

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

KENNETH SAMUEL FARMER, SR.,

Case No. 97-32425-L

Debtor.

Chapter 7

CLAIRE BETTY KAISER FARMER,

Plaintiff,

v. Adversary Proceeding No. 97-1222

KENNETH SAMUEL FARMER, SR.,

Defendant.

MEMORANDUM

Before the Court is a complaint to determine the dischargeability¹ of certain marital debts pursuant to 11 U.S.C. §§ 523(a)(5) and 523(a)(15). This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). This memorandum contains the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

¹ Although the Complaint is titled "Complaint to Determine Dischargeability of Financial Obligations or in the Alternative for Denial of Discharge," the Complaint contains no prayer that the Debtor's discharge be denied pursuant to 11 U.S.C. § 727(c)(1). In her First Amended Complaint, the Plaintiff dropped the language referring to the alternative relief of denial of discharge. At the trial, the Plaintiff did not present any argument relating to the denial of the discharge. Thus, this opinion deals only with the question of whether the particular debts in question are nondischargeable pursuant to one or more subsections of 11 U.S.C. § 523.

I. FINDINGS OF FACT

On July 18, 1995, the Plaintiff, Claire Betty Kaiser Farmer, filed a complaint for divorce against the Defendant, Kenneth Samuel Farmer, Sr., in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. The parties were unable to reach any settlement and did not execute a marital dissolution agreement. The Honorable Janice M. Holder, Circuit Judge, conducted a bench trial on October 29, October 30, and November 4, 1996. At the conclusion of the trial, Judge Holder issued oral findings of fact and conclusions of law, *see* Trial Exhibit J (hereinafter “Tr. Ex.”), which were incorporated in a Final Decree of Divorce on November 20, 1996, *see* Tr. Ex. A. In the decree, Judge Holder awarded custody of the parties’ children to the Plaintiff and ordered the Defendant to pay \$1,500 per month in child support. She also ordered the Defendant to pay any credit card debt that remained unpaid after the sale of the parties’ residence. Judge Holder awarded the Plaintiff alimony in solido in the amount of \$50,000, as well as \$5,000 for attorney fees and expenses incurred in the divorce proceedings. *See* Tr. Ex. A.

On January 8, 1997, the Plaintiff filed a Petition for Contempt as a result of the Defendant’s failure to pay child support as ordered in the divorce decree. On March 13, 1997, the Honorable

James F. Russell² found that the Defendant had cured his default but awarded the Plaintiff's attorney \$600 for his fee incurred to enforce the child support order. *See* Tr. Ex. B.

The Plaintiff currently is employed by Memphis University School ("MUS") as a lower school secretary. In addition to her salary, she earns approximately \$50 per month performing various services at MUS. Each of the parties' three children attends a private school. Because of Mrs. Farmer's employment, two of the children receive the benefit of reduced tuition. The Plaintiff testified that her monthly expenses consistently exceed her monthly income. During the past year, the Plaintiff has supplemented her income through distributions from a trust created by her late father and by gifts from her mother.

The Defendant is employed as a commercial real estate agent by Pomac, Inc., a business owned by the Defendant's brother. The Defendant's expenses also exceed his income every month.

II. ISSUES PRESENTED

1. Whether the \$600 attorney's fee awarded to Plaintiff's counsel, rather than directly to the Plaintiff, is not dischargeable pursuant to 11 U.S.C. § 523(a)(5)?

² Judge Russell succeeded Judge Holder after Judge Holder's appointment to the Tennessee Supreme Court.

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2. Whether the \$50,000 alimony in solido award is not dischargeable pursuant to 11 U.S.C. § 523(a)(5) or pursuant to 11 U.S.C. § 523(a)(15)?
3. Whether the credit card obligations are not dischargeable pursuant to 11 U.S.C. § 523(a)(15)?

III. CONCLUSIONS OF LAW

A. Classification of Claims

The court must initially determine whether the claims for alimony in solido and attorney fees are in the nature of alimony, maintenance or support pursuant to 11 U.S.C. § 523(a)(5).³ That section provides in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —

* * *

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

* * *

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5).

³ Neither party contends that the credit card obligation is in the nature of support. The Court will consider this obligation in Part III.B.2. of this opinion.

Exceptions to discharge are to be narrowly construed. *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 659 (1991). The party objecting to discharge carries the burden of proving by a preponderance of the evidence that a debt is nondischargeable. *Id.* Nevertheless, “the terms ‘alimony’ and ‘support’ are given a broad construction to promote the Congressional policy that favors enforcement of obligations for spousal and child support.” 4 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 523.11[2], p. 523.78 (15th ed. rev. 1997). “Congressional policy concerning § 523(a)(5) ‘has always been to ensure that genuine support obligations would not be dischargeable.’” *Jones v. Jones (In re Jones)*, 9 F.3d 878, 880 (10th Cir. 1993) (quoting *Shine v. Shine*, 802 F.2d 583, 588 (1st Cir. 1986)). “Section 523(a)(5) represents Congress’ resolution of the conflict between the discharge of obligations allowed by the bankruptcy laws and the need to ensure necessary financial support for the divorced spouse and children of the debtor.” *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1106 (6th Cir. 1983). The debtor’s duty to support his or her family takes precedence over the debtor’s right to receive a discharge.

In *Calhoun* the Sixth Circuit set forth a framework for determining when an agreement to assume joint debts creates a nondischargeable obligation to provide support. The court set forth the following factors to be considered in making that determination:

- (1) whether there was an intent to create a support obligation;
- (2) whether the obligation has the effect of providing necessary support;
- (3) if the first two steps are satisfied, whether the amount of the support represented by the obligation is not excessive; and

(4) if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purpose of federal bankruptcy law.

Id. at 1109-10.; *see also Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993).

Following its decision in *Calhoun*, the Sixth Circuit returned to the issue of the dischargeability of marital debts in the case of *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993). The court acknowledged the confusion that had arisen concerning the application of its “present needs” test to support obligations other than assumptions of debt. *Id.* at 520. The court stated that “*Calhoun* was not intended to intrude into the states’ traditional authority over domestic relations and [sic] the risk of injustice to the non-debtor spouse or children.” *Id.* at 521. In *Fitzgerald* the question before the court was “whether something denominated as alimony [was] really alimony and not, for example, a property settlement in disguise.” *Id.* Indeed, it is clear that the labels attached to particular obligations are not controlling. *See Chism v. Chism (In re Chism)*, 169 B.R. 163, 170 (Bankr. W.D. Tenn. 1994); *Dial v. Presler (In re Presler)*, 34 B.R. 895, 897 n.5 (Bankr. M.D. Tenn. 1983). Section 523(a)(5)(B) contemplates by its terms that liabilities designated alimony, maintenance or support may be discharged if they are not actually in the nature of alimony, maintenance or support. *See* 11 U.S.C. § 523(a)(5)(B). What constitutes alimony, maintenance, or support is determined pursuant to federal bankruptcy law. *See Calhoun*, 715 F.2d at 1107; *Fitzgerald*, 9 F.3d at 521; *see also* S. Rep. No. 989, 95th Cong., 2d. Sess. 79, reprinted in 1978

U.S.C.C.A.N. 5787, 5865; H.R. Rep. No. 595, 95th Cong. , 1st Sess. 364, reprinted in 1978
U.S.C.C.A.N. 5963, 6320.

1. Attorney Fees

The Court must determine whether the award of an attorney fee incurred in connection with enforcing a child support order, but ordered to be paid directly to the Plaintiff's attorney, is in the nature of support and nondischargeable pursuant to Section 523(a)(5). The Defendant contends that because the state court ordered the attorney fee to be paid directly to the Plaintiff's attorney, the obligation is nondischargeable. As support for this contention, the Defendant relies on the requirement of Section 523(a)(5) that support be payable to a spouse, former spouse, or child of the debtor.

Contrary to the Plaintiff's position, the Sixth Circuit held in *Calhoun* that "payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable." 715 F.2d at 1107. It has been said that "[t]he majority rule is that an obligation to pay attorney fees is 'so tied in with the obligation of support as to be in the nature of support or alimony and excepted from discharge.'" *Blanchard v. Booch (In re Booch)*, 95 B.R. 852, 855 (Bankr. N.D. Ga. 1988) (quoting *Shaw v. Smith*, 67 B.R. 911, 912 (Bankr. M.D. Fla. 1986)). See also *Truhlar v. Doe (In re Doe)*, 93 B.R. 608, 613 (Bankr. W.D. Tenn. 1988) (Brown, J.) (concluding that attorney fees awarded to a former spouse in an action to modify the debtor's visitation and support were intended to create a support obligation and had the effect of providing necessary support to the minor child).

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In this case, it appears that the filing of the complaint for contempt prompted the Defendant to pay the child support arrearages. The action taken by Plaintiff's counsel in that proceeding benefitted the Defendant's children. Therefore, the Court concludes that the attorney fee in question was intended to create a support obligation that had the effect of providing necessary support to the Defendant's children. As a result, the Court holds that the \$600 fee awarded to Plaintiff's counsel is nondischargeable pursuant to 11 U.S.C. § 523(a)(5).

2. Alimony in Solido

The Court next considers whether the award of \$50,000 as alimony in solido is actually in the nature of alimony, maintenance or support. Unlike *Fitzgerald*, in which “no one dispute[d] that [the] payments [were] anything except alimony payments,” *Fitzgerald*, 9 F.3d at 521, in this case the parties do dispute the nature of an obligation designated alimony in solido. It is clear from the transcript of the proceedings before Judge Holder that the Debtor did not have the ability to pay the award at the time it was entered. Judge Holder’s comments were as follows:

I don’t know how to deal with alimony in this case because I feel very strongly that Ms. Farmer is entitled to it. The problem is I don’t have any way to award her alimony except to set a sum and allow it to become delinquent. I don’t know what else to do with it. I am afraid to say that I reserve it because then I have got to show the same factors again. That concerns me because I don’t want to put Ms. Farmer in a position of having to come in and prove something again when it has already been proven.

And if I go down the factors, I have everything except the ability to pay. Ms. Farmer has been a homemaker for the 17 years or so that the parties have been married. She basically did not have a career for purposes of staying home with the children.

She is not – I don’t know that we have gone into rehabilitation in the true sense. I don’t know if she can be rehabilitated to make enough to bring her up to a life style that is even close to where the parties were.

I can go down all the factors, and it seems to me or the factors that apply Ms. Farmer is entitled to alimony. The problem is there is no ability to pay the alimony. She has a separate estate that she may come into. She may not come into. She also has, I believe, four other siblings. So they get a share of that, too.

Her mother is the person who has the trust at this point. Her mother could end up using a lot of it. So while there is an expectation, that may or may not prove

to be a good expectation. And I don't know that you can look at it and say she will receive x amount at any given time. Or her mother may live for a long time, and I hope she does. At which time there won't be or it is possible there wouldn't be much to distribute anyway.

So I can't look at that as separate funds that somehow I have got to consider being available. It may not be available for a long time, if at all. So my inclination is to set a figure of alimony, I suppose, in solido.

If Mr. Farmer was making a substantial amount of money at this time or if he were making what the parties were living on at the time that they were living on it, I would be awarding Ms. Farmer money for quite a period of time because I am not certain that she is capable of being rehabilitated.

I am going to award Ms. Farmer alimony in solido in the amount of \$50,000. And I'm doing that knowing if I order periodic payment that it can't be paid right now. That when I look at the equities of the parties what has been – the business decisions that have been made that are erroneous that Ms. Farmer is going to have to pay for, then I have got to come up with a figure to compensate her for what she will lose in the future.

This is probably – I feel safer doing this than I do holding alimony as a reserved issue until next year when then I have got to deal with next year rather than dealing with right now.

Tr. Ex. J, pp. 18-21.

The question of treatment of an award of alimony in solido was the subject of an opinion by then Bankruptcy Judge (now United States District Judge) Bernice Bouie Donald in *Chism v. Chism* (*In re Chism*), 169 B.R. 163 (Bankr. W.D. Tenn. 1994). In that case, the Chancery Court of Shelby County, Tennessee awarded a non-debtor spouse alimony in solido in the amount of \$25,000 for the debtor's dissipation of the parties' major marital asset, their residence. *Id.* at 166. Judge Donald found that the state court's language:

evidence[d] an intent to equitably divide marital assets Examination of the court's findings and conclusions does not evidence that the court made any finding of a "need for support." There is no showing that the court applied the "traditional factors" that courts look to in determining a need for support, such as, a demonstrated need for support, relative educational levels and work skills of the parties, disparity of incomes, and prospective employment opportunities. Instead the court focused on the adulterous acts of Mr. Chism during the marriage, his criminal conduct, and his actions resulting in dissipation of marital assets.

Id. at 169-70. Based upon the facts before her, Judge Donald found that it was appropriate to "pierce the label" assigned to the award by the state court to ascertain whether there was an intent to create a support award. *Id.* at 170. Judge Donald concluded that the award was more in the nature of a division of property and therefore dischargeable. *Id.*

Another case in which a bankruptcy court considered the dischargeability of a debt denominated "alimony in solido" is *Dial v. Presler (In re Presler)*, 34 B.R. 895 (Bankr. M.D. Tenn. 1983). In that case, Bankruptcy Judge Keith M. Lundin considered the following eleven factors for evaluating the dischargeability of the obligation:

1. Whether the obligations of payment terminate upon the death of either spouse or upon the marriage of the spouse benefitted by the payments;
2. Whether the obligation terminates when the dependent children reach majority or are otherwise emancipated;
3. Whether the payments are made directly to the spouse;
4. The relative earnings of the parties;

5. Evidence that the spouse relinquished rights and support in return for the payment of the obligations;
6. The length of the parties' marriage and the number of dependent children;
7. The document itself and any inferences which could be drawn and the placement of specific provisions in the document;
8. Whether the debt was incurred for the immediate living expenses of spouse;
9. Whether the payments were intended for the economic safety of the dependent;
10. Whether the obligation is enforceable by contempt;
11. Whether payments are payable in installments over a substantial period of time.

Presler, 34 B.R. at 897-98 (citing *Vickers v. Vickers*, 24 B.R. 112, 114-15 (Bankr. M.D. Tenn. 1982); *Benz v. Nelson*, 16 B.R. 658, 660-61 (Bankr. M.D. Tenn. 1981)). Judge Lundin concluded, based upon the testimony of the parties, that the award would be discharged because the payments did not have "the effect of providing support necessary to insure the daily needs of the former spouse and child." *Id.* at 898. In that case, the former spouse had substantial independent income of her own at the time of the divorce and thus had no need for support. *Id.*

In the present case, Judge Holder considered the factors set forth in the applicable Tennessee statute for determining whether to grant an order for payment of rehabilitative, temporary support and maintenance and concluded that Mrs. Farmer was entitled to an award of alimony⁴. Because the

⁴ The factors provided at Tennessee Code Annotated § 36-5-101(d)(1) are:

(A) The relative earning capacity, obligations, needs, and financial

resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

(B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

(C) The duration of the marriage;

(D) The age and mental condition of each party;

(E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;

(G) The separate assets of each party, both real and personal, tangible and intangible;

(H) The provisions made with regard to the marital property as defined in § 36-4-121;

(I) The standard of living of the parties established during the marriage;

(J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and

Debtor had no ability to make periodic payments, however, Judge Holder awarded alimony in solido. Judge Holder knew that the award could not be paid in the near term, if at all, but apparently hoped that the Defendant's fortunes would improve in the future enabling him to pay. The Defendant has not at any time since the entry of the Final Decree had the ability to pay the alimony in solido award.

tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Historically, the award of alimony in solido (or lump sum alimony) was preferred to an award of alimony in futuro (or periodic alimony) in the case of the granting of an absolute divorce. *See Winslow v. Winslow*, 133 Tenn. 663, 182 S.W. 241, 242 (1916). Where the husband had property, it was thought best to award the wife a specific portion of the husband's estate for her maintenance thereby avoiding the possibility of a change in the husband's business fortunes and the inconvenience of collection of the installments. *Id.* at 243. An exception was made when the defendant had insufficient property, but a substantial future earning capacity. In such cases, an award of periodic alimony was made in an amount thought to approximate the income that could have been derived from property awarded in solido. *See Taylor v. Taylor*, 144 Tenn. 311, 232 S.W. 445, 446 (1921), *overruled in part on other grounds by Morrissey v. Morrissey*, 214 Tenn. 112, 377 S.W.2d 944 (1964). Later, the greater dependence upon wages made an award of alimony in solido impracticable in many cases. *See Rush v. Rush*, 33 Tenn. App. 496, 232 S.W.2d 333, 337 (Tenn. Ct. App. 1949). In 1949, the Tennessee General Assembly made specific statutory provision for the award of alimony in futuro. *See Aleshire v. Aleshire*, 642 S.W.2d 729, 733 (Tenn. Ct. App. 1981), *aff'd* (Tenn. 1982). *See* TENN. CODE ANN. § 36-5-101. In 1953, the General Assembly made provision for the equitable division of property. *See* TENN. CODE ANN. § 36-4-121. Under the present statutory scheme, the state court must perform a two-step analysis. First, the court must determine the equitable division of the parties' marital property pursuant to the factors set forth at Tennessee Code Annotated § 36-4-121(c). Then the court must determine the need for spousal and/or child support pursuant to Tennessee Code Annotated § 36-5-101. Once the court has

determined that a spouse is in need of support, the court may award periodic alimony from future earnings or alimony in solido if there is an estate from which the award can be made. *See* TENN. CODE ANN. § 36-5-102(a).⁵

Alimony in solido may be ordered to be paid in installments. The chief distinguishing characteristic between alimony in solido and alimony in futuro is that once a decree for alimony in solido becomes final, it cannot be modified. *Aleshire*, 642 S.W.2d at 732. Alimony in solido becomes a “vested right from the date of the rendition of the judgment.” *Spalding v. Spalding*, 597 S.W.2d 739, 741 (Tenn. Ct. App. 1980). Generally, alimony in solido is only awarded when the defendant has some estate from which the award can be paid. *See Houghland v. Houghland*, 844

⁵ Tenn. Code Ann. § 36-5-102(a) provides:

(a) In cases where the court orders alimony or child support in accordance with § 36-5-101, the court may decree to the spouse who is entitled to such alimony or child support such part of the other spouse’s real and personal estate as it may think proper. In doing so, the court may have reference and look to the property which either spouse received by the other at the time of the marriage, or afterwards, as well as the separate property secured to either by marriage contract or otherwise.

S.W.2d 619, 622 (Tenn. Ct. App. 1992) (finding that the husband's trust from which he receives \$18,000 net income annually constitutes an "estate" from which to award alimony in solido); *Hall v. Hall*, 772 S.W.2d 432, 438 (Tenn. Ct. App. 1989) (concluding that the husband's profit sharing interest in his employer's business constituted an "estate" from which alimony in solido could properly be awarded); *Beeler v. Beeler*, 715 S.W.2d 625, 626 (Tenn. Ct. App. 1986) (observing that "alimony in solido is not awarded from the expectation of the future earnings of a professional practice since the amount of such future earnings is entirely speculative"); *Aleshire*, 642 S.W.2d at 733; *Rush*, 232 S.W.2d at 336-37; *Williams*, 236 S.W. at 940; *but see Holt v. Holt*, 751 S.W.2d 426, 428 (Tenn. Ct. App. 1988) (concluding that the parties can agree to pay alimony in solido from future earnings, even if the court cannot order such as a matter of law). Only in extreme circumstances such as an intentional dissipation of marital assets will the court award alimony in solido to be paid from future earnings. *See Aleshire*, 642 S.W. 2d at 733; *see also Day v. Day*, 931 S.W.2d 936, 939 (Tenn. Ct. App. 1996) (finding extreme circumstances sufficient to award alimony in solido from future earnings where the wife incurred debt educating herself in order to provide for her own support).

