

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IN RE:

GARY RAY BURTON, Chapter 7

Debtor. Bankruptcy No. 01-00842S

CAROL ANNE ROHMILLER,

Plaintiff,

vs. Adversary No. 01-9134S

GARY RAY BURTON,

Defendant.

ORDER RE:

COMPLAINT TO DETERMINE DISCHARGEABILITY

The matter before the court is the final trial of plaintiff's complaint to determine dischargeability of debt owed to her by debtor Gary Burton. Trial was held March 8, 2002 in Sioux City. Plaintiff Carol Rohmiller represented herself. Attorney David A. Poore appeared on behalf of defendant Burton. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings of Fact

Rohmiller is the former spouse of Burton. They were married in 1992. No children were born of the marriage. On April 2, 1999, Burton filed a petition for dissolution in the Iowa District Court for Pottawattamie County. After trial, the court filed its decree on March 2, 2000.

The court found that both parties were in good health and gainfully employed. The decree allocated assets and debt between the parties. The parties agreed that Rohmiller would pay her own credit card debt and that Burton would be liable for the \$14,500 of debt he incurred between April 1999 and February 2000. This debt included \$2,300 owed to Mercy Hospital. Exhibit 2, ¶ 8.

The court found that Rohmiller had borrowed more than \$36,000 in student loans, but that both parties used \$23,525 of the loan proceeds for other debt or marital assets. Id., ¶¶ 6, 9. Each party was held liable for half of this amount, or

\$11,762.50. Cash assets to be divided included \$8,200 from Burton's IPERS account. Of the marital assets, Burton was awarded \$10,155.10, and Rohmiller was awarded \$1,395.10. The court directed that \$8,555.10 of Burton's award be applied toward his share of the student loan debt (\$11,762.50), leaving a balance of \$3,207.40. *Id.*, ¶ 10. Judgment entered against Burton in favor of Rohmiller for \$3,207, payable at the rate of \$67 per month beginning March 1, 2000, plus interest at the rate of 10 percent from the filing date of the decree on amounts not timely paid.

Rohmiller's records show that Burton paid a total of \$1,045 and that the balance owing is \$2,162 plus interest.

Burton, age 39, is a high school graduate. In 1999, he had income of \$30,871. He was formerly a jailer for Pottawattamie County. Before the divorce became final, he resigned from that position and liquidated his IPERS retirement account. His resignation from the Pottawattamie County job was not primarily for health reasons.

Sometime in 2000, Burton moved to Sioux City. Burton has no dependents. He lives in a one-bedroom apartment at the Alhambra Apartments, 801 8th Street in Sioux City.

Cash on hand	40
Bank accounts	200
Household goods	2,000
Pictures and collections	1,000
Clothing	1,000
1979 Olds 98	<u>1,500</u>
Total	<u>\$5,740</u>

Burton's only secured debt was for the purchase of a 1997

Burton filed a chapter 7 bankruptcy petition on March 21, 2001. His bankruptcy Schedule A shows that he owns no real property. Schedule B lists the following personal property:

Cadillac; this vehicle was surrendered in March 2000. He scheduled no priority claims. Unsecured debts totaled \$24,937.66. Of this amount, a total of \$3,304 was scheduled as owing to eight creditors for medical bills. Burton did not identify when these debts were incurred.

Burton's Schedule I stated that he had been working at Wireless World in Sioux City for four months as of the date of filing. He reported net monthly income of \$968.37. His Schedule J erroneously included the debt to Rohmiller as a monthly expense. Excluding this item, Burton claimed expenses of \$860 per month. He budgeted nothing for medical expense.

Burton works in cellular phone sales. He is paid a base salary plus commissions. Health insurance premiums are deducted from his paychecks. He accrues time that can be used for vacation or sick days at the rate of .75 days per month. He is reimbursed mileage for any work-related traveling. At times he goes to other Wireless World offices in Sioux City or Sioux Falls.

Exhibit 22 shows Burton's paychecks dated March 15 through December 31, 2001. It appears that he is paid twice a month.

There is a delay of approximately one to two months from the date commissions are earned to the date they are paid. Net salary for a pay period is \$625, or \$1,250 per month. Burton has at times earned more from commissions than from salary. His net pay totaled \$3,707.60 for checks dated in April 2001, \$2,636.31 in May, \$2,538.32 in June, and \$2,973.32 in July.

Burton received no salary pay in August. He does not remember why he missed work at that time. He still received "vacation/sick" pay and commissions totaling \$2,479.17. In October he had major back surgery and was out of work for about a month and a half. Despite these absences, Burton had average net monthly income of \$2,163 for the ten-month period.

At trial, Burton itemized his current expenses as follows:

- rent 400
- gas & electric 60
- telephone 60
- cell phone 25
- cable TV 60
- food 270
- clothing 30
- laundry 60
- medical 150
- prescriptions 60
- entertainment 30
- transportation 100
- car insurance 30
- loan payment 50

TOTAL \$1,385

The expense for food includes \$120 for lunches on workdays at \$5 per day. Burton works six days a week. The cell phone expense is a special maximum rate provided by his employer as a benefit. His cable TV package includes HBO. The loan payment is made to Burton's grandmother. After one of his back surgeries, Burton got behind in paying bills. He borrowed money for living expenses. The balance on the loan is about \$3,000.

Burton testified that his health problems stem from an auto accident that occurred when he was in the military. There was no evidence as to when this happened. He said it was "not real serious," but he suffered injury to his back. He has had minor surgery on his back six or seven times in addition to the surgery performed in October 2001. The latter procedure was paid for by the Veterans Administration. More recently he was hospitalized for colon infection. He expects the bills to be covered by his employee health plan, which is a "70/30" plan. The colon condition is not an ongoing problem. His back condition limits his activity; he cannot sit or stand for long periods of time and cannot lift more than 20 pounds.

Burton said he owes about \$7,000 for medical bills. He offered no documentary evidence to identify when the bills were incurred or whether any portion of them are covered by insurance. Burton said he expected to have additional surgery in the future; he did not say when he thought any surgery might be scheduled, how much the procedure would cost, or what amount would not be covered by insurance.

Burton did not reaffirm any of his debts. He received a Chapter 7 discharge on June 21, 2001.

Rohmiller, age 33, is employed as a teacher at Prague High School in Prague, Nebraska. There is a possibility that the school will close next fall. Rohmiller also works part time at The Funny Bone, a comedy club in Omaha. She does not plan to keep that job after this summer. She is expecting a child. Her net monthly income from teaching is \$1,534.56. Her employer deducts \$153.28 from her paycheck for a retirement benefit and matches that amount. Rohmiller does not know if she is vested in the

employer's contributions. Her employer provides health insurance.

Rohmiller lives in Malmo, Nebraska with her fiancé. They	
student loans	408
credit card	89
car payment	253
insurance	
(car and homeowners)	80
gas for car	50
food	250
toiletries	100
medical bills	50
clothes & misc.	<u>100</u>

share household expenses. He pays the mortgage, utilities, telephone and cell phone expenses. She buys food and toiletries for the household. She makes her own loan payments and buys her own clothes. She listed her expenses as follows:

TOTAL \$1,380

The expenses for her credit card and medical bills are minimum payments. The balance on her MBNA card as of January 17, 2002 was \$6,146.69. Exhibit 7. Rohmiller's Exhibits 8-13 document recent medical bills. She expects to incur additional debt for medical expenses through her pregnancy and the birth of her child. She would prefer to budget \$400 per month to pay off the credit card and medical bills sooner.

Rohmiller has college degrees in business and education. As of January 18, 2002, the balances on her two student loans totaled \$21,982.26. After her child is born, she expects to have an additional expense of about \$700 per month for child care and baby necessities. Rohmiller's vehicle is a 1998 Pontiac Sunfire convertible.

Discussion

Rohmiller seeks a determination that Burton's debt to her is nondischargeable under 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.

Rohmiller does not contend that the debt is in the nature of support. The debt was incurred in connection with the parties' dissolution. Therefore, the debt is nondischargeable unless Burton proves that he does not have the ability to pay the debt or that discharge of the debt would result in a benefit to him that outweighs the detriment to Rohmiller. The burden is on Burton to prove by a preponderance of the evidence that either exception, § 523(a)(15)(A) or (B), applies. Moeder v. Moeder (In re Moeder), 220 B.R. 52, 55-56 (B.A.P. 8th Cir. 1998).

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 need not determine the precise amount of the debt at issue. Rohmiller already has judgment against Burton. The amount of the debt is relevant, however, to the issue of whether Burton has the ability to pay it. For this purpose only, the court will assume the debt is approximately \$2,500.

Burton's income history shows an average of \$2,163 net monthly income for the ten months ending December 31, 2001. Burton said he does not expect his

future income to be as high, because his employer will be reducing commissions and has hired two more employees. Burton does not know how much his future income will change. He offered no communications from his employer to explain the change, nor did he offer current pay

stubs to show what his income was during January and February 2002.

Burton did not show that his health condition prevents him from performing his present job or from having the ability to pay the debt. The paycheck dated November 30, 2001 included the full amount of salary for the pay period. In December he received \$1,219.43 in salary, \$30.57 in "vacation/sick" pay, and \$230.08 in commissions, for a total of \$1,480.08. This amount was sufficient to give him disposable income. It appears, therefore, that soon after his recovery from surgery, his earnings began returning to normal levels. In addition, Burton's budget contains some expenses that are not reasonably necessary. The court would not allow a Chapter 13 debtor to budget for premium cable TV channels. Burton did not adequately explain why his expenses increased by \$525 per month since the date of his bankruptcy petition.

The debt to Rohmiller was ordered to be paid at the rate of \$67 per month. Burton has disposable income sufficient pay the debt over time. The court concludes, therefore, that Burton has not proved an inability to pay the debt.

The exception under § 523(a)(15)(B), sometimes called a "balancing test," requires Burton to show that discharge of the debt would result in a benefit to him that outweighs the detrimental consequences to Rohmiller if the debt were not discharged.

Burton argues that Rohmiller is generally better off. She has a better car, more education, a retirement plan, and another person in her household to help with living expenses. However, Rohmiller also has significant debt. She makes payments on her car and medical bills. There are large balances on her credit card and two student loans. After the birth of her child, Rohmiller expects increased living expenses. There was no evidence as to her fiancé's financial condition. Regarding Rohmiller's retirement plan, there was no evidence as to the

value of her interest in the plan or whether it is a voluntary plan. Burton did not say whether his employer offers a retirement program.

Burton has already received discharge of approximately \$22,000 in debt. Excepting his debt to Rohmiller from discharge would not deprive him of a fresh start. Discharging the debt would relieve him of the obligation to pay a small amount of debt that he has the ability to pay. The court concludes that Burton has not shown that the benefit of the discharge would outweigh the detriment to Rohmiller. The debt should be held nondischargeable.

IT IS ORDERED that Gary Ray Burton's obligation to Carol Anne Rohmiller, arising in the Iowa District Court for Pottawattamie County, Equity No. 7431, to pay a share of her student loans as property settlement, is excepted from his discharge under 11 U.S.C. § 523(a)(15).

SO ORDERED THIS 27th DAY OF MARCH 2002.

William L. Edmonds, Bankruptcy Judge