

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 7
 GENE IRIS JOHNSON,)
)
 Debtor.) Bankruptcy No. 02-04336
 -----)
) LORI KATHERINE KENNINGTON,)
) Adversary No. 03-9032
 Plaintiff,)
)
 vs.)
)
 GENE IRIS JOHNSON,)
)
 Defendant.)

ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY

The above-captioned matter came on for hearing on January 13, 2004 on Plaintiff's complaint to determine dischargeability of a debt. Plaintiff Lori K. Kennington appeared with Attorney Thomas Fiegen. Defendant Gene I. Johnson appeared with Attorney Thomas Verhulst. After the presentation of evidence, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

Plaintiff Lori K. Kennington alleges that under 11 U.S.C. § 523(a)(15), certain credit card debts owed by Debtor Gene I. Johnson are not dischargeable. Debtor pleads that the debt is in fact dischargeable because the evidence satisfies at least one of the exceptions to the general rule preventing discharge under § 523(a)(15).

FINDINGS OF FACT

Plaintiff and Debtor were married on June 9, 2001. Their marriage was dissolved in Winneshiek County on March 22, 2002. The dissolution order incorporates the parties' Premarital Agreement, which provides that each spouse would be responsible for one-half of the parties' credit card debts in the event of dissolution. The parties had eight credit cards at the time of dissolution. Pursuant to the decree, Debtor was responsible for payment of the Capital One, First U.S.A., Firststar, and GM credit cards, totaling \$12,446.32. The breakdown is as follows:

Capital One	\$412.64
First USA	\$3832.60
Firststar	\$7259.94
GM	\$941.14
TOTAL:	\$12,446.32

On July 31, 2002, Winneshiek District Court
the found

Debtor in contempt for failure to pay this debt. Debtor subsequently filed Chapter 7 bankruptcy on December 6, 2002. Debtor listed \$17,332.75 in unsecured, non-priority claims on his petition. The majority of these claims consist of the credit card debts. The Plaintiff seeks exception from discharge of those debts under 11 U.S.C. § 523(a) (15).

Debtor is 38 years old and single. He has three children, although Debtor and Plaintiff do not have any children together. He pays child support for Jackie, age 15, who lives with her grandparents. Debtor's other two children, Samantha, age 11, and Shawn, age 10, live with him. He is supposed to receive child support in the amount of \$280 per month, but the last payment he received was in March 2003. He lives on rented property in his mobile home, purchased for \$24,000 in May 2002. He has a 1988 Blazer valued at \$400-500, which has not been operable for six months because he cannot afford the repairs. He has no other vehicles and borrows a friend's truck to get to work.

Debtor suffers from severe and frequent panic attacks and agoraphobia, which affect his ability to work. He has a mental health therapist who has prescribed Paxil. He has worked on and off as a welder since 1988 at Featherlite Manufacturing in Cresco, Iowa. His anxiety increased in May 2003, and panic attacks kept him from working. He returned to work from June 20, 2003 until July 17, 2003 with a pay rate of \$13.75 per hour, which is in the top range for welders. He quit his job at Featherlite and has been unable to return since July 17, 2003. Although most people with anxiety problems can improve, it is difficult to predict if or when Debtor would be able to return to Featherlite. He stated that he does not want to return to Featherlite. Since the end of July 2003, he has been working as a contract welder, earning \$450 in gross weekly wages in December. According to Debtor, this amount may increase to maintain a \$400-600 weekly gross income. He is currently earning about \$600 per month less than he did while employed at Featherlite.

Debtor's listed expenses in interrogatories total \$1,844 per month. His 2003 income totaled \$14,529.25 gross from Featherlite plus \$475.15 in disability payments. His 2002 income totaled \$28,787, according to his 2002 Federal Income Tax Return. He continues to borrow money from his parents, totaling about \$4,000 to date.

Plaintiff is 40 years old and has not remarried. She has two children, Misty, age 19, and Brandy, almost 17. Both Misty and her daughter, Hailey, live with Plaintiff. She pays no child support. She lives in a house on 13.87 acres, purchased in April 2000 for about \$85,000. The current assessed value is \$44,020. Her mortgage is about \$ 60,000. The home has a swimming pool, which was purchased by Plaintiff's grandmother. She had horses worth \$600 and \$800, which she gifted to her daughter. Plaintiff owns a 1997 Ford F250 4WD truck with 91,839 miles, currently valued at \$8,985. She purchased it for \$19,000. In discovery for this action, Plaintiff listed the value of her personal property at \$300-400. In the parties' pre-nuptial agreement, dated January 15, 2001, she listed her personal property value at \$30,000.

Plaintiff currently is employed at Textron Fastening Systems, where she is paid \$9.32 per hour, and works an average of 40 hours per week. In 2002, her hourly rate was \$8.92, and she earned an adjusted gross income of \$15,526. Although she was temporarily on medical leave, Plaintiff is currently working. She received disability payments while on leave, totaling \$181.69 per week for about four weeks. In 2003, Plaintiff also worked as a waitress for \$4.50 per hour. Her daughter, Misty, is also employed, earning \$150 per week.

Plaintiff has medical and dental insurance through Textron that covers her daughter until age 19. Plaintiff's listed monthly expenses total \$2,009.16. She earns about \$282 net per week, translating to around \$1,250 net per month. Her daughter, Misty, also contributes \$200 per month to the household. Plaintiff has unpaid medical bills and owes Allen Barnes, a friend, about \$23,500 at 7% interest. Mr. Barnes loaned her money for the down payment on her home, a plumbing bill, a legal retainer, a payment on her truck, and a co-sign loan to lower her house payment. Plaintiff has paid nothing towards these loans or the interest. Mr. Barnes, however, testified that he expects payment in the indefinite future, when she can afford it. She also owes about \$4,400 to Glenn and Shirley Scott.

CONCLUSIONS OF LAW

Under 11 U.S.C. § 523(a)(15), non-support dissolution debts are nondischargeable. 11 U.S.C. § 523(a)(15). As both parties have stipulated that this is an (a)(15) debt, it is nondischargeable unless an exception under §§ 523(a)(15)(A) or (B) applies. The debt is dischargeable if: (1) the debtor is unable to pay the debt under (a)(15)(A); or (2) the benefit of discharge to the debtor outweighs the detriment of discharge to the plaintiff under (a)(15)(B). 11 U.S.C. §§ 523(a)(15)(A) and 523(a)(15)(B).

The burden of proof initially falls upon the Plaintiff to demonstrate that the debt falls under § 523(a)(15) and not § 523(a)(5). In re Allgor, 276 B.R. 221, 223 (Bankr. N.D. Iowa 2002). As this is not at issue, the Plaintiff has satisfied her burden. After a debt is found to be a non-support debt under (a)(15), a rebuttable presumption of nondischargeability is created. Id. The burden then shifts to Debtor to show by a preponderance of the evidence that the debt qualifies for either of the two exceptions to (a)(15). Id.; Grogan v. Garner, 498 U.S. 279, 291 (1991) ("[W]e hold that the standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard."). This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

§ 523(a)(15)(A) : DEBTOR'S ABILITY TO PAY

Section 523(a)(15)(A) discharges the debt if "the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor" 11 U.S.C. § 523(a)(15)(A). Given the similarity in the language of 11 U.S.C. § 1325(b)(2) to § 523(a)(15)(A), courts apply the Chapter 13 disposable income analysis to (a)(15)(A). In re Brown, 302 B.R. 637, 644 (Bankr. N.D. Iowa 2003).

This requires a two step analysis: (1) whether the debtor's essential and discretionary expenditures are reasonably necessary; and (2) whether the debtor has sufficient disposable income to pay the debt within a reasonable time.

1. ARE DEBTOR'S EXPENSES REASONABLY NECESSARY?

While some courts decide whether each of Debtor's individual, listed expenses is reasonably necessary, this Court lumps the Debtor's expenses into two categories: (1) the Debtor's essential expenses; and (2) the Debtor's discretionary expenses. In re O'Shaughnessy, 301 B.R. 24, 31 (Bankr. N.D. Iowa 2003). The court then determines whether each aggregate category is reasonably necessary. Id. In determining what is reasonably necessary, "[a] debtor is not required to 'live by bread alone,' but is 'allowed some latitude regarding discretionary spending for items such as recreation, clubs, entertainment, newspapers, charitable contributions and other expenses in their budget.'" Id. On the other hand, the court should attempt to "seek a balance between allowing a debtor a reasonable lifestyle and insuring a serious effort to pay creditors by eliminating 'unnecessary and unreasonable expenses.'" In re Eiklenborg, 286 B.R. 718, 722 (Bankr. N.D. Iowa 2002).

In interrogatories, Debtor listed his current monthly expenses as follows:

Trailer Payment	\$350.00
Lot rent	\$90.00
Water	\$35.00
Heat	\$65.00
Phone	\$50.00
Electricity	\$50.00
Child Support	\$250.00
Food	\$400.00
Car Insurance	\$75.00
TV Dish	\$14.00
School Lunches	\$60.00
Clothes	\$75.00
Babysitter	\$100.00
Transportation (Gas)	\$150.00
Medicine	\$80.00
TOTAL MONTHLY EXPENSES	\$1844.00

Debtor has not listed any significant discretionary expenses. There is no allowance made for entertainment, although Debtor previously listed \$50 per month on Schedule J. Debtor has also made no allowance for personal care. The only discretionary expense is \$14 for the TV Dish, but this is not unreasonable in the aggregate.

Essential expenses include such items as "food, utilities, housing, and health expenses." O'Shaughnessy, 301

B.R. at 31. Debtor's necessary expenses total \$1,830. Considering that Debtor is caring for two children in a single parent household and providing support for a third child, Debtor's monthly essential expenses are not unreasonable in the aggregate.

2. DOES DEBTOR HAVE SUFFICIENT DISPOSABLE INCOME TO PAY THE DEBT?

In determining the debtor's disposable income, the court considers the debtor's current and future financial situations. Eiklenborg, 286 B.R. at 722. The court then considers whether the debtor will be able to pay off his debt through monthly payments over a reasonable period of time. In re Hildreth, No. 99-9139F, slip op. at 5-6 (Bankr. N.D. Iowa Sept. 6, 2000) ("Determining ability to pay by reference to a reasonable period of time should ensure that the court's finding is realistic, and not merely a mathematical possibility."). The time period, however, is not limited by the length of a Chapter 13 plan. Id. at 6. While "presumptively a reasonable time to pay on debts, . . . there seems to be no reason to use the plan term as the upper limit of reasonableness of time." Id. at 6.

Debtor listed net monthly income of \$1,238.21 while working at Featherlite when he filed his Chapter 7 petition. He listed his expenses at \$1,271.57. Even before Debtor quit his job at Featherlite, he was operating at a monthly deficit of \$33.36. He currently earns about \$600 less per month as a contract welder than he did at Featherlite. If Debtor returned to work at Featherlite, his net income would increase to about \$1,678. The \$330.76 garnishment would no longer exist and the amount deducted for withholding taxes may decrease by \$100-200. It is not possible to anticipate, however, whether he will be able to return to Featherlite in the future.

The \$250 child support payments will continue for another three years, and Debtor is currently behind on payments. He also mentioned that his child care payments (currently \$100) will "increase significantly in the summer months." As his children are 10 and 11 years old, however, these costs should decrease within four to five years, once they no longer need as much supervision. In eight years, both of his children who are currently living with him will be eighteen years old, and Debtor's food and clothing costs may decrease. His medical expenses will continue indefinitely, as it is unclear when or if he will be able to overcome his anxiety. Debtor's current monthly expenses total \$1,844. Even if Debtor's weekly gross wages increase, he will barely be able to cover his expenses. If Debtor is able to collect the child support owed to him in the future, this would add only an additional \$280 per month (plus the \$10,080 in back support owed). Due to Debtor's current and potential future income, he does not have sufficient disposable income to repay the dissolution debt of \$12,446.32 within a reasonable period of time.

§ 523(a)(15)(B): BENEFIT TO DEBTOR v. DETRIMENT TO PLAINTIFF

Even if the court determines that Debtor has the ability to pay under § 523(a)(15)(A), the debt may still be discharged under § 523(a)(15)(B). The non-support dissolution debt is dischargeable despite the debtor's ability to pay under (A) if "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)(B). The central factor considered by the court is a comparison of the parties' standards of living.

Eiklenborg, 286 B.R. at 722; Allgor, 276 B.R. at 225. The debt is discharged if the debtor's standard of living is materially below that of his ex-spouse. Allgor, 276 B.R. at 225. If the debtor's standard of living is above or about equal to his ex-spouse's, however, then there is no exception to nondischargeability. Id.

Both parties currently have steady jobs. Debtor is able to handle his anxiety working as a contract welder. Debtor is earning between \$400-600 gross per week, while Plaintiff is earning about \$372.80 (9.32 x 40) gross per week. Plaintiff's daughter, however, also contributes roughly \$45 per week to the household (\$200 per month). In addition, Plaintiff also worked as a waitress in 2003, at \$4.50 per hour. When this is factored in, the parties' monthly incomes are relatively similar. Plaintiff listed her expenses as follows:

Gas	\$130.00
Electric	\$115.00
Mable Coop	\$64.89
US Cell	\$58.26
Personal Hygiene, Cleaning Supplies, and Toiletries	\$80.00
Groceries	\$310.00
Gas	\$45.00
Truck Insurance	\$80.00
Mortgage (as of 2/21/04)	\$565.00
Truck Payment	\$284.29
Day Care (Haley)	\$200.00
Dental Insurance	\$2.31
Medical Insurance	\$18.69
Vision Insurance	\$2.07
Uniforms	\$6.15
AAA	\$7.08
Sam's Club	\$2.92
Truck Servicing	\$8.33
Truck Repair	\$29.17
TOTAL MONTHLY EXPENSES:	\$2,009.16

Given that Plaintiff's expenses are higher than Debtor's and that Plaintiff and Debtor share similar incomes, both are clearly operating at or near deficits.

The parties' standards of living, however, are different. Plaintiff lives in a home situated on 13.87 acres of land. Its current assessed value is about \$44,000. Debtor, in comparison, lives in a mobile home that was worth only \$24,000 when it was purchased in 2002. Debtor supports three dependents, two of whom live with him. Plaintiff pays no child support. Plaintiff's daughter and granddaughter live with her, but her daughter is employed and contributes to the household. Both parties currently have unpaid debts. Debtor has no operable vehicles, while

Plaintiff has a truck on which she spends \$401.79 per month, excluding gas and AAA costs.

Additionally, Plaintiff has discretionary expenditures such as personal care, a Sam's Club membership, a AAA membership, and a cell phone, totaling \$148.26. Debtor's discretionary expenses, on the other hand, total \$14 for a TV Dish.

While it is clear that the parties have different standards of living, the court must determine whether Debtor's is materially below that of the Plaintiff. Allgor, 276 B.R. at 225. Both are operating at a monthly deficit and have financial difficulties. Plaintiff's standard of living, however, on this record, is materially above that of Debtor.

Thus, discharging this debt will result in a benefit to Debtor which outweighs the detriment to Plaintiff Kennington.

CONCLUSION

Debtor has met his burden under 11 U.S.C. § 523(a)(15)(A) and has shown by a preponderance of the evidence that he is unable to pay the dissolution debt. Both parties are in precarious financial condition which will be exacerbated by this debt. Plaintiff, however, enjoys a substantially higher standard of living than Debtor. As such, Debtor has also satisfied his burden under 11 U.S.C. § 523(a)(15)(B).

WHEREFORE, for all the reasons set forth herein, the complaint to determine dischargeability filed by Plaintiff and against Defendant is DENIED.

FURTHER, the credit card debts owed by Defendant are determined to be dischargeable.

SO ORDERED this 12th day of February, 2004.

Chief Bankruptcy Judge

PAUL J. KILBURG