

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 98-14245-JMD  
Chapter 7Brian E. Morse,  
DebtorJudith M. Morse,  
Plaintiff

v.

Adv. No. 99-1025-JMD

Brian E. Morse,  
Defendant

*William A. Whitten, Esq.*  
*THE LAW OFFICE OF WILLIAM A. WHITTEN*  
*Attorney for Plaintiff*

*Nancy S. Tierney, Esq.*  
*LAW OFFICE OF NANCY S. TIERNEY*  
*Attorney for Defendant*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

The Court has before it the complaint of Judith M. Morse (“Mrs. Morse”) objecting pursuant to 11 U.S.C. § 523(a)(15) to the dischargeability of an indemnification obligation owed by Brian E. Morse, her former husband (the “Debtor”), as part of their post-divorce property settlement agreement. The Court held a trial of this matter on December 14, 1999, at which both parties testified and presented documentary evidence.

This Court has jurisdiction of the 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. FACTS

The parties were married on November 28, 1980. On March 2, 1994, the parties entered into a permanent divorce stipulation which was incorporated into the final divorce decree that issued from the Grafton County Superior Court (the "Divorce Decree"). The Divorce Decree provided that Mrs. Morse would continue to reside in the marital home until one year after the parties' son graduated from high school, at which time the marital home would be sold with the proceeds divided equally by the parties. Mrs. Morse also retained the option of refinancing or selling the home prior to their son's graduation from high school under which circumstances the equity would be divided equally. The Divorce Decree also required Mrs. Morse to buy the Debtor's equity interest in the home within six months of her cohabitation or remarriage.

In July 1996, the Debtor approached Mrs. Morse about placing a second mortgage on the marital home. The Debtor was interested in buying his own home in Grafton at the time. Mrs. Morse agreed to place a second mortgage on the marital home. Sometime in late July or early August 1996, both parties executed a note and mortgage with Fleet Bank in the principal amount of approximately \$28,000 (the "Fleet Mortgage"). The proceeds from the Fleet Mortgage were used to pay the Debtor's credit card bills; Mrs. Morse did not receive any proceeds from the Fleet Mortgage. Currently the monthly payment on the Fleet Mortgage is approximately \$254 per month.

At the time the parties executed the Fleet Mortgage, the parties also agreed to amend the property settlement provisions of the Divorce Decree. The Debtor drafted a document entitled Amendments to Divorce Stipulations (the "Divorce Decree Amendment"), which agreement was approved by the Grafton County Superior Court in August 1996. The Divorce Decree Amendment provided that the Debtor would execute a quitclaim deed to the marital home. Mrs. Morse would assume all financial responsibility for the home, including payment of the first mortgage. In accordance with the Divorce Decree Amendment, the Debtor gave Mrs. Morse a quitclaim deed to the marital home on September 13, 1996, and the Debtor obtained a release from New London Trust with respect to his obligation to pay the first mortgage.

The Divorce Decree Amendment also provided that the Debtor would assume all responsibility for the payment of the Fleet Mortgage until the house was paid in full or until such time as Mrs. Morse could assume the Fleet Mortgage in payment of the Debtor's share of the equity in the home. The parties also agreed that the cohabitation/remarriage clause of the Divorce Decree would no longer be in effect although the Divorce Decree Amendment does not contain such a provision.

As a result of these actions, the Debtor was able to purchase a home in Grafton, New Hampshire for \$48,000 in September 1996. The Debtor's father loaned him approximately \$10,000 for a down payment on the house. The Debtor obtained a mortgage from New London Trust in the amount of \$38,400 to pay the balance of the purchase price.

In accordance with the Divorce Decree and the Divorce Decree Amendment, the Debtor made monthly payments on the Fleet Mortgage for approximately eighteen months. In February 1998, the Debtor experienced some personal problems, moved to Florida for four months, and stopped making payments on the Fleet Mortgage. Fearing action by the bank for non-payment, Mrs. Morse began paying Fleet Bank.

In July 1998, shortly after his return from Florida, the Debtor brought a petition in Grafton County Superior Court seeking a suspension of his obligation on the Fleet Mortgage. On October 23, 1998, the state court approved the parties' agreement that the Debtor would pay the Fleet Mortgage pending a determination of the matter by the Bankruptcy Court. The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on November 5, 1998. In his schedules, the Debtor listed his Grafton home and claimed a homestead exemption under RSA 480:1 in the amount of \$24,000, the estimated equity in his home. On December 7, 1998, the trustee filed a Trustee's Report of No Distribution after concluding that the Debtor had no property available for distribution to creditors over and above that exempted by law. On December 16, 1998, a reaffirmation agreement between the Debtor and New London Trust with respect to the mortgage note on his home was filed with the Court. The Debtor received his bankruptcy discharge on February 10, 1999.

