Dated: May 24 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-36270
	)	
R. Michael McMullen,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 04-3324
	)	
Linda M. Kilgus,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
R. Michael McMullen,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Plaintiff's complaint to determine the dischargeability of a marital debt. Plaintiff requests that the court declare the debt owed by Defendant/Debtor R. Michael McMullen, her ex-husband, to be nondischargeable in his chapter 7 case under 11 U.S.C. § 523(a)(5) or (a)(15). The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and the

general order of reference entered in this district. Proceedings to determine the dischargeability of debts are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I).

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

FINDINGS OF FACT

I. The Divorce Decree and Marital Debt

The parties were married, apparently for the second time, on February 15, 2001. On February 13, 2001, two days before their marriage, the parties entered into a premarital agreement.[1] Also on that date, Defendant asked Plaintiff to pay a debt owed by him in the amount of $45,000. Plaintiff loaned him $40,000 that she obtained from her home equity line of credit and Defendant executed an agreement acknowledging his responsibility for repaying that $40,000. [Plaintiff's Ex. 16]. During the course of their short marriage, Plaintiff paid debts owed by Defendant in the additional amount of approximately $38,000, also from funds she obtained from her home equity account. At the time of their divorce, the parties entered into negotiations regarding the repayment of these amounts. Plaintiff ultimately agreed to accept, and Defendant agreed to pay, $50,000 as settlement of the debt owed to Plaintiff.

On September 24, 2003, the Common Pleas Court of Lucas County, Ohio, entered a Judgment Entry of Divorce, granting the parties' divorce and incorporating the agreement between the parties as to all issues relating to the divorce that was read into the record. [Plaintiff's Ex. 1]. Pursuant to their agreement, the court awarded Plaintiff the real property located at 4351 Nantucket, Toledo, Ohio, which is the home in which she lived before her marriage to Defendant. Plaintiff agreed to pay both the first mortgage and the home equity loan relating to that property and hold Defendant harmless thereon. The divorce decree further provides as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant shall

[1] The existence and validity of the agreement was later recognized by the state court in its Judgment Entry granting the parties' divorce. But the provisions of the premarital agreement were not disclosed at trial.

> pay to the plaintiff as and for a non-dischargeable in bankruptcy division of property the sum of Fifty thousand ($50,000.00) dollars as a full and complete satisfaction and adjustment of all obligations between the parties.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this sum shall be paid at the rate of five hundred ($500.00) per month for 24 months at which time the entire remaining balance shall be due and payable in full. If the defendant does not pay the balance in full when due in addition to other remedies at law or equity the unpaid amount shall bear interest at the rate of 10% per annum and an additional Forty-five hundred ($4,500) dollars shall be due and owing. The first monthly installment shall be due and payable on the 15th day of the first month following the file-stamped date of the decree of Divorce with subsequent monthly installments due on the 15th day of each month thereafter.

[*Id.* at 5].

With respect to debt other than the mortgage debt, the parties agreed and the decree orders that they each shall hold the other harmless on any indebtedness in his or her name incurred by the individual party. [*Id.* at 8]. The decree also provides that "neither party shall pay spousal support and the same is forever barred except in the case of an attempted or actual bankruptcy as set-forth later in this Judgment of Divorce." [*Id*. at 3]. The divorce decree later sets forth the following "ANTIBANKRUPTCY CLAUSE" to which the parties had agreed:

> IT IS FURTHER ORDERED ADJUDGED AND DECREED that each of the parties are assuming and shall hold the other harmless from liability for the debts designated above on which they may be jointly liable. The parties each intend that the other's assumption of debt is necessary for the suitable support of the other. If either party fails to pay any joint debt assumed by that party herein, or if found liable to pay that debt, or if defendant discharges the property settlement award or any portion thereof, by court order or otherwise, then this Court shall order the party assuming said debt herein to pay spousal support to the party to be held harmless in a like amount as to the amount discharged. Spousal support is reserved only to the extent provided in this paragraph. Any spousal support ordered pursuant to this paragraph shall terminate on the obligated party's death and shall not be deductible by the payer nor shall it be considered income to the other party.

[*Id.* at 9-10].

