

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE

**Tracy Wayne Chapman
Tina Renee Chapman,
AKA Riley, AKA Nuccio,**

Case No. 98-33831

Debtor.

Chapter 7

Kristen Elizabeth Stafford Chapman,

Plaintiff,

v.

Adv. Pro. No. 98-1336

**Tracy Wayne Chapman
Tina Renee Chapman,
AKA Riley, AKA Nuccio,**

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT TO DENY DISCHARGEABILITY OF DEBT**

The Court conducted a trial in this matter on June 15, 1999. FED. R. BANKR. P. 7001.

Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law.

FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The Plaintiff in this matter, Kristen Elizabeth Stafford Chapman, (“Stafford”), and the debtor-defendant, Tracy Wayne Chapman, (“Chapman”), were divorced pursuant to a Final Decree of

Divorce issued by the Circuit Court of Shelby County on July 1, 1998. According to

the terms of the Marital Dissolution Agreement entered into by the parties on June 23, 1998, Chapman

was to be responsible for and hold Stafford harmless for the following debts:

1. Cellular One—approximately \$331.00
2. Cellular One reimbursement—\$300.00
3. First Family
4. Jolly Royal
5. Best Buy—approximately \$1300
6. Kimberly Clark Credit Union—monthly payment \$462.00 (approximately \$20,000 total debt, secured by 1993 Toyota Pickup which Chapman retained and 1993 Pontiac Sunbird which Stafford retained)
7. All medical expenses of Wife incurred prior to execution of MDA—not to exceed \$500.00
8. Kimberly Clark Mastercard—\$731.83

In addition to assumption of these debts, the debtor/defendant was to pay plaintiff the following amounts:

1. \$1000.00 for Stafford’s interest in Chapman’s retirement fund
2. \$1,500.00 as an equitable division of the value of the couple’s Chow dogs
3. Court Costs for the divorce and Stafford’s attorney’s fees in the amount of \$500.00

Stafford received the \$1,000.00 payment on the retirement account in September 1998;

however, she has not received the \$1,500.00 payments for the dogs, nor has she received the payment

for court costs and attorney’s fees. Stafford also has not received payment on any of the other debts

Chapman assumed in the MDA. As a result, Stafford has had the financial responsibility for these bills.

To date, she has paid off the Cellular One bill (\$331.00). She has paid \$296.00 on the Best Buy debt,

which was incurred to purchase two satellite dishes and two receivers which Chapman sold, retaining

the money for himself. Stafford has also paid \$190.00 on the Kimberly Clark Mastercard account.

With regard to the \$20,000 Kimberly Clark loan, Chapman made one or two payments on the debt and then surrendered the 1993 Toyota Pickup. The credit union then sold the pickup to a wholesaler for \$1,000.00, leaving a balance of approximately \$6,000.00 on the truck. Kimberly Clark has turned responsibility for the loan over to Stafford. To date, Stafford has paid Kimberly Clark \$2,075.40.

Stafford currently works for the Peabody Hotel Group making \$11.62/hour. At the time of the divorce, she made \$10.02/hour. Because of the large amount of outstanding debt Chapman has failed to pay, Stafford cannot afford to live on her own and is currently living with her parents. Stafford has borrowed \$6,000 from her parents to help with the payment of these debts. Since January 1997, Stafford has been attending State Tech. She will graduate in August with an Associates Degree in Business. For the most part, her tuition has been paid by her mother.

Chapman currently works for DANKA, making \$11.93/hour. At the time of the divorce, he made \$10.92/hour. Chapman has a company car for which he pays \$100/month. Until February 1999, Chapman worked at Pizza Hut three days/nights a week. He made approximately \$25-\$30 each night at this job. Since May 1999, Chapman has been attending school full-time at night. He receives Pell Grants from the state for these educational costs.

In July 1998, Chapman remarried. At the time of getting married, his wife was working, bringing home \$1150.00/month. In the late fall/early winter of 1998, she went on maternity leave to have the couple's child. While on said leave, Mrs. Chapman was terminated from her job. She is

currently a full-time student. The Chapmans pay \$88/month for this education. In addition to the child she had with Chapman, Mrs. Chapman has two children from a previous marriage, for which she receives \$300/month in child support and \$370/month in SSI. Mrs. Chapman is unemployed at this time. No reason was given for this unemployment. Chapman testified at trial that the Chapman’s monthly expenses are as follows:

Utilities-\$120
Phone-\$60
College-\$88
Associates-\$92
Wedding Rings-\$40
Jolly Royal-\$74
Auto Insurance-\$88
Renters Insurance-\$18
Powertel-\$75
Child Care-\$140
Food-\$130
Rent-\$755

II. CONCLUSIONS OF LAW

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 the 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); *Schmitt v. Eubanks (In re Schmitt)*, 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).

A. 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 courts have grappled with the issue of burden of proof. Some courts have strictly followed *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (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, has 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)(A) 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.

B. 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 this court to consider regarding the debtor's ability to pay:

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 108-09; *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 part¹ of a debt within a reasonable amount of time.

In applying the above-listed factors to the case at bar, the Court concludes that Chapman does have the ability to pay the debts assumed in the MDA. As demonstrated by the debtor’s past job at Pizza Hut, Chapman is fully capable of obtaining a part-time job to help pay for his MDA obligations. With the exception of the \$1000 he paid Stafford for her interest in his retirement, Chapman has never made a good faith effort to pay any of the debts he assumed in the MDA. Chapman makes more money now than he did at the time of the divorce. No reason was given as to why Mrs. Chapman is unemployed at this time. Finally, Chapman retained the Best Buy collateral and then sold it and kept the proceeds without making any effort to repay the debt.

¹The 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.

III. ORDER

It is therefore **ORDERED** that the Complaint to Deny Dischargeability of Debt is
GRANTED.

It is **FURTHER ORDERED** that the debt owing to the debtor’s ex-wife in the amount of
\$10,583.27 is excepted from the debtor’s discharge.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: June 28, 1999

cc:

Allen Jones
Attorney for Plaintiff
314 Poplar Avenue
Memphis, TN 38103

Charles E. Rich
Attorney for Defendants
3884 Summer Avenue
Memphis, TN 38122