In the United States Bankruptcy Court

for the Northern District of Iowa

GILBERT L. HILDRETH *Debtor(s).*	Bankruptcy No. 99-01426F Chapter 7
CAROLYN KING *Plaintiff(s)* vs. GILBERT L. HILDRETH *Defendant(s)*	Adversary No. 99-9139F

ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY

The matter before the court is the final trial of plaintiff's claim to hold her debt excepted from the debtor's discharge pursuant to 11 U.S.C. § 523(a)(15). Trial was held June 21, 2000 in Fort Dodge. Kurt T. Pittner appeared for plaintiff Carolyn D. King. Charles A. Schulte appeared for debtor-defendant Gilbert L. Hildreth. The parties have submitted briefs, and the court now issues its findings of fact and conclusions of law as required by Rule 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings of Fact

Carolyn King is the former spouse of Gilbert Hildreth. The parties were married in 1990. It was not the first marriage for either of them. No children were born of the marriage. King and Hildreth were divorced on April 16, 1998, in the Iowa District Court for Calhoun County, Equity No. CDDM-500016. Exhibit 2. The dissolution decree awarded King the marital home in Rockwell City and the debt associated with it. The home was valued at $35,000; the mortgage debt was $27,526. Other debts of the parties were divided between them. Several of the debts assigned to Hildreth were debts for which King was jointly liable or which were in her name alone.

King refinanced her home and paid off the debts assigned to her. Hildreth made no effort to repay his share of the debts. Creditors which were to have been paid by Hildreth took numerous collection actions against King. One levied on her vehicles. Another took a judgment against her. She is attempting to fend off some of the credit card companies by making $50 monthly payments.

In March 1999, King filed a motion in Calhoun County District Court to have Hildreth held in contempt. On April 26, 1999, the court issued an order finding Hildreth in contempt and sentencing him to 30 days in the county jail. Hildreth was given the opportunity to purge himself of contempt by taking certain actions by June 25, 1999. Exhibit 5. Hildreth filed his Chapter 7 petition on June 1, 1999. He received a discharge on September 1, 1999.

King asks the court to hold Hildreth's obligation under the divorce decree nondischargeable as to the following debts:

Golden Buckle	$ 244
AT&T Universal Card	3682
NationsBanc Card	5393
Discover Card	2621
Attorney fee dissolution	1000
contempt	1500
McFarland Clinic	529
Citibank	1267
TOTAL	$16236[(1)]

Hildreth is 52 years old. He is single and lives alone. He has a B.A. degree in business administration. He is an experienced carpenter and has managed his own businesses. He formerly operated a farm construction business. For a few years, he had a farm supply store. Presently, he works as the maintenance manager for American Meat Protein in Lytton, Iowa.

In January of this year, Hildreth was paid gross wages of $1,300.96, yielding $684.74 in net pay, every two weeks. Exhibit 7. Deductions were taken from Hildreth's wages for taxes, health insurance, child support, life insurance, and a 401(k) plan contribution in the amount of $26.02. For purposes of deciding this dispute, the court will not allow voluntary contributions to a 401(k) plan when calculating a debtor's income and expenses. Adding the plan contribution back into income and deducting taxes at approximately 26% increases net pay by $19.26. Child support at the rate of $400 per month will be an ongoing expense. Hildreth is required to pay current support while his children remain in school. He also owes approximately $14,000 in child support arrearages. Since January, Hildreth has received a four percent cost of living raise. The court calculates this as an additional $52 gross ($1,300.96 X .04) or $38.50 net per pay period. Hildreth does not receive tax refunds. Calculated as a monthly figure, Hildreth has net income from wages of $1,608.75 ([$684.74 + $19.26 + $38.50] x 26 / 12). He also received $680 net from a bonus this year for total monthly income of $1,665 for 2000.

Hildreth itemized the following living expenses:

Rent	230
Electricity and heat	90
Water	30
Telephone	25
Cable TV	40
Food	250
Clothing	75
Laundry	40
Medical	50
Transportation	175

Recreation	40
Charitable contributions	50
Auto insurance	70
Auto payment	131
Son's college tuition	100

Hildreth states the expense for cable television is for basic cable. The balance on his vehicle loan is approximately $3,000. He has recently stopped smoking, which was $30 of his monthly budget for food. He has no special clothing needs for work. The expense for his son's tuition is a voluntary payment in addition to child support. The court believes it is not prohibited from treating charitable contributions as an unnecessary expense in the context of a § 523(a)(15) claim. Cf. 11 U.S.C. §§ 707 (b), 1325(b)(2)(A). The $50 expense in that category will be eliminated. The court also reduces food by $30, clothing by $25, and eliminates the college tuition expense. The court finds that Hildreth's monthly expenses are $1,191. His monthly disposable income is approximately $474.

Hildreth states that he will soon incur additional medical expenses, probably in the next two years. He needs to have dental work done and to be fitted for dentures, he will need to have hemorrhoid surgery, and needs to get prescription safety glasses. There was no evidence of the amount of these expenses or the amount of costs not covered by insurance.

Carolyn King is 47 years old. She is single and lives alone. She has a high school diploma. In 1989 she took a clerical skills class. She is presently unemployed. From 1990 to February 23, 2000, she worked for Calhoun County as a home health care aide. Her work involved a variety of duties, including the personal care of clients, cooking, cleaning, and transportation. Her clients were elderly people or handicapped children. The work was physically demanding. She incurred injury from the work. Three years ago, she had carpal tunnel surgery. She made a workers' compensation claim, which was settled. The terms of the settlement required her to resign. She received $11,000 and six months of unemployment benefits. After paying attorney fees and medical bills, her share of the settlement was $6,000.

King is not able to return to home health care work because of the physical demands of the job. She is hoping to become retrained in some type of computer work. Her unemployment benefit is $384 net every two weeks. To make ends meet, she has been using her settlement proceeds. About $4,000 of that money is left.

King has three children from a previous marriage, two older children who are on their own and a 22-year-old daughter who attends Iowa State University. King helps out the younger daughter by supplying her with a vehicle and paying the insurance. She has an IPERS account, but no life insurance. She owns older vehicles. The one she drives breaks down.

Discussion

King asks the court to find Hildreth's debt to her nondischargeable under 11 U.S.C. § 523(a)(15), which provides that a Chapter 7 discharge does not discharge 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 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 ...; 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.

King bears the initial burden of showing that the debt is of the type described in § 523(a)(15). To avoid a finding of nondischargeability, Hildreth must then prove one of the exceptions under subsections (A) or (B). The exceptions constitute affirmative defenses. Moeder v. Moeder (In re Moeder), 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998). Hildreth must establish his proof by the preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 659 (1991).

Hildreth incurred the debt in connection with a dissolution decree. The parties have not raised the nature of the debt as a disputed issue.[(2)] The debt is nondischargeable unless Hildreth proves an exception.

The exception under § 523(a)(15)(B) requires a balancing of the benefits to Hildreth and the detrimental consequences to King if the debt is discharged. Some courts have created lists of factors to be considered under a "totality of the circumstances" test. Armstrong v. Armstrong (In re Armstrong), 205 B.R. 386, 393 (Bankr. W.D. Tenn. 1996) (quoting In re Smither, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996)). The factors most relevant here are the education, job skills, work history and income of the parties. Hildreth has a college degree, marketable skills, business management experience, and a stable job with a good income. King is presently unemployed and cannot return to her former occupation. Her prospects for future employment are uncertain. She is making ends meet by depleting the proceeds of her workers' compensation settlement. The wide disparity between the parties' circumstances requires the court to conclude that Hildreth has not shown that discharging the debt would result in a benefit to himself that outweighs the detrimental consequences to King.

The determinative issue is whether Hildreth has the ability to pay the debt within the meaning of § 523(a)(15)(A). The test of a debtor's ability to pay begins with a disposable income analysis similar to that in Chapter 13 cases. This test considers whether the debtor's budgeted expenses are reasonably necessary. 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); In re Smither, 194 B.R. at 107-08.

Some courts extend the Chapter 13 analogy by calculating the amount of debt the debtor could pay in a three year plan. If the debt at issue is greater than the debtor's disposable income times 36 to 60 months, the court makes a "partial discharge" of the excess amount. See Fitzsimonds v. Haines (In re Haines), 210 B.R. 586, 893 & n.6 (Bankr. S.D. Cal. 1997) (discussing Comisky v. Comisky (In re Comisky), 183 B.R. 883 (Bankr. N.D. Cal. 1995); McGinnis v. McGinnis (In re McGinnis), 194 B.R. 917 (Bankr. N.D. Ala. 1996); Greenwalt v. Greenwalt (In re Greenwalt), 200 B.R. 909 (Bankr. W.D. Wash. 1996)). For example, in In re McGinnis, the debt at issue was approximately $19,000. The court determined that the debtor had disposable income of $300 per month. Her debt was nondischargeable to the extent of $10,800 (300 x 36 = 10,800). 194 B.R. at 922.

This court has previously held that the Bankruptcy Code does not authorize partial discharge of debts under § 523(a)(15). Satern v. Allen (In re Allen), Adv. No. 96-4032XM, slip op. at 14 (Bankr. N.D.

Iowa Feb. 25, 1997).[3] Dischargeability under § 523(a)(15) is an all or nothing proposition. In re Taylor, 191 B.R. at 766 (Bankr. N.D. Ill. 1996) (stating that the majority of courts take an "all or nothing" approach); see generally 3 Norton Bankruptcy Law & Practice 2d, § 47:38, text at n.30.

In several cases, courts have analyzed the ability to pay seemingly without regard to the usual Chapter 13 plan term. In Crossett v. Windom (In re Windom), 207 B.R. 1017, 1022 (Bankr. W.D. Tenn. 1997), the court found that the debtor had $167 of monthly disposable income and would have more if his new wife chose to work. The court thus concluded that he had the ability to pay a debt of $17,472. In Newcomb v. Miley (In re Miley), 228 B.R. 651, 656-57 (Bankr. N.D. Ohio 1998), the court found that the debtor had the ability to pay $100 per month for one year and $300 per month thereafter on a debt of $15,456 plus ten percent interest. Interestingly, the court approvingly cited two "partial discharge" cases, yet did not apply the principle in the case before it, instead concluding that the debtor could make monthly payments until the debt was paid off.

Other courts have described the debtor's ability to pay in even more general terms. In Johnson v. Henson (In re Henson), 197 B.R. 299, 303-04 (Bankr. E.D. Ark. 1996), the debtor was a person who, in the past, had had "well paying jobs" and chose to be unemployed. He had the ability to "make some payment on the debt" of $27,000, and had the ability to pay all of it over time. In Brasslett v. Brasslett (In re Brasslett), 233 B.R. 177 (Bankr. D. Me. 1999), the debtor's net business income in recent years ranged from about $50,000 to $100,000. The court concluded that he could make "meaningful payments" on a property settlement debt if he would "tighten his financial belt," and had the ability to pay the entire $90,000 debt. Id., 233 B.R. at 184.

Some courts express the ability to pay in terms of a reasonableness standard. In Gamble v. Gamble (Matter of Gamble), 143 F.3d 223, 226 (5th Cir. 1998), the court held it was not error to evaluate whether the debtor could make "reasonable payments" on a $100,000 debt from his disposable income. In Armstrong v. Armstrong (In re Armstrong), 205 B.R. 386, 392 (Bankr. W.D. Tenn. 1996), the court defined "ability to pay" as having "sufficient disposable income to pay all or a material part of the debt within a reasonable amount of time." It was not necessary for the court to make a partial discharge analysis in Armstrong, because the debtor had $1,000 of monthly disposable income and had the ability to pay the debt in full. See also In re Comisky, 183 B.R. at 884 (over a "reasonable period of time," the debtor could afford to pay part of the debt).

This court disagrees with the court in In re Haines, 210 B.R. at 590, that the court need not consider whether the debtor has the ability to pay the debt within a reasonable period of time. In Haines, the court found that the debtor had $200 of monthly disposable income and could pay the debt, even if it would take about 20 years at that rate. 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. SeeIn re Smither, 194 at 109.

Moreover, this court disagrees that a reasonable time period should be measured strictly against the three- or five-year term of a Chapter 13 plan. Perhaps the term of a Chapter 13 plan is presumptively a reasonable time to pay on debts, but there seems to be no reason to use the plan term as the upper limit of reasonableness of time. Student loans were formerly dischargeable, absent undue hardship, only after being in payout status for seven years. Ultimately, however, there is no reason to analyze debtor's ability to pay the debt in the context of bankruptcy at all. Hildreth has already received a Chapter 7 discharge. Chapter 13, and its broader discharge, remains an option for making payments on the debt, but that choice is not inevitable.

As discussed above, the court has found that Hildreth has monthly disposable income in the amount of approximately $474. Hildreth stated that he considered his job one that he would like to retire from. It appears that his position is a stable one, and his present financial circumstances will continue. Hildreth expects to incur future medical expenses. Even so, his disposable income would allow him to make substantial payments on the debt in order to pay off the debt within a reasonable time. The court concludes that Hildreth has failed to show he does not have the ability to pay the debt.

IT IS ORDERED THAT the obligation of Gilbert Hildreth to or on behalf of Carolyn King for debts to Golden Buckle, AT&T Universal Card, NationsBanc Card, Discover Card, attorney Kurt Pittner, McFarland Clinic, and Citibank, in the total amount of approximately $16,236, is nondischargeable pursuant to 11 U.S.C. § 523(a)(15). Judgment shall enter accordingly.

SO ORDERED THIS 6th DAY OF SEPTEMBER 2000.

William L. Edmonds
U.S. Bankruptcy Judge

1. This figure includes a debt of $2,621 to Discover Card. Hildreth's personal liability on this debt has been discharged. The dissolution decree has the effect of requiring Hildreth to hold King harmless from obligation on the debt. King stated that the Discover Card was in Hildreth's name alone. She did not say that Discover Card has made any collection efforts against her; the debt was not referred to in the contempt proceedings. King is not making payments on the Discover Card. See Exhibit 10, King's financial statement dated March 14, 2000. If neither party has personal liability on the Discovery Card, the total debt subject to King's claim is reduced to that extent.

2. Debt "not of the kind described in paragraph (5)" is debt not in the nature of support. One of the debts at issue here is owed to McFarland Clinic. The court takes judicial notice that Hildreth listed this debt in his schedule of unsecured creditors as being for "medical treatment for ex-wife, July & August, 1997." Debts for necessities, such as medical expenses, are generally in the nature of support. Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983). An order to pay a former spouse's attorney fees may create debt in the nature of support, id., particularly if the attorney fees were incurred in an effort to obtain or collect support. Macy v. Macy (In re Macy), 114 F.3d 1, 2 (1st Cir. 1997); Woodard v. Pallesen (In re Pallesen), Adv. No. X92-0075S, slip op. at 8-9 (Bankr. N.D. Iowa Jan. 14, 1993). If any of Hildreth's debts are not properly the subject of a § 523(a)(15) complaint, it is because they are nondischargeable support under § 523(a)(5).

3. The court does not rule out treating particular debts separately in the dischargeability analysis. The Eighth Circuit Bankruptcy Appellate Panel has held that, in undue hardship cases, each student loan must be analyzed separately. Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen), 232 B.R. 127, 137 (B.A.P. 8th Cir. 1999). The attorney fees at issue here were awarded in two proceedings. It seems, however, that each credit card should not be treated as a separate debt. Cf.In re Greenwalt, 200 B.R. at 914 (court may analyze underlying obligations in hold harmless order separately). The court need not address the separate debt issue in this case, however, because the court concludes that Hildreth has the ability to pay all the debt.