Finally, the divorce decree addresses the non-dischargeability of the parties' debts:

> It is further agreed that the non-dischargeability of all debts by both parties is specifically bargained for and is a material consideration of this agreement. The parties agree that their mutual promises to hold each other harmless on these debts are non-dischargeable in bankruptcy pursuant to 11 U.S.C. Section 523(a)(5), and 11 U.S.C. 523(a)(15) as in the nature of alimony, maintenance or support, and that the payment of debts pursuant to the hold harmless clause and

> the obligation to pay the same at this time is not oppressive, the obligor can pay the debts and the detriment to the non-obligor spouse outweighs any benefit of bankruptcy by the obligor-spouse.

[*Id.* at 9].

Defendant testified that, as required under the divorce decree, he paid Plaintiff $500 per month for approximately ten months before he filed his Chapter 7 petition on July 27, 2004. At trial, the parties also agreed that, at the time of their divorce, the $50,000 debt to be paid by Defendant to Plaintiff was intended by the parties and ordered by the court as a division of marital property.

II. The Parties' Financial Condition

Defendant lives in Perrysburg, Ohio, in the home of his girlfriend, Judith Malone, where he has apparently lived since June, 2003.[2] In addition to Malone, Defendant's nine-year-old son by another marriage stays with him three days per week.

Defendant has been employed as the state of Ohio sales manager for Guardian Alarm Company for the past two and one-half years. Originally, on the Schedule I filed with his petition, Defendant reported $5,955 as his monthly gross wage and $1,105 in monthly payroll taxes.[3] [Plaintiff's Ex. 2]. After the adversary complaint in this case was filed, he amended Schedule I wherein he reported his monthly gross wages as being only $4,800, with payroll deductions remaining the same at $1,105. [Plaintiff's Ex. 3]. Defendant testified that he relied on his pay stubs in completing the Schedules and that he did not have complete information at the time. In determining Defendant's current income, the court therefore relies instead on the testimony of Christina Zielinski, the General Manager at Guardian Alarm.

Zielinski testified regarding Guardian Alarm's payroll report for Defendant. Defendant's gross weekly base wage in 2004 was $1,176.93 but was increased to $1,200.47 in November, 2004. [Plaintiff's Ex. 6]. Defendant continues to earn a gross base wage of 1,200.47 per week, or $5,202 per month. [Plaintiff's Ex. 7]. In addition, Zielinski testified that Defendant's income includes both his base wage plus bonuses. In 2004, Defendant earned

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[2] Defendant testified that throughout 2004 and currently he lives in Malone's home located at 711 Briarwood Circle, Perrysburg, Ohio. In addition, he indicates in his Statement of Financial Affairs that he has lived there since June, 2003. [*See* Plaintiff's Ex. 3, p. 7].

[3] The only other deductions from income included child support and spousal support. Defendant testified that he later amended Schedule I to exclude these deductions since he has included child support as an expense on Schedule J and because he mistakenly designated his payments to Plaintiff, which he is no longer making, as spousal support.

$5,610 in bonus pay, or an average of $467 per month. There is no indication that similar bonuses will not continue in the future. Thus, Defendant's current and anticipated future gross monthly income is approximately $5,669. Assuming a reduction in this amount of approximately 25% for payroll taxes,[4] Defendant's net monthly income is $4,252. Although not listed on his Schedule I, Defendant's 2004 W-2 statement also indicates that he contributed $3,206 to his 401K plan, for a monthly contribution of approximately $267.

In addition to his base pay and bonuses, Defendant also receives vehicle reimbursements. Such reimbursements are not dependent upon his actual costs but consist of a flat rate of $45 per day for every day that he is actually at work. In 2004, he received $14,010. Defendant testified that he travels between 100 and 500 miles per day, 3 to 4 days every week. In addition, he pays $755 to lease a 2003 BMW that he uses both for work and personal use. Zielinski testified, however, that Defendant's job does not require a BMW but requires only a clean vehicle in good condition. In any event, Defendant did not list the travel and lease expenses on his Schedule J or list BMW Financial Services as a creditor in his petition since, according to Defendant, these debts are covered by the vehicle reimbursements he receives.[5]

Other household income includes Malone's retirement income and deferred compensation in the total amount of $3,300 per month. Malone testified that her income is commingled with Defendant's money in a joint savings and a joint checking account from which their household expenses are paid. Although she contributes nothing to the home mortgage payment or utilities which are paid entirely by Defendant, she testified that she contributes $200 to $300 per month for food and $200 per month in entertainment cost in addition to the amount Defendant claims to spend for these particular expenses. She also pays for a lease on her own 2004 BMW and for the insurance for that vehicle.

