UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 01-35838
	)	
Panfilo R. Mata, Jr.	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 02-3015
	)	
	)	Hon. Mary Ann Whipple
Maria V. (Mata) Vela,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Panfilo R. Mata, Jr.	)	
Defendant.		

MEMORANDUM OF DECISION

This matter came before the Court for trial upon Plaintiff Maria Vela's complaint to determine the dischargeability of a marital debt. Plaintiff requests that the Court declare the debt owed by Defendant/Debtor Panfilo Mata, her ex-husband, to be nondischargeable in his chapter 7 case under 11 U.S.C. § 523(a)(2), §523(a)(5), or § 523(a)(15). 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 to determine the dischargeability of debts are core proceedings. 28 U.S.C. § 157(b)(2)(I).

This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the Court finds that the marital debt owed by Defendant to Ms. Vela pursuant to their divorce decree is nondischargeable.

FINDINGS OF FACT

I. The Divorce Decree and the Marital Debt

Mr. Mata and Ms. Vela were married in 1974. On August 29, 2001, after a hearing on July

25, 2001, the Court of Common Pleas of Van Wert County, Ohio, entered a Final Judgment Entry granting the parties' divorce. The final divorce decree was entered approximately three weeks before Mr. Mata commenced his Chapter 7 case in this court on September 19, 2001. Defendant's Exhibit C.

The state court determined that Ms. Vela be the custodial and residential parent for the parties' minor children, two daughters born April 4, 1985, and September 23, 1994, and that Mr. Mata pay child support to Ms. Vela until the children reach 18 years of age or graduate from high school, whichever occurs later. However, the decree provides that "neither party shall pay or receive any spousal support." Defendant's Exhibit C, p. 3. The decree also provides that Mr. Mata would retain the marital residence free and clear of any claim of Ms. Vela and would assume any indebtedness related thereto. *Id.* In addition, paragraph nine of the divorce decree required Mr. Mata to assume and pay all of his personal medical bills and all marital debts. *Id.* at 4. However, the decree provided that the parties agreed to pay and hold the other harmless for "any and all personal or marital debts and obligations incurred by him or her since May 16, 2001." The divorce decree further provides that each party shall hold the other party harmless and indemnify him or her with respect to any obligations assumed in the divorce decree, and that "such debts assumed by each of the parties shall be in lieu of spousal support, i.e. alimony, and shall not be dischargeable in Bankruptcy pursuant to 11 U.S.C. Sec. 532 (sic)." *Id.* at 5.

The divorce decree does not specify the amount and identity of the marital debts. However, at trial, the parties stipulated that the marital debt equals $32,174.36 and further stipulated to the accuracy of the schedules in Mr. Mata's main bankruptcy case. The original Schedule F filed by Mr. Mata, wherein he listed all of his unsecured debts, indicates a total debt of $32,174.36. It further indicates, together with the listing of his co-debtors in Schedule H, that Ms. Vela is a co-debtor on only $19,419.70 of that debt.[1] Although Mr. Mata testified that he was not aware of the extent of the marital debt, both parties testified that he agreed to pay the marital debt in order to retain the marital residence free and clear of any claims of Ms. Vela. Pursuant to the divorce decree, Ms. Vela quit-claimed her interest in the real estate to Mr. Mata.

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[1] Mr. Mata later filed an amended Schedule F indicating total debt of $32,641.24. However, the total on which Ms. Vela is designated as a co-debtor is the same as the original Schedule F.

The divorce decree also awarded the parties' 1992 Ford Taurus to Mr. Mata and the 1994 Ford Taurus to Ms. Vela. It further provided that Ms. Vela assume any indebtedness on the 1994 vehicle. Although Ms. Vela paid in full the loan on the 1994 Ford Taurus, Three Rivers Credit Union retained the title to the vehicle as cross collateral for another loan for which Mr. Mata is responsible under the decree.

II. The Parties' Financial Conditions

Mr. Mata lives in Van Wert County, Ohio, and has been employed as a construction worker through the union hall in Fort Wayne, Indiana, for the past four years. While his work tends to vary on a seasonal basis, his gross income in 2002, including unemployment compensation, was $35,323. Mr. Mata's amended Schedules I and J admitted at trial indicate that his average monthly income, after payroll deductions, is $1,234.94, and his monthly expenses total $2,424.40. Plaintiff's Exhibit 2. However, a review of the schedules together with the testimony at trial reveals numerous inaccuracies.

