

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

JOHN ERWIN HAVERHALS
Debtor(s).

Bankruptcy No. 96-51916XS
Chapter 7

PATRICIA HAVERHALS
Plaintiff(s)

Adversary No. 96-5210XS

vs.

JOHN ERWIN HAVERHALS
Defendant(s)

ORDER RE: DETERMINATION OF DISCHARGEABILITY

The matter before the court is the final trial of the complaint to determine dischargeability of debt under 11 U.S.C. § 523(a)(15). Trial was held December 10, 1997 in Sioux City. Alvin J. Ford appeared on behalf of Plaintiff Patricia Haverhals. Donald H. Molstad appeared for the Defendant John Haverhals. This opinion constitutes the court's findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings of Fact

John Haverhals is 43 years old. After high school graduation, he began farming with his father. His father died about 15 years ago. He and Patricia Haverhals were married in 1980. They began their own farm operation. Patricia did the bookkeeping and cooked for the hired hands. Their primary business was custom feeding cattle. John and Patricia operated a feedlot as shareholders of Haverhals Livestock, Ltd. Five years ago they had the capacity to feed 4000 cattle. They owned the real estate where their home and feedlot were located. They rented approximately 240 acres for growing crops. John had a 50% interest in a hog operation called B & H Hog Partnership.

The Haverhals borrowed operating money from American State Bank. The loans were secured by a security interest in their machinery and equipment and a real estate mortgage. John's mother, Arta Haverhals Bonmena, guaranteed debt to the Bank.

In September 1993, Patricia filed a divorce action in the South Dakota Circuit Court for Lincoln County. On November 16, 1995, after trial, the court issued a judgment and decree of divorce. Exhibit 1. Patricia was awarded primary physical custody of the parties' two children, John A. Haverhals and Luke Haverhals, now ages 15 and 13. John was ordered to pay alimony, child support, medical expenses and certain other debts. Exhibit 1, ¶¶ 4, 6, 10, 13. John was awarded the farm assets and was ordered to pay the debt associated with them. *Id.*, ¶¶ 8, 10, attachment B. He was also ordered to pay

the debt on two credit cards that had been used to purchase silver as an investment. Id. The balance on the cards is approximately \$6,000. Patricia was awarded a property settlement of \$117,600, payable in a lump sum of \$65,000 due immediately upon entry of the judgment and the balance in installments over ten years. Id., ¶ 12.

John did not pay the \$65,000 installment. On March 4, 1996, he was found in contempt. Exhibits 2, 3. The judgment of contempt committed him to the Lincoln County jail, but stayed the order if he paid the \$65,000 under a modified schedule. The new payment schedule required John to pay \$30,000 immediately, \$17,000 by April 5, 1996, and \$18,000 by August 5, 1996. Exhibit 3. The contempt judgment did not modify the remaining ten-year installments. Exhibit 3, ¶ 2.D.

John borrowed money from his mother to make the initial \$30,000 payment. He sold his interest in B & H Hog Partnership to the other 50% partner, Chuck Boyer, to make the \$17,000 payment due in April 1996. He paid the attorney fees awarded in the contempt proceeding. See Exhibit 3, ¶ 4. He sold his interest in another partnership, J & L Trucking, and used the proceeds to make a payment to American State Bank.

Patricia used \$12,000 of the money to pay attorney fees. She spent about \$9,000 to purchase two cars, a 1985 Dodge and a 1991 Nissan. She bought some furniture and paid other debts. She has no savings or investments.

On August 1, 1996, John filed a Chapter 7 bankruptcy petition. On the date of filing, he had interests in real estate, crops, equipment and machinery. The Chapter 7 trustee abandoned the property.

In May 1997, John, Patricia, and Haverhals Livestock entered into an agreement with American State Bank under which the borrowers surrendered their interests in collateral in full satisfaction of the debt to the Bank. Exhibit C. John had already received his Chapter 7 discharge. The agreement released Patricia from any obligation for a deficiency after sale of the collateral; it did not release Arta Bonmena from her guarantee.

In August or September, 1996, Arta Bonmena formed a corporation called Haverhals Feedlot, Inc. The corporation purchased from American State Bank the equipment and real estate surrendered under the May, 1997 agreement.

Since the filing of his Chapter 7 petition, John has worked for wages for Haverhals Feedlot, custom feeding cattle and managing the feedlot. He feeds about 2000 head of cattle per month. It is year-round work. He earns \$6.00 per hour for a 40 hour week. Exhibit A. His gross monthly income is \$1,040. Exhibit B, Report, page 1, ¶ 4. In the past, he has had a small amount of income working part time at night at an elevator. He was not needed this past harvest season. He applied for work at a mechanic shop, but there was nothing available. He had some income from a government farm program in 1996 and 1997 for participation in prior years. He had no land in the program in 1997, and expects no further payments.

John has the following monthly expenses:

Income tax	\$ 60
Alimony	100
Child support	450
	57

Health insurance (for children)	
Rent	0
Utilities	0
Food	105
Car payment	138
Auto expense	100
Clothing	20
TOTAL	\$1,030

In 1997, John's obligations for child support and medical expenses were reduced. Exhibit B. The monthly amount for child support itemized above is based on John's testimony that he is paying \$104 per week for combined current and past due child support, at 4.33 weeks per month. His child support arrearage is approximately \$2,000. The itemization of expenses does not include an amount for the children's medical expenses because the parties have not yet set up a method for implementing John's obligation to pay a percentage of those expenses. See Exhibit B, page 3, ¶ 8. Patricia testified that he also owes her approximately \$2,200 for medical expenses under the terms of the divorce decree before it was modified. John does not have rent or utility expenses because they are provided as a benefit of his employment. He has no health insurance for himself. He is using the value of his life insurance to pay the premiums. His car is a 1983 Cadillac with high mileage; he owes monthly payments for approximately another year.

Patricia Haverhals has a high school diploma. She has attended one year of secretarial school and some computer classes. She works as a bookkeeper at Trucktown Cafe for \$6.25 per hour for a 40-hour week. She also has a small amount of income from her own bookkeeping business. Prior to taking the cafe job, she worked as a substitute rural mail carrier for net income of \$67 per day. In 1996 she worked an average of two days per month. Her present net income from wages, alimony, child support and her bookkeeping business is \$1,383 per month. She has the following monthly expenses:

Rent	\$ 300
Gas & electric	158
Water	49
Telephone	35
Food	430
Auto insurance	93
Medical	50
Clothes	100
Transportation	100
Rental insurance	10
School expenses	20
TOTAL	\$1,345

Patricia testified that if she could afford to do so, she would spend more on monthly medical expenses. One son needs braces. One needs shots every other week. The expenses itemized above do not include payments toward debt. Patricia estimated her total debt is \$30,000.

Discussion

Patricia Haverhals filed a complaint to determine the dischargeability of the property settlement arising out of the parties' divorce decree. The debt includes the remaining \$70,600 plus interest awarded as a lump sum and the balance owing on the credit cards used to make the investment in silver. The parties agree that John's obligations for alimony, child support, health insurance for the children, and medical expenses are in the nature of support and are nondischargeable under 11 U.S.C. § 523(a)(5). The debt for property settlement is nondischargeable unless either of the exceptions to 11 U.S.C. § 523(a)(15) applies. 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.

11 U.S.C. § 523(a)(15). The burden is upon John to prove that he does not have the ability to pay the debt or that discharging the debt would give him a benefit that outweighed the detriment to Patricia. Becker v. Becker (In re Becker), 185 B.R. 567, 569 (Bankr. W.D. Mo. 1995). He must establish his proof by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659 (1991).

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 his 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).

The court finds and concludes that John does not have the ability to pay the property settlement. All his income is reasonably necessary for the support of himself, Patricia and their children. John is earning wages of \$6.00 per hour feeding cattle for his mother's corporation. He has farmed all his adult life. Farming has provided him significantly higher income in the past, but he has lost all his farm assets. He has no plans for farming or livestock ventures of his own in 1998. He has no other income-producing assets. He has been unsuccessful in securing other employment. His expenses appear to be reasonable. A significant portion of his income goes for support of Patricia and their

children. His obligation to pay alimony continues until Patricia dies or remarries. Exhibit 1, ¶ 13. He must pay child support until the boys reach age 19 if they attend college. Exhibit B, Report, page 3, ¶ 2.

Patricia argues that John's bankruptcy and loss of the farm assets are part of a plan to deprive her of the property settlement. Trial Brief at 4. The evidence is not sufficient to reach this conclusion. In January 1995, John gave the Bank a financial statement showing Haverhals Livestock's net worth was \$21,354. Exhibit H. On its 1995 tax return, Haverhals Livestock, Ltd. reported an actual loss and a loss carryforward from prior years. Exhibit J. John considered the corporation in financial difficulty at that time. In early 1996, the Bank was unwilling to lend John any more money. He borrowed money from his mother to make the first property settlement payment to Patricia. He sold assets to make the second payment. By the time the third was due, he had no unencumbered assets and could borrow no more money. In May 1997, Patricia voluntarily signed the settlement with the Bank after receiving advice of counsel. American State Bank was an undersecured creditor. Exhibit C, stipulation recitals. It does not seem that the transfer of farm assets to the Bank was a deception.

Patricia claims various actions by John's mother are part of a plan to deprive Patricia of her property settlement. The claim, as to the mother's motivation in purchasing the feedlot property, hiring John and having plans for giving him property in the future, is speculative. Regardless of the mother's motivation, there was no evidence that John has any control of the situation. He denied that he is an officer of Haverhals Feedlot or that he has any ownership interest in the corporation; there was no evidence otherwise. He said he does not expect to receive property from his mother in the future because he has borrowed so much money from her and has not repaid it. He expects gifts or bequests would go instead to his four siblings. Patricia's suggestion that the court delay determination of dischargeability indefinitely to "see what happens" when John's mother dies would be contrary to the Code's indication that complaints under 11 U.S.C. § 523(a)(15) should be determined promptly. 11 U.S.C. § 523(c); Fed.R.Bankr.P. 4007(c), 9006(b)(3).

Counsel for Patricia questioned John about a transaction with his friend, Lorna Kats. Kats was scheduled as an unsecured creditor with a claim for \$15,300. John said that Kats put up money for the purchase of cattle through Haverhals Livestock. He said that he considered Kats the owner of the cattle and that when the cattle were sold, in January or February of 1996, Kats received the proceeds. This statement does not explain why John would list a claim that was already paid. The schedules did not identify the claim as a debt of Haverhals Livestock, whereas several other claims were so identified. John denied that the transaction was a loan, but he signed a promissory note. Patricia raised this transaction as an instance of John paying someone else when he could have paid her. John may have preferred one creditor over another by paying Kats; however, the transaction appears to have been the sale of property acquired with borrowed funds. Because John no longer has such property which could be sold for profit, the transaction with Kats does not appear relevant to the analysis of John's ability to pay.

The second exception to nondischargeability, under 11 U.S.C. § 523(a)(15)(B), requires the court to balance the benefit and detriment to the parties if the property settlement is discharged. The detriment to Patricia would be substantial. She had hoped to use the money to finance an accounting or business degree in order to find better employment. She has had to support herself and two children on an income that allows her only to get by. On the other hand, the benefit to John would also be great. He would receive a fresh start after losing the property on which the property settlement was based. See Hoops v. Hoops (In re Hoops), Adv. No. 95-5206XS, slip op. at 10-11 (Bankr. N.D. Iowa March 25, 1997) (property settlement premised on debtor retention of farm assets and continuing farm operation). It is not necessary for the court to decide which of these two intangibles "outweighs" the

other. The 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. 569. Because the court has determined that John does not have the ability to pay the debt, the debt will be discharged.

ORDER

IT IS ORDERED that, pursuant to 11 U.S.C. § 523(a)(15)(A), the debt of John E. Haverhals for property settlement in the approximate amount of \$70,600 plus interest owed to Patricia L. Haverhals is discharged, and the complaint is dismissed. Judgment shall enter accordingly.

SO ORDERED THIS 30th DAY OF JANUARY 1998.

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 Alvin Ford, Don Molstad and U.S. Trustee.