On his amended Schedule J, Defendant reports total monthly expenses of $3,503. Included in this amount is $667 that he pays in child support for his nine-year-old child. Notwithstanding the fact that he has been divorced

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[4] Payroll taxes reported on Defendant's original Schedule I equals approximately 19% of the $5, 955 gross monthly wage reported on that schedule while the payroll taxes on his amended Schedule I equals approximately 23% of his reported wages. The court has used the greater percentage to calculate his payroll taxes and his net monthly pay for purposes of this order.

[5] Defendant did list the lease for the BMW as an executory contract with BMW Financial Services in his petition. The docket shows that the Chapter 7 Trustee did not assume the lease within 60 days after the order for relief and it was, therefore, rejected by the estate. *See* 11 U.S.C. § 365(d)(1). The docket does not show that Defendant reaffirmed the debt to BMW Financial Services and he has been granted a discharge in the underlying bankruptcy case, thus relieving him of personal liability for the lease debt.

five times, he is required to pay no other child or spousal support.

Also included in his total monthly expenses is $200 that he is paying to his attorney that represented him in his divorce. As of December 20, 2004, the balance due on that debt was $2,278. [Plaintiff's Ex. 13]. Payment at the rate of $200 per month will result in the debt being paid in full by December, 2005. At any rate, this debt has been discharged pursuant to the order of discharge entered in Defendant's bankruptcy case on December 3, 2004. Any post-petition payment of this debt has thus been purely voluntary and is not required by law. 11 U.S.C. § 524(f).

The court finds several of Defendant's other expenses overstated. Defendant indicates that he pays "rent or home mortgage payment" in the amount of $874 and utilities in the total amount of $329 per month. At trial, Malone testified that she does not charge Defendant rent to live in her home and does not claim the payments made by Defendant on the mortgage or for utilities as income. Nevertheless, she testified that Defendant makes those payments to the bank and to the utility companies on her behalf. Those payments are made from a joint account shared by Defendant and Malone in which their funds are commingled. According to Defendant, they do not keep any separate accounting of whose funds are used to pay the expenses paid from that account. The court finds that both Malone and Defendant contribute to the mortgage and utility payments and that two-thirds of those total expenses, or $802, are reasonably attributable to Defendant for housing for himself and his son.

Defendant also indicates that he spends $550 per month on food. Together with the $200 to $300 contributed by Malone for food, they allegedly spend between $750 and $850 for food for two adults and one nine-year-old child that is in their home only three days per week. This is in addition to amounts Malone testified are spent on dining out that are included in her recreation funds. The court finds this amount excessive and finds that a monthly household food budget of $600 is a more realistic, and still generous, figure. Assuming Malone contributes only $200, the court will attribute $400 as Defendant's monthly expense for food.

Finally, Defendant testified that he spends $200 per month for recreation. He explained that this includes money spent on fees for the various sports in which his son participates as well as his son's sports equipment. However, Patty McMullen, his former wife and mother of his son, testified that she pays for her son's sporting equipment and fees. The court finds her testimony credible and finds Defendant's recreation expense is also overstated.

Even without a further reduction to reflect actual recreation expenses, after considering the other adjustments discussed above, Defendant will have an income of $1,500 per month, net of all expenses. To the extent he continues to contribute to his 401K plan as he has in the past, he will still have a monthly net income of $1,233. It does not appear, however, that Defendant has significant personal property that could be liquidated to help pay the debt in issue.

Plaintiff also testified regarding her financial condition. The court finds her testimony, which was for the most part not challenged, to be credible. Since the parties' divorce, Plaintiff has remarried. Her husband contributes approximately $800 per month to the household expenses.[6] Plaintiff testified that her net income is approximately $4,000 per month. Her income is derived from several sources, including her work as a real estate agent, investments, and a $400 per month distribution from the Kilgus Residual Trust, a trust created by her father and of which she, along with others, is a beneficiary. Plaintiff testified that although she has received funds from the residual trust other than the $400 per month, such distributions are at the discretion of the trustee. However, after the parties' divorce, she did receive a $75,000 distribution from the trust to enable her to pay off the home equity loan on her house. Plaintiff also testified that she receives a $10,000 gift from her mother annually. This, together with her net monthly income of $4,000 and her husband's contribution of $800, provides a monthly income of $5,633.