First, Mr. Mata lists his child support payments both as a payroll deduction on Schedule I and as a monthly expense on Schedule J. In addition, Mr. Mata testified that the $213.53 listed as a monthly payroll deduction for union dues is incorrect. He pays only $33 per month in union dues. However, he testified that $ .80 per hour worked is also withheld as his contribution to his pension and health and welfare benefits. Assuming a 40 hour work week[2], his benefit contributions average $138.66 per month. With these modifications, Mr. Mata's average combined monthly income, after payroll deductions that do not include child support payments, is $1,957.21.

Mr. Mata also testified that several entries listed on Schedule J as monthly expenses are inaccurate. He testified that the amounts indicated as monthly expenses for homeowner's insurance and real estate taxes are not his actual monthly expenses. While the testimony was somewhat unclear, the Court finds that $60 per month for real estate taxes and $40 per month for homeowner's insurance is more likely than not his actual expense.

The Court also finds several other monthly expenses overstated. First, Mr. Mata indicates that

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[2] Mr. Mata testified that he works 32 to 40 hours per week.

he spends $100 per month on home maintenance expenses. However, there was no testimony as to any major home repairs or upkeep expenses. While certainly some home repairs may become necessary, the Court finds that $30 per month is a more realistic figure. Second, Mr. Mata indicated that he spends $100 per month on medical and dental expenses. However, he testified that he seldom if ever goes to the doctor. Likewise, Ms. Vela testified that he went to a doctor no more than three times in the 27 years they were married. She further testified that she pays for the children's medical insurance and that Mr. Mata has not paid any of the children's medical bills since the divorce. Mr. Mata's testimony that he spends such amounts on cold remedies and Tylenol for his children when they visit him is not credible. The Court finds that $20 per month for such remedies is adequate. Third, Mr. Mata indicated that he spends $433 per month in gasoline for his vehicle. He testified that he must travel to work and that he fills his tank every day at a cost of approximately $20. Ms. Vela testified that, although he travels from Van Wert County to Indiana to work, while they were married he filled his car's gas tank approximately three times per week. The Court notes that Mr. Mata's original Schedule J filed in his bankruptcy case listed only $200 per month in transportation expenses. While such expenses may certainly vary, the Court finds that an average of $260 per month in transportation expenses is reasonable.

Finally, Mr. Mata lists $680.40 as his monthly child support expense. However, he testified that he only pays $150 per week in child support, which is a monthly average of $650. In addition, the parties' oldest daughter is now 18 years old and will graduate from high school in a few weeks. Thus, beginning in June, 2003, Mr. Mata will not be paying for her support. He will then be paying only an average of $325 per month in child support. After considering the above stated adjustments, rather than a monthly deficit, as of June, 2003, Mr. Mata will have a monthly disposable income of $305. Although Mr. Mata indicated that he allows his 38 year old friend and his friend's son to live in his home, he testified that he collects no rent from his friend. The record is silent as to whether the friend otherwise contributes to the expenses of the home.

While it does not appear that either of the parties has significant personal property that could be liquidated to help pay the debts in issue, Mr. Mata has a significant asset in the retention of the marital residence. He testified that a realty company appraised the property at the time of the divorce at $55,000. The Court notes, however, that the reaffirmation agreement with the mortgagee, which

was signed by Mr. Mata, indicates that the fair market value of the property is $67,000. [Case No. 01-35838: Doc. # 4]. The mortgage debt was reaffirmed in the amount of $44,121.07. *Id.*

Ms. Vela works as a laborer at Teleflex, Inc., in Van Wert, Ohio. Her gross income in 2002 was $28,630. Defendant's Exhibit A. Her net monthly pay, after payroll deductions, is $1,782. Defendant's Exhibit B. In addition, she receives 134.78 per week in child support payments, for a monthly average of $584.[3] See Plaintiff's Exhibit 1. Thus, her total monthly income is $2,366. However, as indicated above, beginning in June, 2003, she will no longer receive child support payments for her oldest daughter. As a result, her monthly income will be decreased by $292, for a total monthly income of $2,074. Ms. Vela testified regarding her individual monthly expenses. Such expenses, which include a car payment in the amount of $392 per month, total $1,997. As of June, 2003, Ms. Vela's monthly disposable income will be $77. Although her monthly expense for health insurance is $56.33, Ms. Vela testified that the cost will increase to approximately $96 per month on April 1, 2004. Finally, Ms. Vela testified that her live-in boyfriend helps with expenses. However, the record is silent as to the extent of such help.

