UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 97-13781-JMD
Chapter 7

William B. Anderson,
Debtor

Noni Smith,
Plaintiff

v. Adv. No. 98-1165-JMD

William B. Anderson,
Defendant

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Attorney for Plaintiff

William B. Anderson
Pro se

MEMORANDUM OPINION

I. BACKGROUND

Before the Court is a complaint filed by Noni Smith ("Plaintiff") against William B. Anderson ("Debtor") objecting to the dischargeability of a number of divorce-related debts, pursuant to 11 U.S.C. §§ 523(a)(5) and (a)(15).[1] A trial was held concerning this matter on August 23, 1999. The Plaintiff and the Debtor were divorced on May 6, 1997 by order of the Belknap County Superior Court, after roughly 25 years of marriage. The Plaintiff has since remarried. The parties have two children: their daughter, who has graduated from college, and their son, who has recently entered his sophomore year of college. The Debtor is self-employed by virtue of his ownership of Anderson Financial Services, a business that

[1] Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

was in operation for much of the parties' marriage. As its name suggests, the Debtor's business concerns financial services of various sorts.

The Debtor filed for bankruptcy under Chapter 13 on October 10, 1997 and later converted his case to Chapter 7. The Plaintiff objects to the dischargeability of a number of debts owed to her from the Debtor, which arise from the decree incident to their divorce. See Stipulated Record of the Divorce Proceeding (hereinafter the "Divorce Decree"). The Plaintiff's complaint relies on § 523(a)(5) and, in the alternative, § 523(a)(15).

The Court has jurisdiction of this subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

A. The Debts at Issue

In her complaint, the Plaintiff objects to the dischargeability of a number of debts, including various credit card indebtedness incurred by the parties during their marriage, as dealt with by the Divorce Decree. It was determined at trial that some of the credit card debts have been fully paid by the Debtor and are thus no longer in dispute. Moreover, the trial revealed that the parties have reached an agreement concerning joint credit card indebtedness owed to the following companies: Associates National Bank of Delaware, Chase, and First USA Visa. The amounts owed to these creditors, according to the Debtor's Schedule F filed with his bankruptcy petition, are $3,820.00, $2,225.21, and $4,606.99, respectively. The parties have agreed that the obligations arising from the Divorce Decree in connection with these debts shall be deemed nondischargeable. The Court notes, however, that the nondischargeable obligations are those that arise from the Divorce Decree, and not the underlying debts themselves. The Divorce Decree provides that the Debtor shall be responsible for all joint credit card debt incurred during the marriage. See Divorce Decree at 10. Accordingly, it is the Debtor's obligation to indemnify the Plaintiff against payment of these debts that

is not dischargeable; the Debtor's obligation to pay this debt vis-a-vis the relevant credit card company remains dischargeable. See Garrity v. Hadley (In re Hadley), Bk. No. 98-13834-JMD, Adv. No. 99-1008-JMD (Bankr. D.N.H. Sept. 7, 1999); MacDonald v. MacDonald (In re MacDonald), 69 B.R. 259, 278 (Bankr. D.N.J. 1986).

Once the credit card debts are removed from the Court's radar screen, five debts remain, all of which arise by virtue of the Divorce Decree and subsequent events. Two of these debts flow solely from the Divorce Decree. The first involves the state court's directive that the Debtor "shall pay to the wife the sum of [$750] per month as child support for Bradford." See Divorce Decree at 6. The Divorce Decree provides that these payments "shall terminate upon [the son] reaching age [18] or finishing high school which ever event last occurs." See id. The parties agree that the Debtor ceased making child support payments before these terminating events occurred, leaving an arrearage of $786.00. Thus, the only issue before the Court is whether this debt is nondischargeable pursuant to § 523(a)(5), or in the alternative, § 523(a)(15).

The second debt involves the Divorce Decree's order that the Debtor pay the Plaintiff $600.00 per month as alimony until one of the following events: (1) August 31, 2002; (2) the Plaintiff remarries; or (3) the Plaintiff earns at least $25,000.00 per year. See id. at 7. Because the Plaintiff remarried on July 18, 1998, the Debtor was not obligated to pay alimony past this date. The Debtor failed to pay alimony for the months of June and July 1998. The Plaintiff, prorating the amount of alimony owed for July 1998, argues that the Debtor owes her alimony in the total amount of $948.00. At trial, the Debtor effectively argued that he does not owe the Plaintiff $948.00 since alimony should not be prorated when a terminating event creates a partial month obligation. The Debtor, however, has not provided this Court with any legal authority that supports such a proposition. Moreover, the Court's own research of New Hampshire law proved fruitless with respect to this issue. The Court concludes that the language of the Divorce Decree is unambiguous and was intended to create a partial month obligation if the occurrence of a terminating event gives rise to such a situation. This interpretation appears to be the most fair and reasonable. Accordingly,

the Court finds that the Debtor owes the Plaintiff $948.00 in alimony. The issue of whether or not it is dischargeable is another matter.

The remaining three debts at issue all arise by virtue of the Divorce Decree and the post-divorce sale of the parties' marital homestead. The Divorce Decree awarded ownership of the parties' homestead to the Plaintiff. See Divorce Decree at 7. At the time of divorce, the homestead was encumbered by a first mortgage, a second mortgage, and a lien connected with a loan from an individual named Richard Kahn (hereinafter the "Kahn Loan"). The Divorce Decree provides that: (1) the Debtor is responsible for payment of the first mortgage until August 31, 1997, after which the Plaintiff assumes responsibility; (2) the Plaintiff is responsible for the interest payment on the second mortgage until August 31, 1997, after which the Debtor assumes sole responsibility for the second mortgage; and (3) the Debtor shall be responsible for payment of the Kahn Loan. See id. at 7-10. The Divorce Decree further provides that in the event the home is sold prior to full payment of the second mortgage and the second mortgage is paid from the equity of the home, the Debtor shall provide the Plaintiff with a note covering the payoff of the second mortgage. See id. at 7-8. The marital home was sold on January 30, 1998. The first mortgage, the second mortgage, and the Kahn Loan were paid from the proceeds of the sale.

It was established at trial that there was an arrearage of $2,500.00 with respect to the first mortgage as of August 31, 1997 that was the responsibility of the Debtor pursuant to the Divorce Decree. Because this sum was paid out of the proceeds from the sale of the marital home, proceeds that would otherwise have gone to the Plaintiff, this is a debt flowing from the Debtor to the Plaintiff by virtue of the Divorce Decree.

Because the second mortgage was paid from the proceeds of the sale of the home, the Debtor executed a note in favor of the Plaintiff for $23,063.02, the payoff amount of the second mortgage. See Ex. 2, Promissory Note dated February 5, 1998. There is no controversy concerning this obligation and thus the only issue is whether it is dischargeable.

The Kahn Loan was paid off from the proceeds of the sale of the home in the amount of $8,423.13. Because the Divorce Decree clearly states that the Debtor is responsible for the payment of the

Kahn Loan, this is now an obligation owed from the Debtor to the Plaintiff as a result of the Divorce Decree. Again, the only issue is dischargeability.

In summary, the following five debts are at issue in this matter, all of which are owed directly from the Debtor to the Plaintiff: (1) a child support obligation in the amount of $786.00; (2) an alimony obligation in the amount of $948.00; (3) indemnification against payment of the first mortgage arrearage in the amount of $2,500.00; (4) a promissory note in the amount of $23,062.02 as a result of the Plaintiff's satisfaction of the second mortgage; and (5) indemnification against payment of the Kahn Loan in the amount of $8,423.13.

B. Section 523(a)(5)

The Plaintiff argues that all five of the debts at issue are nondischargeable pursuant to § 523(a)(5). Not surprisingly, the Debtor argues that none of the debts at issue fall within the parameters of § 523(a)(5). Section 523(a)(5) provides, in pertinent part:

> A discharge under . . . this title does not discharge an individual from any debt . . . 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 . . . divorce decree . . . .

11 U.S.C. § 523(a)(5). As a general rule, marital debts in the nature of alimony, maintenance, or support are governed by § 523(a)(5), whereas marital debts in the nature of property settlements fall under § 523(a)(15). See 4 King et al., Collier on Bankruptcy ¶ 523.11[5] (15th rev. ed. 1998). Thus, the crucial issue in determining whether a debt arising from a divorce decree is nondischargeable pursuant to § 523(a)(5) is whether the debt is in the nature of alimony, maintenance or support rather than a property settlement. Such a determination is a question of federal bankruptcy law. See Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8, 10 (Bankr. D.N.H. 1994); Coe v. Johnson (In re Johnson), 144 B.R. 209, 214 (Bankr. D.N.H. 1992). The Plaintiff bears the burden of proof with respect to this question. See Zalenski v. Zalenski (In re Zalenski), 153 B.R. 1, 3 (Bankr. D. Me. 1993). The issue of whether an obligation is in the nature of alimony, maintenance, or support for purposes of § 523(a)(5) turns solely on whether, at the time of the divorce, the obligation was intended to have such a purpose. See Bourassa, 168 B.R. at 10 ("When determining whether an obligation is actually in the nature of alimony, maintenance or support, the

Court will look no further than 'the intent of parties at the time a separation agreement is executed.'") (citing In re Brody, 3 F.3d 35, 38 (2d Cir. 1993)); Gibbons v. Gibbons (In re Gibbons), 160 B.R. 473, 475 (Bankr. D.R.I. 1993); Zalenski, 153 B.R. at 2. Any subsequent changes in the parties' circumstances are irrelevant for purposes of this inquiry. See Bourassa, 168 B.R. at 10. Intent, of course, is a slippery and elusive concept. Its subjective and often unarticulated nature creates difficulties when a third-party is later called upon to discern its content. As a result, many courts have formulated factors to be used as aids in divining intent. See, e.g., Zalenski, 153 B.R. at 2 (focusing on the following factors: (1) language and substance of the agreement; (2) parties' financial circumstances at time of settlement; and (3) function served by the obligation at the time of the settlement); Gibbons, 160 B.R. at 475 (employing seven factors); Daviau v. Daviau (In re Daviau), 16 B.R. 421, 424 (Bankr. D. Mass. 1982) (listing five factors). See also Bourassa, 168 B.R. at 10 (focusing on (1) the financial condition of the parties at the time of the divorce, and (2) the fact that the payments were periodic). The Court finds that, distilled to their essence, the many factors relied upon by courts can be partially collapsed to yield three primary considerations. Accordingly, the Court concludes that the following factors are useful in determining whether an obligation was intended to be in the nature of alimony, maintenance, or support: (1) the language and substance of the agreement or order; (2) the relative financial circumstances of the parties at the time of the agreement or order; and (3) how the payment at issue is structured (e.g., whether it is periodic or a lump sum, or whether it terminates upon the occurrence of a future contingent event). These factors are listed in descending order with respect to interpretive significance and will be used only as aids in resolving the question of intent.

The Court finds that the first obligation at issue, the child support obligation in the amount of $786.00, is in the nature of alimony, maintenance, or support. The language and substance of the Divorce Decree, the most important factor to be considered, strongly indicate that the child support obligation was intended to be in the nature of alimony, maintenance or support. See Divorce Decree at 6 ("The husband shall pay to the wife the sum of [$750] per month as child support for Bradford."). Moreover, these payments were ordered to terminate upon the parties' son reaching age 18 or graduating from high school,

whichever occurred last. Such a payment structure cuts toward support. Accordingly, the Court holds that the child support obligation is nondischargeable pursuant to § 523(a)(5).

Like the first debt at issue, the alimony obligation in the amount of $948.00 is in the nature of alimony, support, or maintenance. A careful reading of the Divorce Decree shows that the alimony payment was intended to provide the Plaintiff with the means necessary to support her in her quest for further education and a meaningful life. See Divorce Decree at 4 ("In considering the length of the alimony order, the Court has considered that this is a 25 year marriage . . . the wife's educational plans, her present employability and her vocational skills."). In addition, like the child support obligation, the alimony payments are structured to terminate upon future contingent events, thus suggesting alimony, maintenance, or support. Accordingly, the Court holds that this obligation is nondischargeable pursuant to § 523(a)(5).

The obligation concerning the first mortgage arrearage in the amount of $2,500.00 is a closer call than the first two debts. Nevertheless, the Court finds that it too is in the nature of alimony, maintenance or support. The Court finds significant the fact that the Plaintiff was awarded sole ownership of the marital home while the Debtor was ordered to pay the first mortgage until August 31, 1997, after which the obligation fell upon the Plaintiff. The August 31, 1997 date was presumably not determined at random. The Divorce Decree states that it was a goal of the Plaintiff that she keep the marital home until the parties' son graduated from high school. See Divorce Decree at 4-5. August 31, 1997 was the time when the parties' son would have just graduated from high school and be off to college. The Court infers from this that the purpose of placing the first mortgage obligation on the Debtor until August 31, 1997 was to provide a home for the parties' son until he graduated from high school and left for college. Such a circumstance is indicative of support. Again, based on the language and substance of the Divorce Decree, the Court holds that this obligation is nondischargeable pursuant to § 523(a)(5).

The promissory note relating to the payoff of the second mortgage and the Kahn Loan are similar and can therefore be discussed together. The Court finds that both are in the nature of property settlements rather than alimony, maintenance, or support. The terms of the Divorce Decree indicate that both debts were intended to be in the nature of a property settlement. The Divorce Decree envisions the possibility, if

not probability, of the second mortgage being paid off through the sale of the marital home and provides that, in such a case, the Debtor shall execute a note in favor of the Plaintiff for the payoff amount, a situation that did in fact occur. This obligation was clearly intended to compensate the Plaintiff for the equity in the marital home, which cuts toward a finding that it was in the nature of a property settlement. See Zalenski, 153 B.R. at 3 (finding significant the fact that "obligations were intended to compensate Plaintiff for her share of the equity in the jointly owned residence" in determining that the Plaintiff had not met her burden in proving that the obligations were in the nature of alimony, maintenance, or support). Moreover, the Divorce Decree awarded the Debtor more than fifty percent of the marital assets on the ground that, inter alia, he assumed much of the marital debt and the responsibility to finance the childrens' educational expenses. See Divorce Decree at 5. Thus, the allocation of the marital debt was linked to the division of the marital assets. In other words, the distribution of the marital debt (which included the second mortgage and the Kahn Loan) was in effect intended to be in the nature of a property settlement rather than alimony, support, or maintenance. This inference is further supported by the fact that support of the Plaintiff and the parties' children was provided for by other provisions of the Divorce Decree. The Court finds that the language and substance of the Divorce Decree indicate that the allocation of the Kahn Loan and the second mortgage was intended to be in the nature of a property settlement.

The Court is cognizant of the difference in financial resources and outlook between the parties at the time of divorce. On its own, the Plaintiff's lesser financial resources at the time of divorce does suggest alimony, maintenance, or support. But when the language and substance of the Divorce Decree, a more important factor, suggests otherwise, the relative financial circumstances factor becomes less significant. Accordingly, the Court finds that § 523(a)(5) is not applicable. However, the Plaintiff argues alternatively that the two debts should be deemed nondischargeable pursuant to § 523(a)(15).