Plaintiff also has investments in an account with Wachovia Securities that is valued at approximately $180,000. [Defendant's Ex. D]. She testified that when her previous husband and father of her two daughters died, these investments, although held in Plaintiff's name, were earmarked for her daughters' education. Her daughters are now of college age and Plaintiff contributes $2,147 per month for their support and education.

Other assets owned by Plaintiff include an account with Fifth-Third Bank in the amount of $44,000, retirement accounts in the total amount of $81,000, [*see* Defendant's Exs. C and E], as well as a boat valued at $20,000, and jewelry valued at $10,000. In addition, Plaintiff has approximately $170,000 of equity in her home and drives a 2002 Acura that is paid in full.

Plaintiff's expenses total $7,050 per month, including the $2,147 for her daughters' support and education and $1,302 per month that she must pay as an administrative fee to Remax Realty. All of her remaining expenses

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[6] The record is otherwise silent regarding her husband's income and/or assets.

reflect a reasonably modest lifestyle. [*See* Plaintiff's Ex. 15]. As Plaintiff's household income, including her husband's contribution, is $5,633, Plaintiff testified that she has withdrawn funds from her savings to pay for these expenses. This fact is documented by her Fifth-Third Bank statements that show a balance of $69,784 on January 21, 2004, and a balance of $44,041 on January 21, 2005. [*See* Defendant's Ex. E].

LAW AND ANALYSIS

The only debt at issue in this case is the balance due on the $50,000 debt owed by Defendant to Plaintiff under the terms of the Judgment Entry of Divorce. Plaintiff contends that this debt is either nondischargeable under § 523(a)(5) as being a support obligation or under § 523(a)(15) as an obligation otherwise incurred in connection with the divorce decree.

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

Section 523(a)(5) excepts from discharge any debt

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a . . .divorce decree. . . , but not to the extent that–
> . . . .
>
> > (B) such debt includes a liability designated as alimony, maintenance, or support unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5). "The burden of demonstrating that an obligation is in the nature of support in on the non-debtor spouse." *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6th Cir. 1993).

In this case, Plaintiff incurred debt secured by her home, in the form of a home equity loan, in order to pay a debt or debts owed by Defendant. The parties agreed, and the state court ordered, that Plaintiff would pay the home equity loan and hold Defendant harmless on that debt. In exchange, the parties negotiated an agreement that Defendant pay Plaintiff $50,000 in full satisfaction of any obligation owed to her. Plaintiff concedes that at the time of their divorce, the $50,000 debt to be paid by Defendant to Plaintiff was intended by the parties and ordered by the court as a division of marital property and not as spousal support. The decree itself refers to Plaintiff's obligation to pay the $50,000 as "the property settlement award." [Plaintiff's Ex. 1, p. 9]. In determining whether an obligation that is not designated as support is "actually in the nature of alimony, maintenance, or support," the Sixth Circuit has instructed that the initial inquiry must be to ascertain whether the state court or the parties to the divorce *intended* to create an obligation to provide support. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103,

1109 (6th Cir. 1983). "If they did not, the inquiry ends there." *Id.* It is thus clear that the $50,000 debt obligation was not a support obligation when the state court entered its Judgment Entry of Divorce.

Nevertheless, it is Plaintiff's position that the provisions of the divorce decree require a finding that the debt now constitutes spousal support. In particular, Plaintiff relies on the "AntiBankruptcy Clause" in the divorce decree that provides that "[i]f either party fails to pay any joint debt assumed by that party herein, . . .or if defendant discharges the property settlement award or any portion thereof, by court order or otherwise, then this Court *shall order* the party assuming said debt herein to pay spousal support to the party to be held harmless in a like amount as to the amount discharged. Spousal support *is reserved* only to the extent provided in this paragraph."[7] [Plaintiff's Ex. 1, p. 9-10]. This court disagrees that the effect of that provision is to automatically convert the $50,000 property settlement to a nondischargeable support obligation when Defendant filed his bankruptcy petition.

The court interprets the language in the AntiBankruptcy Clause of the decree simply as the state court's attempt to reserve jurisdiction over the issue of spousal support in the event that circumstances change from that which formed the basis of the parties agreement and Defendant receives a discharge of the debt at issue. The language of the decree suggests that the court anticipated revisiting the issue in the future. As such, the state court did not order spousal support in the event certain circumstances should occur. Instead the decree provides that "this Court *shall order*" spousal support if those conditions are met in the future and that "[s]pousal support *is reserved* to the extent provided in this paragraph." [*Id.*]. While it does not appear that the Ohio Supreme Court has addressed the issue of whether a trial court may reserve jurisdiction over the issue of spousal support if it does not enter an order of spousal support in the first place, the majority of appellate courts in Ohio that have addressed the issue have concluded that the trial court may do so, at least for a reasonable period of time. *See, e.g.*, *Okos v. Okos*, 137 Ohio App. 3d 563, 580 (6th Dist. 2000); *McLeod v. McLeod*, 2002 WL 1627834, *14 (11th Dist. July 19, 2002) (unreported); *Aylstock v. Bregenzer*, 1994 WL 371330, *1 (2d Dist. June 29, 1994) (unreported). *But see Wolding v. Wolding*, 82 Ohio App. 3d 235, 239 (3d Dist. 1992) (finding that the trial court does not have

[7] The court notes that the divorce decree also states that "[t]he parties agree that their mutual promises to hold each other harmless on these debts are non-dischargeable in bankruptcy. . . ." [Plaintiff's Ex. 1, p. 9]. However, a prepetition agreement that a debt is nondischargeable is unenforceable as against public policy. *See Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1110 (6th Cir. 1983) (emphasizing that "one cannot contract away bankruptcy rights"); *Ed Schory & Sons, Inc. v. Francis (In re Francis)*, 226 B.R. 385, 390 (B.A.P. 6th 1998) (a prepetition agreement that waives a party's right to file bankruptcy is unenforceable as against public policy); *Klingman v. Levinson*, 831 F.2d 1292, 1296 n. 3 (1987).

the authority to continue jurisdiction concerning the issue of alimony where it made a specific finding that alimony was not warranted).

In light of the foregoing discussion, Plaintiff has failed to demonstrate that the debt at issue is nondischargeable under § 523(a)(5).

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

Plaintiff also argues that Defendant's $50,000 debt obligation is nondischargeable under § 523(a)(15). That section provides that an individual is not discharged from any debt

> not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–
>
> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor. . .; or
> >
> > (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(A)(15). 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. Debtor 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 Plaintiff. *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, Debtor 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).

The parties do not dispute that the marital debt at issue arose in connection with their divorce decree. In light of Plaintiff's failure to prove that Defendant's obligation to pay the marital debt at issue constitutes support

under § 523(a)(5), the burden of proving that the marital debt is of a type excepted from discharge under § 523(a)(15) has been met. It is thus incumbent upon Defendant to establish either an inability to pay the debt or that a discharge would result in a benefit to him that outweighs any detriment to Plaintiff.

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

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*, 540 U.S. 526, 534 (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 in § 523(a)(15)(A) and the definition of "disposable income" in 11 U.S.C. § 1325(b)(2)(A) for purposes of confirming Chapter 13 plans, and conclude that the "disposable income test" is thus the appropriate standard for measuring the 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, 875 (Bankr. S.D. Ohio 2001)*; Gamble v. Gamble (In re Gamble)*, 143 F.3d 223, 226 (5th Cir. 2000) ("[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). 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 transference 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 Defendant does not have the ability to pay Plaintiff, 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." *In re Price*, No. 03-2084, 2004 WL 1208295, at *5, 2004 U.S. App. LEXIS 10960, at *17 (3d Cir. June 4, 2004)(citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) and *Kelly v. Robinson*, 429 U.S. 36, 43 (1986)).

As explained above, Defendant's after-tax income at the time of trial averages $4,252 per month and expenses, as adjusted by the court, total $3,019, including his voluntary contributions of $267 per month to his 401K plan. Defendant is thus left with an average income, net of all expenses, of $1,233 per month. While contributions to a 401K retirement plan may represent prudent financial planning, such expenditures are not necessary, on a current basis, for the "maintenance and support" of Defendant or his dependents. *See Harshbarger*, 66 F.3d at 777. These funds, therefore, constitute income not reasonably necessary for the support

of Debtor or his dependents. Adding the 401K contributions to his net monthly income results in average monthly income of $1,500 that is not reasonably necessary for his and his son's support. In making these calculations, the court has not considered Defendant's car lease payments as an expense nor the sizeable amount received as vehicle reimbursement from his employer. The court credits Defendant's testimony that the lease payments are covered by the amount received as vehicle reimbursements and further finds that such reimbursements do not represent additional income as it is used to cover his travel expenses necessary for his employment, expenses that are not otherwise accounted for in the court's calculations.

The court estimates the total marital debt at issue in this case to be approximately $49,500.[8] At an interest rate of 10% as provided in the divorce decree, and assuming only $750 of Defendant's $1,500 monthly income that is not reasonably necessary for support is dedicated to payment of this marital debt, he has the ability to pay the debt in approximately eight years. Eight years is a reasonable amount of time within which to complete repayment of this debt. *See Koenig v. Koenig (In re Koenig)*, 265 B.R. 772, 776 (Bankr. N.D. Ohio 2001) (finding 8 ½ years is reasonable); *Cox v. Brodeur (In re Brodeur)*, 276 B.R. 827, 835 (Bankr. N.D. Ohio 2001) (finding 8 years is reasonable given the priority the Bankruptcy Code accords to domestic obligations).

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

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

Neither § 523(a)(15)(B) nor Sixth Circuit case law provide definitive guidance as to how the Court should determine and balance the interest of the parties. But the Bankruptcy Appellate Panel for this Circuit and, in an unpublished opinion, the Sixth Circuit, has endorsed a balancing test as set forth in *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). *Molino*, 225 B.R. at 908-09; *Patterson v. Patterson (In re Patterson)*, 132 F.3d

[8] The court's calculation is based on Defendant's unrebutted testimony that he has paid $500 per month for approximatly ten months. Thus, $5,000 of the $50,000 debt has been paid, leaving a balance of $45,000. Assuming, however, that the debt will not be paid in full by September, 2005, an additional $4,500 will be owed to Plaintiff as provided in the divorce decree [*see* Plaintiff's Ex. 1, p. 5], which will result in a balance owed of $49,500.

33 (Table), 1997 WL 745501 (6th Cir. Nov. 24, 1997).[9] Under the balancing test, a court should review the financial statuses of the parties and compare their relative standards of living to determine the true benefit of the debtor's possible discharge against any hardship the former spouse and/or children would suffer as a result of a discharge. *Id.* at *3.

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

Id. (quoting *Smither*, 194 B.R. at 111); *see also Molino*, 225 B.R. at 909. In *Smither*, the court listed the following nonexclusive factors to guide balancing the detriments to each party:

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

Smither, 194 B.R. at 111.

Most of these factors have been discussed above. Both Plaintiff and Defendant work hard for a living. As a result, both have comfortable lifestyles, albeit some of Defendant's comfortable lifestyle having apparently been fueled by credit card debt. They both live in nice houses in nice areas. They both eat well and dress well. They both drive very nice cars. They both care for and support their children well.

Defendant's monthly net income is approximately $4,252. Although the court did not consider Malone's monthly income of $3,300 in determining Defendant's ability to pay his marital debt, the court finds her income

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[9] 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.

relevant in determining Defendant's standard of living and the economic realities involved in that determination. They have lived together for nearly two years, pay expenses from accounts in which they have commingled their funds and for which they keep no separate accounting, and are apparently living as a single economic unit. *See Crosswhite v. Ginter*, 148 F.3d 879, 889 n.17 (7th Cir. 1998) (explaining that in determining whether a debtor's and live-in companion's economic interdependence is sufficient to have improved the debtor's economic situation, the court should consider such factors as the period of time the individuals have lived as a single economic unit and the degree to which they have commingled their assets); *Short v. Short (In re Short)*, 232 F.3d 1018, 1024 (9th Cir. 2000) (holding that in determining the dischargeability of a divorce-related debt, a bankruptcy court may consider the income of a debtor's live-in romantic companion "whenever the debtor and his or her live-in romantic companion are economically interdependent or form a single economic unit"); *see also Dunn v. Dunn (In re Dunn)* ,225 B.R. 393, 401-2 (Bankr. S.D. Ohio 1998); *Halper v. Halper (In re Halper)*, 213 B.R. 279, 284 (Bankr. D.N.J. 1997) (concluding that determination of the relative benefits of discharge to the debtor and creditor "mandates consideration of the income of a live-in companion[ ]"). In total, Defendant's and Malone's monthly household income is $7,552.