LAW AND ANALYSIS

I. Exception to Discharge under 11 U.S.C. § 523(a)(2)(A)

Plaintiff first contends that the marital debt at issue is nondischargeable under 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) excepts a debt from discharge if it is for property "obtained by . . . false pretenses, a false representation, or actual fraud ..." A plaintiff proceeding under section 523(a)(2)(A) must prove the following elements by a preponderance of the evidence: "(1) the debtor obtained [property] through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss." *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). A debtor's intent to defraud a creditor is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *Id.* at 281-82. "If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the

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[3] According to Mr. Mata, the amount he pays in child support includes certain processing charges, thus accounting for the difference in the amount received by Ms. Vela and the amount paid by Mr. Mata.

debtor." *ITT Fin'l Servs. v. Szczepanski (In re Szczepanski),* 139 B.R. 842, 844 (Bankr. N.D.Ohio 1991).

In this case, Plaintiff alleges that Defendant obtained the marital residence by fraudulently representing that he would pay the marital debt at issue, knowing that he was unable to, or had no intention of, paying the debt. The focus of Plaintiff's case was on Defendant's intent to defraud. Although Defendant filed his chapter 7 petition just three weeks after the parties' divorce became final, and approximately two months after the hearing on the divorce, Defendant testified at trial that he did not realize the full extent of the debt owed at the time of the divorce since Plaintiff had historically handled the family finances and paid their bills. Plaintiff failed to present any evidence that Defendant was involved in dealing with their finances during their marriage, that she had ever discussed the extent of the debt with Defendant, or that he should have gained such information in some other manner. Although she indicated that she discussed obtaining a home equity loan to pay their debts, there is no indication as to when such discussions occurred, the amount of the debt at the time of the discussion, or the degree of equity in the home at the time of the discussion. While the closeness in time between incurring a debt and the filing of bankruptcy is a factor that may be considered in determining a debtor's intent to repay the debt, *see Rembert,* 141 F.3d at 282 n.3, it is not alone determinative of such intent. The Court finds Defendant's testimony credible that, at the time of the divorce, he did not realize the degree of indebtedness for which he agreed to assume responsibility. Finding that there is room for an inference of honest intent, the Court further finds that Plaintiff has failed to meet her burden of demonstrating that Defendant intentionally misrepresented his willingness or ability to pay the marital debt. Accordingly, the marital debt at issue is not excepted from discharge under § 523(a)(2)(A).

II. Exception to Discharge under 11 U.S.C. § 523(a)(5)

Plaintiff next contends that Defendant's obligation to pay the marital debt at issue and to hold her harmless and indemnify her thereon constitutes spousal support or alimony and, thus, is excepted from discharge under § 523(a)(5). Section 523(a)(5) excepts from discharge any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a . . .divorce decree. . . ."

In *Long v. Calhoun (In re Calhoun),* 715 F.2d 1103 (6th Cir. 1983), the Sixth Circuit was

presented with the issue of whether the assumption of debt to a third party was in the nature of support or whether it was actually a division of marital property. Although labeled as alimony, the debt obligation was set forth in a section of the separation agreement labeled "Division of Property." *Id.* at 1105. The Sixth Circuit presented a four part test to determine whether the debt was dischargeable under § 523(a)(5). First, the court must ascertain "whether the state court or the parties to the divorce intended to create an obligation to provide support through the assumption of the joint debts." *Id.* at 1109. If they did not, the inquiry ends there. The second factor focuses on whether the obligation in fact provides support. *Id.* Third, the court must determine whether the amount of support represented by the assumption of debt is reasonable under traditional concepts of support. *Id.* at 1110. And finally, "[i]f the bankruptcy court finds the loan assumption too excessive to be fairly considered 'in the nature of' support it must then set a reasonable limit on the nondischargeability of that obligation for purposes of bankruptcy." *Id.*

In *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397 (6th Cir. 1998), the Sixth Circuit further expounded upon the analysis. The court counseled deference to state court decrees and explained that the bankruptcy court should look to traditional state law indicia that are consistent with a support obligation, including: (1) how the obligation is labeled, (2) whether the payment is direct to the spouse or to third parties, and (3) whether the payments are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. *Id.* at 401. The non-debtor spouse has the burden of proving that the obligation constitutes support within the meaning of § 523(a)(5). *Id.*

