

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>95-11624</u>
ROBERT N. CANADY	)	
	)	
Debtor	)	
_____	)	
DIANE W. CANADY	)	FILED
	)	at 4 O'clock & 11 min. P.M.
Plaintiff	)	Date: 9-16-96
	)	
vs.	)	Adversary Proceeding
	)	Number <u>95-01117A</u>
ROBERT N. CANADY	)	
	)	
Defendant	)	
	)	

**ORDER**

Diane W. Canady brings her complaint against Robert N. Canady (hereinafter "Debtor") to determine the dischargeability of a debt under 11 U.S.C. §523(a)(15). This action constitutes a core matter within this court's jurisdiction under 28 U.S.C. §157(b)(1) & (2)(I) and 28 U.S.C. §1334, and this Order constitutes my Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure (FRCP) 52, made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure (FRBP) 7052. For the reasons that follow, the debt is discharged.

The Debtor and Ms. Canady were married on December 28, 1988.

During their marriage, the Canadys incurred several debts, including an unsecured loan from the Bank of Millen which consolidated several previous debts totaling approximately \$22,000.00. On November 19, 1994, the Canadys refinanced the loan with the Bank of Millen, dividing the \$22,000.00 obligation into two equal notes. Each party was primarily liable on one of the two notes and a co-signer on the other note, and both notes were guaranteed by Ms. Canady's father.

On October 20, 1994, the Canadys executed a separation agreement which governed the terms of their pending divorce. Under the separation agreement, Ms. Canady retained possession of the marital residence, the parties waived any claim to alimony, and the parties divided the marital debts as follows:

A) The Husband assumes and agrees to pay the joint note owing Norwest Financial, Inc., Augusta, Georgia in the approximate amount of \$1,500.00 with monthly payments of \$66.00;

B) The Husband assumes and agrees to pay the joint note owing Bankers First, Augusta, Georgia, secured by his pickup truck with monthly payments of \$250.00;

C) Wife assumes and agrees to pay the joint note owing Wachovia Bank secured by her automobile with monthly payments of \$406.00;

D) Each party is jointly obligated on two notes in favor of the Bank of Millen, each in the approximate amount of \$11,314.28. As to such, each party will have in their possession, a monthly payment book for one of the notes and mutually agree that each will pay the note for which they have the installment book. In the event of default by either party it is understood and agreed that payment maybe (sic) enforced by the other through contempt proceedings.

The divorce incorporating the separation agreement became final on December 7, 1994. The Debtor filed his bankruptcy petition on

September 25, 1995. In Schedule I of the petition, the Debtor disclosed gross income of \$1300.00 per month from his employment with Delta Termite & Pest Control, Inc. ("Delta"), less taxes of \$318.02, for net income of \$981.98. Prior to filing the petition, the Debtor also worked for Bi-Lo, Inc ("Bi-Lo") . Subsequent to filing, the Debtor simultaneously worked for Bi-lo and Delta, but later quit his job with Delta because he could not continue working two jobs. The Debtor's average net monthly income during the periods of dual employment exceeded the monthly income listed in Schedule I. However, the Debtor's six weekly bankruptcy post petition paychecks from Bi-lo reflect an average weekly net income consistent with the disclosure in Schedule I.

Schedule J listed the following monthly expenses:

Rent:	\$200.00
Utilities:	100.00
Telephone:	25.00
Cable:	21.50
Food:	200.00
Clothing:	25.00
Laundry:	15.00
Transportation:	45.00
Recreation:	45.00
Life Insurance:	12.00
Health Insurance:	112.00
Auto Insurance:	83.00
Car Payments:	<u>100.00</u>
Total:	\$983.50

At trial, the Debtor testified that, although Schedule J includes rent expense of \$200.00, the Debtor lived (and continues to live) rent free in his grandmother's house and has not paid rent since May, 1995. Also, the Debtor testified that his actual health

insurance expense totaled \$32.50 a month (\$7.50 a week), not \$112.00 a month, that his electricity bill increased by \$25.00 a month, and that following his discharge he purchased an automobile with payments of \$388.00 a month.

Ms. Canady's pay stubs and testimony established that her gross monthly income from her primary employment with the Burke County School System totaled \$2905.83, less federal and state taxes of \$741.13, for net income of \$2164.70. Additionally, Ms. Canady nets approximately \$216.67 monthly ( $\$50.00/\text{week} \times 52 \div 12$ ) from her second job as a waitress at the Huddle House, and receives \$300.00 a month renting out part of her house. Her monthly net income totaled \$2681.37. Bankruptcy Code §523(a)(15)<sup>1</sup> excepts from discharge any non-alimony, maintenance or support obligations incurred in connection with a divorce, unless the debtor lacks the

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<sup>1</sup>11 U.S.C. §523(a)(15) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any 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.

ability to pay the debt or the benefit of discharge to the debtor outweighs the detriment to the non-debtor spouse, former spouse or child of the debtor. Generally, exceptions to discharge are to be construed strictly and the burden rests with the creditor to prove each element justifying the exception. Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986) (citations omitted); Household Fin. Corp. v. Richmond (In re Richmond), 29 B.R. 555 (Bankr. M.D. Fla. 1983). The creditor's burden of proof is by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). To determine the dischargeability of a debt under §523(a)(15), courts are divided over the party bearing the burden of proof on the exception to the exception to discharge. Courts unanimously place upon the creditor the burden of establishing that the debtor incurred the complained of debt in connection with a separation agreement or divorce decree. The majority view then shifts to the debtor the burden of proving a lack of the ability to pay the debt or that the benefit to the debtor of discharging the debt outweighs the detriment to the spouse, former spouse or child. See e.g., Humiston v. Huddelston, 194 B.R. 681 (Bankr. N.D. Ga. 1996); Gantz v. Gantz (In re Gantz), 192 B.R. 932 (Bankr. W.D. Ill. 1996); Bodily v. Morris (In re Morris), 193 B.R. 949 (Bankr. S.D. Cal. 1996). Contra, Dressler v. Dressler (in re Dressler), 194 B.R. 290 (Bankr. D. R.I. 1996); In re Butler, 186 B.R. 371 (Bankr. D. Vt. 1995); Woodworth v. Woodworth (In re Woodworth), 184 B.R. 174, 177 (Bankr. N.D. Ohio 1995) (The

burden of proof remains at all times on the creditor spouse.)

The majority view correctly apportions the parties' respective burdens of proof. Initially, the creditor must establish by a preponderance of the evidence that the obligation was incurred in the course of a divorce or separation or in connection with a separation agreement or divorce decree. Once this is established, the debt is nondischargeable unless the debtor proves by a preponderance of the evidence that the debtor lacks the ability to repay the debt or that the debtor's benefit in discharging the debt outweighs the corresponding detriment to the spouse, former spouse or child.

I. THE DEBTOR'S OBLIGATION TO PAY OFF THE LOAN TO THE BANK OF MILLEN WAS INCURRED PURSUANT TO THE DIVORCE DECREE.

Ms. Canady has established that the Debtor's loan obligation arose out of the divorce decree. The Debtor argues that the obligation was actually created with the original note, long before the divorce was contemplated by the parties. Furthermore, he asserts that the divorce decree merely split the original note into two obligations, and that this division creates no new obligation, but rather reduces each spouses primary obligation by one-half, without a court decree in the divorce imposing a "hold harmless" provision for enforcing each spouse's primary obligation.

A pre-divorce marital debt may become a nondischargeable divorce obligations under §523(a)(15) via a "hold harmless" clause in the divorce order which requires the debtor to indemnify the spouse in

the event the debtor defaults on the debt. See e.g., Belcher v. Owens (In re Owens), 191 B.R. 669 (Bankr. E.D. Ky. 1996). Although a "hold harmless" clause is sufficient to create a nondischargeable obligation under §523(a)(15), this language is not the exclusive means by which a pre-divorce debt becomes an obligation arising out of a divorce or separation agreement. Congress clearly intended this provision to encompass divorce agreements which divide marital debt between the parties in lieu of payments for alimony, support and maintenance.

In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. ... This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts.

H. Rep. No. 103-835, 103rd Cong., 2nd Sess. 54.

In the instant case, the separation agreement, incorporated into the final divorce, allowed the parties to petition the court for a contempt order to enforce the other's obligation to make the loan payments to the Bank of Millen. Because the final decree requires the Debtor to pay this loan under penalty of contempt, the debt due the Bank of Millen falls within the exception to dischargeability of §523(a)(15). See e.g., Johnston v. Henson (In re Henson), 197 B.R. 299 (Bankr. E.D. Ark. 1996) (debtor's obligation to pay joint debts nondischarge despite lack of "hold harmless" language in divorce decree); accord, Schmitt v. Eubanks (In re Schmitt), 197 B.R. 312 (Bankr. W.D. Ark. 1996).

II. THE DEBTOR LACKS THE ABILITY TO PAY THE BANK OF MILLEN, AND HIS BENEFIT OF THE DISCHARGE OUTWEIGHS THE DETRIMENT TO MS. CANADY.

Having established that the Debtor's obligation to pay the Bank of Millen arose in connection with the separation agreement and final decree, the Debtor has the burden of proving that either he lacks the ability to pay the debt or the benefit to him of discharging the debt outweighs the detriment of the discharge to Ms. Canady. Section 523(a)(15) provides no guidance for determining whether to analyze a debtor's ability to pay the obligation as of the petition date, the date the complaint is filed, the date of trial, or viewing the debtor's future earning potential and debt load in the indefinite future. Not surprisingly, courts are split on this issue. See, Carroll v. Carroll (In re Carroll), 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995) (court should look at relative positions of the parties on the petition date); Anthony v. Anthony (In re Anthony), 190 B.R. 433, 438 (Bankr. N.D. Ala. 1995) (relevant date is date complaint is filed); Belcher, 191 B.R. at 674 (relevant date is time of trial); Collins v. Florez (In re Florez), 191 B.R. 112, 115 (Bankr. N.D. Ill. 1995) (statute contemplates the debtors ability to repay the debt over a period of time).<sup>2</sup>

The date on which the bankruptcy petition is filed and the order for relief is entered is the watershed date of a bankruptcy proceeding. As of this date, creditors' rights

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<sup>2</sup>Courts interpreting §523(a)(15) have routinely decried the lack of clarity of the statute and the difficulty of implementing it with any degree of satisfaction. Humiston 194 B.R. at 685, n.8 (citing cases describing §523(a)(15) as "a formidable challenge," "a piece of legislative sausage", and "clearly in need of legislative remediation and clarification").

are fixed (as much as possible), the bankruptcy estate is created, and the value of the debtor's exemptions is determined.

Johnson v. General Motors Acceptance Corp. (In re Johnson), 165 B.R. 524, 528 (S.D. Ga. 1994). Likewise, the analysis under subsections (A) and (B) must turn upon the Debtor's income and expenses on the date the petition is filed, as reflected by Schedules I & J. Schedules I & J reflect the debtor's financial condition on the date of the petition, but also contemplates the effect of the debtor's impending discharge. Schedule J includes only those expenses that the Debtor is paying as of the date of the petition and which he anticipates carrying over post discharge. Discharged debts are not included.

In this case, Schedule I reflects net income of \$981.98. Ms. Canady asserts that I should impute to the Debtor a higher net income, noting that the Debtor's average net income for the months preceding and immediately following the petition date are higher than the \$981.98. However, the Debtor's higher monthly income in both the months preceding and immediately following the petition date reflect the Debtor maintaining two jobs. The Debtor testified that he is no longer working two jobs because he became "burnt out." In analyzing the Debtor's disposable income, I will not require the Debtor to work a second job to maintain a level of disposable income sufficient to repay his (a) (15) obligation. "Even if the debtor has worked more than an average amount in the past, the court should not consider overtime pay or income from a second job to be 'disposable

income' which the debtor must continue to earn and commit to the plan." 5 Collier on Bankruptcy, §1325.08[4][b], p. 1325-71 (15th Ed. 1995). See also., Commercial Credit v. Killough (In re Killough), 700 F.2d 61, 65 (5th Cir. 1990) (The "disposable income" test of 11 U.S.C. §1325(b) does not require a debtor to sacrifice her health and well-being by working overtime to create a level of disposable income which could, in turn, be paid to unsecured creditors).

Ms. Canady also asserts that Schedule J overstated the Debtor's expenses by \$254.50, leaving him disposable income of \$252.98 (\$981.98 - \$729.00). Schedule J overstated the Debtor's monthly insurance expense by \$79.50. However, although the Debtor is not currently paying rent, he is obligated to pay \$200.00 a month, but is unable to do so because he lacks sufficient income to meet this obligation. Furthermore, his utility expense has increased by \$25.00 a month, bringing his monthly expenses to \$929.00. With net income of only \$981.98, the Debtor lacks the ability to repay the \$175.00 monthly obligation to the Bank of Millen.<sup>3</sup>

The benefit to the Debtor of discharging the debt outweighs the detriment of the discharge on Ms. Canady. Ms. Canady's net income totaled \$2,681.37, over two and a half times that of the Debtor's

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<sup>3</sup>The Debtor argues that I should consider his post-petition obligation to pay \$388.00 for an automobile. The Debtor purchased this vehicle despite having reaffirmed the debt on another vehicle which remains in his possession. The \$99.00 payment on this vehicle is included in Schedule J. Even without considering this post-petition debt, the debtor lacks the ability to pay the \$175.00 monthly note.

net income of \$981.98. She has steady income from her career as a teacher and resides in the parties' former marital residence, while the Debtor has uncertain income and must rely upon the charity of his grandmother for temporary housing. The Debtor's financial rehabilitation and fresh start is greatly aided by discharging this debt, and this benefit outweighs the detriment to Ms. Canady.

It is therefore ORDERED that the Debtor's obligation to the Bank of Millen and Ms. Canady's ability to require, through a state court contempt action, the Debtor to pay \$175.00 a month to Bank of Millen is DISCHARGED.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 16th day of September, 1996.