

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

IN RE

Jimmy N. Edwards,

Case No. 99-11049

Debtor.

Chapter 7

Amanda Fay Edwards,

Plaintiff,

v.

Adv. Pro. No. 99-5194

Jimmy N. Edwards,

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT EXCEPTING DEBT TO AMANDA FAY EDWARDS FROM DISCHARGE**

This matter involves debts incurred in the course of the parties' divorce. The plaintiff is alleging that three debts the debtor assumed in their marital dissolution agreement are nondischargeable pursuant to 11 U.S.C. § 523(a)(5) and (15). The debtor is alleging that he does not have the ability to pay these debts.

The Court conducted a trial in this matter on February 4, 2000. 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

Prior to the trial in this matter, the parties to this action entered into a "Stipulation of Facts and Exhibit" which was filed with the Court on February 2, 2000. The Court hereby adopts this stipulation, as set forth below, as its own.

1. That defendant, Jimmy Neal Edwards, filed for relief under Chapter 7 of the Bankruptcy Code on or about April 5, 1999, bearing Case No. 99-11049-GHB.

2. That Plaintiff, Amanda Fae [sic] Edwards and the Defendant, Jimmy N. Edwards were formerly husband and wife but were divorced by Order of the Chancery Court for the Twenty-Eighth Judicial District of Crockett County, Tennessee at Alamo, dated March 8, 1999 in the matter styled: Jimmy N. Edwards v Amanda Fae Edwards, bearing Docket No. R D. No. 7591.
3. The subject Final Decree . . . adopted the Marital Dissolution Agreement executed by the parties on the 13th day of November, 1998 and the Amendment to Marital Dissolution Agreement executed on the 8th day of March 1999 and made same a part of the Order of the Court for all purposes. . . .
4. Numerical Paragraph 2 of the Marital Dissolution Agreement of the parties . . . provides that Defendant will pay the monthly payment for the indebtedness against the marital residence, (\$500.00 per month) as Alimony directly to Plaintiff as long as she lives in the marital home or until she remarries. Plaintiff continues to live in the subject home and has not remarried. Defendant has continued to pay the subject \$500.00 directly to Plaintiff and is current on the said obligation. Accordingly, the parties stipulate that Defendant’s obligation to pay the monthly payment for the indebtedness against the marital home of \$500.00 per month, so long as she lives in the marital home or until she remarries, constitutes alimony and is accordingly excepted from discharge.
5. Numerical Paragraph 3 of the Marital Dissolution Agreement of the parties . . . provides that Defendant will assume certain marital indebtedness holding Plaintiff harmless, thereon. Included in those debts to be assumed by Defendant, and the dischargeability of which are at issue before this Honorable Court include the following: (i.e. this is an exclusive list of the debts at issue)
 - a) First American National Bank, account #9500121377, representing a deficiency balance on a 1998 Ford Ranger surrendered through the debtor’s Chapter 7 bankruptcy proceeding in the amount of \$8,987.33 as of January 14, 2000, with a contractual interest rate of 9.95% per annum and \$2.18 daily interest accrual.
 - b) Discover Credit Card, account #6011006762500644, with a payoff as of May 18, 1999, in the amount of \$5,255.29, with a contractual interest rate of 19.80% APR. The payoff as of January 14, 2000 was \$8,907.78.
 - c) PNC Bank (VISA), account #4270031901041350, with a payoff as of June 1, 1999, in the amount of \$5,396.00, with a contractual interest rate of 9% APR. The payoff as of January 14, 2000 was \$6,102.91.
6. The sole remaining issue to be decided by this Honorable Court is whether Plaintiff should be awarded her attorney fees for prosecuting the within action as is set forth in Numerical Paragraph 8 of the Marital Dissolution Agreement of the parties

In addition to these stipulations, the parties also filed nine exhibits with the Court. These exhibits include the following:

Exhibit 1—Final Decree of Absolute Divorce, *Jimmy Neal Edwards v. Amanda Fay Edwards*.

