of living if they are not discharged. *Id*. at 3, n.1. In *Patterson*, the court of appeals also listed the following, non-exclusive factors to guide balancing the detriment to each party:

> (1) the amount of debt and payment terms;
> (2) all parties and spouses' current incomes;
> (3) all parties and spouses' current expenses;
> (4) all parties and spouses' current assets;
> (5) all parties and spouses' current liabilities;
> (6) parties and spouses' health, job training, education, age, and job skills;
> (7) dependents and their ages and special needs;
> (8) changes in financial conditions since divorce;
> (9) amount of debt to be discharged;
> (10) if objecting creditor is eligible for relief under the bankruptcy code; and
> (11) whether parties have acted in good faith in filing bankruptcy and in litigation of §523(a)(15) issues.

Id. at 7, n.1 (citing *In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky 1996)).

Most of these factors have already been discussed and addressed above. The parties' incomes and expected future incomes are not dramatically different from one another. While Mary earned more than Anthony in 2001, she also has business expenses connected with earning her income that tend to even their earnings out. Both have some earnings risk, Mary because she is paid through commissions and Anthony because his work is seasonal. Neither spouse lives luxuriously or beyond their means now, and while both have basic shelter and transportation, neither appears to have any savings or much personal property of value other than for their own use in daily living. Anthony currently benefits from his supportive relationship with his fiancee in having a place to live that he does not have a legal obligation to pay for. Their daughter is only 13, however, and most of the financial burden of raising her will clearly fall on Mary, even though Anthony has a weekly child support obligation that will continue for at least 5 more years. Their son, on the other hand, is now 18 and Anthony will be relieved of the legal obligation for his support upon his imminent graduation from high school.

Anthony is also clearly deriving an acknowledged financial benefit from his bankruptcy discharge.

Mary's personal liability for the assumed obligations would also be dischargeable were Mary to file for bankruptcy, one of the factors identified for consideration in *Patterson*. This court, like others, doubts that Congress really intended to encourage more bankruptcy filings to discharge marital debts by adoption of the test in Section 523(a)(15)(B). *Findley*, 245 B.R. at 532-33. Nevertheless, the court recognizes that in some circumstances, a bankruptcy filing by the other spouse might make the most overall financial sense for addressing the debts in issue. In this case, the court is persuaded that Mary's employment in the financial services industry realistically precludes a bankruptcy filing. While a bankruptcy discharge would provide immediate short term financial relief for both her and Anthony by discharging any personal liability she has on the assumed obligations, its long term consequences to Mary's income potential and her ability to support herself and their daughter would be damaging.

The last factor on the enumerated list in *Patterson* "strongly suggests that ... equitable considerations can and should be considered in applying Section 523 (a)(2)(B)." *Findley*, 245 B.R. at 533. In October, 2000, when Anthony agreed to the terms of the JE, he was already in serious financial trouble. He was clearly in substantial default on the Boat debt to NCB by then. And if Anthony hadn't already defaulted on the mortgage debts, he did almost immediately thereafter, with his chapter 7 filing to follow within only 7 months. If these problems had been raised at the time of the divorce decree, the debts might have been addressed differently and the potential for cooperative, economically beneficial negotiated resolutions with the creditors, such as through quick voluntary surrender of the collateral, was then more realistic. Even now, it does not appear that Anthony has undertaken active efforts to cooperate with the secured creditors and minimize potential deficiencies.

In particular, it was irresponsible of Anthony to assume the NCB debt and push for possession of the Boat given the already existing default and his apparent inability at that time to cure the default and resume monthly payments on the Debt. The Boat appears from the testimony to have been something of a symbolic marital flashpoint between the parties, even at the time of trial in this case, with Anthony in particular unwilling

to let Mary have it. The court cannot find that Mary's payment of the marina fees, which is admittedly curious given their substantial amount, and her brief use of the Boat in 2001 relieved Anthony of his obligation for the NCB debt, either as an equitable matter or a legal matter.

In this case Anthony was not ordered to pay debts on property that Mary was awarded. Anthony agreed and was ordered to pay debts on property that he wanted and was awarded in the divorce. He and their son lived in the home for more than a year without paying any of the debt on it, while Mary continued to pay her own rent and her obligations from the divorce, including her part of the VFCU debt. From an equitable standpoint, the court finds it unfair to now essentially dump these debts back in Mary's lap to pay.

In summary, the court finds from an overall analysis of the factors identified in *Patterson*, and a general balancing of the relative detriments, that Anthony has failed to prove that the discharge of the assumed marital debts would result in a benefit to him that would outweigh the hardship that Mary would encounter as a result of the discharge. The equities of their relative situations favor Mary. Most of the financial factors are neutral between the parties. Neither have much significant personal property. Both have monthly disposable income, as established above with respect to Anthony and as evidenced by Mary's ability to find the money in the summer of 2001 to pay a substantial marina bill. But Anthony has received a "fresh start" from this court, and his financial condition has clearly stabilized and improved since the divorce. Mary has continued all along to pay her obligations, including the VFCU debt and the others she assumed in the divorce. The financial factor that weighs heaviest in Mary's favor is that she is the residential custodian bearing most of the financial responsibility of supporting their daughter, who is still only 13 years old. In contrast, Anthony's legal obligations for support of their 18 year old son will cease very soon.

The issue ultimately becomes which party's future disposable income should be exposed to paying the debts in issue. The court finds that the burden should continue to rest with Anthony, as the further benefit to him of their discharge does not under all of the foregoing circumstances outweigh the detriment to Mary if his obligation to her is discharged. Coping with these debts will undoubtedly impact Anthony's standard of

living in the future. But the court cannot find that he will be unable to support himself reasonably in the future or that his standard of living will fall so materially below Mary's that she should now essentially be forced to pay the GMAC, VFCU and NCB debts. She has already been named a defendant in a foreclosure action and her professional future has been risked with the ensuing credit problems. Therefore, Defendant has not met his burden under of proof under Section 523 (a)(15)(B).

Conclusion:

Finding that the Plaintiff has sustained her burden and Defendant has failed to sustain his burden under 11 U.S.C. § 523(a)(15)(A) and (B), judgment will be entered in Plaintiff's favor on her Complaint to Determine Dischargeability of Certain Debts and the debts declared NON-DISCHARGEABLE. In reaching this decision the court has considered all of the evidence, exhibits and arguments of counsel, regardless whether they are specifically referred to in this Memorandum of Decision. A separate judgment in accordance with this Memorandum of Decision will be entered.

Dated:

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge