

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: September 18 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 05-75269
)	
Pamela Rose McGlothlin,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 06-3145
)	
Terry L. McGlothlin,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
Pamela Rose McGlothlin,)	
)	
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 Pamela Rose McGlothlin, his ex-wife, to be nondischargeable in her Chapter 7 case under 11 U.S.C. § 523(a)(15). The court has jurisdiction over this adversary proceeding under 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 under 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 Marital Debt

Plaintiff and Defendant were married in 1978 and have three adult children. In 2001, as amended in a nunc pro tunc judgment entry dated December 30, 2004, the Court of Common Pleas of Ottawa County, Ohio, entered judgment granting the parties a divorce. Pursuant to the divorce decree, Plaintiff was awarded the marital home, which consisted of a manufactured home situated on real estate located at 3751 W. Oak Harbor S.E. Road in Port Clinton, Ohio. Also pursuant to the decree, Plaintiff was made responsible for all obligations on a Green Point Credit loan on and after October 1, 2000, which loan was secured by the manufactured home. The decree further provided that Defendant pay, and hold Plaintiff harmless from, all money due to her father, Clyde R. Gullihier, including a note and mortgage secured by the real estate on which the manufactured home is situated. The decree required Plaintiff to refinance the Green Point Credit loan out of Defendant's name and, upon doing so, the decree required that Defendant either refinance the note and mortgage held by her father or obtain a release from him so that the note and mortgage no longer encumbered the real estate and Plaintiff is no longer personally liable on the debt.

Plaintiff complied with the decree and paid the Green Point Credit loan in full on November 1, 2004. Defendant neither refinanced the note and mortgage held by her father nor did she obtain a release from him. Due to Defendant's failure to pay the debt owed to her father, foreclosure proceedings were commenced in 2005 and a sheriff's sale of the real estate on which the manufactured home is situated is scheduled to occur on September 22, 2006. According to Schedule D filed by Defendant in her underlying Chapter 7 case, [Pl. Ex. 2], she owes her father \$17,000 on the note and mortgage held by him. Defendant has also scheduled Plaintiff as a creditor on Schedule F, reflecting her acknowledged duty to hold him harmless on the debt owed to her father. Although there was some confusion at trial as to the amount of the marital debt that Defendant seeks to have discharged in her Chapter 7 case, to the extent that Plaintiff is forced to satisfy

the mortgage through foreclosure of his home together with liability on any deficiency judgment, the marital debt equals the entire debt owed to Defendant's father, which she has indicated totals \$17,000.

II. The Parties' Financial Conditions

Defendant is 46 years old and works in production at Whirlpool where she has been employed for the past twelve years. She earns \$16.54 per hour and works an average of 35 hours per week. According to Defendant, she often does not work a 40-hour week, in part due to scheduling at work and in part due to days off taken under the Family Medical Leave Act to care for her mother and to take her daughter to doctor appointments. At 35 hours per week, Defendant earns approximately \$30,102 per year or \$2,508 per month. After deductions of approximately \$500 for payroll taxes,¹ \$211 for insurance and \$112 for a healthcare spending account, her net monthly income is approximately \$1,685. Defendant also has approximately \$22,000 in a 401K account and savings bonds with a face value of \$600.

Defendant's Schedule J indicates that her monthly expenses total \$1,613. While her testimony at trial indicates that certain adjustments to the figures in Schedule J are in order, the net result is approximately the same. Defendant was previously living with her mother and paid no rent but paid \$175 for utilities. Defendant is now paying \$300 per month for rent but nothing for utilities. She also pays \$60 for her cell phone as compared to \$40 previously but only \$250 for groceries versus \$400 listed on Schedule J. Other expenses included the following: \$100 for clothing, \$25 for laundry and cleaning, \$200 for transportation, \$50 for recreation, \$60 as charitable contributions, \$88 for car insurance, \$238 as an installment payment on a 2001 Oldsmobile Alero, and \$217 monthly repayment of a 401K loan. Her monthly expenses total \$1,608.

Defendant testified that her adult daughter is mentally handicapped and is currently living in a group home. Although Defendant provides medical insurance for her daughter under a family plan through her employer, her daughter also receives assistance under Medicaid and Social Security disability payments. Defendant testified to no additional expenses born by her on account of her daughter other than the cost of gas to drive the distance to the group home in order to take her to doctors appointments.

Plaintiff testified that he is currently living in the manufactured home that was the parties' marital home and that it is still located on the real estate encumbered by the mortgage held by Defendant's father.

¹ Defendant's Schedule I indicates that withholding taxes represent approximately twenty percent of her gross income. [Pl. Ex. 2, Schedule I].

Plaintiff has a high school education and is self-employed as a truck driver. According to his 2005 federal income tax return, prepared for him by a certified public accountant, his gross income in 2005 from his truck driving business was \$62,939, with business expenses totaling \$55,451. [Pl. Ex. 3]. After adjustment for self-employment taxes, Defendant's adjusted gross income was \$6,959, and his tax liability totaled \$693. [*Id.*]. These figures were not challenged at trial. Given the cost of fuel, Defendant testified that he does not anticipate his income as a truck driver increasing in the near future. Consequently, he obtained employment at OK Rental to generate additional income. His after tax earnings from that job total approximately \$130 per week or \$6,760 per year. Combined, Defendant's net after tax income totals \$13,026 per year or \$1,085 per month.

In addition to the expenses set forth as business expenses on Schedule C of his income tax return, Defendant testified that his personal expenses for gas, food, cigarettes, property maintenance, shoes and dental bills total \$544 per month. Although Defendant did not testify as to his expense for utilities, that is obviously an additional living expense. Defendant has few assets of any significant value. However, he testified that the manufactured home is a 1979 model and estimates that the value of the home and the real estate on which it is situated is approximately \$20,000.

LAW AND ANALYSIS

Plaintiff contends that Defendant's obligation to hold him harmless on the debt owed to her father is nondischargeable under § 523(a)(15).² 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.

² Section 523(a)(15) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the Act"), effective October 17, 2005. Because Plaintiff's bankruptcy case was filed before the effective date of the Act, all references to the Bankruptcy Code in this opinion are to the pre-BAPCPA version of the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, sec. 1501(b)(1), Pub. L. No. 109-8, 119 Stat. 23, 216 (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act).

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 burden of proving that the debt is of a type excepted from discharge under § 523(a)(15) rests with the objecting creditor/spouse. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998). Once this burden is met, the burden shifts to the debtor to prove, by a preponderance of the evidence, either of the exceptions to nondischargeability set forth in subsections (A) or (B). *Id.* at 907, 909. Defendant must make her 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, she 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 and, in fact, the divorce decree clearly sets forth Defendant’s obligation to pay the note and mortgage held by her father and to hold Plaintiff harmless with respect to that debt. Thus, Plaintiff’s burden of proof is satisfied, and it is incumbent upon Defendant to establish either an inability to pay the debt or that a discharge would result in a benefit to her that outweighs the detriment to Plaintiff.

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

In determining a debtor-spouse’s ability to pay a marital debt, a majority of courts utilize the disposable income test under § 1325(b)(2). *See, 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, however, care needs to be taken in doing so. 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 within a reasonable amount of time. *See Sacher v. Gengler (In re Gengler)*, 278 B.R. 146, 150 (Bankr. N.D. Ohio 2002); *Findley v. Findley (In re Findley)*, 245 B.R. 526, 529 (Bankr. N.D. Ohio 2000).

While there is some logic to looking at the disposable income test under § 1325(b) and related case

law in considering the factors set forth in § 523(a)(15), 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. That is a meaningful difference in this case, as the record shows that Defendant makes charitable contributions while asserting that she cannot pay her marital debt owed to Plaintiff.

On the other hand, 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 or not a debtor has 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. In deciding whether Defendant has the ability to pay the marital debt at issue, 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)).

Although Defendant’s average monthly income in this case exceeds her monthly expenses by only \$77, she is making a \$217 monthly payment on a loan from her 401K plan. Applying the disposable income test of § 1325(b)(2), the Sixth Circuit has determined “that it would be unfair to creditors to allow . . . Debtors . . . to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.” *Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d

775, 777-78 (6th Cir. 1995) (finding funds used for repayment of loan from pension plan are disposable income in chapter 13 case). The court finds the reasoning in *Harshbarger* equally valid in this Chapter 7 case. As the court similarly concluded in *Harshbarger*, although Defendant's repayment of a 401K loan may represent prudent financial planning, those funds constitute income not reasonably necessary for the maintenance or support of Defendant or of a dependent of Defendant. *See id.* at 777. Adding the \$217 payment to her net income after expenses of \$77 results in an average monthly income of \$294 that is not reasonably necessary for support of Defendant or her dependents. Defendant's monthly household expenses also include charitable contributions of \$60. As explained above, Congress has not included charitable contributions within the definition of reasonably necessary expenses under § 523(a)(15)(A), *cf.* 11 U.S.C. § 1325(b)(2), which this court construes as a legislative directive that they should not be included in determining an inability to pay a marital debt for Chapter 7 discharge purposes. In addition, Defendant lists \$100 per month as a clothing expense on her Schedule J. However, she testified that she "probably" spends less now. The court finds \$100 to be excessive and that no more than \$50 per month is reasonably necessary. *See Messenger v. Messenger (In re Messenger)*, 331 B.R. 733, 739 (Bankr. N.D. Ohio 2005) (finding that only \$25 per month is a reasonably necessary clothing expense for one person who is otherwise not meeting his monthly financial obligations). Thus, Defendant's monthly income over an above the amount reasonably necessary for her support, as adjusted by the court, is \$404.

Other property held by Defendant includes her 401K, valued on Defendant's Schedule B at \$22,168. In addition, she testified that she generally receives an income tax refund, having received \$2,065 in the year 2005.

As discussed earlier, the total marital debt at issue in this case is \$17,000. In determining whether a defendant has a sufficient amount of income available to pay the marital debt within a reasonable amount of time, courts have warned against dedicating all of the debtor's disposable income to repayment of the debt since unexpected expenses, such as car and home repairs, may arise. *See Koenig v. Koenig (In re Koenig)*, 265 B.R. 772, 776 (Bankr. N.D. Ohio 2001). In this case, ignoring Defendant's ability to tap into her 401K in order to effect a speedy repayment of the marital debt or to make additional payments after receiving income tax refunds, and assuming only \$250 of Defendant's \$404 of monthly income not reasonably necessary for her or her dependant's support is dedicated to payment of the marital debt, she has the ability to pay the debt in less than six years. Six years is a reasonable amount of time within which to complete repayment of her debt. *See id.* (finding 8½ years is reasonable); *Cox v. Brodeur (In re Brodeur)*,

276 B.R. 827, 835 (Bankr. N.D. Ohio 2001) (finding eight years is reasonable given the priority the Bankruptcy Code accords to domestic obligations).

For the foregoing reasons, the court finds that Defendant has failed to meet her burden to prove that she 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).

II. 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 Smithers*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). *Hart v. Molino (In re Molino)*, 225 B.R. 904, 908-09 (B.A.P. 6th Cir. 1998); *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33 (Table), 1997 WL 745501 (6th Cir. 1997). Under the balancing test, a court should review the financial statuses of the parties and compare their relative standards of living to determine the true benefit of the debtor's possible discharge against any hardship the former spouse and/or children would suffer as a result of a discharge. *Id.* at *3.

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

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

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

Smithers, 194 B.R. at 111.

Most of these factors have already been discussed. Both parties live modest lifestyles. Defendant's income in excess of her adjusted expenses is \$404. Plaintiff's net income after stated expenses is \$541. However, as noted earlier, Plaintiff's stated expenses did not include his expense for utilities in his home. Thus, the court finds the parties' monthly financial positions are comparable. As explained above, Defendant is able to repay the marital debt at issue within a reasonable time by applying only \$250 of her monthly income after expenses and without depleting any of her investment in her 401K. By contrast, Plaintiff is facing foreclosure on the land on which his home is situated. Plaintiff testified that the manufactured home and the land on which it is situated and on which Defendant's father holds a \$17,000 mortgage, together are valued at approximately \$20,000. Consequently, the foreclosure action will most likely result in a deficiency judgment against Plaintiff as a result of Defendant's failure to pay the mortgage debt owed to her father. In addition, for Plaintiff to retain his home, he will be required to either purchase or rent land on which he can move the manufactured home, all of which will be significant additional expenses for Plaintiff to absorb. The court finds these factors weigh heavily in favor of Plaintiff.

Another factor listed for consideration in *Smithers* is the non-debtor spouse's eligibility for bankruptcy relief. Defendant, however, offered no evidence regarding Plaintiff's eligibility for a Chapter 7 discharge. Nevertheless, even assuming his eligibility for a discharge, the mortgage held by Defendant's father is a lien on Plaintiff's real estate that would pass through bankruptcy unaffected. Moreover, while bankruptcy might address any deficiency judgment resulting from the foreclosure action, it does not address Plaintiff's added burden of securing a place to move his manufactured home and of incurring costs to move the home or, in the event he is unable to do so, the risk of simply losing his home altogether. The court finds this to be a substantial detriment that outweighs any benefit of a discharge to Defendant. Defendant's standard of living will be materially better than Plaintiff's if she is forced to pay the marital debt. The court, therefore, finds that Defendant has failed to meet her burden under § 523(a)(15)(B) and concludes that the marital debt at issue is nondischargeable under § 523(a)(15)(B).

CONCLUSION

Finding that Plaintiff has sustained his burden and that Defendant has failed to sustain her burden under 11 U.S.C. § 523(a)(15), judgment will be entered in Plaintiff's favor and the marital debt will be declared nondischargeable. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