If the court considers only Defendant's net monthly income and the expenses the court found attributable to him in the total amount of $2,752, he is left on a monthly basis with $1,500 that is not reasonably necessary for his or his dependent's support. If the court also considers the total household income of $7,552, as well as the additional mortgage and food expenses attributed to Malone in the amount of $550, the household income not reasonably necessary for support is approximately $4,250, less unknown amounts for Malone's car lease and car insurance payments. No other household expenses were presented to the court.

Plaintiff's net monthly household income, including the annual gift from her mother, averages approximately $5,600,[10] significantly lower than that of Defendant. After deducting Plaintiff's business expense of $1,302 paid monthly to Remax Realty, her monthly household income totals $4,298, approximately equal to Defendant's net monthly income exclusive of Malone's income. Plaintiff's remaining monthly expenses, not including payments for

[10] This figure includes $800 per month that Plaintiff's husband contributes on a monthly basis. Because the record is silent as to whether her husband has income in excess of this amount, and because Defendant has the burden of proof with respect to the equitable considerations under § 523(a)(15)(B), the court will not assume her husband's income is any more than $800 per month.

support of her college-aged daughters, total approximately $3,600, leaving her $698 that is not reasonably necessary for her support or the support of dependents.

Although this is significantly less than the income available to Defendant, either inclusive or exclusive of Malone's contribution, for use other than for necessary support, Plaintiff also owns significant assets consisting of her retirement accounts, Wachovia Securities account and her own trust account that total approximately $357,000. Defendant on the other hand owns only $4,000 in exempt personal property. Defendant has, however, received a Chapter 7 discharge of all debts other than the marital debt. His schedules show that he has been relieved of at least $45,000 in other unsecured debt, in addition to any personal liability on the BMW lease. Although both a comparison of the parties' income that is available for their discretionary use and Defendant's discharge of all of his non-marital debt weigh in favor of finding the marital debt nondischargeable, a comparison of the parties' assets weighs in Defendant's favor. However, the court's assessment under § 523(a)(15)(B) should take into account considerations of fairness that go beyond a simple mathematical exercise. *Slygh v. Slygh (In re Slygh)*, 244 B.R. 410, 418 (Bankr. N.D. Ohio 2000); *see also Gamble*, 143 F.3d at 226 (the court's assessment under § 523(a)(15) "implicates an analysis of the totality of the circumstances, not just a comparison of the parties' relative net worths."). The court therefore turns to the other *Smither* factors. The parties' ages, health, education and job skills are neutral factors. Their ages were not revealed at trial, however, the parties appear to be close in age. No significant or unusual health issues were identified and both have comparable skills that they can and do use profitably in the workforce. Plaintiff's eligibility for bankruptcy relief is not a proper consideration since her financial circumstances indicate no necessity that she contemplate such relief. The fact that Defendant has a nine-year-old child and Plaintiff has no minor children weighs in favor of Defendant. None of these factors strongly favor either party.

The court next considers any changes in the parties' financial conditions since their divorce. Plaintiff no longer has the additional resource of Defendant's income. She has, however, remarried and benefits, albeit to a lesser degree, from her new husband's monthly contribution. Defendant testified at trial that his circumstances had not changed since the divorce. In fact, Defendant's earnings have increased slightly since that time. In addition, he has been relieved of all of his considerable non-marital debt by way of his Chapter 7 discharge. Apart from the debt to Plaintiff and his child support, Defendant is now debt free. He is also living as a single economic unit with

Malone who also has significant income. Thus, it does not appear that Defendant's situation has deteriorated nor does it appear that Plaintiff's situation has improved. At the time he agreed to pay the $50,000 marital debt and the state court incorporated that agreement into its Judgment Entry of Divorce, his financial situation was less favorable than it is now. Plaintiff agreed to a reduced balance on the debt she claimed was due from him. Defendant testified that at the time of the divorce he fully intended to pay the agreed amount according to the terms structured by the parties, and so represented his ability to do so in the decree. At trial in this adversary proceeding, Defendant was not able to identify any fact or circumstance that had changed since the divorce that negatively affected his ability to pay the debt to Plaintiff. This factor is an equitable consideration that weighs in favor of a finding that the marital debt is nondischargeable. *See Slygh*, 244 B.R. at 418 (finding that it would be unfair and inconsistent with the importance accorded by the Bankruptcy Code to spousal obligations to discharge a marital debt where the debtor's financial situation was tighter at the time of his divorce, at which time he had entered into an agreement to pay the marital debt, than at the time of the trial to determine the dischargeability of that debt).