This Court finds itself in the difficult position of determining the nature of the state court award of alimony in solido where the Debtor had no estate and no expectation of future earnings from which the award could be paid at the time of the divorce. The Court has carefully reviewed the transcript of Judge Holder's ruling. Little additional evidence was produced by the parties concerning their circumstances at the time of their divorce. It is apparent from Judge Holder's

comments that the parties had enjoyed a relatively affluent lifestyle during their marriage, but that they had achieved this lifestyle by consistently living beyond their means. Mr. Farmer apparently experienced a serious financial reversal. Judge Holder indicates that the value of Mr. Farmer's business for purposes of distribution of marital property was a negative \$100,000. *See* Tr. Ex. J., p.7. The other property awarded to Mr. Farmer was described as "St. Thomas Square Apartments," having a negative value of \$61,595. *Id.* Judge Holder does not indicate that this reversal was the result of anything other than poor business judgment. If there were other circumstances involved, such as those described in the *Aleshire* decision, the Plaintiff failed to prove them.

The record before this Court reveals no basis at the time of the parties' divorce for the award of alimony in solido pursuant to established Tennessee jurisprudence. The Court finds that Judge Holder could not have intended the award of alimony in solido for support because she knew it could not be paid and thus would not have the effect of providing actual, necessary support. The Court concludes that the award of alimony in solido is not actually in the nature of support and thus is not excepted from discharge pursuant to Section 523(a)(5).

B. Section 523(a)(15) Analysis

The Court next turns to consideration of whether the award of alimony in solido may nevertheless be excepted from discharge pursuant to Section 523(a)(15). The Court also considers whether Mr. Farmer's obligation to pay the parties' credit card obligations may be excepted from discharge pursuant to Section 523(a)(15).

Bankruptcy Code Section (a)(15) provides:

(a) A discharge under section 727 . . . 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.

11 U.S.C. § 523(a)(15).

Section 523(a)(15) was added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994. Pub. L. No. 103-394, 108 Stat. 4106 (1994). It covers all marital debts determined or conceded to be not in the nature of alimony, maintenance or support. It is said that the addition of Section 523(a)(15) to the Bankruptcy Code created a presumption that all marital debts are not dischargeable in bankruptcy. *See, e.g., Crosssett v. Windom (In re Windom)*, 207 B.R. 1017 (Bankr. W.D. Tenn. 1997); *Wolfe v. McCartin (In re McCartin)*, 204 B.R. 647 (Bankr. D. Mass. 1996); *Cleveland v. Cleveland (In re Cleveland)*, 198 B.R. 394 (Bankr. N.D. Ga. 1996).

Section 523(a)(15) supplies a debtor with two affirmative defenses to the nondischargeability of nonsupport marital debt: “inability to pay” and “greater benefit.” The debtor-spouse has the burden of proof with respect to these defenses. *See Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 56 (8th Cir. BAP 1998).⁶ The defenses are offered in the disjunctive. Thus, if a debtor does not have

⁶ The majority approach places the burden of proof regarding the affirmative defenses on the debtor-spouse. The *Moeder* court cited the following cases as support for this approach: *Jodoin v. Samayoa (In re Jodoin)*, 209 B.R. 132, 139 (9th Cir. BAP 1997); *Johnson v. Rappleye (In re Rappleye)*, 210 B.R. 336, 340 (Bankr. W.D. Mo. 1997); *Williams v. Williams (In re Williams)*, 210 B.R. 344, 346 (Bankr. D. Neb. 1997); *Scigo v. Scigo (In re Scigo)*, 208 B.R. 470, 473 (Bankr. D. Neb. 1997); *Wellner v. Clark (In re Clark)*, 207 B.R. 651, 655-56 (Bankr. E. D. Mo. 1997); *Wynn v. Wynn (In re Wynn)*, 205 B.R. 97, 101 (Bankr. N.D. Ohio 1997); *Schmitt v. Eubanks (In re Schmitt)*, 197 B.R. 312, 316 (Bankr. W.D. Ark. 1996); *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302-03 (Bankr. W.D. Ark. 1996); *Bodily v. Morris (In re Morris)*, 193 B.R. 949, 952 (Bankr. S.D. Cal. 1996). *See also Kirchner v. Kirchner (In re Kirchner)*, 206 B.R. 965, 970 (Bankr. W.D. Mo. 1997); *Florio v. Florio (In re Florio)*, 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995); *Silvers v. Silvers (In re Silvers)*, 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995) (holding that the debtor bears the burden of going forward with respect to section 523(a)(15)(A) and (B), but not the burden of proof). *But see Marquis v. Marquis (In re Marquis)*, 203 B.R. 844, 847 (Bankr. D. Me. 1997); *Greenwalt v. Greenwalt (In re Greenwalt)*, 200 B.R. 909 (Bankr. W.D. Wash. 1996); *Willey v. Willey (In re Willey)*, 198 B.R. 1007 (Bankr. S.D. Fla. 1996); *Dressler v. Dressler (In re Dressler)*, 194 B.R. 290, 302-03 (Bankr. D.R.I. 1996); *Kessler v. Butler (In re Butler)*, 186 B.R. 371, 373-74 (Bankr. D. Vt. 1995) (holding that the objecting creditor has the burden of proving that the exceptions to nondischargeability contained in § 523(a)(15)(A) and (B) do not apply).

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the ability to pay a nonsupport marital debt, the inquiry ends, and the debt is dischargeable.⁷ If a debtor does have the ability to pay, the debt may still be discharged if the benefit to the debtor of discharge outweighs the detriment of nonpayment to the plaintiff.

⁷ See *Soforenko v. Soforenko (In re Soforenko)*, 203 B.R. 853 (Bankr. D. Mass. 1997); *Willey v. Willey (In re Willey)*, 198 B.R. 1007 (Bankr. S.D. Fla. 1996).

In this case, the Defendant asserts that he does not have the ability to pay the alimony in solido award or the parties' credit card obligations. To determine whether the Defendant has the ability to pay, this Court will apply the "disposable income" test.⁸ To determine a debtor's disposable income, the Court looks to the evidence offered at trial, including the debtor's schedule of current income and expenses filed with his petition. As part of this review, the Court will determine if the debtor's expenses are reasonable. While the Court will not impose its own values on the debtor, it will exclude any luxury items and obvious indulgences.

The Defendant testified that his income and expenses have not changed since the filing of his bankruptcy petition. In "Schedule I — Current Income of Individual Debtor," the Defendant lists his monthly gross income at approximately \$3,008. After deducting taxes and insurance payments, the Defendant has a net income of approximately \$2,300 per month. In "Schedule J — Current Expenditures of Individual Debtor," the Defendant lists his monthly expenses at \$2,690. The Court

⁸ See *Sterna v. Paneras (In re Paneras)*, 195 B.R. 395, 404 (Bankr. N.D. Ill. 1996); *McGinnis v. McGinnis (In re McGinnis)*, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); *Humiston v. Huddleston (In re Huddleston)*, 194 B.R. 681, 687 (Bankr. N.D. Ga. 1996); *Dressler v. Dressler (In re Dressler)*, 194 B.R. 290, 304 (Bankr. D.R.I. 1996); *In re Smither*, 194 B.R. 102, 108 (Bankr. W.D. Ky. 1996); *Straub v. Straub (In re Straub)*, 192 B.R. 522, 528 (Bankr. D.N.D. 1996); *Slover v. Slover (In re Slover)*, 191 B.R. 886, 892 (Bankr. E.D. Okla. 1996); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 237 (Bankr. D. Md. 1996); *Phillips v. Phillips (In re Phillips)*, 187 B.R. 363, 368-69 (Bankr. M.D. Fla. 1995); *Carroll v. Carroll (In re Carroll)*, 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995); *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386 (Bankr. W.D. Tenn. 1996).

has reviewed the Defendant's listed expenses and finds that they are reasonable. Based on these schedules and the Defendant's testimony at the trial, the Court finds that the Defendant's expenses exceed his income by approximately \$390 per month.

The Plaintiff contends that the Defendant's financial condition must have improved since he filed his bankruptcy petition because in December of 1997 he entered into a lease for an apartment and is able to pay the additional expense of \$550 per month in rent. The Court notes that in Schedule J of the Defendant's petition, he lists a rent or home mortgage payment of \$650 per month. The testimony before the Court was that the Defendant was not paying rent when he filed his petition. There is no evidence before the Court regarding this \$650 expense from either party. Therefore this Court has no basis to conclude, and does not conclude, that this is not an expense of the Defendant's. However, even if the Court deducts \$650 from the Defendant's expenses and adds \$550 for rent the Defendant testified he now pays each month, the Defendant still has a shortfall of approximately \$290 per month.

The Plaintiff did not rebut the Defendant's proof regarding his ability to pay beyond the simple assertion that the Defendant's financial situation must have improved for him to be able to afford the additional rent payment. There is no proof before the Court that the Defendant is intentionally underemployed. The Court therefore concludes that the Defendant has met his burden of proving his inability to pay under Section 523(a)(15)(A).

1. Alimony in Solido

Based on the Court's conclusion that the Defendant lacks the ability to pay the nonsupport debts owed to the Plaintiff, the Court holds that the \$50,000 award of alimony in solido is dischargeable.

2. Credit Card Obligation

The Defendant contends that the credit card obligation is not subject to Section 523(a)(15) analysis because there is no indemnification or hold harmless language in the parties' Final Decree of Divorce. Additionally, the Defendant contends that no new debt was incurred in the course of the divorce.

While some bankruptcy courts have held that Section 523(a)(15)'s "incurred" requirement can only be satisfied if the divorce decree or separation agreement contains "hold harmless" language, *see, e.g., Stegall v. Stegall (In re Stegall)*, 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995); *McCracken v. LaRue (In re LaRue)*, 204 B.R. 531, 536 (Bankr. E.D. Tenn. 1997), most courts broadly interpret that section as requiring only that the debtor undertake to pay the obligation in the course of a divorce or separation. *See, e.g., Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 203 (6th Cir. BAP 1998) (citing *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302-03 (Bankr. E.D. Ark. 1996); *Schmitt v. Eubanks (In re Schmitt)*, 197 B.R. 312, 315 (Bankr. W.D. Ark. 1996)); *King v. Speaks (In re Speaks)*, 193 B.R. 436, 441 (Bankr. E.D. Va. 1995). This Court adopts the majority approach.

In this case, the testimony before the Court is that at the time of the divorce, one of the credit cards was solely in the name of the Plaintiff. All of the others were in joint names. While there is

no specific language either in the divorce decree or the transcript of the oral ruling specifically identifying the credit card obligation as a new debt, Judge Holder required the Defendant to pay all of the credit card debt, including the debt on the Plaintiff's credit card. Prior to this order from Judge Holder, the Defendant had no obligation to pay the Plaintiff's sole credit card debt. There would have been no reason to mention the credit card obligations at all unless Judge Holder intended the Defendant to pay them and the Plaintiff to be relieved of the liability to pay. Thus the Court concludes that the requirement that the obligation be incurred in the course of a divorce or separation is satisfied.

Because the Court has already concluded that the Defendant does not have the ability to pay nonsupport marital debts, the Court holds that the Defendant's obligation to pay all of the parties' pre-divorce credit card debts is dischargeable.

IV. CONCLUSION

Based upon the foregoing, the Court concludes that judgment should be entered for the Plaintiff with respect to the attorney fee award of \$600, but judgment should be entered for the Defendant declaring that the award of alimony in solido in the amount of \$50,000 and the Defendant's obligation to pay the parties' credit card obligations is discharged. A separate order will be entered consistent with this Memorandum.

BY THE COURT:

JENNIE D. LATTA

In re Kenneth Samuel Farmer, Sr.
Chapter 7 Case No. 97-32425-L
Claire Betty Kaiser Farmer v. Kenneth Samuel Farmer, Sr.
Adv. Proc. No. 97-1222
Memorandum

United States Bankruptcy Judge

Date: July 23, 1998

cc: Plaintiff
Plaintiff's Attorney
Defendant
Defendant's Attorney