Exhibit 2—Marital Dissolution Agreement, *Jimmy Neal Edwards v. Amanda Fay Edwards*.

Exhibit 3—Monthly Financial Statement of Amanda Fay Edwards, showing a monthly income of \$1,755.38 and monthly expenses of \$2,131.55.

Exhibit 4—(Collective Exhibit) Various Account Statements for Amanda Fay Edwards.

Exhibit 5—Monthly Financial Statement of Jimmy Neal Edwards, showing a monthly income of \$4,020.86 and monthly expenses of \$3,806.67.

Exhibit 6—October 14, 1999, Tennessee Farmers Mutual Insurance Company Declarations Page for Jimmy Neal Edwards showing coverage for 1999 Jeep Cherokee, 1995 Dodge Neon Sport and 1998 Honda Motorcycle.

Exhibit 7—September 4, 1999, Serra Chrysler Plymouth Jeep Vehicle Invoice and Bill of Sale for 1999 Jeep Cherokee to Michelle J. Edwards.

Exhibit 8—October 19, 1999, Dyersburg Cycle Corral, Inc., Bill of Sale for Yamaha 4-wheeler to Michelle Edwards.

Exhibit 9—Copy of July 6, 1999, canceled check for \$89.24 to Crockett Telephone Company from the account of “Jimmy N. or Michelle J. Edwards.”

In addition to the facts as set forth in the stipulation and exhibits, the Court also finds that on March 27, 1999, the defendant, Jimmy Edwards, married Michelle J. Edwards. Michelle Edwards has a paralegal degree and, according to the testimony of her husband, was earning \$355/week at the last job she held. Michelle Edwards voluntarily quit working as a paralegal in September 1999. Currently Michelle Edwards works part-time for the Tennessee National Guard. At the trial, Jimmy Edwards testified that there is nothing to prohibit Michelle Edwards from working at the present time.

The Court also finds that Paragraph 10 of the Marital Dissolution Agreement entered into between the parties to this action provides as follows:

10. Obligations not dischargeable in bankruptcy. It is expressly agreed by the parties that each obligation to pay marital indebtedness or assumption of marital property securing any indebtedness, payment of fees, costs, support, or any other payment to be made under the terms of this settlement agreement, is a liability and obligation for support and maintenance one has for the other. It is expressly agreed by and between the parties that no maintenance and support obligation under this agreement may later be

construed as a debt to the other party and under no circumstances will the obligations to make any of the support and maintenance payments which either party to this Agreement is or may be required to make hereafter be considered a debt to the other party which is dischargeable in bankruptcy.

MDA, ¶ 10.

Additionally, the Court finds that prior to surrendering the 1998 Ford Ranger, the debtor made no effort to either sell the truck or to reaffirm the debt with First American National Bank. Also, the debtor has reaffirmed an unsecured credit card debt owing to Capital One in the amount of \$3600.00, to be paid at the rate of \$150/month. Finally, according to the debtor’s monthly financial statement (Exhibit 5), the Court finds that three of the seven monthly debts were incurred by Jimmy Edwards’ new wife, Michelle, prior to their marriage.

II. CONCLUSIONS OF LAW

A. 11 U.S.C. § 523(a)(5)

Subsection (a)(5) of § 523 provides as follows:

(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--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act [42 U.S.C. § 602(a)(26)], or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(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).

