Dated: September 17 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-72851
	)	
Gregory T. Teslovich,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 06-3086
	)	
Julie L. Teslovich,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Gregory T. Teslovich,	)	
	)	
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. In her complaint, Plaintiff requests that the court declare the debt owed to her by Defendant/Debtor Gregory Teslovich, her ex-husband, to be nondischargeable in

his Chapter 7 case under 11 U.S.C. § 523(a)(5).[1] In addition, at trial, evidence and argument was offered by both parties on the issue of dischargeability of the debt under 11 U.S.C. § 523(a)(15), which, the court concludes, was tried by implied consent of the parties. *See* Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(b). 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 dischargeable.

FINDINGS OF FACT

I. The Marital Debt

Plaintiff and Defendant were married in 1986 and have two minor children. In 2004, the Court of Common Pleas of Lucas County, Ohio, entered judgment granting the parties a divorce and approving the parties' agreement as to all rights and obligations stemming from their marriage. Pursuant to the divorce decree, Plaintiff was designated the residential parent and Defendant was ordered to pay child support, for which Defendant is currently paying a total of $600 per month.[2] The divorce decree expressly states that "neither party shall be responsible to pay to, nor entitled to receive from, the other, any spousal support" and further states that "[t]his provision is non-modifiable." [Plf. Ex. A, p. 4]. According to the divorce decree, at the time of the divorce, Plaintiff's gross annual income was $26,000 and Defendant's gross annual income was $46,500.

The divorce decree also ordered each party to pay certain debts and to hold the other harmless on the debts they were ordered to pay. Plaintiff was ordered to pay debts owed on a Bank of America credit

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[1] Although Plaintiff's complaint includes allegations regarding a certain MBNA credit card account and seeks a determination that Defendant is liable to Plaintiff for any amounts for which Plaintiff is ultimately found liable with respect to that account, she offered no evidence or argument at trial regarding the MBNA account.

[2] Defendant's child support obligation is nondischargeable under 11 U.S.C. § 523(a)(5) and is not at issue in this adversary proceeding.

card in the approximate amount of $1,600 and an Elder Beerman credit card in the approximate amount of $750. [*Id.* at 6]. Defendant was ordered to pay the following debts: the balance of a loan owing to Defendant's 401(k) Plan in the approximate amount of $12,100; Defendant's auto loan debt in the amount of $11,000; a Bank One credit card debt in the approximate amount of $4,000; a Sears credit card debt in the approximate amount of $2,200; a debt owed to Hume & Pulito in the amount of $1,500; a Discover credit card debt in the approximate amount of $700; a Citi Financial credit card debt in the approximate amount of $300; and a Sunoco credit card debt in the approximate amount of $2,300. [*Id.* at 7]. The decree further provides that

> the above noted payments are intended to be an integral part of the financial support settlement of the parties and not a specific division of property and are not modifiable by the court absent agreement of [the] parties. With respect to each parties' responsibility to pay and/or hold the other harmless for the payment thereof, the parties intend these specific debts and liabilities to be nondischargeable under sections 523(a)(5) and 523(a)(15) of the Bankruptcy Code of the United States.

[*Id.*]. Plaintiff testified that she understood that the divorce decree provided for a division of their debt and that she believed such division was fair.

It is undisputed that Defendant complied with the divorce decree in paying the debts he was required to pay with one exception. Defendant continued to make monthly payments on the Discover credit card, but he did not pay it off. The account was not closed in connection with the divorce. Rather, Defendant testified that he continued to use the credit card to cover expenses when he was unemployed and to pay some of the other credit card debts. It is undisputed that there were no charges by Plaintiff on the Discover credit card after the parties' divorce. Although the parties were jointly liable to Discover for the debt owed, the court credits Defendant's testimony that he was not aware that Plaintiff had any financial responsibility for the Discover card debt until September 2005 when he met with his attorney regarding bankruptcy and reviewed his credit report. Prior to that time, he believed only he was responsible for all of the debt that he was ordered to pay under the divorce decree. Defendant stopped using the Discover card some time before September 2005 and stopped making monthly payments on the credit card debt when he decided to file bankruptcy.

Defendant filed his bankruptcy petition on October 10, 2005. At that time he owed approximately $16,000 on the Discover card and a lawsuit against both Defendant and Plaintiff had been commenced in state court by Discover Bank. Discover Bank subsequently obtained a judgment against Plaintiff for the amount owed but, as of the time of trial, had not commenced proceedings to garnish Plaintiff's wages.

II. The Parties' Respective Financial Conditions

Defendant's employment since the parties' divorce has been somewhat unstable with periods of unemployment. However, just before filing his bankruptcy petition in October 2005, Defendant began working as a sales representative at Taylor Material Handling ("Taylor"). Defendant testified that his income earned in 2006 was approximately $40,000. In mid-March 2007, approximately six weeks before trial, Defendant left his sales position at Taylor and began working in sales as an independent contractor for Arrow Supply, selling maintenance supplies used in an industrial setting. Defendant testified that he believed his position at Arrow Supply "had more potential." Although Defendant's earnings will be based solely on commissions, because he has been working in this position for only six weeks, he is currently being paid $550 per week, or approximately $2,383 per month. As an independent contractor, there is no withholding of taxes from his pay, which is designated as a commission draw. [*See* Def. Ex. 1]. Defendant testified that his future income based on commissions will depend on establishing a repeat customer base. As of the time of trial, he had not yet established any customer base.

Defendant's testimony and amended Schedule J offered at trial indicate monthly expenses of $2,625. [Def. Ex. 2]. Included in this amount is $600 for child support, for which Defendant testified all payments are current, $600 for rent, $285 for a car payment on a 1999 Chevy truck, $75 for auto insurance, $200 for food, $265 for utilities, $40 for a cell phone and $45 for cablevision. Also included is $350 for transportation, which Defendant testified is necessary because his sales position requires him to travel all day long, and $55 for telephone and internet services, which Defendant testified is necessary for him to process orders. Because of the age of his vehicle, he testified that a $100 per month auto maintenance expense is necessary. No provision for the payment of income taxes, medical and dental expenses, or expenses for clothing and recreation are included in Defendant's monthly budget. The court credits Defendant's testimony and finds his expenses are not overstated.

The evidence at trial reveals no assets that Defendant can use to pay the Discover card debt. Although he had made some large item purchases after the parties' divorce at a time when he was more gainfully employed, including a home, a hot tub and a plasma screen television, all have been sold by the Chapter 7 Trustee.[3]

Plaintiff testified that she is employed as an office manager and views her employment as stable.

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[3]The Chapter 7 Trustee has completed distribution in the underlying Chapter 7 case, including a $475 payment to Plaintiff for attorneys' fees treated as a priority claim for support and a $2,522.34 payment to Discover Bank for 15.864695 % of its general unsecured claim for the $15,899.12 debt in issue as calculated at the commencement of Defendant's case. [Doc. #58, Chapter 7 Case No. 05-72851].

She earned $32,000 in 2006, or approximately $2,666 per month, which amount includes an hourly rate of $14.93 plus bonuses ranging between $89 and $500 per month. Plaintiff's net weekly pay, before any bonus and after withholding for taxes, insurance, and contributions to her 401(k) plan, is $480, or $2,080 per month. She and her two children live with Plaintiff's significant other, a partner in the company for which she works and who earns approximately $60,000 per year plus bonuses. Plaintiff testified that he makes the mortgage payment every month in an amount unknown to Plaintiff. She testified, however, that she pays for all other expenses, including utilities, food, cablevision, and cell phone, as well as a $285 car payment and a $300 payment on credit cards.

LAW AND ANALYSIS

In her complaint, Plaintiff seeks an order that her claim under the terms of the divorce decree against Defendant for indemnification with respect to the Discover card debt in the approximate amount of $16,000 is nondischargeable under § 523(a)(5) as being a support obligation and, at trial, raised the issue of dischargeability under § 523(a)(15).[4]

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

> Section 523(a)(5) excepts from discharge any debt
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> 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). Under this section, debts to spouses under a divorce decree are discharged "even though designated as alimony, support, or maintenance, unless they are *actually* in the nature of alimony, support, or maintenance." *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 399 (6th Cir. 1998). This determination depends upon the nature of the obligation and the language of the state court decree. "The burden of demonstrating that an obligation is in the nature of support is on the non-debtor spouse." *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6th Cir. 1993).

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[4] Section 523(a)(5) and (a)(15) were amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the Act"), effective October 17, 2005. Because Defendant'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).

In *Sorah*, the Sixth Circuit explained the inquiry necessary for this determination where spousal obligations are actually designated as "support." The language of the decree is somewhat contradictory, in that it provides that neither party is entitled to spousal support but that the payments in issue "are intended to be an integral part of the financial support settlement of the parties and not a specific division of property." *See Thornton v. Thornton (In re Thornton)*, 331 B.R. 306, 309-10 (Bankr. N. D. Ohio 2005)(construing decree with inapposite labels, and concluding that more specific language controlled over more general provision that no spousal support is being awarded). The court finds that the more specific statement that the respective payments "are intended to be an integral part of the financial support of the parties" constitutes a designation of the obligation as support so as to bring it within the analysis required by *Sorah*.[5] In deciding whether the obligation designated as support is actually in the nature of support, the *Sorah* factors require the bankruptcy court to "look to the traditional state law indicia that are consistent with a support obligation," including, but not limited to, (1) how the obligation is labeled, (2) whether the payment is direct to the spouse or to third parties, and (3) whether the payments are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. *Id.* at 401.

> An award that is designated as support by the state court and that has the above indicia of a support obligation (along with any others that the state support statute considers) should be conclusively presumed to be a support obligation by the bankruptcy court. "A non-debtor spouse who demonstrates that these indicia are present has satisfied his or her burden of proving that the obligation constitutes support within the meaning of § 523, and is thus nondischargeable."

Id. In addition to the traditional indicia of support noted in *Sorah*, courts have also considered the following: "(1) the disparity of earning power between the parties; (2) the need for economic support and stability; (3) the presence of minor children; and (4) marital fault." *Bailey v. Bailey (In re Bailey)*, 254 B.R. 901, 906 (B.A.P. 6th Cir. 2000) (quoting *Luman v. Luman (In re Luman)*, 238 B.R. 697, 706 (Bankr. N.D.

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[5]If it is determined that the court is wrong in deciding that the obligation is labeled as support in the divorce decree, thus bringing it within the analysis required by *Sorah,* then the proper analysis is found in *Calhoun*, as clarified by *Fitzgerald. See Jestice v. Jestice (In re Jestice)*, Case No. 05-3007, 168 Fed. Appx. 39, 2006 U.S. App. LEXIS 6863 at *13 (6th Cir., Feb. 9, 2006). The outcome of Plaintiff's claim under § 523(a)(5) in Defendant's favor, as explained subsequently in this opinion, would not be different. The language of the decree, including the nondischargeability language, could otherwise be construed as demonstrating that the parties intended the debt assumption to create an obligation to provide support. If such intent is found, the court must then determine whether the debt assumption actually has the effect of providing support for the daily needs of the recipient and any minor children and, if so, whether the amount is manifestly unreasonable. Although there was a disparity of income between the parties, there is an insufficient showing in the record that the credit card debt assumption and hold harmless obligation associated therewith had and have the actual effect of providing support for Plaintiff's daily needs. Also, other periodic payments by Defendant in the form of child support to provide for the parties' two minor children's daily needs were provided by the decree. He is also required to provided health insurance for them. These facts negate that the debt assumption and hold harmless provision have the actual effect of providing support.

Ohio 1999)).

Initially, the court notes that the divorce decree's nondischargeability provision, which memorializes the parties agreement to waive dischargeability (i.e. "the parties intend these specific debts and liabilities to be nondischargeable under sections 523(a)(5) and 523(a)(15) . . ."), is not binding on this court's determination of dischargeability. A prepetition waiver of the dischargeability of a debt is unenforceable. *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 651-54 (B.A.P. 9th Cir. 1998) ("The bankruptcy court correctly held that the prospective waiver of the dischageability of the Debt was unenforceable."); *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir.1987) (observing in dictum that public policy reasons preclude a debtor from contracting away a right to obtain a discharge in bankruptcy on a specific debt in the future); *Kohlenberg v. Baumhaft (In re Baumhaft)*, 271 B.R. 517, 522 (Bankr. E.D. Mich. 2001) (holding that "a prepetition waiver of a discharge of a particular debt or of all debts is against public policy and unenforceable"). Nor does it shed any light on the nature of the award at issue as it states that the parties intend that the debt and liabilities set forth in the divorce decree be nondischargeable under both § 523(a)(5), dealing with support obligations, and § 523(a)(15), dealing with debts other than support that are incurred in connection with a divorce decree.

Applying the *Sorah* analysis in this case, the court finds that the marital debt at issue is not actually in the nature of support and thus does not constitute support within the meaning of § 523(a)(5). Plaintiff relied heavily upon the state court's designation of the payments required under the division of debt provisions as being "an integral part of the financial support settlement of the parties and not a specific division of property. . . ." [Pl. Ex. A, p. 7]. While the state court's label of the debt obligation is a factor to be considered, it is not dispositive. *Luman v. Luman (In re Luman)*, 238 B.R. 697, 705 (Bankr. N.D. Ohio 1999). Plaintiff has failed to demonstrate any of the other traditional state law indicia that are consistent with a support obligation. Defendant made payments on the Discover card debt directly to the credit card company and was not required to make any payments to Plaintiff. *See In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983). More importantly, Defendant's payment obligation was not contingent upon any future event, such as Plaintiff's death, remarriage, or eligibility for Social Security benefits.

The additional indicia identified in *Bailey* do not convince the court otherwise. While there was disparity in the parties' income at the time of their divorce, with Plaintiff's annual income being $26,000 and Defendant's being $46,500, that alone is insufficient to demonstrate that the marital debt in this case constitutes support. There is no evidence of Plaintiff's circumstances at the time of the parties' divorce. For example, there is no evidence as to whether she was or was not then living with her significant other,

a fact that would impact a determination regarding her need for economic support. Although Plaintiff is the residential parent of the parties' minor children, the divorce decree addresses this factor by awarding child support in the total amount of $1,058 per month (since reduced). Finally, to the extent that marital fault is a proper factor, there is no evidence of such in this case one way or another.

The court's finding that the marital debt at issue does not constitute support is consistent with the parties' trial testimony that they understood the state court's order to be a division of their debt. As Defendant's obligation to pay the Discover card debt is not in the nature of support, he is entitled to judgment on this claim.

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

Although not expressly raised in Plaintiff's complaint, evidence and argument was offered at trial regarding excepting the debt owed by Defendant from discharge under § 523(a)(15). The court may decide this claim to the extent it was tried by express or implied consent of the parties. *See* Fed. R. Civ. P. 15(b). Rule 15(b) provides in relevant part as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Fed. R. Civ. P. 15(b).

Interpreting the mandatory language of the first sentence of Rule 15(b), one court explained that "[w]hen issues not mentioned in the complaint . . . are nevertheless litigated with the consent of the parties, the complaint is not 'constructively amended;' it is simply an irrelevance so far as those issues are concerned." *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005). The second sentence of Rule 15(b) is permissive and simply allows any party at any time, even after judgment, to move to amend the pleadings to conform to the evidence; however, it does not require that the complaint actually be amended or that a party move to do so in order for the issue to be decided by the court as if it had been raised in the pleadings. *Id.* at 878-79. The Sixth Circuit has cautioned, however, that

> a trial court ... may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue. Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case.

Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353, 358 (6th Cir. 1992). The test is "whether the [opposing party] knew what conduct was in issue and had an opportunity to present his defense." *Id.*; *Sasse v. U.S. Dept. of Labor*, 409 F.3d 773, 781 (6th Cir. 2005).

In this case, although Defendant did not expressly consent to litigate a claim under § 523(a)(15), applying the principles set forth in *Yellow Freight*, the court finds that the claim was tried by implied consent of the parties. At trial, Plaintiff introduced testimony by Defendant regarding his inability to pay the Discover card debt in light of his then current income and expenses. This testimony has no relevance to Plaintiff's § 523(a)(5) claim. However, as discussed below, it clearly has relevance to a claim under § 523(a)(15). Defendant did not object to the testimony and, instead, introduced testimony by both parties detailing their respective financial positions at the time of trial. Defendant argued in closing that he did not have the ability to pay the debt and that Plaintiff's financial condition was better than his. While Defendant's failure to object to testimony relevant only to the § 523(a)(15) claim does not by itself establish Defendant's implied consent, his failure to object together with the fact that he actually litigated the claim leads this court to conclude that the § 523(a)(15) claim was tried by implied consent of Defendant. Defendant knew what conduct was in issue and had an opportunity to, and did, present a defense. The court will therefore address the merits of the § 523(a)(15) claim.

> Section 523(a)(15) provides that an individual is not discharged from any debt
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> > 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.'" *Crosswhite v. Crosswhite (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 debts or that a discharge would result in a benefit to him that outweighs any detriment to Plaintiff.

A debtor's income and expenses are generally gauged at the time of trial; however, if the circumstances so warrant, the court may consider a debtor's future earning potential and/or expenses. *Jestice v. Jestice (In re Jestice)*, Case No. 05-3007, 168 Fed. Appx. 39, 2006 U.S. App. LEXIS 6863 at *13 (6th Cir., Feb. 9, 2006); *Molino*, 225 B.R. at 908. 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). *Id.; see, e.g.*, *Hammermeister v. Hammermeister (In re Hammermeister),* 270 B.R. 863, 874-75 (Bankr. S.D. Ohio 2001); *Gamble v. Gamble (In re Gamble),* 143 F.3d 223, 226 (5th Cir. 1998)("[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 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.

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. 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 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)).

As explained above, Defendant's income and expenses at the time of trial, including the child support obligation upon which he was current, leave him with no disposable/discretionary income that can be used to pay the marital debt owed to Plaintiff. This is so even considering the Chapter 7 Trustee's payment on and reduction of the debt in the Chapter 7 case. Although Defendant's monthly income was only $2,383 per month, the court believes that Defendant's future earning potential is greater than what he was earning at the time of trial. Defendant left a sales position at Taylor, where he had worked throughout 2006, to work in sales as an independent contractor for Arrow Supply. He testified that he had gross income of $40,000 from his employment in 2006, for an average of $3,333 per month. Although at the time of trial Defendant was earning only $2,383 per month, he had only taken the Arrow Supply sales position six weeks before trial. Defendant has worked in industrial product sales during his entire professional career and testified that he believed his position at Arrow Supply had more potential than his position at Taylor.

Notwithstanding Defendant's testimony that the market is depressed in his sales area in northwest Ohio and that he had not yet developed a customer base, the court believes he is likely to earn at least $40,000 in 2007, the same amount that he earned in 2006 in the position that he left.

While the court assumes Defendant's future earnings will total $40,000 per year, or $3,333 per month on average, the court finds that even this increased amount will leave him with no disposable/discretionary income to pay the marital debt. Defendant's monthly expenses itemized at trial, which the court finds are not overstated and which were not challenged by Plaintiff, total $2,625. However, this amount includes no provision for the payment of income and social security taxes, medical insurance, medical and dental expenses, or expenses for clothing. Estimating Defendant's tax obligation at approximately $650 per month,[6] he will be left with only $58 per month to cover his medical and clothing expenses.

Finding that Defendant has met his burden under § 523(a)(15)(A), the court need not address a claim balancing the equities under § 523(a)(15)(B). He need not demonstrate *both* an inability to pay *and* that the benefit of his discharge outweighs the detriment to Plaintiff. The fact that Defendant is unable to pay the debt is sufficient to find the debt dischargeable.

While the court recognizes that Plaintiff did nothing to deserve being saddled with the Discover card debt that Defendant ran up on the joint account left open after the parties' divorce, it is this inequitable result that Congress addressed by amending § 523(a)(15) in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. However, Defendant filed his bankruptcy petition before the effective date of those amendments. The court is, therefore, compelled to apply the law in effect at that time.

CONCLUSION

Finding that Plaintiff has failed to meet her burden under 11 U.S.C. § 523(a)(5) and that Defendant has sustained his burden under 11 U.S.C. § 523(a)(15)(A), judgment will be entered in Defendant's favor on the complaint and the marital debt will be discharged. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

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[6] The court's estimate is based on Defendant claiming one of his children as a tax exemption [*see* Pl. Ex. A, p. 6], taxable income for federal tax purposes of $28,000 after the standard deduction, taxable income for state tax purposes of $37,200, and an overall tax rate for federal and state income and social security taxes of approximately 28 percent (which includes 17.5 % for federal income taxes, 3% for state income taxes, and 7.5% for social security and Medicare taxes).