Applying the foregoing analysis, the Court finds that Plaintiff has failed to meet her burden of demonstrating that the assumption of the joint marital debt and hold harmless obligation of Defendant constitutes support.[4] The divorce decree does not designate such obligations as support. Payments were to be made to third-party creditors, not directly to Ms. Vela. The decree does not terminate Defendant's obligations upon Plaintiff's death, remarriage, or eligibility for Social Security. Thus, none of the traditional indicia of a support award set forth in *Sorah* exist in this case. Moreover, the divorce decree, which adopted the agreement entered into between the parties,

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[4] On summary judgment, the Court previously found that, based upon the record before it, Plaintiff was not entitled to judgment in her favor on her § 523(a)(5) claim. [Doc. #12]. At trial, Plaintiff offered no additional evidence in support of her claim under § 523(a)(5). .

expressly provides that "neither party shall pay or receive any spousal support."

The Court finds such agreement indicative of the parties' intent. In addition, at trial, both parties testified that Defendant agreed to assume the marital debt because he wanted to retain the marital residence. The Court finds this testimony supports a finding that the debt assumption was in the nature of a division of property rather than spousal support. In the court's view, the statement in paragraph 11 of the divorce decree that the assumption of debts was "in lieu of support" does not turn Mr. Mata's obligations to hold Ms. Vela harmless into a debt actually in the nature of support, given the foregoing facts and the other provisions of the decree. *Contra Traut v. Traut (In re Traut),* 282 B.R. 863 (Bankr. N.D. Ohio 2002). Accordingly, the Defendant's obligation to Plaintiff with respect to the marital debt at issue is not excepted from his discharge under § 523(a)(5).

III. Exception to Discharge under § 523(a)(15)

Plaintiff also argues that Defendant's obligation to pay the joint marital debts and to indemnify and hold Plaintiff harmless thereon are nondischargeable under § 523(a)(15). That section provides that an individual is not discharged from any debt

> 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. . .; 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.

This section "is intended to cover divorce-related debts such as those found in property settlement agreements that 'should not justifiably be discharged.'" *In re Crosswhite*, 148 F.3d 879, 882 (7th Cir. 1998) (citing Collier on Bankruptcy ¶ 523.21 (Lawrence P. King et al. eds.)). The burden of proving that the debt is of a type excepted from discharge under § 523(a)(15) rests with the objecting creditor/spouse. *Hart v. Molino (In re Molino),* 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998). Once this burden is met, the burden shifts to the debtor to prove, by a preponderance of the evidence, either of the exceptions to nondischargeability set forth in subsections (A) or (B). *Id.* at 907, 909.

The parties do not dispute that the marital debt at issue arose in connection with their divorce

decree. Thus, Plaintiff's burden of proof is satisfied, and it is incumbent upon Defendant to establish either an inability to pay the debt or that a discharge would result in a benefit to him that outweighs the detriment to Plaintiff.

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

Under the "ability to pay" test, the Court must determine whether the debtor has disposable income or other assets available to pay the marital debt within a reasonable amount of time. *Sacher v. Gengler (In re Gengler)*, 278 B.R. 146, 150 (Bankr. N.D. Ohio 2002); *Findley v. Findley (In re Findley)*, 245 B.R. 526, 529 (Bankr. N.D. Ohio 2000). In determining disposable income, the majority of courts have applied the following definition of "disposable income" as set forth in 11 U.S.C. § 1325(b)(2): "'[D]isposable income' means income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor. . . ." *See, e.g., Koenig v. Koenig (In re Koenig)*, 265 B.R. 772, 775-76 (Bankr. N.D. Ohio 2001). The debtor's income and expenses are generally gauged at the time of trial; however, if the circumstances so warrant, the Court may consider a debtor's future earning potential and/or expenses. *See Id.* at 776.

As explained above, Defendant's income and expenses as of June, 2003, will leave him with disposable income of $305 per month. In determining whether a Debtor has a sufficient amount of disposable income available to pay the marital debt within a reasonable amount of time, courts have warned against dedicating all of the debtor's disposable income to repayment of the debt since unexpected expenses, such as car and home repairs, may arise. *See Id.* Allowing Defendant an additional $100 per month for unexpected expenses, he will have disposable income of $205 per month that can be applied to repay the marital debt at issue. As discussed above, Defendant's Schedule F indicates that the marital debt on which the parties are jointly indebted totals $19,419.70. Thus, Defendant has the ability to pay the debt in less than eight years. The Court finds that eight years is a reasonable amount of time to complete repayment of his debt. *See Id.* (finding 8 ½ years is reasonable); *Cox v. Brodeur (In re Brodeur)*, 276 B.R. 827, 835 (Bankr. N.D. Ohio 2001) (finding eight years is reasonable given the priority the Bankruptcy Code accords to domestic obligations). Mr. Mata's precise age is not specified in the record, but from the court's observation of him at trial, this time period would be well within Mr. Mata's reasonably anticipated working life.

Furthermore, the Court may consider not only the disposable income but also property of the debtor in determining his ability to repay the marital debt. The Court finds the marital home, which Defendant now owns free and clear of any claims of Plaintiff, is a significant asset, the equity of which may be tapped to assist in a speedier payment of the debt. The home is subject to a mortgage with a balance of approximately $44,000. Although Defendant testified that at the time of the divorce, a realty company appraised the home at $55,000, the appraisal was not offered into evidence. Defendant's reaffirmation agreement, filed October 24, 2001, and signed by both Defendant and a representative of First Bank of Berne, sets forth a present market value of $67,0000. Thus, it appears that Defendant has between $11,000 and $23,000 in equity in the property.

For the foregoing reasons, the Court finds that Defendant has failed to meet his burden to prove that he does not have the ability to pay the marital debt at issue. Therefore, the Court concludes that the marital debt incurred by Defendant in connection with the parties' divorce decree and for which Plaintiff also has personal liability is nondischargeable under § 523(a)(15)(A). Nevertheless, even if Defendant has the ability to pay, the debt is dischargeable under § 523(a)(15)(B) if the benefit to Defendant from its discharge is greater than the corresponding detriment to Plaintiff.

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

Neither § 523(a)(15)(B) nor Sixth Circuit case law provide definitive guidance as to how the Court should determine and balance the interest of the parties. However, in an unpublished opinion, the Sixth Circuit endorsed a balancing test as set forth in *In re Smithers*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). *Patterson v. Patterson (In re Patterson),* 132 F.3d 33 (Table), 1997 WL 745501 (6th Cir. 1997). Under the balancing test, a court should review the financial statuses of the parties and compare their relative standards of living to determine the true benefit of the debtor's possible discharge against any hardship the former spouse and/or children would suffer as a result of a discharge. *Id.* at *3.

> "If, after making this analysis, the debtor's standards of living will be greater than or approximately equal to the creditor's if the debt is not discharged, then the debt should be nondischargeable under the 523(a)(15)(B) test. However, if the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the debt should be discharged."

Id. (quoting *Smithers*, 194 B.R. at 111); *see also Molino*, 225 B.R. at 909. In *Smithers,* the court

listed the following nonexclusive factors to guide balancing the detriments 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 Code; and
(11) whether parties have acted in good faith in filing bankruptcy and in litigation of § 523(a)(15).

Smithers, 194 B.R. at 111.

Most of these factors have already been addressed above. While neither of the parties live an extravagant life style, the financial position of Defendant is notably better than Plaintiff. After considering the parties' income and expenses, Defendant will have a monthly disposable income of $305 as of June, 2003, while Plaintiff's disposable income will be $77. As noted above, Defendant is able to repay his marital debt within a reasonable amount of time by applying only $205 of his disposable income. Thus, if the debt is not discharged, the monthly financial position of Defendant is still slightly better than Plaintiff. Although Plaintiff testified that her boyfriend helps her with her expenses, the record is silent as to the extent of his help, as it is with regards to the extent of any assistance provided to Defendant by his live-in friend. The Court will not speculate as to such assistance. The Court also notes that the parties' youngest daughter is only nine years old. Although Defendant has a monthly child support obligation for at least nine more years, most of the financial burden of raising her will clearly fall on Plaintiff.

The Court also considers the parties' assets that could be applied to the debt at issue. As noted above, neither party owns personal property that could reasonably be liquidated to pay the debts in issue. However, Defendant's retention of the marital home, with equity of between $11,000 and $23,000, provides a significant asset that could be utilized in paying the marital debt. The home could have been sold in connection with the divorce, relieving both parties of the mortgage debt and with any excess proceeds available to apply to the unsecured marital debts. Instead, Mr. Mata bargained

for the equity in the home in exchange for the other liabilities, a deal he sought to undo three weeks after it was complete with the filing of his bankruptcy case. Effectively, however, the option of sale of the home that was available at the time of the divorce is still available to Mr. Mata. It does not appear that the sale of his home now, should it come to that, would impair Mr. Mata's standard of living since he should be able to rent suitable housing for the amounts he now spends on his mortgage, property tax, insurance and home repairs. And it certainly would not lower his standard of living below that of Plaintiff who pays rent of $350 per month for an apartment for herself and the parties' two daughters.

Defendant is also deriving a financial benefit from his bankruptcy discharge. The balance of the $32,641.24 debt, above the amount for which the parties are jointly indebted, has been discharged. While one of the factors listed for consideration in *Smithers* is the non-debtor spouse's eligibility for bankruptcy relief, without more it is not dispositive. The legislative history of § 523 indicates that in applying the balancing test under subsection (B), an uncollectible spouse might suffer little detriment from a debtor-spouse's discharge of a hold harmless obligation. The legislative history provides as follows:

> The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.

140 Cong. Rec. H10752-01, H10770 (daily ed. Oct. 4, 1994). However, as one court observed, the legislative history "does not mention bankruptcy relief as the basis for the nondebtor spouse's uncollectibility and it seems anomalous to ascribe to Congress an intent to promote bankruptcy filings." *Findley v. Findley (In re Findley)*, 245 B.R. 526, 533 (Bankr. N.D. Ohio 2000). In *Findley*, the court further observed that "[d]espite the now popular view that the onus of filing bankruptcy has greatly diminished, it is still for many a traumatic and shameful alternative. . . ." *Id.* The court concluded that such an alternative should be imposed upon an unwilling spouse only where the debtor's case is compelling. *Id.*

In this case, Plaintiff is working full time and her wages would be subject to garnishment to pay the debts upon which she also has personal liability, which could certainly diminish her ability to provide life's basic necessities for herself and her children.[5] There was no testimony regarding her eligibility for discharge in bankruptcy. In any event, even if bankruptcy was an option for her, as in *Findley*, this Court is unwilling to impose such an alternative where Defendant is able to pay the debt and doing so will not cause his standard of living to notably suffer or fall below that of Plaintiff. Accordingly, the Court finds that Defendant has failed to meet his burden under § 523(a)(15)(B). Therefore, the Court concludes that the marital debt totaling $19,419.70 incurred by Defendant in connection with the parties' divorce decree and for which Plaintiff is also personally liable is nondischargeable under §523(a)(15)(B).

CONCLUSION

Finding that Plaintiff has failed to meet her burden under 11 U.S.C. § 523(a)(2)(A) and (a)(5), judgment will be entered in Defendant's favor on those claims. However, 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, therefore, be entered in Plaintiff's favor on that claim, and the marital debts upon which Plaintiff is also personally liable will be excepted from Defendant's Chapter 7 discharge.[6] A separate judgment

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[5] In Ohio, a debtor may exempt 75% of her disposable earnings, which are defined as "net earnings after the garnishee has made deductions required by law, excluding the deductions ordered pursuant to [Ohio Revised Code provisions dealing with payment of child support]." Ohio Rev. Code § 2329.66(A)(13) & (B)(1). Plaintiff's disposable income under Ohio's more restrictive definition equals $1,782.26. *See* Defendant's Exhibit B. Plaintiff could exempt 75% or $1,336, leaving $445 available for creditors to garnish.

[6] While the focus of this adversary proceeding and of the parties has been the unsecured debt for which the parties are jointly liable, the Court's decision applies equally to the secured debt for which the parties are jointly liable. Defendant has, in essence, admitted his ability to pay the mortgage debt secured by the marital residence on both of the Schedules J he has submitted and has, in fact, reaffirmed that debt. However, Plaintiff apparently remains liable on that mortgage debt. While it does not appear that either party will ever be required to pay the debt in the event that Defendant defaults on his obligations under the reaffirmation agreement, due to the fact that the debt is oversecured and would likely be satisfied from the proceeds of any foreclosure or other sale of the

in accordance with this Memorandum of Decision will be entered by the Court.

Dated:

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Mary Ann Whipple
United States Bankruptcy Judge

property, Defendant's obligation under the divorce decree to indemnify Plaintiff as to the secured debt is also not excepted from his Chapter 7 discharge.