For a debt to be nondischargeable under § 523(a)(5), it must be one that (1) is owed to a spouse, former spouse or child of the debtor; (2) has not been assigned to another entity, except pursuant to section 402 of the Social Security Act; (3) arose in connection with a divorce decree, separation agreement, property settlement agreement, order of a court of record or determination made by a governmental unit with state or territorial law; and (4) is "in the nature of alimony, maintenance or support." See, *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir.1993); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir.1983). As another bankruptcy court in Tennessee has stated, “When examining debts derived from a divorce, the critical inquiry for the court is not whether the parties have given a certain name to an obligation, but whether that obligation is, in fact, in the nature of support.” *Light v. Adkins, (In re Adkins)*, 151 B.R. 458, 461 (Bankr. M.D.Tenn. 1992). This requirement that payments be “*in the nature of alimony, maintenance or support*” was designed to avoid excepting from discharge debts which are actually property settlements disguised as support obligations. *Calhoun*, 715 F.2d 1103. Agreements which are designated as “alimony, maintenance or support” and which meet some threshold definition of these terms, are generally found to be non-dischargeable under § 523(a)(5). *Fitzgerald*, 9 F.3d 521.

To determine if the debt in question is in the nature of support, alimony or maintenance, the court will look to the MDA entered into by the parties. Paragraph 10 of the Edwards’ MDA states that any debt assumption made within the agreement “is a liability and obligation for support and maintenance one has for the other.” There was no proof introduced at trial that either the Discover Credit Card, account #6011006762500644, or the PNC Bank Visa, account #4270031901041350, were used for anything other than the support of Amanda Fay Edwards and her children. Consequently, the Court finds that those two debts are “in the nature of alimony, maintenance or support” and, as a result, will be

declared nondischargeable under 11 U.S.C. § 523(a)(5). With respect to the 1998 Ford Ranger, however, the Court finds that because Jimmy Edwards retained possession of the truck his assumption of the First American National Bank debt, account #9500121377, is not “in the nature of alimony, maintenance or support,” even though the MDA designates it as such. Rather, the Court finds that the assumption is more akin to a property settlement between the parties and, as such, the Court will analyze this debt under 11 U.S.C. § 523(a)(15).

B. 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.

There are several factors which lead this Court to conclude that Jimmy Edwards does indeed have the ability to pay the debt owing to First American National Bank. First, according to Jimmy Edwards' Monthly Financial Statement (Exhibit 5), Jimmy Edwards has a disposable income of over \$200.00 a month. Secondly, in addition to two automobiles, Mr. Edwards' also owns a 1998 Honda Motorcycle, for which he pays \$170/every six months in insurance premiums, and a Yamaha Four Wheeler with a monthly payment of \$99.00. Jimmy Edwards did testify that his son, Zachary Edwards, is making the Four Wheeler payments; however, when asked on cross examination where his son is getting the money for the payments, Mr. Edwards testified that his son uses his lunch money to make the payments. In light of the fact that Mr. Edwards is the one giving Zachary the lunch money and the fact that Mr. Edwards' Monthly Financial Statement reflects a monthly expense of only \$65 for Zachary's lunches, the Court finds it hard to conclude that Jimmy Edwards is not the one making the Four Wheeler payments.

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.

The third and final factor which lead this Court to conclude that Mr. Edwards does have the ability to pay the First American National Bank debt is the employment situation with Mr. Edwards' new wife, Michelle. Not only is Michelle Edwards able to work, but she also has a specialized degree with which she was making \$355/week until she voluntarily quit in September 1999. Absolutely no proof whatsoever was presented at trial as to any possible reasons for Michelle's sudden decision to quit work. As a result, the Court concludes that Michelle Edwards has the ability to work and can begin working at any time. The court, therefore, must consider the additional income the debtor will receive as a result of his wife's working. Any amount Michelle Edwards would make, which in this case would be over \$18,000/year if she would return to work as a paralegal, would only add to the debtor's disposable income.

As a result of all of the above listed factors, the court concludes that Jimmy Edwards has the ability to pay the debt to First American National Bank over a period of time.

C. Balancing Hardships

Even though the debtor in this case has the ability to pay the debt in question, the debtor may still obtain a discharge if he can prove by a preponderance of the evidence that "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)(B). The court must compare the evidence of the debtor's standard of living as opposed to the plaintiff's standard of living to balance the equities in this case. If the debtor's standard of living will be greater than or approximately equal to the plaintiff's standard of living if the debt is not discharged, then the debt should be considered nondischargeable. If, however, the debtor's standard of living will fall materially below that of the plaintiff's if the debt is not discharged, then the debt should be discharged. In other words, if the court finds that the debtor will

"suffer more" by not receiving a discharge than the plaintiff would suffer if the debt were discharged, then the court will discharge the debt. See *Smither*, 194 B.R. at 110-11.

To properly balance the equities, the court should consider, at a minimum, the following factors:

1. The amount of debt involved, including all payment terms;
2. The current income of the debtor, objecting creditor and their respective spouses;
3. The current expenses of the debtor, objecting creditor and their respective spouses;
4. The current assets, including exempt assets of the debtor, objecting creditor and their respective spouses;
5. The current liabilities, excluding those discharged by the debtor's bankruptcy, of the debt, objecting creditor and their respective spouses;
6. The health, job skills, training, age, and education of the debtor, objecting creditor and their respective spouses;
7. The dependents of the debtor, objecting creditor and their respective spouses;
8. Any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree;
9. The amount of debt which has been or will be discharged in the debtor's bankruptcy;
10. Whether the objecting creditor is eligible for relief under the Bankruptcy Code;
- and
11. Whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the § 523(a)(15) issues.

Smither, 194 B.R. at 111.

The court concludes that the debtor failed to meet his burden of establishing that the benefit of a discharge to him outweighs the detriment to the plaintiff, and therefore the court holds that the debt in question is nondischargeable. First, the Court must consider that according to the parties' respective Monthly Financial Statements, Jimmy Edwards has a disposable income of over \$200/month while Amanda Fay Edwards has a negative monthly income of \$375.00. Secondly, the debt owing to First American National Bank is one which arose out of Jimmy Edwards' retention and subsequent surrender of the 1998 Ford Ranger. In surrendering the truck, Mr. Edwards made no effort to either sell the truck, which surely would have reduced the deficiency balance, or to reaffirm the debt. He simply made no attempts to minimize the First American debt. Finally, as the Court found in analyzing Mr. Edwards

ability to pay the First American debt, the Court finds that if Michelle Edwards would return to work on even a part-time basis as a paralegal, Mr. Edwards would have no problem paying for this debt.

Clearly based on these facts, the Court concludes that discharging Jimmy Edwards from his obligation to pay the debt to First American National Bank would not result in a “benefit to the debtor that outweighs the detrimental consequences to” Amanda Fay Edwards. As a result, the Court finds that the debt owing to First American National Bank falls within the non-dischargeability provisions of § 523(a)(15).

III. ORDER

It is therefore **ORDERED** that the Complaint Excepting Debt to Amanda Fay Edwards from Discharge is **GRANTED as follows:**

a. The debt owing to Discover Credit Card, account #6011006762500644, with a payoff as of January 14, 2000, of \$8,907.78, with a contractual interest rate of 19.80% APR, is excepted from the debtor’s discharge under 11 U.S.C. § 523(a)(5).

b. The debt owing to PNC Bank (VISA), account #4270031901041350, with a payoff as of January 14, 2000, of \$6,102.91, with a contractual interest rate of 9% APR, is excepted from the debtor’s discharge under 11 U.S.C. § 523(a)(5).

c. The debt owing to First American National Bank, account #9500121377, in the amount of \$8,987.33 as of January 14, 2000, with a contractual rate of interest of 9.95% per annum and \$2.18 daily interest accrual, is excepted from the debtor’s discharge under 11 U.S.C. § 523(a)(15).

It is **FURTHER ORDERED**, per the terms of the parties’ Marital Dissolution Agreement, Paragraph 8, that the defendant, Jimmy N. Edwards, shall pay to the plaintiff, Amanda Fay Edwards, any and all attorney fees and expenses that were incurred by the plaintiff in prosecuting this action. Counsel for Amanda Fay Edwards shall submit an appropriate application for such compensation.

IT IS SO ORDERED.

By the Court,

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

Date: February 24, 2000