C. Section 523(a)(15)

Section 523(a)(15) provides that a debtor will not be discharged from a debt when the debt is:

> 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). In essence, § 523(a)(15) excepts from discharge debts arising from a divorce decree or separation agreement that are not in the nature of alimony, maintenance, or support, unless one of two conditions is shown to exist: (A) the debtor is unable to pay the debt; or (B) the benefits of a discharge to the debtor outweigh the detrimental effects of such a discharge on a spouse, former spouse, or child. See Shea v. Shea (In re Shea), 221 B.R. 491, 499 (Bankr. D. Minn. 1998). Thus, if either of these conditions can be shown to exist, then the relevant debt is dischargeable. For purposes of § 523(a)(15), the financial ability and financial circumstances of the parties are analyzed as of the time of trial. See Konick v. Konick (In re Konick), 236 B.R. 524, 529 (B.A.P. 1st Cir. 1999); Dressler v. Dressler (In re Dressler), 194 B.R. 290, 300 (Bankr. D.R.I. 1996). This Court has recently held that the creditor bears the ultimate burden of persuasion with respect to all elements of § 523(a)(15), while the debtor bears the burden of production with respect to the issue of whether, pursuant to § 523(a)(15)(A), he or she has the ability to pay the debt. See Garrity v. Hadley (In re Hadley), Bk. No. 98-13834-JMD, Adv. No. 99-1008-JMD (Bankr. D.N.H. Sept. 7, 1999).

There is no dispute that the promissory note and the obligation to indemnify the Plaintiff against payment of the Kahn Loan arose from the Divorce Decree. In addition, based on the reasoning above, the Court concludes that they are in the nature of a property settlement. Thus, the only issue to be decided is whether §§ 523(a)(15)(A) or (B) is satisfied, thus rendering the debt dischargeable.

The disposable income test, as defined by § 1325(b)(2), is an appropriate way to analyze the § 523(a)(15)(A) question of whether the debtor is able to pay. See Konick, 236 B.R. at 528 ("It is proper to use the disposable income test to determine [the debtor's] ability to pay."); Brasslett v. Brasslett (In re

Brasslett), 233 B.R. 177, 183 (Bankr. D. Me. 1999); Dressler, 194 B.R. at 304. Both parties have introduced documentary evidence concerning the Debtor's disposable income. All of this evidence, when supplemented by the testimony offered at trial, shows a marginal financial picture at best. Although the Debtor's business, and therefore his income, is variable, the evidence presented shows a financially precarious trend. A recent financial affidavit of the Debtor provides a total net business monthly income of $3,540.00 and monthly living and debt expenses totaling $4,983.00, thus yielding a negative monthly income of $1,443.00. See Ex. 6, Financial Affidavit of William B. Anderson dated May 13, 1999. The Debtor introduced evidence detailing monthly income totaling $13,426.74 for June of 1998. See Ex. 107, Income June 1998. Pursuant to the Debtor's testimony at trial, this income includes amounts that were unique to that month: a yearly payment of $1,450.00 for tennis coaching services; real estate rents totaling $2,100.00; and a loan from the Debtor's sister in the amount of $1,400.00. The Debtor testified that the rental income ceased as of September 1998. Thus, the $2,100.00 rental income amount and the $1,400.00 loan amount should be ignored since it is the Debtor's financial circumstances at the time of trial that are relevant. Moreover, the $1,450.00 received for tennis coaching services is an annual payment and should therefore be converted to a monthly figure of $120.83.[2] Thus, the Debtor's monthly income for June 1998 equals $8,597.57.[3] The Debtor's evidence shows that his expenses surrounding the period of June 1998 totaled $12,796.24. See Ex. 108, Expenses Surrounding Period June 1998. Reconciling these two figures yields a negative $4,198.67. The Debtor also introduced evidence showing income for July 1998 in the amount of $6,695.07 and corresponding expenses totaling $5,167.81, producing a positive net monthly income of $1,527.26. See Ex. 105 Income July 1998; Ex. 106 Expenses. However, the Debtor indicated that this surplus was put aside to satisfy educational expenses for the parties' daughter. The evidence presented paints a troubled financial picture.

[2] $1,450.00 / 12 = $120.83.

[3] $13,426.74 - $1,450.00 - $2,100.00 - $1,400.00 + $120.83 = $8,597.57.

