UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 01-34752
	)	
Nicholas Willis Dammeyer	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 01-3282
	)	
Brenda Warniment,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Nicholas Willis Dammeyer,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Plaintiff Brenda Warniment's ("Warniment") complaint against her former spouse, Debtor/Defendant Nicholas W. Dammeyer ("Dammeyer"), to determine the dischargeability of a marital debt and objecting to Dammeyer's discharge. Warniment asserts claims under §§ 523(a)(15) and 727(a)(2) and (4) of the Bankruptcy Code, 11 U.S.C. The court previously denied Dammeyer's motion for summary judgment.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334 and General Order 84-1 of the United States District Court for the Northern District of Ohio, the general order of reference to bankruptcy courts in this district. 28 U.S.C. § 157(a). Proceedings under §§ 523and 727 are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1), (b)(2)(I) and (J).

The court has reviewed the entire record of the case, and considered all of the testimony, exhibits and arguments of counsel, regardless of whether referred to in this memorandum of decision. Based upon that examination, and for the following reasons, the court finds that Dammeyer is entitled to a discharge and further that the marital debt in issue owed to Warniment is dischargeable. This memorandum of decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable

to this adversary proceeding by Fed. R. Bankr. P. 7052.

STATEMENT OF FACTS

I. The Parties' Divorce and the Marital Debt

Dammeyer and Warniment divorced in 1996 after ten years of marriage. Dammeyer and Warniment entered into a written Separation Agreement on September 23, 1996. The Separation Agreement is an exhibit to and incorporated in the agreed Judgment Entry Granting Divorce, entered by the Auglaize County, Ohio Court of Common Pleas, Domestic Relations Division. Plf. Exh. 2. The Separation Agreement is a relatively complex document due to the nature of the couple's marital property interests. Both parties were represented by counsel in the divorce.

When the parties separated and divorced, Dammeyer was a shareholder in a closely held corporation called NTZD, Inc. ("NTZD"). NTZD's only business and asset was the S&W Motel located at 1321 Celina Road in St. Mary's Ohio. Although not completely clear from the trial testimony, the Separation Agreement shows that NTZD and the motel was a family business, with Dammeyer's parents and his brother, Terry Dammeyer, holding mortgages on the motel property. Terry Dammeyer was also a 50% shareholder in NTZD. There was a house appended to the motel, in which the family lived when they were together. Dammeyer made his living running the motel, both before and immediately after the divorce. The corporation paid many routine living expenses during that time frame, such as the utilities and taxes for the house where they lived. Dammeyer's interest in NTZD was the parties' primary marital asset.

The Separation Agreement comprehensively addresses division of the NTZD interest, providing that Warniment receive 165.98 of Dammeyer's 375 shares of stock in NTZD. In turn, NTZD then repurchased the 165.98 shares from Warniment. For purposes of the divorce, Warniment's interest in the NTZD stock was valued at $290,500.00. NTZD issued a promissory note for payment of the $290,500.00 value of the stock to Warniment, with the debt payable in monthly installments over thirty years at 6% interest. Each monthly installment was $2,081.23, with payments commencing retroactive to July, 1996. The Separation Agreement included the complete terms of the promissory note. Dammeyer personally guaranteed the corporation's promissory note, with the

terms of the guarantee also included in the Separation Agreement. [1]

The promissory note to Warniment contained other provisions addressing various scenarios that might arise as to the property in the future. Dammeyer's family members held the first and second mortgages on the motel property, and Warniment was granted a third mortgage on the motel property to secure the debt owed to her. Certain provisions addressed the potential for additional secured financing for the property of up to $400,000.00, as well as repayment scenarios involving consensual disposition of the property. Some protection was provided to Warniment to insure that Terry Dammeyer was not unfairly favored in repayment of his secured debt, the amount of which is not in the record. Further, upon sale of the property, Dammeyer's parents were to be repaid their debt in full, or alternatively were to receive an annuity providing monthly payments of $10,421.00. The total debt they were owed is not in the record.

After the divorce, Dammeyer continued to manage the motel. NTZD made to Warniment the promised monthly payments of $2,081.23 effective July, 1996, through October, 2000, which was the last payment made.

The S&W Motel and NTZD encountered financial difficulties in 2000 and 2001. Dammeyer testified that other motels were built in the area at the same time several businesses that provided a regular stream of lodging customers closed. Although 2000 was overall ultimately a strong year due to one business supplying steady customers, it was a temporary uptick. A downward trend continued, with NTZD's financial problems culminating in the sale of the property through a foreclosure proceeding in February or March, 2002. Details about the state court foreclosure proceeding, such as when it was commenced, the identity of the plaintiff, the exact date of sale and the purchaser at the sale are not in the record. After expenses of the foreclosure, Dammeyer's parents received the balance of the sale proceeds in an unknown amount. Neither Terry Dammeyer nor Warniment received any proceeds from the

---

[1] Separate, executed copies of the promissory note and personal guaranty, if such documents exist, are not part of the record. But Dammeyer does not dispute that he owes Warniment the debt.

foreclosure sale.

Even though Dammeyer had personally guaranteed the note, no further payments were made to Warniment after the corporate payments ceased in October, 2000. Between Dammeyer and NTZD, there was insufficient cash flow to pay both his child support, which was apparently also sometimes paid directly by the corporation, and the mortgage payments due to Warniment. Child support contempt proceedings against Dammeyer culminated in cessation of the mortgage payments in favor of child support payments. Warniment testified that thereafter child support payments from Dammeyer were still irregular. She also commenced state court proceedings to enforce payment on the marital debt. But Dammeyer then filed his chapter 7 petition with this court on July 31, 2001, Plf. Exh. 1, invoking the automatic stay of the state court proceedings and seeking to discharge his debt to Warniment arising from his guarantee of the corporate repurchase of Warniment's NTZD stock. As of the commencement of his chapter 7 case, Dammeyer's debt to Warniment for his guarantee of the stock repurchase had been reduced from the original amount of $290,500.00 to approximately $197,000.00.[2]

The parties had also owned a duplex. The Separation Agreement awarded the duplex to Warniment. Although she and her new husband received some rental income from the duplex, upon which there was a $26,000 mortgage, Warniment testified that she later sold the property in 2002 for $90,000.00.

The Separation Agreement also resolved custody and support issues for the couple's three children. All three are minors, with the eldest child born on September 1, 1988, the middle child born on October 1, 1990, and the youngest child born on May 18, 1994. Plf. Exh. 2. Warniment has custody of the couple's three children, with Dammeyer required to pay her child support.[3] His original child support obligation was $455.94 per week. *Id.* By the time of trial, Dammeyer had a child support arrearage of approximately $10,000.00, but the parties had just concluded further proceedings in domestic relations court

---

2 The record does not show what this $197,000 amount represents-- principal, interest or both. This is the amount the parties have presented as in issue in this adversary proceeding.

3 The child support obligation is not in issue in this adversary proceeding.

that would result in a significant reduction in his ongoing monthly support obligation. Dammeyer testified that he intended to close out an exempt IRA to pay

the arrearage, which was to be adjusted retroactively based on his reduced income.

II. The Parties' Respective Financial Situations

A. The Dammeyers

In May of 1998, Dammeyer married Carolyn Dammeyer. A former schoolteacher, she was a successful insurance agent when they got married. She had her own assets and her own income. Dammeyer continued to manage the S&W Motel after they married, until its forced sale in February or March, 2002.

After their marriage, in May, 1999, Carolyn Dammeyer entered into a land installment contract to purchase residential property at 6765 Silver Lake Drive, St. Mary's, Ohio ("Silver Lake property"). Plf. Exh. 3. Warniment's objection to Dammeyer's discharge focuses on the Silver Lake property. In the preamble to the contract, Carolyn M. Dammeyer is identified as the "Buyer." Carolyn Dammeyer is also the only signatory to the land contract as "Purchaser." Dammeyer did not sign the contract; however, Warniment argues that he is nevertheless a "buyer" under the contract, and holds at least an equitable interest in the property in addition to his marital interest. A provision of the land contract states that "[i]n the event that Buyer sells the S & W Motel...Buyer shall immediately pay all remaining principal and interest due under [the] contract." Plf. Exh. 2. But Carolyn Dammeyer never held any interest in the S & W Motel or in NTZD. The court further infers from the record that NTZD owned the S&W Motel, and that Dammeyer did not have any ownership interest in the motel either. The court notes that also in 1999, when the land contract was signed, a sale of the S&W Motel was under active negotiation. Further, Dammeyer orally represented to Carolyn Dammeyer that he would apply any excess proceeds from the sale to the land contract. Nevertheless, there is no clear explanation in the record as to how or when or why that provision ended up in the land contract executed only by Carolyn Dammeyer.

The $186,000.00 purchase price of the Silver Lake property under the land contract was to be paid through a down payment of $15,000.00, a second lump sum payment of $10,000.00 due three months after signing and monthly installment payments of $1,200.00 at 8% interest through April 2004, with the balance due at that time. Plf. Exh. 3. Carolyn Dammeyer made the two lump sum payments from her own funds by cashing in her account in the State of Ohio State Teachers Retirement System ("STRS"). *See* Def. Exh. G. She testified convincingly that she did not want her husband's name on the land contract, as they were only eleven months into a new marriage and she was the one putting down all the upfront cash on the property. All of the installment payments due on the land contract were made, and although they generally combined their finances after the marriage, both Dammeyers insisted that he never made any of the $1200.00 monthly installment payments.

After the Silver Lake property was purchased in May, 1999, until March, 2002, Dammeyer continued to manage the S&W Motel and live there as needed to do his job. He estimated that he spent about 10% of his time at the Silver Lake property and the balance of his time at the motel, which were about 12 miles apart. Carolyn Dammeyer lived at the Silver Lake property after it was purchased. On his bankruptcy petition, a public document, Dammeyer specified his address as the 1321 Celina Road, St. Mary's Ohio address of the S&W Motel. On his separate 2001 tax return, a private document, Dammeyer specified his address as the Silver Lake property. *See* Def. Exh. E. At trial, after the sale of the S & W Motel, Dammeyer also identified the Silver Lake property as his residence address. Dammeyer did not disclose the Silver Lake property, any interest in the Silver Lake property or any interest in the land contract on his bankruptcy schedules. *See* Plf. Exh. 1 (Schedules A, B, C and G). He testified that he had seen, but not reviewed the land contract and that he believes he did not and does not have any interest in the land contract. But Dammeyer also admitted that he did not want Warniment to know about his alternative residence and did not tell her about it. His children, however, were at the Silver Lake property for visitation during the time Dammeyer was still running the motel. And after his children mentioned to their mother a friend named "Danny" and his neat house with a pool that they played at when they visited the Dammeyers, Warniment drove by with them one day and saw Dammeyer's truck at the Silver Lake property. Warniment then had her brother check the county real property records to determine its ownership, learning that there was a land contract in Carolyn Dammeyer's name on the property. These

events occurred sometime in February or March of 2000, before NTZD's default in the payments due to Warniment.

Warniment also alleges that Dammeyer failed to schedule a truck he owned prior to commencement of his chapter 7 case. Specifically, the truck is a 1986 pick up truck, with the $1800 purchase price paid by the corporation three to four years before the trial. The truck does not appear on Dammeyer's Schedule B, *see* Plf. Exh. 1, and Debtor explains this oversight as having simply forgotten about it. Dammeyer did schedule a 1998 Dodge Durango vehicle and claim an exemption in same. *Id.*

Dammeyer is in his late thirties, and Carolyn Dammeyer is in her early forties. They do not have children of their own. Both are in good health. In 1999, when the Silver Lake property was acquired, they were keeping up on their bills and did not have personal financial problems. Dammeyer testified that, at that time, there was no anticipation that the ongoing payments due to Warniment would not be made into the future. The Dammeyers' joint adjusted gross income that year was $105,242.00. *See* Plf. Exh. 1 (Statement of Affairs, Q. 1). The corporation was making the payments due to Warniment and Dammeyer was making his child support payments out of salary or other distributions from the corporation. Essentially, NTZD was the ultimate source of the funds for all of the payments being made to Warniment under the divorce decree. In 1999, the potential sale of the S & W Motel, which would have satisfied all of the mortgages, including Warniment's, fell through. Carolyn Dammeyer eventually used some of the funds drawn from her STRS account to invest in a lounge at the motel, with the hopes that it would help business. It did not.

In 2000, the Dammeyers' adjusted gross income as shown on their joint federal tax return totaled $172,767.00, with a substantial tax debt owed to IRS. Def. Exh. H. Dammeyer testified that 2000 was an unusually strong year at the motel due to the substantial book of temporary business from one customer. In 2001, the Dammeyers filed separate income tax returns, with Dammeyer's adjusted gross income only $22,360.00, Def. Ex. E, and Carolyn Dammeyer's adjusted gross income $88,943.00, Def. Exh. F.

In 2002, both of their incomes dropped dramatically. Dammeyer had earned income from three different employers, totaling approximately $17,500.00: $3200.00 from NTZD before the foreclosure sale, Def. Exh. B; $5919.17 from St. Mary's Chrysler-Dodge-Jeep, Def. Exh. A; and $8827.82 from Kerns

Chevrolet-Oldsmobile-Geo, Inc., Def. Exh. C. Carolyn Dammeyer's 2002 income was $41,015.26, Def. Exh. D, a decrease she attributed to the general poor state of the economy and the bankruptcy of several customers.

Dammeyer was unemployed at the time of trial, having resigned his last employment as a salesman with a local car dealership in December, 2002. He resigned because his commissions were insufficient to meet his monthly draw. Dammeyer has a high school education, with his only work experience besides managing the motel working at the car dealerships. He estimated a 30 year working life ahead of him, and evaluated his earning power notwithstanding his unemployment in the $30,000.00 to $40,000.00 range. This range was proving difficult to attain, however, in the St. Mary's area. Dammeyer's child support obligation was to be reduced substantially based on attribution of $22,000.00 in annual income to him. Carolyn Dammeyer predicted that her 2003 income was shaping up to be more like 2002 than her prior more successful years. With her compensation based on commissions, she has little predictability as to her ultimate annual income. Both Dammeyers admitted, however, that 2002 was a transition year as far as their financial situations, individually and jointly, were concerned, and that their income was unusually low, both individually and jointly.

At the commencement of the case, Dammeyer's Bankruptcy Schedule I showed average monthly net income for the couple of $4,969.99 (including $1733.33 attributed to Dammeyer as income from the S&W Motel) and his Bankruptcy Schedule J showed average monthly expenses of $6,490.49. Plf. Exh. 1. Included in these expenses was the $1200.00 for the land contract payment, $500.00 a month for life insurance and $2500.00 a month for Dammeyer's child support payments. Carolyn Dammeyer testified that she sometimes helped make her husband's child support payments. At trial, Dammeyer submitted updated Bankruptcy Schedules I and J. Def. Exhs. K and L. The updated Schedule I showed total average monthly net income of $2,336.49, based entirely on Carolyn Dammeyer's income. Their monthly expenses were reduced to $4,203.49. The primary changes from the original

expense schedule is reduction of the monthly child support payments to $513.00, reduction of the life insurance expense to $250.00 and the addition of $200.00 monthly payments on Carolyn Dammeyer's credit card bills, which they were using to live on to some extent.

Dammeyer's bankruptcy schedules listed five debts, two secured debts totaling $32,000.00 relating to the Dodge Durango and a boat, $8,000.00 owed to IRS, the $197,000.00 debt owed to Warniment and a minimal credit card debt. Plf. Exh. 1. Dammeyer surrendered the Durango and the boat to the secured creditors. If Dammeyer receives a discharge, the probable unsecured deficiencies on those debts will be discharged. Dammeyer acknowledges, however, that the main purpose of the bankruptcy filing was to address the debt owed to Warniment. Dammeyer's assets consisted of personal goods, an IRA worth $6,000, an annuity worth $2,000, some baseball cards and two four

wheelers. To the extent not exempt, none of these assets would be sufficient if liquidated to pay or make a meaningful payment on the debt owed to Warniment. To meet the parties' ongoing expenses given their reduced incomes, Carolyn Dammeyer's credit card debt had increased to $10,000 and she had cashed in some of her pre-marital assets. At the time of trial, they were not current on all of their bills.

B. <u>The Warniments</u>

Warniment is in her late thirties and is also remarried. She has been married to Daniel J. Warniment for five years, and they have a child together. Both Warniments are employed at steady, long term jobs. She has been a nurse for 20 years and works at a local hospital. Daniel Warniment has been an Ohio state trooper for more than 13 years.

In 2000, the Warniments' joint adjusted gross income was $68,441.00, including a loss of $2461.00 on the duplex. Def. Exh. I. Warniment's federal W-2 wages were $21,643.32 and Daniel Warniment's W-2 wages were $40,518.98. In 2001, their joint adjusted gross income was $61,171.00, including a loss of $3981.00 on the duplex. Def. Exh. J. Warniment's federal W-2 wages were $25,614.09 and Daniel Warniment's W-2 wages were $42,262.00. They received a substantial tax refund of $8,179.00 for 2001. In 2002, their joint gross earnings were approximately $86,000.00, with $33,000.00 attributed to her earnings and $53,000.00 attributed to his earnings. (For purposes of the child support modification proceedings, Warniment's income was determined to be $33,000.00). Warniment received a raise, as she

usually does in mid year, and had picked up extra hours. They each anticipated that their financial circumstances would be about the same in 2003 as in 2002.

At trial, the Warniments also provided income and expense information in the format of Bankruptcy Schedules I and J. Their combined net monthly income at that time was $4,324.39, including deductions for retirement accounts and deferred compensation. Plf. Exh. 4. Their combined monthly expenses at that time were $5,261.00, including $1,126.00 for the mortgage payment, real estate taxes and insurance, $850.00 a month for payments on new vehicles acquired in 2001 and monthly expenses related to the children for school, child care and miscellaneous gifts approximating $652.00. Warniment testified that monthly payments on a 2001 model $20,000.00 fifth wheel camper that they acquired in late summer 2001 do not appear on the Schedule I budget form.

Warniment has not, however, been receiving any regular child support from Dammeyer, which would certainly improve the Warniments' financial situation. As a result, Warniment was trying to work extra hours and they borrowed some money from her father to make ends meet. Their average monthly expenses also include $300.00 a month allocated to minimum credit card payments. Like the Dammeyers, the Warniments are also living to some extent on credit cards, with total credit card debt in the range of $20,000.00 to $25,000.00. Payments on their debts, including minimum payments on the credit cards, were current at the time of trial.

In connection with refinancing their first home mortgage, to reduce their monthly payments by $70.00, the Warniments' home was valued at $204,000.00. A new two car garage, paid for by a relative, had been added to the home. At the time of trial, the mortgage debt on the home was $148,000.00, leaving approximately $55,000.00 in equity. The Warniments had no problem securing credit to refinance their mortgage twice within a year.

In December, 2002, the Warniments sold the duplex that Warniment was awarded in the divorce

for $90,000.00. They incurred capital gains associated with the sale, but after payment of the $26,000.00 mortgage on the property, they cleared equity that was used to pay other bills, including paying off a second mortgage on their home that had been incurred to finance home improvements. Although they had acquired two new vehicles, a camper and made substantial home improvements, the Warniments also disposed of some other assets. A mutual fund account of $9,000.00 was closed, as was an IRA account of approximately $12,500.00. At the time of trial, they had $12,000.00 in a checking account, but those funds were earmarked to paying extra taxes arising from sale of the duplex and cashing in the IRA.

When asked what the family was foregoing, Warniment said that there were indeed things they liked to do that they could not afford, with paintball being the example given.

LAW AND ANALYSIS

Warniment has commenced this adversary proceeding under 11 U.S.C. § 727(a)(2)(A) and (4), objecting to Dammeyer's right to discharge, and 11 U.S.C. § 523(a)(15), objecting to the dischargeability of Dammeyer's debt to her arising out of the NTZD stock repurchase.

I. 11 U.S.C. § 727 Objection to Discharge Claim

A. General Principles

Under 11 U.S.C. § 727, an individual debtor is entitled to a discharge unless one of the ten enumerated exceptions to discharge specified in that section is established. Consistent with the fresh start policy underlying the Bankruptcy Code, exceptions to discharge should be construed strictly against the objecting creditor and liberally in favor of the debtor. *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000); *see Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000)(citing *Gullickson v. Brown* (*In re Brown*), 108 F.3d 1290, 1292 (10th Cir. 1997)). The party objecting to discharge has the burden of proving by a preponderance of the evidence that the exception applies. *Id.*

The primary factual basis for Warniment's claims against Dammeyer under both § 727(a)(2) and (a)(4) is that he concealed and then knowingly and fraudulently made a false oath for failing to disclose on his Bankruptcy Schedules A, B or G his alleged interest in the Silver Lake property and the land contract. Warniment further argues that the omission of the 1986 truck from his Schedule B justifies denial of

Dammeyer's discharge as a false oath.

B. 11 U.S.C. § 727(a)(2)(A)–Concealment of an Interest in Property Claim

Warniment first asserts that the court should deny Dammeyer's discharge under § 727(a)(2)(A) for concealment of an alleged interest in the Silver Lake property and the land contract. Section 727(a)(2)(A) of the Bankruptcy Code states that:

> (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.

The Sixth Circuit held in *Keeney* that this section "encompasses two elements: 1) a disposition of property, such as concealment, and 2) 'a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act of disposing of the property.'" *Id.* at 683 (quoting *Hughes v. Lawson* (*In re Lawson*), 122 F.3d 1237, 1240 (9th Cir. 1997)). The debtor's act must occur within the one year time frame before the filing of the petition, which in this case would be from July 7, 2000, through the July 7, 2001, petition date. For purposes of determining whether the debtor's act occurred within the statutory time period, the Sixth Circuit adopted in *Keeney* the doctrine of "continuing concealment," upon which Warniment relies in this case. Under that doctrine, "a concealment will be found to exist during the one year before bankruptcy even if the initial act of concealment took place before this one year period as long as the debtor allowed the property to remain concealed into the critical year." *Id*. at 684 (quoting *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993)). Warniment thus argues that Dammeyer acquired an interest in the Silver Lake property and the land contract in May, 1999, outside of the one year period, but with his concealment of that interest from Warniment continuing into the critical time period between July 7, 2000,

and the commencement of the case on July 7, 2001.

The factual and legal predicate, and in the court's view, the most critical issue, to Warniment's discharge objection is whether Dammeyer had any interest in property that he concealed in the first instance. Dammeyer argues that he simply had no cognizable interest in either the Silver Lake property or the land contract. The following discussion in *Pher Partners v. Womble (In re Womble)*, 289 B.R. 836 (Bankr. N.D. Tex. 2003), is on point:

> The retention of benefits under a secret interest may constitute fraudulent concealment. Nevertheless, as explained by the Third Circuit, "a relevant concealment can occur only if *property of the debtor* is concealed. Thus, it is clear from the statute that the debtor must possess some property interest in order to be barred from discharge on the grounds of a 'continuing concealment.'" A legally relevant concealment can exist only if there is, in fact, some secret interest in property. ***
> Thus, the debtor must retain control of the property, or some secret legal or equitable interest in the property, before the court may deny discharge under the doctrine of continuing concealment.

Id. at 846 (emphasis original)(citations omitted). Moreover, "'[i]nterest in property is not defined by the bankruptcy code. In the absence of a controlling federal law, interests in property are a creature of state law.'" *Id.* at 846-47 (quoting *Simpson v. Penner (In the Matter of Simpson)*, 36 F.3d 450, 452 (5th Cir. 1994)); *see Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 700 (6th Cir. 1999).

Under Ohio law, a land installment contract involves a vendor promising to convey title to a parcel of real estate at some point in the future in exchange for the vendee's promise to make monthly payments of interest and amortized principal during the intervening period of time. Residential land contracts, such as the land contract involved in this case, are governed by Ohio Revised Code Chapter 5313. A vendor who sells real property on land contract retains legal title to the property, while the vendee becomes the equitable owner of the property in issue. *Thornton v. Guckiean & Co., Inc.*, 77 Ohio App.3d 794, 798 (1991). Specifically, the vendee receives "an equitable interest in the contract as personalty as well as an equitable interest in the land." *Id.* (citing *Basil v. Vincello*, 50 Ohio St.3d 185, 189 (1990)).

Carolyn Dammeyer, as the vendee under the land contract for the Silver Lake property, clearly has "an equitable interest in the contract as personalty as well as an equitable interest in the land." Warniment

asserts under three alternative legal theories that Dammeyer also has an interest in the Silver Lake property and in the land contract. First, Warniment argues that Dammeyer is also a vendee under the land contract and therefore has a direct equitable interest in both the contract and the property under Ohio law, just as Carolyn Dammeyer does. Second, Warniment argues Dammeyer has a beneficial interest under the facts and law articulated in *Keeney*. Third, Warniment argues that Dammeyer has a marital interest in the property under Ohio law. The court will examine each theory.

Warniment's first argument is based on the terms of the land contract itself, Plf. Exh. 3, specifically the provision stating that "[i]n the event that Buyer sells the S&W Motel, 1321 Celina Road, St. Mary's, Ohio 45885, Buyer shall immediately pay all remaining principal and interest due under this contract." Warniment asserts that, since Carolyn Dammeyer never had any interest in the S&W Motel, Dammeyer must by logical inference be the "Buyer" to which the land contract there refers. Further, Warniment points out, Dammeyer represented to Carolyn Dammeyer that he would contribute to the land contract payoff upon the sale of the motel.

The court finds that the plain terms of the contract do not support Warniment's argument that Dammeyer is a "Buyer" under the contract with a direct interest that has been concealed. The preamble specifically identifies and defines only Carolyn Dammeyer as the "Buyer." And Carolyn Dammeyer was the only signatory to the land contract as "Purchaser." The ambiguous and admittedly curious surplus language highlighted by Warniment does not contradict these clear provisions of the land contract and make Dammeyer a vendee under the agreement. There is no evidence that Dammeyer individually had any ownership interest in the S&W Motel as opposed to being a shareholder of NTZD as owner of the motel. Put differently, if Carolyn Dammeyer defaults under the land contract, the court cannot see any contractual basis upon which the land contract vendor could enforce the debt against Dammeyer as his independent legal obligation within the definition of "Buyer" under the land contract.

Warniment's second argument is that Dammeyer has an equitable or other beneficial interest in the property, just like the debtor in *Keeney*, notwithstanding that the land contract is in Carolyn Dammeyer's name. The locus of title, Warniment argues, is not controlling. Warniment is correct from the standpoint of the basic legal principle being articulated. In *Keeney*, Plaintiff Smith obtained a judgment against debtor

Keeney in 1971. After the judgment was obtained, two parcels of real estate were acquired and titled in Keeney's parents names. But Keeney or his business made all of the payments on debt incurred for the properties and he lived at each of them without ever paying rent to his parents. By the time Keeney filed for bankruptcy in 1996, he had lived on the second property since 1983. Smith's judgment remained unsatisfied. Keeney did not list either property on his schedules. Smith objected to Keeney's discharge under § 727(a). Keeney's discharge was ultimately denied under the continuous concealment doctrine, with the Sixth Circuit finding as follows:

> The bankruptcy and district courts determined that Keeney had concealed his beneficial interest in the two properties by placing them in his parents' names, with the requisite intent to defraud. Keeney argues on appeal that he had nothing to conceal because he has no interest in the property. A beneficial interest of ownership can be inferred, however, from Keeney's payment for and use of the properties, including his rent-free residence on each and payment of all mortgage obligations. As noted by the district court, no explanation was provided as to why the properties were titled in the parents' names. Courts have found that a debtor retained a beneficial interest in property under similar circumstances. [Citations omitted]. Under the facts of this case, the bankruptcy court did not commit clear legal error in its determination that Keeney had a beneficial interest in the properties.

Keeney, 227 F.2d at 683-84.

Warniment urges the same result here. The court finds, however, that the facts of this case are distinguishable from *Keeney* and compel the opposite result. The evidence shows that Carolyn Dammeyer used her own money derived from cashing in her pre-marital State Teachers Retirement System account to make the substantial up front payments totaling $25,000.00 due under the land contract. In contrast, in *Keeney*, the debtor's equitable interest in property titled in his parents' name was derived from the fact that he (or his company) made all of the payments on the debt associated with the property.

Another case similar to *Keeney* highlights the materiality of this distinction. In *Kaler v. Craig (In re Craig)*, 195 B.R. 443 (Bankr. N. Dak. 1996), the debtor, a physician, titled all real property and personal property solely in his second wife's name, where he had significant debts to IRS and his first wife. For example, debtor alone signed the note to the bank on the family's farm, titled only in his second wife's name. And all debt payments came from debtor's substantial income. These facts resulted in denial of

debtor's discharge because the court believed that he "embarked upon a means to divert his income into assets in which he had no apparent interest but all the while continuing to enjoy the benefits of ownership." *Id.* at 450. In Dammeyer's case, the asset in issue is instead "titled" in the name of the non-debtor spouse actually contributing her own funds for its acquisition.

Warniment points out that the parties pooled their finances. The proper inference, she argues, is that Dammeyer contributed to the substantial monthly payments made thereafter on the contract and helped build equity in the property. While acknowledging that they pooled their funds, Carolyn Dammeyer testified that she handled the family finances and made the payments, and both Dammeyers testified that he did not make the payments. The court interprets this testimony, which is ambiguous, to mean that his money was not used to make the payments. This is credible given that Carolyn Dammeyer is separately employed and the large disparities in their incomes that emerged especially in 2001 and 2002. Dammeyer was having trouble paying his child support, let alone the secured debts for his Durango and his boat. While the court cannot find that none of the money earned by Dammeyer found its way into the monthly land contract payments, the degree to which it may have would not be sufficient in the court's view to give Dammeyer a beneficial interest in the property that would bring this case within the ambit of *Keeney*. Nor did Dammeyer's admitted

intention to contribute any excess distribution received after the sale of the motel to paying down Carolyn Dammeyer's land contract debt. If he had done so, the result might be different. But the sale never occurred and Dammeyer's intention was never effected.

The court also credits Dammeyer's testimony that until the S&W Motel was sold at foreclosure, which occurred after commencement of his chapter 7 case, Dammeyer spent the majority of his time at the motel managing it, not at the Silver Lake property with Carolyn. In any event, even if Dammeyer actually spent more time there, as his identification of that as his address on his 2001 tax return, Def.. Exh. E, would show, "merely living on the property is insufficient to prove a secret interest." *Anderson v. Hooper (In re Hooper)*, 274 B.R. 210, 216 (Bankr. D.S.C. 2001)(citing *Patton v. Hooper (In re Hooper)*, 39 B.R. 324, 327 (Bankr. N.D. Ohio 1984)("The Court holds that the bare proof of debtors continuing to live on the property that they transferred...without more, is insufficient to constitute a 'continuing concealment'...")). And in further contrast to *Keeney*, Carolyn Dammeyer's testimony offered a credible reason as to why

the contract was in her name only and did not have Dammeyer's name on it: she had just married this guy and it was her money. Warniment has failed to prove that Dammeyer had any secret beneficial or other equitable interest in either the Silver Lake property or the land installment contract**.**

Warniment's third argument is that Dammeyer has a marital interest in the land contract and in the Silver Lake property that has been concealed. This argument focuses on Ohio statutes governing property division in divorce and dissolution proceedings. Ohio Revised Code § 3105.171 defines marital and separate property in such proceedings. "Marital property" includes "[a]ll real and personal property that currently is owned by either or both of the spouses...and that was acquired by either or both of the spouses during the marriage" as well as "[a]ll interest that either or both of the spouses currently has in any real or personal property...and that was acquired by either or both of the spouses during the marriage." Ohio Rev. Code Ann. § 3105.171(A)(3)(a)(i) and (ii) (Page 2004). "Separate property" means:

> All real and personal property and any interest in real or personal property that is found by the court to be any of the following: (i) An inheritance by one spouse by bequest, devise, or descent during the course of the marriage; (ii) Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage; (iii) Passive income and appreciation acquired from separate property by one spouse during the marriage; (iv) Any real or personal
>
> property or interest in real or personal property acquired by one spouse after a decree of legal separation issued under section 3105.17 of the Revised Code; (v) Any real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement; (vi) Compensation to a spouse for the spouse' personal injury, except for loss of marital earnings and compensation for expenses paid form marital assets; (vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.

Ohio Rev. Code § 3105.171(A)(6)(a). Further, "'marital property' does not include any separate property." Ohio Rev. Code Ann. § 3105.171(A)(3)(b). The land contract was signed and Carolyn Dammeyer's equitable interest in the Silver Lake property as vendee under the land contract therefore acquired in May, 1999, after the marriage in 1998. That makes both interests marital property and not Carolyn Dammeyer's separate property under § 3105.171(A)(3) and (6). The question is whether that marital interest under the Ohio statute is property that is subject to the continuing concealment doctrine

under Bankruptcy Code § 727(a)(2)(A).

The court cannot find any cases on point. But at least one Sixth Circuit case interpreting the same Ohio statutes in another bankruptcy context, involving avoidance of pre-petition transfers of a debtor's property interests, suggests that "marital property" is a debtor's property and hence subsequently property of the estate under 11 U.S.C. § 541 upon commencement of a bankruptcy case. In *Fordu,* debtor's wife won the Ohio lottery in 1986, entitling her to winnings of $388,888.00 payable in annual installments of $19,444.40 through the year 2011. In 1991 the Fordus executed a separation agreement that was incorporated into an agreed dissolution decree entered by an Ohio domestic relations court. Under the decree, debtor conveyed to his former wife all of his right, title and interest in the marital residence and in the remainder of the lottery proceeds, except for ½ of the installment received in 1990. In turn, the Fordus agreed that neither would be responsible for supporting the other, he would not pay alimony and she would waive any claim she had to a new restaurant business venture he was about to undertake at the time of the divorce.

Two years after the divorce, Fordu's business failed and he filed a chapter 7 petition. The chapter 7 trustee sued Ms. Fordu under 11 U.S.C. § 544 seeking to avoid and recover transfers of the debtor's interests in the marital residence and the lottery proceeds that she received through the divorce decree. He argued that the transfers amounted to a fraudulent transfer under the applicable Ohio statute, as imported into bankruptcy by the "strong arm" power of 11 U.S.C. § 544(b), due to lack of reasonably equivalent value received by Mr. Fordu.

The Sixth Circuit examined Ohio Rev. Code § 3105.171, noting the basic principle that although the issue of what is property of a bankruptcy estate is a matter of federal law, a debtor's property interests are created and defined by state law. *Fordu*, 201 F.3d at 700. Applying that statute, the Sixth Circuit determined that the debtor held an interest in the marital residence and in the lottery proceeds as part of the

parties' marital property. That finding resulted in the conclusion "that the lottery proceeds were part of the Fordu's marital estate and the Debtor thus held a property interest in such proceeds that was transferred to Ms. Fordu under the Separation Agreement. This transfer was properly subject to challenge by the Trustee through the assertion of his avoidance claim." *Id*. at 702. Although Warniment does not cite *Fordu*, it is not a huge leap in legal logic to argue that if marital property under state law is subject to the provisions of the Bankruptcy Code addressing avoidance of pre-petition transfers, it must also be subject to the provisions of the Bankruptcy Code excluding the right to a discharge for improper acts of property transfer or concealment. Further, the legal inference would be that a married debtor would be required to schedule all such property interests even though a bankruptcy case was not a joint filing.

The court declines to so apply and extend *Fordu* in this case. One reason is that under Ohio law, "[a] married person may take, hold, and dispose of property, real or personal, the same as if unmarried." Ohio Rev. Code § 3103.07. Moreover, there is a critical distinction between the facts of *Fordu* and this case. The debtor in *Fordu* and his spouse had already commenced and completed a dissolution of their marriage before the commencement of the bankruptcy case. Here, Dammeyer and Carolyn Dammeyer had not commenced any such proceedings before he filed for bankruptcy. The provisions of Ohio Rev. Code § 3105.171 defining and governing marital property do not have any generalized or abstract application outside of the context of the distributive award in an Ohio divorce or marriage dissolution proceeding. After the definitions in subsection (A), the balance of

the subsections of the statute all govern domestic relations court determination and division of marital property in such proceedings. For example, "[i]n divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property...In either case upon making such a determination, the court shall divide the marital property and the separate property equitably between the spouses." Ohio Rev. Code § 3105.171(B). The court finds that, in the absence of at least a divorce or dissolution proceeding existing prior to the commencement of Dammeyer's bankruptcy case, Dammeyer had no vested marital interest in the land contract or the Silver Lake property under Ohio law.

The case *In re Greer*, 242 B.R. 389 (Bankr. N.D. Ohio 1999), assists the court in reaching this conclusion. In *Greer*, the debtors commenced a divorce proceeding before they jointly filed for chapter

7 bankruptcy relief. The Ohio domestic relations court subsequently determined that Ms. Greer was entitled to one half of Mr. Greer's interest in his 401(k) plan, as well as to an earned but undistributed COLA payment due from Mr. Greer's employer. The chapter 7 trustee then filed a motion against Ms. Greer demanding turnover as property of her bankruptcy estate the marital property awarded to her by the domestic relations court. In determining whether Ms Greer's interests constituted property of her bankruptcy estate under 11 U.S.C. § 541 subject to turnover, the bankruptcy court first noted that a "fundamental principle of Ohio law is that marriage alone does not confer upon a spouse an interest in the other spouse's separately titled property." *Id.* at 395. Moreover, the court noted, a spouse's ownership interest in separately titled property is not affected by the commencement of a bankruptcy case because a joint petition still creates two separate bankruptcy estates. *Id.* Analyzing the Ohio statutes discussed above, the court found that under Ohio law the commencement of a divorce proceeding vests the state court with jurisdiction over all property in which either spouse has an interest, regardless of whether separately titled.

The following conclusions, pertinent to this case, flowed from that finding**:**

> [T]his court finds that it was the intention under Ohio law to confer upon a spouse an interest in any property that is or would qualify as "marital property," regardless of whether such property was separately titled. ... The Court, however,...also comes to the conclusion that such a property interest is limited. Specifically...the Court holds that upon a spouse filing for divorce, and until a formal distribution of the parties' property is made, the interest a spouse acquires in the other's separately titled property is strictly contingent, and therefore subject to later divestment if the state court with jurisdiction over the parties' property does not enter an order awarding the property
>
> to the non-title holding spouse. The effect of this is that although contingent interests are clearly property of the estate pursuant to § 541(a), the contingency of the interest may prevent the bankruptcy trustee from ever utilizing the property for the benefit of the bankruptcy estate...

Id. at 396-97 (citations omitted). In this case, the facts are yet one step further back: there is no divorce pending and therefore not even any contingent marital interest under *Greer* that would be treated as property of Dammeyer's estate, for administration, avoidance or any other purpose. *Cf. Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004)(addressing but ultimately not deciding similar issues under Maine law).

Other bankruptcy courts in other states have reached similar conclusions, albeit again in different contexts and under somewhat different state statutory structures. *But cf. Ludwig v. Geise (In re Geise)*,

132 B.R. 908 (Bankr. E.D. Wis. 1991)(under Wisconsin law, trustee awarded certain marital property in possession of non-debtor spouse). In *In re Johnson*, 210 B.R. 153 (Bankr. D. Minn. 1997), the chapter 7 trustee objected to debtors' claimed exemptions where the debtors had filed for but not completed their divorce before they filed for bankruptcy. Debtors sought to apportion the value of their claimed exempt property between their two estates, invoking the Minnesota marital property statute to argue that as marital property one half of the assets in issue titled in husband's name also belonged to the debtor wife. Relying on case law from other jurisdictions, the bankruptcy court said that it was "not persuaded that the mere classification of property as 'marital property' is sufficient to create cognizable property rights." *Id*. at 155. Under Minnesota law, the court concluded, the time of vesting of an interest in "marital property" did not occur until the entry of the divorce decree. *Id.* at 156.

In *Blair v*. *Hohenberg (In re Hohenberg)*, 174 B.R. 487 (Bankr. W.D. Tenn. 1994), the chapter 7 trustee of the ex-husband's bankruptcy estate claimed an interest in the assets awarded the non-debtor ex-wife in a divorce, relying on the Tennessee domestic relations statutes and the concept of "marital property" as defined in those statutes. In findings equally pertinent to this case, the court in *Hohenberg* concluded:

> ... that the classification of property as "marital property" within the meaning of the Tennessee divorce statute serves no purpose until after the parties have filed a state court action for divorce and the state court exercises its jurisdiction to classify the property of the parties in connection with the granting of a divorce....In this particular case, when the bankruptcy estate was fixed upon the commencement of the case,
>
> neither Mr. Hohenberg nor his subsequent chapter 7 trustee had any basis for claiming a legal or equitable interest in property separately owned by Sarah Hohenberg, unless her interest were subject to some avoidance recovery or other attack under either the Bankruptcy Code or any applicable nonbankruptcy law. Now that it appears that Sarah Hohenberg's property is subject to classification as either "separate" or "marital property" within the meaning of TENN. CODE ANN. § 36-4-121 in the divorce proceeding, the bankruptcy trustee may not bootstrap a claim against Sarah Hohenberg upon the domestic relations "marital property" concept.

Id. at 493-94. And so it is for Warniment. *Fordu* involves a divorce decree issued and a property division completed before the bankruptcy case commenced, *Greer* involves a divorce commenced but not completed before bankruptcy and this case involves neither. Notwithstanding that the land contract and the Silver Lake property would be "marital property" under Ohio Rev. Code § 3105.171 in any divorce

involving the Dammeyers, Warniment cannot bootstrap that concept into an objection to discharge under § 727(a)(2). Nick Dammeyer had no property interest, in the absence of a divorce or dissolution proceeding, that he concealed for purposes of § 727(a)(2).

Having determined that Dammeyer had no property interest in the land installment contract or the Silver Lake Property, the court need not address the other § 727(a)(2) elements of concealment, intent to hinder defraud or delay and statutory timing required to sustain an objection under that provision of the Bankruptcy Code. Warniment has failed to sustain her burden of proof under § 727(a)(2).

C. 11 U.S.C. § 727(a)(4)(A)–False Oath Claim

Warniment further claims that Dammeyer is not entitled to a discharge under § 727(a)(4)(A), which provides that "[t]he court shall grant the debtor a discharge unless. . .the debtor knowingly and fraudulently, in or in connection with the case. . .made a false oath or account[.]" 11 U.S.C. § 727(a)(4)(A). In order to prevail, a plaintiff must prove by a preponderance of the evidence that:

> 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case.

Keeney, 227 F.3d at 685. The purpose of § 727(a)(4)(A) is to enforce a debtor's duty of disclosure and to ensure that the debtor provides complete and accurate information to those interested in the administration of the bankruptcy estate.

A false oath can include false statements in or omissions from a debtor's schedules, as they are executed under penalty of perjury. *Huntington Center Partners, Ltd. v. Dupree (In re Dupree),* 197 B.R. 928, 937 (Bankr. N.D. Ala. 1996); *see Hamo v. Wilson (In re Hamo),* 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). A false oath is material if it "'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'" *Keeney,* 227 F.3d at 686 (quoting *Beaubouef v. Beaubouef (In re Beaubouef),* 966 F.2d 174, 178 (5th Cir. 1992)). The question of whether a debtor has made a false oath under subsection (a)(4)(A) is an issue of fact. *Keeney,* 227 F.3d at 685.

Warniment argues that Dammeyer made a false oath in two respects: omitting the land installment contract and the Silver Lake property from his schedules and omitting the 1989 pick-up truck from his schedules. The court will examine each argument.

Although the claims are different, the court finds that Warniment's § 727(a)(4) claim as to the land installment contract and the Silver Lake property fails for essentially the same reasons her § 727(a)(2) claim fails. There is no dispute that Dammeyer failed to schedule the land installment contract and the Silver Lake property, and that he made a point of identifying his address in the petition as the S&W Motel and not the Silver Lake property, in contrast to his tax returns in 2001 where he identified the Silver Lake property as his address. The court finds, however, for the reasons already stated, that Dammeyer did not have a duty to schedule either the land installment contract or the Silver Lake property on Schedule A, Schedule B or Schedule G. In the absence of at least a commenced divorce or dissolution proceeding involving Dammeyer and Carolyn Dammeyer, he had no interest in property that was material to the bankruptcy case. Lacking an interest in the Silver Lake property and in the land installment contract, it cannot be said that the omission of the land installment contract or the Silver Lake property from Dammeyer's petition and schedules ultimately bears a relationship to *his* business transactions, *his* bankruptcy estate, or concerns the discovery of *his* assets, *his* business dealings, or existence or disposition of *his* property. And it therefore follows that the omission did not make Dammeyer's schedules false or knowingly false, or that the omission was made with fraudulent intent.[4]

4

Had the court concluded otherwise as to Dammeyer's obligation to schedule the Silver Lake property and the land installment contract, it does not automatically follow that the omission was made with fraudulent intent. Dammeyer said he did not disclose the land installment contract or the Silver Lake property because he did not think he had any interest to disclose and his lawyer said he did not have to do so. Warniment asserts that advice of counsel does not negate fraudulent intent for purposes of § 727(a)(4). But the case law on that point is somewhat more refined, with most courts holding that mistaken reliance on (or mistaken) advice of counsel will excuse acts of fraudulent intent only where reliance was in good faith, was reasonable and the attorney was aware of all of the facts. *See, e.g., First Beverly Bank v. Adeeb (In re Adeeb),* 787 F.2d 1339, 1343 (9th Cir. 1986); *Cuervo v. Snell (In re Snell),* 240 B.R. 728, 730-31(Bankr. S.D. Ohio 1999); *Craig*, 195 B.R. at 452. The court need not reach that issue here given its determination that Dammeyer did not have any interest in the land installment contract or the Silver Lake property that he was required to schedule.

Beyond the schedules requiring the listing of all property interests, the petition form, also signed under penalty of perjury, requires a debtor to list a street address and a mailing address if different than the street address. As explained, when he commenced his chapter 7 case on July 31, 2001, Dammeyer identified his street address as the S&W Motel address and not the Silver Lake property address. Plf. Exh. 1. Although a seemingly innocuous inquiry, this is material information in the court's view, required to be truthfully answered. As emphasized by the Petition's focus, and likewise the Statement of Affair's focus, on addresses, debtor location always relates to the location and discovery of assets and the existence and disposition of property. *See* Plf. Exh. 1 (Petition, p.1; Statement of Affairs, Q. 15). A trustee or creditor desiring to test the accuracy of a filing will always start with a debtor's address. Proper venue is also dependent upon location of a debtor or a debtor's principal assets. 28 U.S.C. § 1334. As already indicated above, however, the court credits Dammeyer's testimony that he was spending most of his time at the S&W Motel until it was sold, which occurred in early 2002 after commencement of his chapter 7 case on July 31, 2001. Dammeyer did identify the Silver Lake property as his address in his separately filed 2001 tax return, which would have been first due on April 15, 2002, after the commencement of his chapter 7 case and after the motel property was sold. There is, however, no evidence as to precisely when he signed and filed the tax return such that it could be probative of a lie as to where he was really living all along, particularly when the Dammeyers' joint 2000 tax return, Def. Exh. H, identified the S&W Motel address. The evidence thus does not establish that Dammeyer's identification of the motel address as his street address in his chapter 7 petition was a false statement for purposes of §

727(a)(4).

Another potential false statement Warniment alleges is Dammeyer's omission to list the 1986 pick up truck on his Schedule B. *See* Plf. Exh. 1. Dammeyer should have scheduled the truck, even though it is old and apparently of little value; debtors must disclose all assets, even those they believe are worthless. *See Fokkena v. Tripp (In re Tripp)*, 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998). Dammeyer, for example, properly disclosed his NTZD stock interest, even though he valued it at zero. Debtors are not at liberty to determine what assets or transactions should be disclosed. *Id*. Because of this, "[t]he [debtor] cannot circumvent section 727(a)(4) by claiming that the omitted information has zero or little value. However, the

Court can consider the value to ascertain whether the [debtor] has the intent and motivation to deceive, and to determine the materiality of the omissions." *Wade v. Wade (In re Wade)*, 189 B.R. 522, 526 (Bankr. M.D. Fla. 1996) (citations omitted). Warniment has satisfied the first two elements of her § 727(a)(4) claim, that Dammeyer made a statement under oath, in his schedules, and that it was false, in its omission of the truck.

Warniment's § 727(a)(4) claim as to the truck founders, however, on the other elements of proof. Dammeyer testified that he simply overlooked the truck and his omission to schedule it was inadvertent. The court finds Dammeyer's testimony on this point credible, bolstered by the truck's limited value and the fact that Warniment was clearly aware of its existence all along. His testimony negates the elements of materiality and fraudulent intent. While a false statement knowingly made or an omission made with reckless indifference to the truth may be grounds for denying a chapter 7 discharge, a debtor is entitled to a discharge if the false statement is the result of mistake or inadvertence. *Keeney*, 227 F.3d at 686. Dammeyer's failure to schedule the truck is not grounds for denial of his discharge under § 727(a)(4)(A).

II. 11 U.S.C. § 523(a)(15) Exception to Discharge Claim

Warniment's complaint raises the issue of whether Dammeyer's personal guarantee of the NTZD obligation undertaken in the Separation Agreement is dischargeable under 11 U.S.C. § 523(a)(15), which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (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 or a dependent of the debtor and, if the debtor 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.

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 initial 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 the exceptions to nondischargeability set forth in subsections (A) or (B). *Id.* at 907, 909.[5] Dammeyer can meet his burden by proving either that he cannot pay the debt or that the benefits to him of its discharge outweigh any detriment to Warniment. *Id.* Debtor must make his showing by a preponderance of the evidence. *Grogan v. Garner*, 488 U.S. 279, 291 (1991). As subsections (A) and (B) of § 523(a)(15) are in the disjunctive, Dammeyer need not prove both to prevail. *Molino*, 225 B.R. at 907; *Baker v. Baker (In re Baker)*, 274 B.R. 176, 197 (Bankr. D.S.C. 2000).

---

5 Other courts have allocated the burden of proof differently. *Compare Molino* (shifting burdens) with *Greenwalt v. Greenwalt (In re Greenwalt)*, 200 B.R. 909 (Bankr. W.D. Wash. 1996)(finding that plaintiff has the motivation and ability to demonstrate that debtor has the ability to pay and to prove that the detrimental consequences of discharge to plaintiff outweigh the benefits to debtor). This court will follow the burdens articulated in *Molino*, which represents the majority view. The two circuit courts that have addressed the issue have also concluded that § 523(a)(15) sets up a shifting burden or proof. *Crosswhite*, 148 F.3d at 884-85; *Gamble v. Gamble (In re Gamble)*, 143 F.3d 223, 226 (5th Cir. 1998). Debts of the type proven by the creditor to fall under § 523(a)(15) are presumed by the statute to be nondischargeable, *Crossett v. Windom (In re Windom*), 207 B.R. 1017, 1020 (Bankr. W.D. Tenn. 1997), with two exceptions. The two exceptions are like affirmative defenses, *Gamble*, 143 F.3d at 226, with the evidence, motive and ability to prove them thus most logically resting with the debtor in this court's view, *Crosswhite*, 148 F.3d at 884-85. Moreover, the plain language of § 523(a)(15)(A) is phrased in terms of a debtor's inability to pay, which is the debtor's position, not the debtor's ability to pay, which is the creditor's position.

Warniment met her burden. The court first finds that the debt in issue is not a support obligation as defined under § 523(a)(5), a predicate to application of § 523(a)(15). So Warniment has the burden of proving that Dammeyer incurred the obligation in the course of a divorce or separation. Submission of the parties' Separation Agreement satisfies Warniment's burden. It is appended to and incorporated in the Auglaize County Common Pleas Court's Judgment Entry Granting Divorce. Plf. Exh. 2. All of the terms of the transaction, including the distribution of the NTZD stock to Warniment, her resale of the stock to the corporation and Dammeyer's personal guarantee of the resulting debt, are in the Separation Agreement. The burden of proof therefore shifts to Dammeyer to prove by a preponderance of the evidence that he is entitled to discharge his debt to Warniment under one of the exceptions to nondischargeability in § 523(a)(15).

A. <u>11 U.S.C. § 523 (a)(15)(A) - "Inability to Pay" Test</u>

The Sixth Circuit has not interpreted § 523(a)(15)(A) in a published decision. The starting point for applying the Bankruptcy Code is always the existing statutory text, with the court's function to enforce the statute according to its terms unless the disposition required by its terms is absurd. *Lamie v. United States Trustee*, -- U.S.--, 124 S.Ct. 1023, 1033-34, 157 L.Ed.2d 1024 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). The text of § 523(a)(15)(A) establishes a four part inquiry to be undertaken by the bankruptcy court. The court must determine: (1) the debtor's income; (2) the debtor's property; (3) the expenses reasonably necessary for the maintenance or support of the debtor or any dependent of the debtor; and (4) after payment of such reasonably necessary expenses, whether debtor can pay the marital debt from income or property.

Most courts note the similarity between the language of § 523(a)(15)(A) and the definition of "disposable income" in 11 U.S.C. § 1325(b)(2) for purposes of confirming chapter 13 plans, and conclude that the "disposable income test" is thus the appropriate standard for measuring a debtor's ability to pay a marital debt under § 523(a)(15)(A). S*ee, e.g., Hammermeister v. Hammermeister*

(In re Hammermeister), 270 B.R. 863, 874-75 (Bankr. S.D. Ohio 2001); *Gamble,* 143 F.3d at 226 ("[B]ankruptcy court was correct to focus its investigation on whether Mr. Gamble could make reasonable payments on the debt from his disposable income.").

In this court's view, care needs to be taken in recasting the test for inability to pay under § 523(a)(15)(A) as the disposable income test of § 1325(b)(2). From an analytical standpoint, setting up the disposable income test in chapter 13 as the standard for a debtor's inability to pay under § 523(a)(15)(A) is almost an unhelpful truism, basically restating the inquiry already mandated by the plain terms of the statute. And the introductory language to the definition in § 1325(b)(2) states that "disposable income" is being defined "[f]or purposes of this subsection." There are also significant differences between the language of the two provisions that get washed out by wholesale transfer of the chapter 13 definition of "disposable income" into § 523(a)(15)(A). *See Straub v. Straub (In re Straub)*, 192 B.R. 522, 528 (Bankr. D.N.D. 1996). Congress chose not to use the word "disposable" in § 523(a)(15)(A) or to incorporate that definition into its terms. Moreover, Congress' definition of disposable income under § 1325(b)(2) expressly includes charitable contributions up to a prescribed limit as reasonably necessary expenses. Section 523(a)(15)(A) does not.

On the other hand, there is statutory logic to looking to § 1325(b) and related case law; obligations nondischargeable in chapter 7 under § 523(a)(15) are dischargeable under chapter 13 through a plan complying with all of its provisions, *see* 11 U.S.C. § 1328(a), including the disposable income test of § 1325(b). And there are unquestionably aspects of the manner in which courts interpret the "disposable income" test of § 1325(b) that are analytically valid in the statutory inquiry under § 523(a)(15)(A). For example, in applying the disposable income test of § 1325(b), courts generally analyze a debtor's average income and expenses on a monthly basis using Bankruptcy Schedules I and J. This is an equally valid and helpful approach to determining under § 523(a)(15)(A) whether a debtor does not have the ability to pay a marital debt. Moreover, except as to the explicit definitional difference involving charitable contributions, the determination of what kinds of expenses and in what amounts are reasonably necessary for support of a debtor or a debtor's dependents should logically be the same under both sections of the statute. *See, e.g., Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775, 777 (6th Cir. 1995)(funds used for repayment of loan from pension plan are disposable income in chapter 13 case).

In deciding whether Plaintiff does not have the ability to pay Defendant, this court will therefore be guided by the plain terms of § 523(a)(15)(A), looking to other sections of the Bankruptcy Code only to the extent such guidance does not conflict with or change the plain meaning of the Code section in issue.

"Statutory context can suggest the natural reading of a provision that in isolation might yield contestable interpretations." *Price v. Del. State Police Fed. Credit Union (In re Price)*, 370 F.3d 362, 369 (3d Cir. 2004)(citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) and *Kelly v. Robinson*, 429 U.S. 36, 43 (1986)).

In support of his position, Dammeyer argues that his chapter 7 petition, his unemployment, his child support obligations and arrearage, and an $8,674.56 income tax obligation that was not discharged show he does not have the ability to pay Warniment/ Warniment counters that Dammeyer's financial condition is temporary, that he has many more working years ahead of him, and that his trial testimony shows he will be capable of earning $30,000 - $40,000 a year over an extended period of time. The original term of repayment of the debt was indeed over 30 years, and his child support obligations will terminate as the parties' three minor children reach the age of majority in 2006, 2008 and 2012.

Dammeyer has no assets to be liquidated to pay the debt. His only significant assets are exempt interests in an IRA and an annuity totaling $8,000.00, which he testified at trial that he intended to use to pay his child support arrearage, unquestionably an expense reasonably necessary for the support of his three dependents. Dammeyer's NTZD stock is now worthless due to foreclosure of the S & W Motel. So the focus of Dammeyer's ability to pay the marital debt must be on his future income.

At the commencement of the case, Dammeyer's Schedule I showed joint monthly income net of taxes and 401(k) contributions of $4,969.99. Plf. Exh. 1 at 17. At trial, Dammeyer submitted an updated Bankruptcy Schedule I showing both overall family income and individual incomes reduced since commencement of the case. Def. Exh. K. The only income for the family shown at the time of trial on Schedule I is Carolyn Dammeyer's net monthly income of $2,336.49, after deduction of taxes and a 401(k) contribution. Dammeyer's income is zero due to his unemployment.

In applying § 523(a)(2)(A), a 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. *Koenig v. Koenig (In re Koenig)*, 265 B.R. 772, 776 (Bankr. N.D. Ohio 2001)(citing *Newcomb v. Miley* (*In re Miley*), 228 B.R. 651, 655 (Bankr. N.D. Ohio 1998)). The court is not bound by a debtor's income and expense figures and must independently analyze the evidence to determine whether an upward adjustment in income or a downward adjustment in expenses is appropriate

based on the statutory standard. *Bubp v. Romer (In re Romer)*, 254 B.R. 207, 212 (Bankr. N.D. Ohio 2000). As one court has aptly noted, "when parties produce a budget, it tends to corroborate the contentions of the party producing the statement." *Huchteman v. Ingalls (In re Ingalls)*, 297 B.R. 543, 550 (Bankr. C.D. Ill. 2003).

Warniment argues that the Dammeyers have intentionally reduced their incomes for purposes of pleading poverty at trial, and that this represents a nadir in their joint earnings, which are likely to rise again over time as both Dammeyers admitted at trial. The court does not agree, however, that the evidence supports an inference that the Dammeyers have intentionally reduced their incomes solely for purposes of this proceeding.

As to Carolyn Dammeyer, Warniment argues in particular that her income will likely increase in the future, as it has been much more substantial in the past and she herself admits that the couple is in a financial transition period. Between Dammeyer and Carolyn Dammeyer, Carolyn clearly has the most demonstrated earning power. As an initial matter, this court agrees with most other courts that a new spouse's income is relevant in analyzing a debtor's inability to pay. *Cleveland v. Cleveland* (*In re Cleveland*), 198 B.R. 394, 399 (Bankr. N.D. Ga. 1996). But there are limits to the relevance of such evidence.[6] Where new spouses and debtors have joined as a family financial unit, as Dammeyer and Carolyn Dammeyer both testified they have, the contribution of the new spouse is directly relevant to the expense inquiry. A debtor whose new spouse is economically self-sufficient, as Carolyn Dammeyer is, will incur fewer expenses reasonably necessary for support of dependents than a debtor whose new non-debtor spouse is not economically self-sufficient and is dependent on the debtor for support. *Beasley v. Adams (In re Adams)*, 200 B.R. 630, 633-34 (N.D. Ill. 1996). And a debtor whose new spouse supports the debtor will likewise incur less expense for self-support. *Id.* But the limit to relevance of evidence of a non-debtor spouse's income arises because, ultimately, a new spouse such as Carolyn Dammeyer has no liability whatsoever to pay the

---

6 Evidence of a new spouse's earnings are of more general relevance in the § 523(a)(15)(B) analysis of benefit to the debtor and detriment to the non-filing spouse, where courts must compare the relative lifestyles of the two families involved.

former spouse child support or property settlement debts. *Foto v. Foto (In re Foto)*, 258 B.R. 567, 574-75 n.4 (Bankr. S.D.N.Y. 2000). So the amount of Carolyn Dammeyer's earnings beyond what would be reasonably necessary to support herself and Dammeyer would be irrelevant to Dammeyer's ability to pay his debt to Warniment.

That said, however, the record lacks evidence from which any future increase in Carolyn Dammeyer's income that might be postulated would be anything other than unsupported speculation by this court. She has clearly earned much more money in the past, but her earnings have been variable. The court also finds Carolyn Dammeyer's testimony about the difficulties she has encountered in her business due to the economy and structural changes in her customer base persuasive and credible, and does not believe that she has intentionally refrained from earning commissions just to plead poverty in this court. Carolyn Dammeyer is also a commission- based employee, making predictions about her future income beyond the evidence of her income at trial particularly problematic in this case.

As to Dammeyer, he had no income at the time of trial. And while the court believes Dammeyer's testimony that he quit his job because his commission earnings were not keeping pace with his monthly draw, rather than conveniently to show no income at trial as Warniment argues, the record supports imputing income to Dammeyer beyond the zero income presented at trial on his updated Schedule I. *See Molino*, 225 B.R. at 908; *Biederman v. Stoodt (In re Stoodt)*, 302 B.R. 549, 556-57 (Bankr. N.D. Ohio 2003). *But see Crosswhite*, 148 F.3d at 891 (Manion, J., dissenting)("...I question the bankruptcy court's imputing of potentially earned income to Crosswhite. This appears to be wrong as a matter of law..."). The statute speaks in terms of a debtor's "ability" to pay, whether that earning potential is being utilized by a debtor or not. *Mandanici v. Slygh (In re Slygh)*, 244 B.R. 410, 416 (Bankr. N.D. Ohio 2000)("[G]iven his proven earning potential Slygh has the ability to pay the debts."). Dammeyer's unemployment does not result from illness, disability, or other factors beyond his control. And Dammeyer admitted and the court agrees that he has the capacity to earn income in the future. So it would be improper in this case in analyzing Dammeyer's inability to pay under § 523(a)(15)(A) to allow him as a matter of choice to earn nothing at the time of trial, rely on Carolyn Dammeyer for support and then tell this court and Warniment that he cannot pay his debt today and is therefore entitled to its discharge. If a bankruptcy court cannot impute income

potential in accordance with a debtor's income earning ability–the concept set forth in the statute--debtors will only be encouraged to quit their jobs in advance of trial, as Warniment alleges Dammeyer did just for this purpose.[7]

The evidence shows that, for purposes of recalculating his child support, Dammeyer's income was imputed in the state system at $22,000.00. Dammeyer's earned income in 2001 was $22,360.00 and in 2002 was $17,500.00 from three different jobs. Dammeyer had also lost within the year his long time livelihood upon foreclosure of the S&W Motel; there is not a hint of evidence in the record that the foreclosure and sale of the motel was collusive or a fraud on Warniment. Dammeyer testified, however, that he believed his future earning power was in the $30,000.00 to $40,000.00 range, although he has only a high school education and was having not-- surprising difficulty finding employment at that pay level in the St. Mary's-Celina area.

Based on all of the facts, the court will impute income to Dammeyer at $30,000.00 per year, the lower end of the range Dammeyer testified that he could earn. The lower end of the range is appropriate because of his education level, his limited work experience beyond the motel, his recent earned income history and the difficulty Dammeyer was encountering in finding employment in his geographical area. After deducting 20% as an approximated amount for federal, state and local taxes, *Windom*, 207 B.R. at 1022, Dammeyer's net annual earnings would be $24,000.00, or $2,000.00
per month.

The addition of Dammeyer's imputed net monthly income of $2,000.00 to Carolyn Dammeyer's net monthly income at the time of trial of $2,336.49 makes the Dammeyers' joint net monthly income $4,336.49 for purposes of determining Dammeyer's inability to pay Warniment.

Expenses are likewise to be gauged at the time of trial. *Koenig*, 265 B.R. at 776. Dammeyer's original Schedule J showed monthly family expenses of $6,490.49. Plf. Exh. 1 at 1-
18. At trial, Dammeyer's updated Schedule J shows budgeted monthly expenses reduced to $4,203.49, including Dammeyer's revised child support obligation of $513.00. Def. Exh. L. The material changes between the two budgets were reductions in clothing expense from $200.00 a month

---

[7] The court also notes that state courts exercising domestic relations jurisdiction routinely impute income, usually in determining child support, to counter precisely such behavior.

to $50.00 a month, reduction in life insurance premiums from $500.00 to $250.00 and reduction in Dammeyer's monthly child support from $2,500.00 to $513.00. Warniment does not identify or attack any particular expense or the family expenses overall as not reasonably necessary for maintenance or support of the Dammeyers. The Dammeyers are living a middle class existence; they are certainly not living in poverty, but they are also not living extravagantly. From the overall perspective of the family, the court finds that the monthly expenses budgeted on Dammeyer's updated Schedule J are reasonably necessary for the maintenance and support of the family unit.[8] And if anything, the budgeted monthly amounts for food ($ 250.00) and clothing ($50.00) are low. Neither spouse's income is alone sufficient to pay their reasonably necessary living expenses at the time of trial.

Analyzed alternatively, from the perspective of Dammeyer's expenses alone, his monthly child support of $513.00 is unassailably necessary for the support of his three dependent children. Based on the evidence, Dammeyer has not been paying and has no liability for the $1200.00 land contract payment that represents the couple's monthly housing expense. Dammeyer can be expected, however, to contribute to the rest of the family expenses for maintenance and support: utilities, food, transportation costs, installment payments, insurance. He also has liability for the tax debt. And as

the parties are living to some extent on Carolyn Dammeyer's credit cards, it is also reasonable that he contribute to payment of this debt. Subtracting Carolyn Dammeyer's $1,200.00 land contract payment from their total joint expenses of $4,203.49 leaves monthly family expenses of approximately $3,000.00, Dammeyer's share of which would be approximately 1/2, or $1,500.00.

On a monthly basis, Dammeyer's own expenses would therefore average approximately $2,000.00 ($513.00 for child support and $1,500.00 for his share of monthly family support expenses).

Dammeyer's total debt to Warniment is $197,000.00. The regular installment payments on the debt were $2,081.23 a month, or $24, 974.76 per year.[9] NTZD having made the payments for

---

8

Carolyn Dammeyer is contributing to a 401(k) plan. Def. Exh. L. Rather than appearing as an expense on Schedule J, the contribution appears as a deduction from gross income on Schedule I. While the court would not find such a contribution reasonably necessary for Dammeyer's maintenance and support, *cf. Harshbarger*, 66 F.3d at 777, the court does not believe such a finding is proper as to a non-debtor spouse without liability to the marital creditor and who is making the contribution from his or her own earned income.

9

approximately four years, the obligation would still require at least 25 years to discharge if monthly payments at that level could be resumed.

Even imputing $2,000 in net monthly income to Dammeyer, the family's overall income and reasonably necessary monthly support expenses at the time of trial are virtually the same. Carolyn Dammeyer cannot and does not now provide total support for Dammeyer, and vice versa. The same is true if Dammeyer's imputed monthly income and monthly expenses are analyzed individually. There is thus no income left after payment of reasonably necessary expenses with which Dammeyer can either make monthly payments of $2,081.23 or an annual payment of $24,974.76 to Warniment. Dammeyer's child support and marital debt to Warniment (if paid on an installment basis) together total over $31,000.00 a year, compared to the $24,000 a year in net income potential the court imputes to him. Even if Carolyn Dammeyer would or could fully support both herself and Dammeyer, and he devoted all of his projected net earnings to paying his marital obligations, Dammeyer would still not be able to pay both obligations. *See Maldonado v. Sanabria (In re Sanabria),* 275 B.R. 204, 208 (Bankr. D.N.J. 2002). And the evidence at trial does not support that Carolyn Dammeyer does or can fully support Dammeyer so as to free up all of his income (and more) to pay his child support and marital debt. Dammeyer has proven an inability to pay Warniment and on that basis is entitled to the discharge of the debt under § 523(a)(15)(A).

Warniment argues that the proper horizon for analysis is twenty to thirty years out, as the obligation was originally contemplated to be paid over thirty years through year 2026. Over that extended time period, Warniment argues, Dammeyer will be able to get back on his feet and pay the debt or at least part of the debt. Plus, she argues, by 2012, he will not have any child support to pay. Section 523(a)(15)(A) addresses whether an obligation shall be forever dischargeable. "It contains no deadlines, dates or measuring points for making an assessment of a debtor's disposable income." *Straub*, 192 B.R. at 528. The reported case law is confusing as to how the timing of a debtor's

---

Actually the obligation is in default due to nonpayment of installments of principal and interest, as a result of which "the entire balance of principal then remaining unpaid, with accrued interest thereon at the rate of six percent (6%), shall at once become due and payable at the option of the holder hereof, without notice or demand." Plf. Exh. 2 at 2-13.

inability to pay should be factored into the statutory analysis. The majority of courts clearly hold that the time for analysis of a debtor's lack of ability to pay is the time of trial, as opposed to the petition date. After that standard is stated, however, courts then routinely go beyond a snapshot

at the time of trial and look into the future, making predictions about a debtor's income potential (as this court has with respect to Dammeyer) and whether a debtor's expenses will increase or decrease. The time frame of the view being taken is stated in different ways. Some courts focus on whether the debtor's income will allow payment of the debt within a "reasonable" time. *See, e.g.*, *Stoodt*, 302 B.R. at 556 (bankruptcy court focuses on "whether [debtor's] utilization of such funds would enable the debtor to pay the debt within a reasonable amount of time."). Other courts adopt three to five years as the time measure for repayment-- a time period flowing naturally from the stated formulation of the standard under § 523(a)(15)(A) as tied to the "disposable income" test of § 1325(b)(2) and from the fact that a debtor can discharge § 523(a)(15) debts through chapter 13, 11 U.S.C. § 1328. *See Cameron v. Cameron (In re Cameron)*, 243 B.R. 117, 123 (D. M.D. Ala 1999); *Melton v. Melton (In re Melton)*, 228 B.R. 641, 646-47 (Bankr. N.D. Ohio 1998)(court enters partial discharge of all amounts that cannot be repaid in five years).[10] And yet other courts look by analogy to student loan discharge cases under 11 U.S.C. § 523(a)(8), gauging whether an existing inability to pay at the time of trial will exist in the "foreseeable future." *See, e.g., Straub*, 192 B.R. at 528-29.

The court notes that the statute reads in the present tense: a marital debt within § 523(a)(15) is excepted from discharge unless "the debtor does not have the ability to repay such debt from income or property of the debtor...." Congress did not include in the statute a term specifying that the court should

---

10

As a practical matter, such decisions reflect the statutory reality that, if a debt is determined to be nondischargeable under § 523(a)(15), a debtor would generally still be entitled to discharge it through a subsequent chapter 13 plan by dedicating three years of disposable income to plan payments and otherwise meeting the requirements of chapter 13, including good faith.

determine whether a debtor has the ability to pay a marital debt within a "reasonable" period of time or in the "foreseeable future." *Haines v. Fitzsimonds (In re Haines)*, 210 B.R. 586, 593 (Bankr. S.D. Cal. 1997); *Crosswhite*, 148 F.3d at 890-91 (Manion, J. dissenting). The statute is essentially directing bankruptcy courts to make the type of decision lenders routinely make in extending credit: does a debtor's income and other financial circumstances at a given point in time predict the ability to pay a debt over the time period for which credit will be extended? *Slygh*, 244 B.R. at 416 (debtor cannot pay marital debts out of current assets, "but [can] by refinancing repayment over time."). After all, nobody can know or predict the multitude of events that will actually occur over one, three, five, fifteen or thirty years that will ultimately impact repayment of a debt.

In this court's view, then, the temporal inquiry cannot properly be measured with a descriptive standard not adopted by Congress, such as within a "reasonable time" or "foreseeable time." Rather, the court must be guided by the nature of the debt in issue, the time period over which the debt was originally required to be repaid by the state court (as Warniment argues) and the evidence of a debtor's known income--earning ability shown by the record in a particular case. The line to be drawn must be between reasonable inferences supported by the evidence in the record and improper speculation. *Cf. Commercial Credit Corp. v. Killough (In re Killough)*, 900 F.2d 61, 65 (5th Cir. 1990)(income from overtime should not be included in a chapter 13 plan because the possibility of getting such overtime was not "definite enough");*see Pollard v. Superior Community Credit Union (In re Pollard)*, 306 B.R. 637, 654 (Bankr. D. Minn. 2004)("Basing an argument on the prospect of an income surplus [arising from anticipated payoff of a homestead mortgage] eight years after trial, after the sweep of time could have opened up so many other potential variables, is just not humane. Nor is the position capable of a principled and rational adjudication, on presently ascertainable facts."). So a known distribution from a trust or an annuity or the impending right to draw upon pension income or retirement savings or to receive deferred compensation or a tax refund or an inheritance are examples of the kind of future financial events that could impact a debtor's "ability to pay" that must be considered, even if a debtor is unemployed at the time of trial. On the other hand, the fact that a debtor buys a Mega Millions lottery ticket every week will lead only to improper speculation that a debtor has the ability to pay a marital debt because she might win the lottery

some day.

The court acknowledges Warniment's point that this was originally structured as a long term debt upon which the court must take the long view in analyzing Dammeyer's inability to pay it. Dammeyer has nevertheless shown that under his current circumstances and the future circumstances reasonably inferred from the evidence that it is more probable than not that he will not be able to repay the debt from his income within the twenty to twenty five year time frame originally due, even if it were not now in default and the balance accelerated. The substantial amount of the debt combined with Dammeyer's earning ability, as measured by his education, work history especially since the forced sale of the family business and his age show that, in the absence of the income stream from the motel, he does not and will not have the ability to pay the entire $197,000 debt from income that will not be reasonably necessary for his support and to pay his child support.

Warniment also notes that Dammeyer will see relief from child support obligations in 2006, 2008 and then be relieved completely by 2012. At the current amount of $513 per month, that would ultimately mean an additional $6,156 in annual income not necessary for support of dependents that could presumably be dedicated to repayment of Warniment. At that rate, she argues, Dammeyer could repay a substantial part of the debt of the debt over 20 to 25 years, starting in his late forties. Warniment even seems to concede, however, and the court finds that, assuming that Dammeyer's financial and personal circumstances as shown by the record remain the same, it is still more probable than not that he will not be able to repay the whole $197,000 debt within the time for repayment of the original installment obligation using funds he is currently dedicating to child support payments. Instead, Warniment argues that a partial discharge is appropriate, an issue that will be separately discussed below.

Dammeyer has proved by a preponderance of the evidence that he does not have the ability to pay Warniment the $197,000 marital debt from income that will not be reasonably necessary for his own support and support of his dependents. On that basis alone, Dammeyer is entitled to discharge of the marital debt and judgment in his favor on Warniment's claim under § 523(a)(15)(A). The court will still analyze the balancing of benefits and detriments test under § 523(a)(15)(B) should there be disagreement by any reviewing court with the court's analysis under § 523(a)(15)(A).

B. 11 U.S.C. § 523(a)(15)(B)-"Balancing of Benefits and 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 interests of the parties. But in an unpublished opinion, the Sixth Circuit endorsed a balancing of the totality of the circumstances as set forth in *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33 (Table), 1997 U.S. App. LEXIS 33664, at *7-*9, 1997 WL 745501 at *3 (6th Cir. November 24, 1997).[11] Under this balancing test, a court reviews the financial situations of the parties and their relative standards of living to compare the true benefit to debtor of discharge of the debt with any hardship the former spouse would suffer as a result of its discharge.

> If, after making this analysis, the debtor's standard 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 *Smither*, 194 B.R. at 111). This formulation was also endorsed by the Sixth Circuit Bankruptcy Appellate Panel in *Molino*. S*ee Molino*, 225 B.R. at 909.

In *Smither*, the court listed the following nonexclusive factors to guide balancing the benefit and detriment:

(1) the amount of debt and payment terms;
(2) all parties' and spouses' current incomes;
(3) all parties' and spouses' current expenses;

11

Unpublished decisions of the Sixth Circuit Court of Appeals are not binding precedent. But they can be cited if persuasive, especially where there are no published decisions that serve as well. *See* Sixth Circuit Rule 28(g); *Belfance v. Black River Petroleum, Inc. (In re Hess)*, 209 B.R. 79, 82 n.3 (B.A.P. 6th Cir. 1997). There is no published Sixth Circuit decision that addresses § 523(a)(15)(B); thus, this court finds the directives of *Patterson* instructive even though not binding precedent.

(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).

Smither, 194 B.R. at 111.

The first factor has already been discussed. The $197,000 debt in issue is substantial. And while it was originally contemplated that it would be repaid in monthly installments of $2,081.23 over thirty years, the obligation is in default and accelerated under the note. This is a factor that favors Dammeyer in the balance.

As to factors two through six, addressing and comparing the parties' respective financial situations, the court finds that the Warniments are slightly better situated than the Dammeyers in terms of property, income, expenses, assets and liabilities. The Warniments work hard, including overtime, to make ends meet; both have stable incomes at long term jobs. The Dammeyers' financial situation is more volatile. While they have earned more substantial incomes in the past, and Carolyn Dammeyer has greater potential to earn a more substantial income than any of the four spouses in the future, the Dammeyers' financial prospects are less stable over the long term than the Warniments' due to the nature of their work situations, both of which are very much in transition. Both families live in comparable, comfortable homes and have similar asset and liability situations. And both families are living somewhat beyond their means on credit cards, a situation that would be relieved for Warniment if child support were regularly paid by Dammeyer. But the Warniments have been able to include vacations, a camper, substantial home improvements and a line item for gifts in their monthly budget. The Dammeyers' current discretionary expenditures for entertainment and recreation are more circumscribed, and their scheduled food budget seems insufficient. The Warniments are also positioned better for the future in terms of retirement savings and plans, largely due to the nature of their employment. Dammeyer now does not have any retirement savings; Carolyn Dammeyer cashed in her STRS account to buy the Silver Lake property and to invest in the motel. On the whole, these factors

also favor Dammeyer in the balance.

As to the sixth factor addressing the parties' and spouses' health, job training, education, age and job skills, there is no evidence of any impending health problems. Dammeyer is in the weakest position from the standpoint of job training, skills and age. Warniment is a degreed, experienced nurse and her husband is an experienced state highway patrolman. Dammeyer has only a high school education with an employment background consisting of running the defunct family motel business and two jobs selling cars.

As to dependents, Dammeyer has an obligation to support his three children running through 2012. Carolyn Dammeyer does not depend upon him for support. The Warniments contribute substantially to the support of the three Dammeyer children, and have another young child of their own to support. None of the four children involved between the two families have been shown to have any special needs. The Dammeyer children would benefit from discharge of Dammeyer's property settlement obligation to their mother; the prospects for return to stable and regular payment of their child support would be enhanced without the competing liability of the $197,000 property settlement debt. And any prospective increases in Dammeyer's income would result in increased child support and redound to their benefit.

The eighth factor, the change in the parties' financial conditions since the divorce, also weighs in Dammeyer's favor. His business, which was the stream of income originally intended to pay the property settlement debt and which was the source for his initial substantial child support payments, encountered irreparable financial difficulties and the property was sold at foreclosure. Dammeyer's financial condition has therefore deteriorated substantially from what it was at the time of the divorce. Warniment's financial condition has become more stable since the divorce. She continues her same long term employment, and is remarried to a spouse with a stable employment situation. Both have enjoyed increases in their earned incomes. Warniment's new family's financial problems have been largely derivative of Dammeyer's inability to pay his child support regularly, which in turn has stemmed from the downfall of the motel business.

The ninth factor, the amount of Dammeyer's debt to be discharged, is neutral in this case. The court has overruled Warniment's objection to his discharge. The discharge will relieve him largely of other long term installment debt on a boat and a vehicle which, while providing Dammeyer with a fresh start as

intended, will still not free up enough personal resources to pay the marital debt in issue. He also has a nondischargeable tax liability.

As this case does not involve a debtor's liability to pay joint third party creditors, Warniment's eligibility for bankruptcy relief is irrelevant. Warniment is not exposed in this case, as is often the situation in § 523(a)(15)(A) cases, to personal liability to joint third party creditors if Dammeyer's marital obligation to her is discharged.

The final enumerated factor endorsed by *Patterson* is the good faith of the parties. As other courts have stated, this factor "strongly suggests that ... equitable considerations also can and should be considered in applying section 523 (a)(2)(B)." *Findley v. Findley (In re Findley)*, 245 B.R. 526, 533 (Bankr. N.D. Ohio 2000). Warniment argues that Dammeyer and his new wife have intentionally reduced their incomes so as to prove and improve Dammeyer's case in this court during an economic transition time. This argument is not credible. Dammeyer did quit his job shortly before trial, but also admits that he has the potential to earn at least $30,000 per year. The court believes and the record supports both Dammeyers' explanations about why their incomes were substantially reduced from prior years and the uncertainties of the future in that regard. Dammeyer lost the family business he and Warniment were both relying on to provide the stream of income needed to repay the marital debt. There is no evidence the foreclosure was fraudulent or collusive. The value to Warniment of Dammeyer's personal guaranty, where the corporation was controlled by her ex-husband and his family, was to prevent creative corporate planning and transfers so as to avoid paying Warniment for the value of her interest in the company while Dammeyer still retained a stream of income from the motel. But that is not what has happened according to the evidence. Now there is no longer any stream of income or value from the motel to support the debt, either for the corporation to pay Warniment directly on its primary obligation or to pay Dammeyer so that he could pay his guaranteed obligation. It is true that Dammeyer filed for bankruptcy and that this case being tried at most likely the low point of Dammeyer's financial trajectory, but that is almost universally true of debtors in this court by definition. The court cannot find that either party has acted inequitably as to the other or otherwise than in good faith in litigating both the underlying bankruptcy and this adversary proceeding.

On balance, the court finds that Dammeyer has established by a preponderance of the evidence that

the benefit to him of discharging his $197,000 property settlement debt to Warniment outweighs the detriment to her of doing so. The money would obviously be nice for Warniment to have, but she does not need the property settlement funds to pay her basic family living expenses. When asked at trial what her family has foregone as a result of Dammeyer's default, she identified only not being able to do things like playing paintball. The Warniments work hard to maintain their comfortable middle class lifestyle. This money would provide a cushion and perhaps allow for less overtime. But its absence will not impact their ability to maintain their current lifestyle, which includes substantial equity in a home worth more than $200,000 and expenses beyond those reasonably necessary for maintenance and support of the family unit. As to Dammeyer's children, the court finds that discharge of the property settlement will actually enhance the likelihood of his regular and current payment of his nondischargeable child support obligations for their benefit, and permit potential future increases in the absence of the competing $197,000 property settlement debt.

In contrast, Dammeyer has indisputably lost his business and is starting over again financially. The magnitude and potential duration of the marital debt in issue is such that it would impact him for years to come. As the court has determined, it would consume his probable income for years. A fresh start through discharge of this debt will not be devoted to enhancing discretionary income but to meeting basic living expenses and especially to payment of his child support obligations.

For all of the foregoing reasons, the court finds that, if this marital obligation is not discharged, Dammeyer's standard of living will fall materially below Warniment's standard of living. Therefore, he is also entitled to judgment in his favor under § 523(a)(15)(B).

III. Partial Discharge of Marital Debt

Warniment argues that the court should discharge only part of the debt. She has not explicitly argued any amount of debt that would appropriately be discharged or not discharged based on the record. As noted above, she does point out that Dammeyer's child support obligations will change in three steps starting in 2006 and terminating in 2012. Presumably, then, Warniment seeks an equitable remedy fashioned on using future income Dammeyer earns that will not necessary be for future payment of child support starting in 2006.

The statute does not by its terms provide for a partial discharge, *Taylor v. Taylor (In re Taylor)*, 191 B.R. 760, 766 (Bankr. N.D. Ill. 1996), *aff'd* 199 B.R. 37 (N.D. Ill 1996), such as by relieving a debtor of a marital obligation "to the extent" not reasonably necessary for support. Case law is seriously divided over whether bankruptcy courts have statutory authority to partially discharge marital property settlement obligations. *Compare, e.g., Graves v. Myrvang (In re Myrvang)*, 232 F.3d 1116, 1122-24 (9th Cir. 2000)(relies on Sixth Circuit student loan case to find authority for partial discharge of § 523(a)(15) marital debts under 11 U.S.C. § 105), *and Smither*, 194 B.R. at 109-10, *with , e.g., Smith v. Smith (In re Smith)*, 218 B.R. 254, 260 n.2 (Bankr. S.D. Ga. 1997), *and Mannix v. Mannix (In re Mannix*), 303 B.R. 587, 598 (Bankr. M.D. Pa. 2003).

There is no binding Sixth Circuit precedent on this issue. *Patterson*, however, suggests in dicta that a bankruptcy court may consider partial discharge of marital property settlement obligations under certain circumstances. *Patterson*, 1997 U.S. App. LEXIS at *9-*10, 1997 WL 745501 at *3. And in cases involving nondischargeable support under § 523(a)(5), the Sixth Circuit directs bankruptcy courts to "set a reasonable limit on the nondischargeabilty of that obligation for purposes of bankruptcy," which sounds like a partial discharge. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1110 (6th Cir. 1983). Moreover, in student loan undue hardship cases under 11 U.S.C. § 523(a)(8), the Sixth Circuit expressly authorizes, and this court might say that in certain circumstances it expressly directs, bankruptcy courts to fashion partial discharge remedies. *See Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998). Rather than under § 523(a)(8), the Sixth Circuit finds authority for partial discharges in student loan cases in the court's general authority under 11 U.S.C. § 105. And bankruptcy courts within the Sixth Circuit generally find they have authority under § 105(a) to partially discharge marital property settlement obligations. *E.g., Melton*, 228 B.R. at 646; *Alexander v. Alexander (In re Alexander)*, 263 B.R. 800, 805 (Bankr. W.D. Ky. 2001).

This court finds, however, that there are material differences in the structure of the Bankruptcy Code between cases under §§ 523(a)(5) and (a)(8), on the one hand, and § 523(a)(15), on the other hand. There is no other Bankruptcy Code remedy for discharging obligations determined nondischargeable under §§ 523(a)(5) and (a)(8). In contrast, unlike support debts and student loan debts, marital debts within §

523(a)(15)(A) can otherwise be discharged through chapter 13, 11 U.S.C. § 1328(a), even if they cannot be discharged under chapter 7. A debtor with regular income may generally discharge an unsecured § 523(a)(15) property settlement debt through a chapter 13 plan meeting the best interests of creditors standard of 11 U.S.C. §1325(a)(4) and the disposable income standard of § 1325(b). In particular, the latter standard requires a debtor to devote disposable income, as defined, to repayment of creditors for just a three year period. Confirmation and consummation of a chapter 13 plan then results in a "superdischarge," which will include

§ 523(a)(15) debts but not student loan or support debts. The Bankruptcy Code therefore already has a separate remedy for marital property settlement debts that can result in a partial discharge for

debtors otherwise eligible for chapter 13. *Haines*, 210 B.R. at 593-94 (where there is an ability to pay in part, chapter 13 provides structural basis for payment in accordance with its provisions over three to five years and discharge of § 523(a)(15) debts). *But see* 11 U.S.C. § 1141(d)(2)(confirmation of a chapter 11 plan does not discharge an individual debtor from any debt not dischargeable under § 523).

Because of this important statutory distinction, and notwithstanding the unpublished *Patterson* dicta, the court does not believe the Sixth Circuit would extend its partial discharge precedents in student loan and support cases to marital property settlement debts. Such an extension would also conflict with the basic principle that "whatever equitable powers remain in the

bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *see Union Planters Bank, N.A.*, 530 U.S. at 13-14 (where "the natural reading of the text produces the result we announce...[a]chieving a better policy outcome...is a task for Congress, not the courts.").

Moreover, when one examines partial discharge cases closely, many courts are not actually restructuring and rewriting state court divorce decrees, an action decried by the Sixth Circuit under § 523(a)(5) in *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397 (6th Cir. 1998).[12] Some courts that use partial

---

12

The court acknowledges that, where the statute clearly permits the discharge of an entire marital property settlement obligation, a partial discharge might be considered sort of a lesser included federal intrusion upon the traditional authority of the state courts in handling divorce and domestic relations proceedings. Where this argument has some obvious persuasive appeal, the court believes it cannot overcome the existence of a specific alternative remedy established by Congress in chapter 13.

discharge language where a debtor has some income not necessary for support are actually looking at the three to five year time frame of chapter 13 and discharging the debt to that extent. *See, e.g., Myrvang,* 232 F.3d at 1121-22 n.4; *Greenwalt,* 200 B.R. at 913. They are essentially effecting, under the label of a partial discharge, a chapter 13 "superdischarge" without the accompanying administrative expense or process of a chapter 13 case. *E.g., Melton* , 228 B.R. at 646-47 (finding that debtor can pay $200 per month on marital debt, court enters partial discharge of all amounts not repaid in five years).

Other partial discharge cases involve joint debts owed to third parties assumed by the debtor-spouse in the divorce decree. These cases frequently involve more than one debt assumed through a divorce decree, such as multiple credit card debts, or more than one type of debt, such as a mixture of credit card debts and mortgage debts. Courts will discharge some of the debts assumed in the divorce decree and not others. *E.g., Gagne v. Gagne (In re Gagne),* 244 B.R. 544, 548 (Bankr. D.N.H. 1998). In this court's view, that is not the same partial discharge remedy Warniment is asking the court to develop in this case, where a large unitary debt is involved. *Ferraro v. Ballard (In re Ballard),* 2001 Bankr. LEXIS 1661, *87-*88, 2001 WL 1946239, *25 (Bankr. E.D. Va. Jul. 18, 2001)("This Court is less confident of its authority to effect a partial discharge in an instance in which the contested obligation is a unitary one."). These courts are actually separately applying § 523(a)(15)(A) and (B) to each debt or type of debt addressed in the divorce decree, which this court finds to be simply an application of the plain terms of § 523(a)(15). Moreover, there is a principled jurisprudential basis in those types of cases for deciding how much the debtor has the ability to pay, even if the debtor cannot pay the full amount of the assumed third party debts.

The court finds the case law holding that bankruptcy courts do not have the authority to partially discharge marital property settlement debts under § 105 or § 523 to be generally more persuasive than cases holding that bankruptcy courts do have such authority, and declines to create a remedy requiring Dammeyer to pay some part of the $197,000 debt he owes Warniment, having already determined that it is dischargeable under § 523(a)(15)(A) and (B).

Even if this court does have such authority, it cannot find any principled basis rooted in the evidence before the court in this case upon which to decide how much should be paid and how much should be

discharged. Any decision in that regard would be arbitrary and speculative. Dammeyer does not now have "disposable income" to fund a chapter 13 plan or otherwise to pay some part of the debt. The court cannot predict from the evidence when or if he will. The court acknowledges that Dammeyer might in the future be able to pay part of Warniment's debt, with the available option of structuring payment through a chapter 13 plan, when his child support obligations begin to terminate, as Warniment argues. Or he might not. That is ultimately but one known fact in a pantheon of otherwise unknown predictions that even a practiced Tarot card reader would be reluctant to make.[13] *See Pollard*, 306 B.R. at 654. Nor are there in this case multiple assumed debts from which the court can decide those specific amounts or types of debt that the debtor has the ability to pay and those that the debtor does not have the ability to pay.

For the foregoing reasons, the court will not split the $197,000 marital debt into a part to be paid at some time in the future and a part to be discharged now.

CONCLUSION

Based on the foregoing reasons and authorities, the court concludes both that Dammeyer is entitled to a discharge under § 727 and to have the debt he owes Warniment included in his bankruptcy discharge. The court will enter a separate final judgment in Defendant Nicholas Willis Dammeyer's favor in accordance with this Memorandum of Decision.

13

One might be tempted to observe that the whole enterprise engaged in by bankruptcy courts in deciding whether a debtor lacks the ability to pay a marital debt, or whether repayment of a student loan would be an undue hardship, resembles nothing so much as the Delphic oracle predicting the future. The dissent in *Crosswhite*, 148 F.3d at 890-91, and other cases that decline to look at a debtor's future income earning potential, *e.g.*, *Mannix*, 303 B.R. at 597, thus present an admittedly attractive and eminently practical position in asserting that the statute requires a static analysis of the parties' financial situations at the time of trial, without looking at a Debtor's potential income. But the time of trial, or any other specific measuring date selected, would be inherently arbitrary. There is always a line between reasonable inferences based on evidence about what will happen in the future and unreasonable speculation not rooted in the record. Courts and juries must often draw this kind of line in other settings, for example as in a wrongful death case where a decedent's lifetime of lost income must be determined. In its use of language requiring bankruptcy courts to determine a debtor's *ability* to pay a marital debt from income or property, Congress has imposed on bankruptcy courts a duty to find this line in § 523(a)(15) cases before them. And this court has tried to do just that based on the evidence in this case, finding that Dammeyer has shown it more probable than not that he does not have the ability to pay his debt to Warniment from his income, now or in the future.

_____

Mary Ann Whipple
United States Bankruptcy Judge