On January 25, 1999, Mrs. Morse filed the instant action seeking a determination that the Debtor's obligation with respect to the Fleet Mortgage be deemed nondischargeable pursuant to section 523(a)(15) of the Bankruptcy Code. During the pendency of this case, the state court denied the Debtor's request to be relieved from responsibility for the second mortgage, describing the requested relief as "an impermissible modification of a property settlement." Despite the state court order that requires the Debtor to pay the Fleet Mortgage, Mrs. Morse has been making these mortgage payments since at least December 1998.

### III. DISCUSSION

At issue in this case is whether the Debtor's obligation to indemnify Mrs. Morse for her payment on the Fleet Mortgage should be deemed nondischargeable pursuant to section 523(a)(15) of the Bankruptcy Code. The Debtor's personal obligation on the Fleet Mortgage was discharged by order of this Court on February 10, 1999. What the parties are contesting is the implicit obligation of the Debtor to hold Mrs. Morse harmless from the Fleet Mortgage debt. See Dressler v. Dressler (In re Dressler), 194 B.R. 290, 304 (Bankr. D.R.I. 1996) (explaining that only hold harmless obligations may escape discharge in bankruptcy as the debtor's obligation to the third party creditor is "wiped out"). Although it is clear that Mrs. Morse co-signed the Fleet Mortgage, it is undisputed that, pursuant to the Divorce Decree Amendment, the Debtor was to be solely responsible for the obligation.

The parties agree that the threshold requirements of section 523(a)(15) have been met as the debt at issue arose out of the Divorce Decree Amendment and constitutes a property settlement. See 11 U.S.C. § 523(a)(15) (stating that the debt must be "not of a kind described in [section 523(a)(5) dealing with alimony, maintenance, or support] 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"). Pursuant to section 523(a)(15), the debt is presumed nondischargeable unless one of the two conditions outlined in section 523(a)(15) exists. See Garrity v. Hadley (In re Hadley), 239 B.R. 433, 436 (Bankr. D.N.H. 1999). First, if the Debtor is unable to pay the Fleet Mortgage, the Court will find the debt dischargeable. Second,

even if the Debtor can pay the Fleet Mortgage, if the benefits to the Debtor of discharging the indemnity obligation outweigh the detrimental effects of such a discharge on Mrs. Morse and the parties' children, the Court will find the debt dischargeable. Conversely, if Mrs. Morse can prove<sup>1</sup> that (1) the Debtor is able to pay the Fleet Mortgage, and (2) the detrimental effects of the discharge on her and her children outweigh the benefit to the Debtor, the obligation will be deemed nondischargeable by the Court.

#### **A. Debtor's Ability to Pay**

Section 523(a)(15)(A) requires the Court to determine whether a debtor has the ability to pay a property settlement 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." 11 U.S.C. § 523(a)(15)(A). The debtor has the burden of production on this issue. See Hadley, 239 B.R. at 437. Accordingly, in this case, the Debtor must present a prima facie case that he lacks the ability to indemnify Mrs. Morse with respect to the Fleet Mortgage.

In determining the Debtor's ability to pay, it is appropriate to consider the Debtor's disposable income within the meaning of 11 U.S.C. § 1325(b)(2). See Hastings v. Konick (In re Konick), 236 B.R. 524, 528 (B.A.P. 1<sup>st</sup> Cir. 1999). During the trial, the Debtor presented several financial affidavits setting forth his assets, liabilities, income, and expenses from the time of his divorce until the time of trial. At issue under section 523(a)(15), however, is the Debtor's financial circumstances, financial ability, and financial potential at the time of trial. See Hadley, 239 B.R. at 436; see also Humiston v. Huddelston (In re Huddelston), 194 B.R. 681, 687-88 (Bankr. N.D. Ga. 1996) (suggesting that the analysis under section 523(a)(15)(A) should not rely on a "snap-shot" of the debtor's financial situation focusing only on ability to pay at the time of petition or at the time of trial but rather should entail a broader scope of inquiry). The latest financial affidavit presented by the Debtor dated December 13, 1999 reveals that the Debtor has no disposable income with which to satisfy the Fleet Mortgage. The Debtor is currently self-employed and has

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<sup>1</sup> While the Debtor bears the burden of production regarding section 523(a)(15)(A), Mrs. Morse bears the burden of production and persuasion on all other elements of section 523(a)(15) and bears the ultimate burden of persuasion with respect to section 523(a)(15)(A). See Hadley, 239 B.R. at 437.

gross earnings of \$1,352 per month. See Exhibit A to the Memorandum Opinion. His expenses total roughly \$2,075 per month. Based only upon this evidence, it would appear that the Debtor has established a prima facie case that he lacks the ability to pay the debt at issue from his current income.

