

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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ANNETTE L. ALLEN  
Debtor.

Bankruptcy No. 95-42357XM  
Chapter 7

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DAVID M. SATERN  
Plaintiff

Adversary No. 96-4032XM

vs.

ANNETTE L. ALLEN  
Defendant.

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### ORDER RE: DISCHARGEABILITY

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The matter before the court is the dischargeability, under 11 U.S.C. 523(a)(15), of debt owed to Debtor's former spouse. Trial was held January 13, 1997 in Mason City, Iowa. J. Mathew Anderson appeared for Plaintiff David M. Satern. Kristy B. Arzberger appeared for Debtor-Defendant Annette L. Allen. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. 157(b)(2)(I).

### FINDINGS OF FACT

Annette Allen filed a Chapter 7 petition on December 4, 1995. She received a discharge March 13, 1996. Her schedule of general unsecured creditors listed debts in the total amount of \$26,801.48, including debt in the amount of \$9,502 to David Satern.

Satern, the former husband of Allen, is 39 years old. Allen was 36 on the date of her petition. Schedule I. Allen and Satern were married in April, 1979. They have two children: Melissa, 17 years old, and Bradley, 13. The marriage was dissolved by decree filed March 19, 1992 in the Iowa District Court for Cerro Gordo County. Exhibit 2. The decree approved and adopted a Stipulation of Settlement entered into by Allen and Satern on March 16, 1992. Exhibit 1. The parties' dissolution decree was modified January 6, 1993. Joint Pretrial Statement, uncontested facts D. The modified decree was not offered as an exhibit. Neither party argues that modification affected the terms of the stipulation relating to the debt at issue in this proceeding.

The Stipulation provided that both parties had equal joint physical custody and that neither was obligated to pay a specific amount to the other for child support. Exhibit 1, item 1. Allen later became obligated to make child support payments in the amount of \$333 per month. For eight months from the end of 1994 to 1995, Melissa lived with Allen. Now both children live with Satern.

The Stipulation provided that neither party would receive alimony. Exhibit 1, item 5. The parties agreed to allocate property and debt between themselves. Item 16 of the Stipulation related to income

tax liability. Satern had filed his 1987, 1988 and 1989 state and federal income tax returns as a married person filing individually. The Stipulation stated that Satern's debt to the Iowa Department of Revenue was then \$655.75 plus interest, and that he owed the Internal Revenue Service \$9,461.10 plus interest. Each party agreed to pay half of the delinquent income taxes. Exhibit 1, item 16, 1. Allen's liability for half of Satern's taxes was to be reduced if her personal income tax liability increased because of having to file individually as a married person for tax years 1987, 1988 and 1989. Id., 2. There was no evidence relating to Allen's tax returns or tax liability for those years. Allen's liability for Satern's taxes could also have been reduced depending upon the value of certain property awarded in the dissolution. Id., 3. The evidence showed that the property had been appraised and that the condition for reducing Allen's liability did not exist.

Item 17 of the Stipulation provided that Allen was to pay the debt due on several credit cards. In particular, she was to assume and pay the debt due on Satern's Discover card. She was also to pay the debt owed by both of them to American General Finance. Allen agreed to indemnify Satern and hold him harmless from liability as to the debts for which she was responsible under the Stipulation. Id., item 18.

Satern paid his Iowa income tax liability for tax years 1987, 1988 and 1989 in full; Allen did not reimburse him. As of July 23, 1992, Satern's federal income tax liability was as follows:

1987	\$3,908.64
1988	\$3,506.39
1989	\$3,187.28
<b>TOTAL</b>	<b>\$10,602.31</b>

Exhibit 5. On June 25, 1993, Satern paid the IRS \$4,870.38. Exhibit 6. Prior to that date, the IRS offset a tax refund owed to Satern in the approximate amount of \$700 against the delinquent taxes. The 1993 payment paid the tax liability for 1987 in full and was applied as a partial payment for tax year 1988.

On or about November 6, 1995, Satern received from the IRS notice of intent to levy to collect the remaining tax due for tax years 1988 and 1989. Exhibits 8, 9. Satern operates a general contractor business. In order to prevent levy on his business building, tools and equipment, Satern obtained a bank loan in the amount of \$7,000 to pay the taxes. Exhibit 14. On November 10, 1995, Satern wrote a check to the IRS for \$3,354.83 and another for \$4,081.14. Exhibits 12, 13. These two payments paid the debt for tax years 1988 and 1989 in full.

On October 24, 1995, Satern filed an application to show cause to hold Allen in contempt of the dissolution decree for her failure to pay her one-half share of the delinquent taxes. The Iowa District Court issued its order December 4, 1995. Exhibit 23. Allen had filed her bankruptcy petition at 8:00 that morning. The court found Allen in contempt, but gave her the opportunity to purge herself of the contempt by making \$50 monthly payments beginning January 3, 1996. The order further provided that the finding of contempt would be dismissed upon a finding by the bankruptcy court that the debt was dischargeable. Allen made eleven payments in the total amount of \$215.00 between January 2, 1996 and November 22, 1996. Exhibit Q.

In 1992, Satern filed an application to find Allen in contempt for her failure to pay the debt owed on his Discover card. On August 26, 1992, the Iowa District Court filed its order on the matter. Exhibit 21. The court found that the parties had agreed Allen would pay debt on the Discover card in the

amount of \$1,457.96. Id. at 2-3. The court found Allen in contempt, and provided her an opportunity to purge herself of contempt by proof of payment of the debt in full within 20 days. Sometime after the contempt order, Allen wrote a letter to Discover enclosing three checks, each for \$52. The checks were dated November 9, 1992, December 1, 1992 and January 12, 1993. Exhibit R.

Satern made various payments on his Discover card. Exhibit 15. In August, 1994, he borrowed \$1,202.77 from a friend, Laura Brincks, to pay the balance in full. Exhibit 18. Satern did not give Brincks a note for the loan. Satern filed a small claims action and obtained judgment against Allen for the amount he paid on the Discover card.

The Stipulation stated that the unpaid balance due and owing to American General Finance was \$3,194.43. Exhibit 1, item 9. The debt was secured by a 1980 Ford pickup and several other items of personal property. Exhibit 19. The Stipulation provided that the Ford pickup would be sold and that the proceeds would be applied toward payment of the debt. Exhibit 1, item 9. American General repossessed the vehicle. Of the other collateral securing the debt to American General, Satern was awarded a boat and motor, chainsaw, push mower, television, VCR, and table saw. Satern sold some of these items and used the proceeds to pay other of his debts. He made no further payments to American General. American General also had a security interest in a Sears mower/snowblower. This property was awarded to Allen, who sold it. There was no evidence showing how the proceeds were applied. The remaining balance owed to American General is unknown.

The Stipulation stated that Allen was the owner of five parcels of real estate in Mason City, that the real estate would be her property, and that she would be liable for the debt against the property. Exhibit 1, item 7. In March, 1994, upon application by Satern, Roger Holtz was appointed receiver of Allen's property. Exhibit Z, 1. Holtz was actively involved in the management and sale of three of the parcels, which were rental properties: 112 - 9th Street, N.E., 233 - 5th Street, N.W., and 624 South Jersey Avenue. Exhibits Z, J, V, CC. Another, 16 - 16th Street, N.E., is described on Exhibit Y. None of the receivership documents offered into evidence relate to the fifth property, identified in the Stipulation as 609 North Washington Avenue. Allen owned none of the five properties at the time of her bankruptcy petition. Allen received no money from the receivership.

Allen's ownership of the properties was not a financial success for her. She had actual losses on two or three of the properties in 1991 and 1992. Exhibits K, L, Form 1040 Schedule E. Allen became delinquent on some payments relating to the properties. In May of 1994, Allen was approximately 120 days delinquent on one of the mortgage notes. Exhibit C. Allen testified that before the receiver was appointed, she offered to transfer the properties to Satern in satisfaction of her debt to him, but he was not interested in such an arrangement.

On October 3, 1994, the receiver Holtz sold the 624 South Jersey Avenue property. Exhibit J. Proceeds in the amount of \$7,002.83 were deposited into the receivership account. Exhibit Z, Accounting. On October 11, 1994, Holtz paid \$4,158 to the Cerro Gordo County Treasurer, the bulk of which was marked as being for "tax sale." Id. On October 24, 1994, a payment of \$1,064.98 was made to Satern. Id.

On April 21, 1995, the receiver sold the property at 112 - 9th Street. Exhibit V. Entries on the closing statement show a debit of \$900 "to release Satern" and another for \$1,800 to release a confessed judgment to attorney Arzberger. The net from this sale was \$36.84. Id. On June 9, 1995, the receiver sold the property at 233 - 5th Street. Exhibit CC. The closing statement showed a debit of \$4,764.66 to pay three years' delinquent taxes. There were no proceeds from this sale.

Allen was living at 112 - 9th Street until October 1994. See Exhibit Z, Accounting. She moved after the receiver took over the property. She purchased a house on contract, borrowing \$6,800 from her mother for the down payment. Allen has valued the property, located at 909 North Delaware, Mason City, at \$30,000. Exhibit T. Her mother has a second mortgage on the property. In September 1996, Allen was terminated from her job at Jim Hayden Ford in Osage, Iowa. Exhibit O. Allen feared that she would be unable to make her contract payments. She rented out the property and moved in with a friend who helps her with household expenses. Allen has an agreement to pay the friend \$200 per month, but has not yet been able to do so.

On the day of trial, Allen was working as a part-time bookkeeper for \$5.00 per hour. She earns approximately \$50 per week. She receives \$600 per month in rental income. Allen listed the following as her current monthly expenses:

231.66	car payment
304.02	house payment
24.83	property insurance escrow
39.66	property taxes
40.00	water bill
333.00	child support payment
102.59	health insurance for children
100.00	attorney fees
<b>TOTAL</b>	<b>\$1,175.76</b>

Exhibit T. Allen is two months behind on car payments. She did not make child support payments for November and December, 1996 or January, 1997. She has not made any payments to her mother on the second mortgage. She does not have health insurance for herself or car insurance. She has made loan applications at various times and has been turned down. Exhibits G, H, I (rejection letters dated November 1995, December 1995 and August 1996).

After graduation from high school in 1978, Allen attended Luther College for one year. About a year after marrying Satern, Allen attended Hamilton Business College. She also attended two evening classes at a community college. Her first jobs were at a bank. She has worked as a teller, a mortgage loan secretary, and a mortgage loan processor. She worked for Principal Financial Group as a pension administrator for about two years beginning in 1988. She then obtained a real estate license and sold on commission for a year and a half. Allen listed her employment and income history from 1992 to the present on Exhibit U.

Allen submitted copies of her income tax returns filed for tax years 1991 and 1992. Exhibits K, L. She submitted copies of partial unfiled returns for tax years 1993 and 1994, consisting of W-2 and 1099 forms and the front page of the form 1040. Exhibits M, N. Allen said she has not filed the 1993 and 1994 returns because she does not know the tax effect of the receivership and cannot afford to hire someone to prepare the returns. In 1992, Allen filed a joint tax return with Terry Allen. She was married to him for about one year. Terry Allen filed a separate return for tax year 1993. Annette Allen did not submit any tax return information for tax year 1995.

Satern submitted a copy of his tax returns for 1995. Exhibit 22. He had income from the operation of his construction business and from rental property. In 1996 he incurred \$9,000 in medical bills that

were not covered by health insurance. He listed his current monthly expenses on Exhibit 26. Satern and his children live in a home owned by Laura Brincks. She assists them with household expenses.

## DISCUSSION

Satern seeks a determination that Allen's obligation to hold him harmless as to the debts for taxes, the Discover card, and American General is nondischargeable pursuant to 11 U.S.C. 523(a)(15). That section provides that a Chapter 7 discharge does not discharge debt:

(15) 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 a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; 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.

The parties do not dispute that the debt at issue was incurred in connection with the dissolution and is not in the nature of support. The debt is of the type described in the first clause of 523(a)(15). See generally 4 Collier on Bankruptcy 523.21 (15th ed. rev. 1996). The debt is nondischargeable unless either subsection (A) or (B) applies. The burden is upon Allen to prove the existence of either of the two exceptions to nondischargeability. Becker v. Becker (In re Becker), 185 B.R. 567, 569 (Bankr. W.D. Mo. 1995). She must establish her proof by the preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659 (1991). Allen claims that both exceptions are applicable in her case. She contends that she does not have the ability to pay the debt and that the benefit she would receive from discharge of the debt outweighs any detriment to Satern.

The test of a debtor's ability to pay for purposes of 523(a)(15)(A) is similar to the disposable income analysis in Chapter 13 cases. Taylor v. Taylor (In re Taylor), 191 B.R. 760, 765-66 (Bankr. N.D. Ill. 1996), aff'd, 199 B.R. 37 (N.D. Ill. 1996). The court must consider the debtor's current and prospective financial circumstances, rather than her situation at a particular moment in time. The analysis examines a debtor's economic prospects and the ability to pay the debt over time. Cleveland v. Cleveland (Matter of Cleveland), 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996); McGinnis v. McGinnis (Matter of McGinnis), 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); In re Smither, 194 B.R. 102, 107-08 (Bankr. W.D. Ky. 1996).

Allen has not had the ability to pay this debt at any time between the date of her bankruptcy petition and the date of trial. Her bankruptcy schedules show that at filing she had monthly net income of \$1,001.53 from wages and \$253.00 from rental income. Schedule I. She scheduled monthly expenses of \$1,822.68, an amount exceeding income by approximately \$568.00 per month. The expenses appear reasonable and necessary. They do not include amounts for her own health insurance or mortgage payments to her mother. Sometime after the petition date, Allen began working at Jim Hayden Ford. Her draw against commission was \$1,500.00 per month, but she was terminated from this position in September, 1996. She then moved out of her home and rented out the property. This arrangement gave her approximately \$350 per month additional income, but also created an added

expense for the rent or mortgage payment for a new household. On the day of trial, Allen was earning approximately \$200 per month as a part-time bookkeeper. She listed monthly expenses of only \$1,175.76, but did not include amounts for ordinary living expenses such as food and clothing. Exhibit T.

Allen's employment history shows she has the ability to earn far more than she was earning on the day of trial. However, it is difficult to say with accuracy what her earning capacity is. She has had several employers and several types of jobs since 1992. Exhibit U. Although courts have imputed income to parties who have voluntarily reduced or eliminated their income, it would probably be unfair to impute to Allen the income from one particular job. Cf. Greenwalt v. Greenwalt (In re Greenwalt), 200 B.R. 909, 913 n.2 (Bankr. W.D. Wash. 1996) (debtor unemployed on date of trial stipulated to annual income of \$52,000 as electrical engineer); Florio v. Florio (In re Florio), 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995) (post-petition, debtor quit job as surgical technician to work for nothing as pet groomer; court found she had ability to earn amount shown on schedules). Allen has a history of relatively modest earnings. One of her higher income years was in 1993 when she worked as a newspaper circulation manager. That year she earned a total of \$18,586.32 or \$1,548.86 gross per month from that type of work. Exhibit U. That income would not meet the expenses she listed on her Schedule J. It would be speculation to assume that her near future income would give her disposable income that could be applied to the debts at issue. The court finds and concludes that, for purposes of 11 U.S.C. 523(a)(15)(A), Allen does not have the ability to pay the debt.

Courts have considered, in determining a debtor's ability to pay, the income of a new spouse the debtor has married prior to trial. Beasley v. Adams (In re Adams), 200 B.R. 630, 633-34 (N.D. Ill. 1996); In re Smither, 194 B.R. 102, 108 (Bankr. W.D. Ky. 1996). One court stated it would also take into account the income of a "spousal equivalent." Matter of Cleveland, 198 B.R. at 399; but see Willey v. Willey (In re Willey), 198 B.R. 1007, 1015 (Bankr. S.D. Fla. 1996) (refusing to consider income of girlfriend). Another court has emphasized that 523(a)(15) requires a determination of the debtor's ability to pay. Carter v. Carter (In re Carter), 189 B.R. 521, 522 (Bankr. M.D. Fla. 1995). Without deciding the issue, this court declines to consider the fact that Allen on the date of trial was living with a friend. No one presented evidence of the friend's income or expenses. The only evidence relating to their arrangement was that Allen had agreed to pay the friend \$200 per month and has thus far been unable to do so. Allen has been living with the friend only since sometime after September, 1996, when she lost her job with Jim Hayden Ford.

Some courts have concluded that they may allow partial discharge of a property settlement, borrowing the analysis from student loan undue hardship cases. In re Smither, 194 B.R. at 109-10; Comisky v. Comisky (In re Comisky), 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995). This court has ruled that it does not have the authority to enter a partial discharge of student loans. Hawkins v. Buena Vista College (In re Hawkins), 187 B.R. 294, 300-01 (Bankr. N.D. Iowa 1995). The ability-to-pay analysis under 523(a)(15) requires a similar "all or nothing" result. In re Taylor, 191 B.R. at 766; aff'd, 199 B.R. at 42 n.5; Silvers v. Silvers (In re Silvers), 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995). The exception under 523(a)(15)(B) calls on the court to compare two intangibles: the benefit a debtor would receive from discharge of the debt and the detriment to the former spouse if the debt is discharged. This weighing process has proved troublesome. See In re Smither, 194 B.R. at 110 (comparing different approaches to the test); Hill v. Hill (In re Hill), 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995) (describing the exception as a most "illusive" standard). In this case, the detriment to Satern would be considerable, since he continues to be liable for the amount borrowed to pay the debt. However, the discharge would also give Allen a substantial benefit. She would receive a needed fresh start after losing the bulk of the property awarded her in the dissolution proceedings. The real estate

was the quid pro quo for liability on at least part of the debt to Satern. See Exhibit 21 at 2. The court will not decide the 523(a)(15)(B) issue. The two exceptions to 523(a)(15) are written disjunctively. Once a debtor has proved either exception, the analysis is at an end. In re Becker, 185 B.R. at 569. Because Allen has proved her inability to pay, the debt will be discharged.

### **ORDER**

IT IS ORDERED that, pursuant to 11 U.S.C. 523(a)(15)(A), the debt of Annette L. Allen owed to David M. Satern is discharged, and that the complaint is dismissed. Judgment shall enter accordingly.

So ORDERED THIS 25th DAY OF FEBRUARY 1997.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order and a judgment by U.S. mail to: J. Mathew Anderson, Kristy B. Arzberger and U.S. Trustee.