Furthermore, the fact that Defendant filed bankruptcy less than one year after the divorce and was less than candid in itemizing his actual expenses on Schedule J, together with the fact that Defendant's circumstances have actually improved since the parties' divorce, causes the court to question his good faith with respect to the marital obligation he agreed to at the time of the divorce and the litigation of Plaintiff's § 523(a)(15) claim. *Findley v. Findley (In re Findley)*, 245 B.R. 526, 533 (Bankr. N.D. Ohio 2000) (finding that a debtor's good faith can and should be considered in applying § 523(a)(2)(B)).

In assigning the appropriate weight to each factor discussed above, the court recognizes that this case presents circumstances that are unusual in a § 523(a)(15) case in that both parties enjoy a very comfortable standard of living As one court observed, the balancing test under this section "is far more often applied to the circumstances of a debtor whose expenses exceed his income or a nondebtor spouse whose finances cause the court to marvel how he or she has heretofore avoided the necessity of bankruptcy relief." *Ferraro v. Ballard (In re Ballard)*, 2001 WL 1946239, *22 (Bankr. E.D. Va. July 18, 2001). Given the relative financial comfort of both parties, the court places less weight on their respective financial positions and greater weight on the other equitable considerations discussed above in balancing the equities in this case. In so doing, the court finds the *Smither* factors weigh in favor of finding that the marital debt at issue is nondischargeable.

The discernible benefit to Defendant in receiving a discharge of the marital debt at issue in this case is that he will have additional funds that he may use at his discretion that are not reasonably necessary for his or his dependent's support. Courts have found that this alone is not the kind of benefit that carries much weight. *See Brasslett v. Brasslett (In re Brasslett),* 233 B.R. 177, 186 (Bankr. D. Me. 1999); *Carroll v. Carroll (In re Carroll),* 187 B.R. 197, 201 (Bankr. S.D. Ohio 1995) (finding that providing debtor with additional disposable income to use at his discretion "is not the type of benefit that § 523(a)(15)(B) sought to protect"). If this debt is not discharged, Defendant will still be able to meet his living expenses without lowering his standard of living. Paying the marital debt at issue will not prevent him from contributing to his 401K or even require him to decrease his contributions. Nor does it appear that it will even require any judicious financial belt-tightening under the financial circumstances shown at trial.

While the benefit to Defendant of discharge of the debt is not overwhelming, it must be noted neither is the detriment to Plaintiff. She will not receive the funds otherwise due from Defendant in satisfaction of the marital debt. Given Plaintiff's financial circumstances, this will not impact her standard of living. Nevertheless, "[l]oss of funds by a creditor may be a sufficient detriment to prevent the discharge of a debt, where the debtor can not demonstrate that he or she will receive a benefit which outweighs the detriment." *Smither,* 194 B.R. at 111.

Considering the totality of the circumstances, the court finds that Defendant's standard of living will not fall materially below Plaintiff's standard of living if the debt is not discharged and that the equities in this case militate in favor of finding the debt nondischargeable. Defendant has failed to meet his burden of proof under § 523(a)(15)(B). The court, therefore, concludes that the marital debt incurred by Defendant in connection with the parties' divorce decree is nondischargeable under § 523(a)(15)(B).

III. Attorney Fees

In her complaint, Plaintiff's prayer for relief requests that the court award her reasonable attorney fees. Generally, under the "American Rule," which applies to litigation in the bankruptcy courts, a prevailing litigant may not collect attorney's fee from his opponent unless authorized by federal statute or an enforceable contract between the parties, neither of which is applicable in this adversary proceeding. *See In re Sheridan,* 105 F.3d 1164, 1166 (7th Cir. 1997); *see also* 11 U.S.C. § 523(d).

CONCLUSION

Finding that Plaintiff has failed to meet her burden of proof on her claim brought under 11 U.S.C. § 523(a)(5), judgment will be entered in Defendant's favor on that claim. However, Plaintiff has sustained her burden and Defendant has failed to sustain his burden under 11 U.S.C. § 523(a)(15)(A) and (B). Judgment will, therefore, be entered in Plaintiff's favor on that claim and the marital debt at issue will be excepted from Plaintiff's Chapter 7 discharge. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.