The Court recognizes the fact that the figures provided by the Debtor are approximate and that exactitude cannot be realized given the variable nature of the Debtor's business. However, the Court finds that they show that the Debtor currently has little or no disposable income and that his circumstances are not likely to change in the foreseeable future. The root of the Debtor's financial problems appears to be the stagnant nature of his business combined with his responsibility to finance his childrens' college education. The Debtor testified that he does not expect the income from his business to increase in the foreseeable future. Moreover, he testified that he has had great difficulty in finding the funds to pay the expenses related to his childrens' education. He has been forced to defer payment on loans connected with his daughter's education and has received a loan from his sister to try to make ends meet. The Court finds that the Debtor has satisfied his burden of production with respect to § 523(a)(15)(A). In other words, he has presented enough evidence to make out a prima facie showing that he is unable to pay the debts at issue. The question thus becomes whether the Plaintiff has fulfilled her ultimate burden of persuasion.

The Plaintiff argues that the parties' daughter is no longer in college and therefore the Debtor's expenses relating to the childrens' education have decreased. Although this argument has merit, it appears that the Debtor is still paying for his daughter's education to some degree due to the deferment of associated loans. The Court finds, based on the parties' evidence, that the Plaintiff has not persuasively rebutted the Debtor's showing that he has little or no disposable income and that, consequently, he is unable to pay the debts at issue pursuant to § 523(a)(15)(A). In other words, the Plaintiff has not satisfied her burden of persuasion under § 523(a)(15)(A). Accordingly, the promissory note in the amount of $23,062.02 and the Debtor's obligation to indemnify the Plaintiff against payment of the Kahn Loan in the amount of $8,423.13 are dischargeable. Because § 523(a)(15)(A) is found to be satisfied, it is unnecessary to consider § 523(a)(15)(B).

D. Attorneys' Fees

The Plaintiff requests that this Court order the Debtor to pay the Plaintiff's costs and reasonable attorneys' fees incurred in bringing the present action pursuant to RSA 458:51, which provides:

> In any proceeding under this chapter in which a party alleges, and the court finds, that the other party has failed without just cause to obey a prior order or decree, the court shall award reasonable costs and attorneys' fees to the prevailing party.

RSA 458:51. By its explicit terms, RSA 458:51 is triggered when the underlying proceeding is brought pursuant to Chapter 458, New Hampshire's statutory regime governing annulment, divorce, and separation. The Plaintiff attempts to meet this requirement by stating that "[t]his action is brought pursuant to N.H. R.S.A. 458 to enforce the Defendant's obligations under the parties' divorce decree." Plaintiff's Complaint at 11. In reality, however, the Plaintiff's complaint is brought pursuant to §§ 523(a)(5) and (a)(15) of the federal bankruptcy code, for the purpose of determining the dischargeability of marital obligations arising from the Divorce Decree. Chapter 458 of the New Hampshire Revised Statutes is not the operative law at issue. Accordingly, RSA 458:51 cannot be relied upon to alter the normal allocation of costs and attorneys' fees. The Court therefore holds that the parties shall bear their own respective costs and attorneys' fees.

III. CONCLUSION

For the reasons stated above, the Court finds that the child support obligation in the amount of $786.00, the alimony obligation in the amount of $948.00, and the obligation to indemnify the Plaintiff against payment of the first mortgage arrearage in the amount of $2,500.00 are all nondischargeable pursuant to § 523(a)(5). In addition, the Court finds that the promissory note in the amount of $23,062.02 and the obligation to indemnify the Plaintiff against payment of the Kahn Loan in the amount of $8,423.13 fail the requirements of § 523(a)(15) and therefore remain dischargeable. Finally, by agreement of the parties, the Debtor's obligation to indemnify the Plaintiff against payment of their joint credit card indebtedness to Associates National Bank of Delaware, Chase, and First USA Visa, should the Plaintiff actually pay this debt, is nondischargeable. Each party shall bear its own costs and attorneys' fees. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate judgment in accordance with this opinion shall be entered.

DONE and ORDERED this 23rd day of September, 1999, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge