

Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

SHERI LYNN HANKS,

Debtor.

JACKIE L. PLEDGE,

Plaintiff,

v.

SHERI LYNN HANKS,

Defendant.

Case No. 95-13199

Chapter 7

Adv. Pro. No. 96-5057

MEMORANDUM OPINION AND ORDER RE
COMPLAINT TO DETERMINE DISCHARGEABILITY

The plaintiff, Jackie L. Pledge, filed this complaint seeking to except from discharge debts owed by the debtor, Sherri Lynn Hanks. The plaintiff contends that the debt arose in connection with his divorce from the debtor/defendant and, thus, is nondischargeable under 11 U.S.C. § 523(a)(15). This Court conducted a trial on this matter on July 2, 1997, pursuant to FED. R. BANKR. P. 7001. This is a core proceeding. 28 U.S.C. § 152(b)(2). After reviewing the testimony from the hearing and reviewing the record as a whole, the Court makes the following findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The parties to this proceeding were divorced on July 17, 1990, in Dyer County Chancery Court in Tennessee. They had one child of the marriage, Chastity, who was born in August of 1978. Upon divorcing, the parties executed a marital dissolution agreement (MDA) which was incorporated into their final divorce decree. As part of the property settlement, the parties agreed in their MDA that the debtor would assume the debt owed on the parties' MBNA "Medical MasterCard," account number 5329 0091 8104 7279. At the time of the divorce, the account was in the names of "Jackie and Sheri Pledge" and

carried an approximate balance of \$1000.00.¹

In the years since divorcing Pledge, Hanks was remarried one time to Dale Hanks. As a result of this change in marital status, Hanks had the names on the MasterCard account changed to “Jackie Pledge and Sheri Lynn Hanks.” Although, Hanks subsequently divorced this second husband, the names on the account remain the same.

Despite the fact that the debtor agreed to assume responsibility for the debt in issue, Jackie Pledge’s name was never removed from the MasterCard account. Hanks contacted MBNA in an attempt to do so, but was informed that Pledge’s name would remain on the account until such time as the balance was entirely paid off. Although Hanks consistently and regularly made the minimum monthly payments each month from the time of the divorce until the filing of her bankruptcy petition (even making a one-time payment of \$500.00), the account has never been reduced to a zero balance. As such, Pledge’s name remains on the account

On December 19, 1995, Sheri Hanks filed her Chapter 7 bankruptcy petition in the Western District of Tennessee Bankruptcy Court. Hanks listed the MBNA MasterCard account in her petition and listed Jackie Pledge as the co-debtor on such account. At the time of filing bankruptcy, the balance on such card had risen to \$2846.26. Hanks’ testified at trial that the increase in the balance reflected the purchases of necessities for the couple’s daughter, Chastity. Nothing was purchased for either Hanks or her other children with this card. This testimony was not contradicted by Pledge at trial.

Since the filing of Hanks’s bankruptcy petition, MBNA has contacted Pledge and made demand on him for the balance due and owing on this account. Pledge has been making the minimum monthly payment on the MasterCard since December of 1995. Pledge testified that he was doing this in order to avoid being sued by MBNA.

¹ In addition to the MasterCard account assumed in the parties’ MDA, the debtor also agreed to assume responsibility for repaying an Amoco credit account, a J C Penney’s credit account, and a Lerner’s credit account. There was no hold harmless provision in the paragraph assigning repayment of these debts to Hanks. In the MDA, the debtor also quit-claimed her interest in the parties’ marital home and 5.5 acres of farm land to Jackie Pledge. For his part, Pledge assumed an FDIC account, a debt with Security Bank and a debt with First Citizen’s National Bank. There was a hold harmless provision in the paragraph assigning these debts to Pledge. The parties also agreed in their MDA that Pledge would retain possession of a Pick-up truck, while Hanks would receive ownership of the couple’s Grand Am.

Hanks is currently employed at Penguin U.S.A. as an order picker. Her normal wage is \$7.78 per hour. Since March of 1997, however, Hanks has been recovering from surgery for Carpal Tunnel syndrome and has not been working. As a result, Hanks is not receiving her hourly wage at present, but instead is being paid \$202.00 a week in worker's compensation benefits. Hanks is not receiving a disability check. Hanks testified that once she is released to return to work by her physician, she will be assigned light duty for at least a month. During this time, she will be making \$6.25 an hour. When Hanks is allowed to return to full duty she will resume making her \$7.78/hour wage and will resume working a forty-hour week.

Since divorcing Pledge, Sherri Lynn Hanks has had three other children. The two middle children, now five and four years old, were fathered by Anthony Dean. Dean and Hanks were never married; however, Dean is under a court order to pay \$311.00 a month in child support for these children. Hanks also had a child while married to Dale Hanks. That child is now two years old. Sherri Lynn and Dale are currently divorced. Although Hanks is supposed to be paying \$75.00 a week in child support for this youngest child, he does so only sporadically.

Hanks currently lives in Trimble, Tennessee. All four of her children live with her there, including her and Pledge's daughter, Chastity. Chastity turned eighteen (18) in August of 1996; however, and, as a result, Pledge is no longer paying Hanks child support for Chastity. Hanks testified that Chastity is currently employed, but does not earn enough to contribute any of her wages to her mother's household.

At trial, Hanks testified to approximately \$1330.00 in monthly expenses. In addition to her rent payment of \$300.00/month, Hanks spends \$250.00/month on food and approximately \$420.00/month on day care for her three youngest children. Hanks also has monthly payments on two debts reaffirmed in her bankruptcy case: a \$366.00 monthly car note and a \$45.00 payment on an \$879.00 debt to Southern Financial for her stove and refrigerator.

Although not presented at trial, the debtor's bankruptcy schedules reflect other monthly expenses of almost \$400.00. All of these additional expenses are for things such as electricity, insurance, gas and water. None of Hanks' payments for her dischargeable debts are included within this figure. These additional expenses bring the total of Hanks' monthly expenses up to approximately \$1730.00. At present, Hanks' current income is \$202.00 a week, or around \$875.00 a month plus the \$311.00/month in

child support. When she is returned to full duty, her monthly income will increase to approximately \$1345.00 plus the child support.

At trial, Pledge also testified to his monthly expenses. According to both the debtor's and Pledge's testimony, Pledge has been employed at Colonial Rubber Works in Dyersburg, Tennessee, for the last eight or nine years. His current wage is \$11.28 an hour for a forty-hour work week. Occasionally, Pledge works for his brother, assisting him in his carpentry business. At trial, Pledge was unable to testify as to exactly how much extra income this job provides him with, although he estimated that last year, he earned only \$400.00 from this extra work.

Pledge is still in possession of the house he and Hanks shared while they were married and the 5.5 acres of undeveloped land Hanks quit-claimed to him in the parties' MDA. Although the land is free and clear of all liens, Pledge testified that there is \$32,000.00 still owed on the house. Pledge also testified that he believes the estimated value of the house to be \$35,000.00 and the estimated value of the 5.5 acres as \$5,000.00.

In November of 1996, Pledge remarried. Currently, he and his spouse reside in the home Pledge was awarded in he and Hanks' MDA. Pledge testified that his wife earns approximately \$140.00 to \$150.00 a week. His take-home pay is estimated to be \$330.00 to \$340.00 a week. There are no dependents living with Pledge and his new spouse. Neither of the Pledges currently pay child support for any children.

Pledge has various monthly expenses. His house note is \$387.00 a month. His truck note is \$180.00 a month and he pays half of his wife's car note which is \$231.00 a month total. Insurance on Pledge's truck is \$41.00/month and insurance on his wife's car is \$52.00/month. Pledge's home is insured also and the yearly premium on such policy is \$437.00. At trial, Pledge estimated that his weekly food bill is between \$60.00 and \$70.00, that his monthly phone bill is \$20.00, and that his monthly water bill is \$15.00. The range for Pledge's electricity bill is \$75.00 to \$100.00 a month and the range for his gas bill in the winter months is \$60.00 to \$70.00.

In addition to these monthly bills, Pledge also has two credit cards on which he makes monthly payments of between \$150.00 to \$175.00. One card has a balance of \$2500.00, while the other has a balance of \$1200.00. Pledge's wife also has credit cards with a total balance of approximately \$7500.00. Because Pledge's father paid off a loan for Pledge, Pledge also owes his father the sum of \$1200.00.

Upon being contacted by MBNA, Pledge filed this adversary proceeding on March 22, 1996. Such complaint alleges that the MBNA MasterCard account is non-dischargeable pursuant to 11 U.S.C. § 523(a)(15).² A trial on the merits was held by this Court on July 2, 1997.

II. CONCLUSIONS OF LAW

A. 11 U.S.C. § 523(a)(15)

Subsection (a)(15) excepts from discharge 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 detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15). Section 523(a)(15) has the effect of making all divorce related obligations subject to a presumption of nondischargeability. Cleveland v. Cleveland (In re Cleveland), 198 B.R. 394, 397 (Bankr. N.D. Ga. 1996); Schmidt v. Eubanks (In re Schmidt), 197 B.R. 312, 315 (Bankr. W.D. Ark. 1996). This Court has exclusive jurisdiction to determine if the debt in question is nondischargeable. 11 U.S.C. § 523(c)(1); see In re Smither, 194 B.R. 102, 106 (Bankr. W.D. Ky. 1996) (noting that § 523(c)(1) grants federal courts exclusive jurisdiction over § 523(a)(15) matters while granting concurrent jurisdiction with state courts over § 523(a)(5) matters).

B. Burden of Proof

Before the court can review the evidence presented at the trial, the court must first determine on whom the burden of proof rests. Since Congress amended § 523 and added subsection (a)(15), several

² The parties stipulate that Hanks' agreement in the MDA to assume the MBNA MasterCard was not a claim "in the nature of support," nor was the assumption a claim for alimony, spousal support or child support. As a result of this agreement as to the type of claim MBNA is, the credit card debt in issue does not fall within the nondischargeability provision of 11 U.S.C. § 523(a)(5). Rather, the parties agree that such debt is to be analyzed under the guidance of 11 U.S.C. § 523(a)(15).

courts have grappled with the issue of burden of proof. Some courts have strictly followed Grogan v. Garner, 498 U.S. 279, 291 (1991), which held that in an action brought under § 523(a) the burden of proof lies with the plaintiff to prove all of the elements of his or her case by a preponderance of the evidence. See Greenwalt v. Greenwalt (In re Greenwalt), 200 B.R. 909 (Bankr. W.D. Wash. 1996) (finding that in a § 523(a)(15) proceeding the plaintiff has the motivation and ability to demonstrate that the debtor has the ability to pay the obligation in question and to prove that the detrimental consequences of discharge outweigh the benefits the debtor would otherwise gain); In re Dressler, 194 B.R. 290 (Bankr. D.R.I. 1996) (finding that shifting the burden to the defendant debtor is unnecessary to carry out § 523(a)(15)'s purpose); In re Butler, 186 B.R. 371 (Bankr. D. Vt. 1995).

The majority of courts, however, have ruled that the plaintiff creditor *only* has the burden of proving that (a) the debt is not a debt which is nondischargeable under § 523(a)(5), and (b) the debt was incurred “in the course of 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 . . .” in order for it to be nondischargeable under § 523(a)(15). See In re Smither, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996). If the plaintiff meets this burden of proof, then the burden shifts to the debtor who must either prove an inability to pay the debt under § 523(a)(15) or that a discharge of the debt would result in a benefit to the debtor that outweighs the detrimental consequences of a discharge to the spouse, former spouse, or children of the debtor under § 523(a)(15)(B) regarding the consequences of the discharge on the respective parties.

C. Ability to Pay

The court will measure the debtor's ability to pay as of the date of the trial. In making this determination, the court will not focus on a single moment in time or mere “snapshot” of the debtor's financial strength. Rather the court will look to the totality of the circumstances, including the debtor's future earning potential, as well as his or her income as of the date of the trial. Smither, 194 B.R. at 107; Dressler, 194 B.R. at 300; Belcher v. Owens (In re Owens), 191 B.R. 669, 674 (Bankr. E.D. Ky. 1996).

To determine the amount of income that a debtor earns for purposes of § 523(a)(15), several courts have used the “disposable income” test. Greenwalt, 200 B.R. at 913; Smither, 194 B.R. at 108; Dressler, 194 B.R. at 304; Slover v. Slover (In re Slover), 191 B.R. 886, 892 (Bankr. E.D. Okla. 1996); Owens, 191 B.R. at 674. Some courts have used the “undue hardship” test found in § 523(a)(8). In re

Comisky, 183 B.R. 883 (Bankr. N.D. Cal. 1995); In re Straub, 192 B.R. 522 (Bankr. D.N.D. 1996). However, the language of subsection (a)(15) is almost identical to the language found in § 1325(b)(2); therefore, this Court finds the “disposable income” test to be the appropriate standard by which to determine the debtor’s ability to pay.

Several courts have enumerated several factors for courts to consider when evaluating the debtor’s ability to pay. These factors include:

1. The debtor’s “disposable income” as measured at the time of trial;
2. The presence of more lucrative employment opportunities which might enable the debtor fully to satisfy his divorce-related obligation;
3. The extent to which the debtor’s burden of debt will be lessened in the near term;
4. The extent to which the debtor previously has made a good faith effort toward satisfying the debt in question;
5. The amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and condition of those debts;
6. The value and nature of any property the debtor retained after his bankruptcy filing;
7. The amount of reasonable and necessary expenses which the debtor must incur for the support of the debtor, the debtor’s dependents and the continuation, preservation and operation of the debtor’s business, if any;
8. The income of debtor’s new spouse as such income should be included in the calculation of the debtor’s disposable income;
9. Any evidence of probable changes in the debtor’s expenses.

Smither, 194 B.R. at 108-109; Cleveland, 198 B.R. at 398. A debtor has the ability to pay an obligation, for purposes of § 523(a)(15)(A), if the debtor has sufficient disposable income to pay all or a material part³ of a debt within a reasonable amount of time.

In the instant case, the Court concludes that the debtor does not have the ability to pay this debt. Although over \$31,000.00 in debts will be discharged through Hanks’ current chapter 7 bankruptcy, the debtor is still left with over \$1800.00 in monthly expenses. When Hanks is released back to full work duty, she will only earn around \$1350.00 a month. Because she is currently solely receiving worker’s compensation benefits of \$202.00 a week, her monthly income is much lower than the \$1350.00 figure.

³ The Smither court held that a court may grant a partial discharge of § 523(a)(15) debts. In so holding, the court followed the student loan discharge analysis. 194 B.R. at 109. The Cleveland court also indicated that it would likely allow partial discharges; however, the court found that it did not need to decide that issue. 198 B.R. at 400 n. 8. Likewise, this court does not need to decide this issue in the instant case.

Neither Hanks' current income nor her future income upon returning to full duty are enough to pay for her monthly expenses, even with the \$311.00 a month she receives in child support. These facts lead the Court to conclude that the debtor has no disposable income at the present time, nor does the Court believe that she will have any disposable income in the near future.

Additionally, the Court finds that the debtor has made a good faith effort towards repaying this debt before filing bankruptcy. She made at least the minimum payment each month and did not miss a payment. There was testimony at the trial that Hanks was to pay off the balance of the credit card at the time of the divorce and refrain from using it in the future, there was no proof presented that Hanks used the card for other than necessities for the couple's daughter, Chastity.

The debtor in this case is a single parent armed with the responsibility of fully supporting three of her children, while partially supporting another. Hanks is not remarried and the only assistance she is receiving with such expenses is the \$311.00 monthly child support payment from Anthony Dean. Even including this amount in her monthly income, however, Hanks will still not have enough money to pay her monthly expenses for housing, electricity, groceries, a car payment, insurance payments and child care. Should an unexpected expense arise for medical care or some other situation, Hanks will be hard-pressed at best to find the necessary funds.

Because the Court today finds Sheri Lynn Hanks does not have the ability to repay the MasterCard debt to MBNA, the inquiry under § 523(a)(15) is complete. No balancing of the hardships between the parties is necessary to the Court's determination. The debt to MBNA, in the amount of \$2846.26 is discharged.

III. ORDER

_____ It is therefore **ORDERED** that the debt owed by Sheri Lynn Hanks on the MBNA America MasterCard, account number 5329 0091 8104 7279, in the amount of \$2846.26 is discharged.

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: August 13, 1997