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.

Mary Ann Whipple
United States Bankruptcy Judge

Dated: September 30 2006

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-75424
		Chapter 7
Robert Scott Guerra & Janie Guerra,	)	
	)	Adv. Pro. No. 06-3154
Debtors.	)	
	)	Hon. Mary Ann Whipple
Richard Celestino,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Janie Guerra,	)	
	)	
Defendant.		

MEMORANDUM OF DECISION

This matter is before the court for decision after trial upon Plaintiff Richard Celestino's ("Plaintiff") complaint to determine dischargeability of marital debt. Plaintiff requests that the court

declare the debt owed to him by Defendant/Debtor Janie Guerra ("Defendant"), his ex-wife, to be nondischargeable under 11 U.S.C. § 523 (a)(5) or 11 U.S.C. § 523 (a)(15). This court has jurisdiction over Defendant's underlying Chapter 7 case and this adversary proceeding pursuant to 28 U.S.C. § 1334(a) and (b) respectively. This adversary proceeding has been referred to this court for decision under the general order of reference entered in this district. *See* 28 U.S.C. § 157(a)(1). Proceedings to determine dischargeability of debts are core proceedings that this court may hear and determine. 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 dischargeable.

FINDINGS OF FACT

I. The Marital Debt

Plaintiff and Defendant were married in 1996. In 2001, the Court of Common Pleas of Defiance County, Ohio, entered judgment granting the parties a divorce. [Pl. Ex. D]. Under the divorce decree, Defendant was awarded custody of the parties' two minor children, who are now ages 9 and 6, and Plaintiff was ordered to pay child support in the total amount of $1,250 per month. When poundage is added by the state court, the cost to Plaintiff of this obligation appears to be about $1,336 per month. [*See* Pl. Exs. K and L]. At trial, however, it was reported that due to an impending

custody change, Plaintiff will be awarded custody of their two children and Defendant may be required to pay him child support.

Also pursuant to the divorce decree, Plaintiff was awarded the marital residence free and clear of any claim by Defendant and Plaintiff was made solely responsible for the mortgage thereon. Defendant was awarded certain other real property ("the Belmore property") and made responsible for the debt thereon until a loan for a 1998 Chevrolet Van was paid off. After the van was paid off, Plaintiff was ordered to pay $110 each month toward the mortgage on the Belmore property until the mortgage was paid in full. Defendant was to retain the van, although payments would continue to be deducted from Plaintiff's paycheck at a rate of $488 per month. Defendant was then to reimburse Plaintiff $378 per month toward payment on the van, the difference being the $110 per month payment that Defendant was required to make on the Belmore property debt. Defendant was also ordered to pay one half of the insurance for the van. Plaintiff continued to have the monthly van payments paid by payroll deduction until Defendant took out a loan from American General and paid off the $1,700 balance due on the van in April 2003. [Pl. Ex. C].

Defendant was deemed responsible for the balance due on a JC Penney credit card and each party was responsible for one half of the balance due on a Capital One credit card. The evidence [Pl. Exs. A and B] shows that Defendant is currently being sued for approximately $3,845 by the assignee of the JC Penney debt. He testified that he paid off the Capital One debt for approximately $600.

The evidence is somewhat murky as to the total marital debt that Defendant owes to Plaintiff. Plaintiff points to a decision rendered in January 2006 by a domestic relations court magistrate [Pl. Ex. E] as showing the total. The magistrate never actually decided the total due because of the pending bankruptcy automatic stay. Certain of his findings are nevertheless helpful in reaching a

total amount. Defendant failed to reimburse Plaintiff for any of the $378 monthly van payments he made, and Defendant never made any of the $110 monthly payments due after Defendant paid off the van debt in April 2003. The magistrate found that Plaintiff paid $6,804 on the van until Defendant paid it off [Pl. Ex. E at p.3], which generally comports with the GMAC payment figures in evidence here [Pl. Ex. C]. However, the magistrate's report stated that Plaintiff acknowledged owing $1,870 on the Belmore payments he never made to Defendant after she paid off the van. [Pl. Ex. E at 3]. Defendant did not challenge this figure or provide a different amount at trial here. Defendant also never reimbursed Plaintiff for 1/2 of the insurance payments he made. Plaintiff's Exhibit F shows that Plaintiff paid a total of approximately $2,312 in insurance premiums on account of the van, 1/2 of which would be $1,156. The amount now owing on the JC Penny debt is $3,845 [Pl. Exs. A and B], all of which is Defendant's responsibility under the divorce decree and none of which she has paid. Plaintiff testified that the Capital One debt was paid off for $600, half of which was Defendant's responsibility under the divorce decree. Accordingly, only for purposes of determining the § 523(a)(15) claim, the court finds that the approximate amount of the marital debt Defendant owes to Plaintiff is $10,235 [$6,804 - $1,870 + $1,156 + $3,845 + $300].

After the parties' divorce, Defendant remarried her first husband. Defendant and her husband filed a joint petition for relief under chapter 7 of the Bankruptcy Code on October 14, 2005. Discharge was entered in Defendant's bankruptcy proceeding on March 21, 2006. Plaintiff timely filed this adversary proceeding on February 27, 2006. [Doc #1].

II. The Parties' Respective Financial Conditions

At the time of hearing, Defendant testified that she was not working but had applied for workers compensation benefits. Defendant was scheduled to return to work on August 2, 2006

earning $11.50 per hour as a packer. Defendant has been supporting four children on her income, child support from Plaintiff and the income of her current husband, who earns $14.00 per hour as a painter. Defendant's tax returns for the year 2003 demonstrate that she earned $6,300 (not including child support from Plaintiff). [Pl.'s Ex. G]. For the years 2004 and 2005 she filed joint tax returns with her current husband, reporting AGI of $23,400 for 2004 and AGI of $32,000 for 2005 (not including child support from Plaintiff). [Pl.'s Ex. G]. In 2005, Defendant and her husband received a federal income tax refund of $1, 950. Child support added an additional approximately $15,000 per year to the funds available for support of the family.

Broken out on a monthly basis, Defendant's Schedule I from her October 14, 2005, bankruptcy petition showed a combined net monthly income of $3,403, including child support and temporary disability payments for her husband. Defendant's Schedule J from her October 14, 2005, bankruptcy petition indicates monthly expenses of $3,388, however, she testified that rent and utilities have increased because the family has moved out of their mobile home and into a house, and she now has less disposable income per month. She did not further quantify what the amount of the family's monthly expenses are now, but the amount being expended for rent as housing costs at the time of the bankruptcy was an extremely low $130. In addition, the child support from Plaintiff will end and Defendant may have to make child support payments to Plaintiff in the near future. On the other hand, her monthly expense for at least food and clothing are likely to decrease somewhat, although those amounts have not been and cannot now be quantified.

Defendant also testified that she had been renting the Belmore property to her brother at a rate that would cover the mortgage payments, but that the property was going to be sold.

Plaintiff has been employed at the GM Powertrain plant in Defiance for 28 years. A copy of

Plaintiff's federal tax returns for each of 2002, 2003 and 2005 indicate that Plaintiff's AGI ranged between $87,000 and $104,000 annually. [Def.'s Ex 1]. The 2004 return is not in evidence, but Plaintiff testified that he earned about $90,000. In 2005, his federal AGI was $87,469. [Def. Ex. 1] He received a $5,600 tax refund for 2005, showing that he over-withheld by more than $450 per month. Plaintiff also has a personal savings plan account through GM with a value of almost $123,000 at the end of 2005, subject to outstanding loan balances of almost $25,000 on which he is making monthly payments of almost $1,200. [*See* Pl. Exs. L and M (page 2 for 12/31/05)]. It also appears that he continues to make monthly contributions to the plan in the amount of approximately $400. [*See* Pl. Ex. M, page 2 (Your Contributions 1/19/06)].

Plaintiff also provided information to complete Schedules I and J for both 2002 and 2006. [Pl. Exs. L & K]. During 2002, Plaintiff's reported net monthly income was $3,660. [Pl.'s Ex K]. Monthly expenses, including roughly $1,336 in child support payments and the full payment for Defendant's van and insurance, came to $4,262,00. [Pl.'s Ex. K]. This resulted in a $602 monthly deficit which Plaintiff credibly testified he met through loans from his personal savings plan. [*See* Pl. Ex. M]. Currently, Plaintiff's average reported net monthly income as shown on Exhibit L is $3,898 and his monthly expenses are $3,345, including $1,336 on account of his child support obligations. On its face, this still leaves him with a monthly disposable income of $550. [Pl.'s Ex. L]. However, the court would note that the math on the Schedule I does not seem to add up, as the court's calculation of his net monthly income using his numbers is $2,998. [*Id.*, Schedule I for 2005]. Also, no deductions are shown for contributions being made to the personal savings plan and the loan payments seem somewhat understated compared to Exhibit M. On the other hand, the monthly gross income stated there seems to be less than the amount that would be predicted from his 2005 tax

returns; if $87,000 is divided by 12, the monthly income amount is approximately $7,250 per month gross and not $6,780 per month gross as shown on Exhibit l. In addition Plaintiff will no longer be required to pay child support, which would give him an additional $1,336 per month, although he will undoubtedly still incur unspecified direct expenses for care of the parties' two minor children once they come to live with him, most likely an increase in his identified monthly food budget of $200, his clothing budget of $100 and perhaps child care expense because he works third shift.

LAW AND ANALYSIS

Plaintiff contends that the marital debt Defendant was obligated to and failed to pay under the parties' divorce decree is nondischargeable under either § 523(a)(5) as being a support obligation or under § 523(a)(15) as an obligation otherwise incurred in connection with the divorce decree. Defendant's underlying chapter 7 bankruptcy Case No. 05-75424 was filed on October 14, 2005, before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") went into effect on October 17, 2005. All citations to the bankruptcy code in this opinion are therefore to the pre-BAPCPA version of the code. The relevant parts of § 523 of the Bankruptcy Code were significantly amended by BAPCPA, but those changes do not apply in this case. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, Sec. 1501(b)(1) (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act). The determination that the pre-BAPCPA code applies in this case is critical to its outcome; it is clear that the result of this proceeding would be different under BAPCPA.

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... ." The scope of 523(a)(5) is limited to those debts that are "actually in the nature" of support. 11 U.S.C. § 523 (a)(5)(B). Plaintiff, as the non-debtor spouse, has the burden of proving that the obligation in issue constitutes support within the meaning of § 523(a)(5). *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6th Cir. 1993).

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.* The Sixth Circuit has identified several factors for analyzing whether the parties intended a debt as support: "(1) a label such as alimony, support or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits." *Sorah v. Sorah (In re Sorah)*, 163 F. 3d 397, 401 (6th Cir. 1998).

The marital debt in contention in this case is the approximately $10,000 Defendant owes Plaintiff for payments on the van, insurance on the van, and her portion of the credit card balances. The debt arises under several different articles of the divorce decree, captioned "Real Estate," "Vehicles," "Debt" and "Insurance." [Pl. Ex. D, Arts. 2, 4, 10 and 11]. None of them are included under a label that would induce one to think they were meant for support. In fact, the Final Divorce Judgement specifically states in Article 7 that "The Plaintiff [Ms. Guerra] and Defendant [Mr. Celestino] mutually agree that neither wishes to make a claim for spousal support against the other." [Pl.'s Ex. D, Art. 7]. Likewise, the subsequent magistrate's decision specifically states that the debt

obligations are not in the nature of support. [Pl. Ex. E, p.5].

While the payments for the van were to be made directly by Defendant to Plaintiff, this was because the arrangements to pay for the van directly out of Plaintiff's paycheck had already been established. [Pl.'s Ex. D, Art. 4]. Also, the insurance and credit card payments were not to be made to Plaintiff, but were to be made by Defendant to the third party creditors. [Plf. Ex. D, Arts. 10 and 11]. None of these payments were contingent upon Plaintiff's life expectancy or marital status.

Lastly, at the time of the divorce, Plaintiff was employed earning over $100,000 per year, while Defendant was attending cosmetology school and employed part time, further demonstrating the improbability that these obligations were intended to function as spousal support for Plaintiff.

There is no factor that even suggests Defendant's obligation to pay the debts in issue was in the nature of support for Plaintiff rather than part of the division of their property rights and debt. Most importantly, Plaintiff offers no persuasive reason why the court should disregard the plain terms of the original decree and the state court's subsequent reinforcement that the debts in issue are not in the nature of support. *See Sorah*, 163 F.3d at 401 (in the Sixth Circuit's view in the context of analyzing divorce decrees, "if something looks like a duck, walks like a duck, and quacks like a duck, then it probably is a duck," with the converse also being true). Section 523(a)(5), therefore, does not permit an exception to discharge for the marital debt in question.

II. Ability to Pay and Balancing Tests

Plaintiff also contends that Defendant's obligation to pay the marital debts 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 kind of court record, a determination made in accordance with the 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 burden of proving that the debt is of a type excepted from discharge under § 523(a)(15) rests with the objecting spouse. *Hart v. Molino (In re Molino)*, 225 B.R. 904 (B.A.P. 6th Cir. 1998); *Henderson v. Henderson (In re Henderson)*, 200 B.R. 322, 324 (Bankr. N.D. Ohio 1996). 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). *Hart* 225 B.R. at 907, 909; *Henderson* 200 B.R.at 324. The debtor does not have to prove both subsections to prevail.

The parties do not dispute that the marital debt at issue arose in connection with their divorce decree. The court has determined above that the requirement that Defendant pay the debts in issue is not in the nature of alimony or support for Plaintiff within the scope of § 523(a)(5). Thus, Plaintiff's burden of proof under § 523(a)(15) 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 if she is excused from her obligation to pay him.

Under the "ability to pay" test of § 523(a)(15)(A), the court must determine whether the

debtor has disposable income or other assets available to pay the marital debt within a reasonable amount of time. *Ramey v. Barton (In re Barton)*, 321 B.R. 869, 875 (Bankr. N.D. Ohio 2004); *Sacher v. Gengler (In re Gengler),* 278 B.R. 146, 150 (Bankr. N.D. Ohio 2002); *Findley v. Findley (In re Findley)*, 245 B.R. 526, 529 (Bankr. N.D. Ohio 2000). In determining disposable income the majority of courts have applied the following definition as set forth in 11 U.S.C. § 1325(b)(2): "'[D]isposible income' means income which is received by the debtor and which is not reasonably necessary to be expended... for the maintenance or support of the debtor or a dependent of the debtor... ." *See, e.g., Koenig v. Koenig (In re Koenig),* 265 B.R. 772, 775-76 (Bankr. N.D. Ohio 2001). The debtor's income and expenses are generally gauged at the time of trial; however, if the circumstances so warrant, the court may consider a debtor's future earning potential and/or expenses. *See id.* at 776.

Defendant's income and expenses as shown by her Schedules I ($ 3,403) and J ($3,388) at the commencement of her bankruptcy case in October 2005 were virtually the same. From the income perspective, both she and her husband are employed and earning modest wages. By the time of trial, Defendant's husband was no longer out on disability and was earning approximately $14 per hour as a painter. The court infers from Defendant's testimony, her 2005 tax returns and the couple's bankruptcy Schedule I that their future earned income will be similar to their 2005 AGI of $32,000, or approximately $2,700 per month before taxes. There is no evidence even hinting that the couple's earned income is likely to increase materially in the future. More significantly, the approximately $15,000 in annual child support payments from Plaintiff that she has been using to supplement their earned income (which is included in their Schedule I monthly income of $3,403) will terminate. In addition to termination of the support

payments she has been receiving from Plaintiff due to the impending custody change, there a possibility that Defendant will be required to pay child support to Plaintiff, which will only decrease her monthly income. In evaluating her ability to pay, the court will thus use the $2,700 figure less 20% for tax withholding [*see* Pl. Ex I; health insurance has been addressed on her Schedule J and not on her Schedule I], leaving the family with modest monthly net income of $2,160 to support a family of four, plus two during visitation times.

From the expense perspective, Defendant's bankruptcy schedule J shows monthly expenses of $3,388. They are very modest for a family of six, and include a monthly rent payment of just $130.00. The court cannot find that any of these expenses are unreasonable or can be materially decreased, as all appear reasonably necessary for the maintenance and support of Defendant and her family. Defendant also testified that since filing for bankruptcy, they had moved out of a trailer and into a house and that their housing and utility expenses had thus increased. Although the amount of the increase was not quantified, the court finds this testimony credible given the minimal $130 monthly housing cost for a mobile home shown on Schedule J. On the other hand, with the change in custody, some monthly expenses should decrease, such as for food and clothing. Accordingly, given the unquantified increase in housing expense that has occurred and the impending and unquantified decrease in expenses resulting from the custody change, the court finds that Defendant's family's monthly basic living expenses overall will likely not be much different in the near future than they are now.

At the time Defendant filed for chapter 7 relief, the family income and reasonable monthly living expenses for a family of six were about even, leaving her with no disposable income with which to pay Plaintiff on a monthly basis. But that also included as income some

$1,250 in child support, which is going to terminate. So while Defendant's family's monthly net income will decrease substantially to about $2,160,[1] their expenses will not experience a concomitant decrease and indeed are likely remain about the same at the $3,400 level. The lack of disposable income with which to pay the debt will be exacerbated.

The court is also directed to look at whether Defendant has any assets out of which the debt can be paid. No assets were identified at trial, beyond the Belmore property. The value and ownership of the Belmore property and any debt on it are not identified on the record one way or another. The divorce decree refers to Defendant as the "purported owner" of the property and it does not appear at all on her bankruptcy schedules. Thus, the court cannot identify any assets from which Defendant can pay Plaintiff the money that she owes him.

Given Defendant's lack of disposable income now and for the reasonably foreseeable future and no known assets from which the marital debt owed to Plaintiff can be satisfied, the court finds that Defendant has met her burden of proving that she cannot pay Plaintiff from income or property not otherwise necessary for support of her family.

It is enough that Defendant demonstrate an inability to pay in order to satisfy the requirements of dischargeability under § 523(a)(15), but Defendant has also demonstrated that the benefit of her discharge outweighs the detriment it will cause to Plaintiff.

Neither § 523(a)(15)(B) nor published Sixth Circuit Court of Appeals case law provide definitive guidance as to how the court should determine and balance the interests of the parties.

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[1] Defendant and her husband received a tax refund in 2005 of $1,950, or an average of $162.50 per month. If income tax withholdings were reduced, the average addition to monthly income would not materially change the imbalance between income and expenses.

In an unpublished opinion, however, the Sixth Circuit endorsed the balancing test of 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 WL 745501, 1997 U.S. App. LEXIS 33664 (6th Cir. November 24, 1997).[2] Under this balancing test, a court reviews the financial situations of the parties and compares 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; *Courtney v. Traut (In re Traut)*, 282 B.R. 863, 870 (Bankr. N.D. Ohio 2002).

> 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.

Patterson, 132 F. 3d at *3. (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;

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[2] 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.

(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 amount of the debt is about $10,000. Defendant has not met the payment terms of the divorce decree to which she agreed. Thus, Defendant faces further contempt proceedings in state court if the debt she owes Plaintiff is not discharged here. Alternatively, Plaintiff might be awarded a money judgement by the state court and be permitted to collect that judgment through state court process such as garnishment of the nonexempt portions of Defendant's wages. Based on Plaintiff's Trial Exhibit J, approximately $330 per month could be garnished. As shown above, Plaintiff's and her family's basic financial survival would be seriously impacted by that level of involuntary payment for several years notwithstanding the amount of overall debt being discharged in the chapter 7.

Plaintiff, on the other hand, still faces having to pay almost $4,000 on the JC Penney debt that Defendant has not paid, having absorbed the rest of the obligations she was supposed to pay through his savings plan loans. Bankruptcy is not a realistic option for him under BAPCPA given his income and the new reality of means testing. So Plaintiff, too, faces the unfortunate prospect of wage garnishment if a judgment is entered on the pending lawsuit on the JC Penney debt. Realistically, though, Plaintiff has more resources with which to try and manage the remaining debt and avoid wage garnishment than Defendant does. At the end of 2005, the net value of his personal savings plan account was almost $100,000. Given the impending termination of his child support obligation and his higher income, he will better be able than Defendant to weather involuntary repayment without impacting basic financial survival if he chooses not to dip into his

savings again. It also appears that Plaintiff could pay the remaining credit card debt though a reduction for a time in contributions to his savings plan or a reduction in withholding that resulted in a 2005 federal income tax refund of $5,600.

Looking to a comparison of the parties' income and expenses, Plaintiff has a long term job and a federal AGI more than double the joint income of Defendant and her husband. There is no evidence showing that Defendant's income situation will materially improve; her educational background is in cosmetology and her current husband has a felony conviction for a drug related offense that will restrict improvement in his earning power. As for expenses and relative living situations, both parties live modestly and seem to work hard to take care of their families. Clearly, however, Plaintiff has borne the brunt of that largely by virtue of his substantial earnings and earning power. By the time he has paid child support and the obligations, through savings plan loans, that Defendant was supposed to pay, the income left over to pay his own living expenses has historically not been much more than Defendant's notwithstanding the substantial difference in the family's respective AGIs. Since the divorce, both parties' financial situations have improved incrementally, so that is a neutral factor. The court would note, however, that the magistrate's report shows that Defendant's family situation is overall much less stable than Plaintiff's, and that while Plaintiff has two children to support, Defendant has four. Moreover, Plaintiff lives in a home he owns and has been able to accumulate substantial savings in the GM personal savings plan. Until recently, Defendant lived in a trailer and now lives in a rented house. Unlike Plaintiff, Defendant has no financial resources to fall back on and has depended on child support that will end to make ends meet. Freed from the court-enforced discipline of paying child support to Defendant, Plaintiff will better be able to control and manage

financial support of his two children on his own.

As for good faith in both filing for bankruptcy and in this litigation, Defendant did not file her chapter 7 case shortly after the divorce, which occurred almost four years before bankruptcy. She and her current husband are discharging substantial amounts of unsecured debt, so it cannot be said that she was singling out and trying only to escape her obligations to Plaintiff in commencing her bankruptcy case; she also has other nondischargeable debt of some $16,000 for student loans. Defendant has clearly made some very poor and even unfair financial decisions by incurring dischargeable debt to American General, part of which was used to pay off the van but at least some of which was used for a quinceanera party for her daughter instead of paying Plaintiff the other debts he was owed. The court cannot say, however, that her actions in that regard rise to the level of bad faith, even if that were in and of itself a proper basis for finding against her under § 523(a)(15)(B).[3]

After working through the relevant *Smithers* factors and overall balancing the interests of the parties, the court finds that the benefit of the discharge of the marital debt to Defendant

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[3] The United States Supreme Court has granted a writ of certiorari to hear this term the case *Marrama v. Citizens Bank of Mass. (In re Marrama)*, 430 F.3d 474 (2005), *cert. granted* 126 S. Ct. 2859 (2006). The issue in *Marrama* is whether lack of good faith is a proper basis to deny conversion of a case from Chapter 7 to Chapter 13 when there is no such provision in the statute. The Supreme Court's decision may affect the use of unwritten good faith criteria applied by courts to other aspects of Bankruptcy Code practice. However, the court need not await its outcome here. First, the court does not believe that Defendant's conduct in using borrowed funds for a party instead of paying Plaintiff does not rise to the level of bad faith given her other family and financial circumstances. Second, in this context, even if her actions could be considered bad faith, the Sixth Circuit has approved consideration of whether the parties have acted in good faith as just one of many factors in evaluating the totality of the circumstances. The court is not aware of any authority that would make lack of good faith determinative under § 523(a)(15) similar to the way courts have applied it, for example, under 11 U.S.C. § 706.

in preserving her ability to support her family outweighs the detriment Plaintiff has and will suffered by paying her obligations, as he has and will be able to support himself and his smaller family notwithstanding getting stuck with this debt. Defendant has established a right to discharge the marital debt in issue under § 523(a)(15)(B).

CONCLUSION

Finding that the marital debt at issue was not in the form of support and further finding that Defendant has met her burden under both subsections (A) and (B) in § 523 (a)(15), judgment will be entered in Defendant's favor on Plaintiff's claims under both § 523(a)(5) and (a)(15). Defendant has shown that she would be unable to pay back the marital debt owed to Plaintiff, and that requiring her to do so would disproportionally benefit Plaintiff and be a real detriment to Defendant's basic standard of living. Defendant's marital debt owed to Plaintiff is therefore found to be dischargeable. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.