However, further evidence elicited from the Debtor at trial revealed that the Debtor sold his home in Grafton for \$67,500 in late November 1999, just three weeks before trial. The Debtor testified that after payment of the mortgage, taxes, and closing costs, he received proceeds of approximately \$17,000 from the sale. By the time of trial, the Debtor testified that he had spent this money. He presented a financial affidavit at the time of trial which reflected less than \$400 in his only bank account. The record contains no evidence on the disposition of the sale proceeds. The Debtor does not dispute, however, that he did not use any portion of the proceeds to pay the Fleet Mortgage or reimburse Mrs. Morse for her payments to Fleet Bank. While the Debtor may have used a small portion of the proceeds for a down payment and first month's rent for his new apartment in Lebanon, New Hampshire, the record lacks any evidence as to how the Debtor spent the balance of the funds. Accordingly, the Court finds that it should consider these funds in determining whether the Debtor has the ability to pay the Fleet Mortgage.

Mrs. Morse presented evidence that the Debtor is currently underemployed. At the time of the parties' divorce in 1994, the Debtor was working for Thermal Dynamics, a company for which he had worked for over twenty years, earning \$22 per hour. Within fifteen months of the parties' divorce, the Debtor requested a job transfer that resulted in a \$10 per hour pay cut. The Debtor left that job within a few months, and since that time, the Debtor has worked a series of different jobs earning anywhere from \$11 per hour to \$15 per hour. Currently, the Debtor is self-employed earning an average wage of less than \$8 per hour, based upon a forty hour work week. The evidence at trial revealed that the Debtor possesses numerous trade skills, including welding, rough carpentry, electrical, and plumbing. Based on the evidence, it is not difficult for the Court to find that the Debtor has the capacity to earn more than his current wage and that he is currently underemployed. See Migneault v. Migneault, No. 98-CV-498-B, 1999 WL 1027052, at \*4 (D.N.H. May 18, 1999) (“[T]aking account of a debtor’s earning capacity when evaluating

an inability to pay claim upholds the underlying purpose of 11 U.S.C. § 523(a)(15) and best guards against potential abuses.”); see also Oswald v. Asbill (In re Asbill), 236 B.R. 192, 195 (Bankr. D.S.C. 1999) (finding that the debtor was voluntarily underemployed and capable of earning at least \$3,600 per month); Jenkins v. Jenkins (In re Jenkins), 202 B.R. 102, 106 (Bankr. C.D. Ill. 1996) (stating that voluntary underemployment should be considered by the court in making its evaluation under section 523(a)(15)(B)). The Court acknowledges that the Debtor testified that he has been unable to find better paying employment despite good faith attempts. The evidence also suggests that the Debtor has started down the road of rebuilding his financial health following the personal and employment difficulties that led to his time in Florida and his bankruptcy filing. The sale of the Debtor’s Grafton home was a step in that direction, and the proceeds from that sale should provide him with a financial cushion during the time it will take the Debtor to rebuild his employment and increase his income. Based upon all the testimony, the Court concludes that the Debtor should be able to find employment within a reasonable period of time paying in the vicinity of \$13 per hour.<sup>2</sup>

Thus, taking into account the \$17,000 in funds that the Debtor received from the sale of his Grafton home and an anticipated increase in pay of roughly \$884 per month,<sup>3</sup> the Court finds that the Debtor has the ability to indemnify Mrs. Morse for the Fleet Mortgage payments both currently and in the future when he is employed at the level his job history indicates he can achieve. The Court finds that the Debtor has not met his burden of producing evidence demonstrating that he currently does not have the ability to pay the Fleet Mortgage due to his failure to explain the disposition of the \$17,000 he received from the sale of his only significant asset three weeks before trial. The Court finds that Mrs. Morse has met her

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<sup>2</sup> The Court agrees with the Debtor that he is unlikely to find another job paying \$22 per hour. However, the Debtor has been able to earn wages in the range of \$11 to \$15 per hour during the last few years.

<sup>3</sup> If the Debtor earned \$13 per hour at 40 hours per week, he would receive \$520 a week, or \$2,236 per month (\$520 x 4.3). This would increase his monthly salary by almost \$884 per month (\$2,236.00 - \$1,352.17). This money alone would cover the monthly payment of \$254 on the Fleet Mortgage.

burden of persuasion under section 523(a)(15)(A) with respect to the Debtor's long term employment prospects and his ability to pay the Fleet Mortgage in the future.

### **B. Balancing Test**

As explained above, before the Court can find the debt nondischargeable, Mrs. Morse must also meet her burden of proof under section 523(a)(15)(B). Mrs. Morse must demonstrate that the discharge of the Debtor's indemnity obligation will result in a detriment to her that outweighs the benefit to the Debtor. In conducting the so-called "balancing test," the Court should consider the totality of the circumstances and the equities of the case. See Huddelston, 194 B.R. at 689. Specifically, the Court should consider the income and expenses of both parties, the nature of the debt in question, and Mrs. Morse's disposable income and ability to pay. See id.; see also Hadley, 239 B.R. at 439.

The benefit of discharging the Debtor's obligation to indemnify Mrs. Morse is obvious. The Debtor would be in a much better financial situation if he were not required to make a monthly payment of \$254 on account of the Fleet Mortgage. The Court must consider, however, the fact that the Debtor is already in a much better position having filed bankruptcy. See Huddelston, 194 B.R. at 687 (stating that courts should consider the impact of the debtor's bankruptcy and discharge). Through his Chapter 7 case, the Debtor has been able to discharge an \$8,000 deficiency claim on his Toyota truck as well as his personal liability on the Fleet Mortgage. The Debtor has also been able to discharge approximately \$11,150 in credit card debt, a \$3,000 loan from his sister, and a \$13,000 loan from his father. While the Debtor may feel a personal obligation to repay his relatives, he is no longer legally obligated to repay these debts.

With respect to the detriment to Mrs. Morse, she submitted a financial affidavit summarized in Exhibit B to the Memorandum Opinion that shows that she has monthly income of approximately \$3,477, which includes gross wages of \$2,553, child support of approximately \$424, and a contribution from her live-in companion of \$500. See Kopp v. Marro (In re Marro), Bk. No. 99-10545-JMD, Adv. No. 99-1095-JMD (Bankr. D.N.H. Dec. 10, 1999) (stating that it is appropriate to consider the income of a debtor's live-in companion in completing the section 523(a)(15) analysis). Mrs. Morse's financial affidavit shows total



monthly expenses of \$4,048, including the monthly Fleet Mortgage payment of \$254, which leaves her with a monthly deficit of almost \$571.

At trial, the Debtor suggested that several of Mrs. Morse's monthly expenses were unnecessary, specifically, the \$60 payment on her pop-up camper, her \$87 savings expense, and her \$125 retirement contribution. Mrs. Morse testified that the pop-up camper was used to take the parties' children on vacation, an activity which she stated they enjoyed. The Court does not find this expense excessive. As for the savings and retirement expenses, the Court considers these expenses reasonable given Mrs. Morse's testimony regarding the need to perform some repairs on her home and the Court's view that individuals need to save for retirement. Even if these expenses were not reasonably necessary for Mrs. Morse's maintenance and support, she still would experience a shortfall of almost \$289 per month if forced to continue making the Fleet Mortgage payments. The evidence clearly demonstrates that Mrs. Morse does not currently possess sufficient resources to meet her monthly expenses.

In conducting the balancing test of section 523(a)(15)(B), it is also appropriate for the Court to consider what effect, if any, a discharge of the obligation will have on the property settlement provisions of the Divorce Decree and Divorce Decree Amendment. Pursuant to these documents, Mrs. Morse, in her sole discretion, can elect to remain in the marital home or to sell the marital home. In either situation, the Debtor is entitled to share in the marital home's equity. In accordance with the Divorce Decree Amendment, if Mrs. Morse elects to remain in the marital home, she must buy out the Debtor's equity share. Pursuant to the Divorce Decree Amendment, the Debtor's interest in the equity will be one-half of the appraised market value at the time of the election less \$76,000, the balance of the first mortgage as of August 15, 1996, the approximate date of the Divorce Decree Amendment.<sup>4</sup> If Mrs. Morse instead elects to sell the home, the Debtor's equity interest will be one-half of the net sale proceeds less \$76,000, the balance of the first mortgage at the time the parties amended the property settlement provisions.

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<sup>4</sup> The Divorce Decree Amendment provides that Mrs. Morse may assume the second mortgage as a means of paying the Debtor his equity share. The Divorce Decree Amendment does not require this method of payment however.

Mrs. Morse has not yet made her election. Nonetheless, under either scenario, Mrs. Morse will suffer further detriment if the Fleet Mortgage obligation is discharged, given the economic effect of the property settlement provisions. At the time the parties amended the Divorce Decree, the marital home was valued at \$111,000<sup>5</sup> and was subject to a \$76,000 first mortgage. This left the parties with \$35,000 in equity in the marital home. Pursuant to the parties' 1996 agreement, the Debtor obtained approximately \$28,000 of the equity for his own use by placing the Fleet Mortgage on the marital home, money that the Debtor used to pay his credit card debts which thus enabled him to purchase the Grafton house. Despite the Debtor having already received his share of the equity in the marital home in 1996 (as well as most of Mrs. Morse's share), the Debtor is still entitled, pursuant to the terms of the Divorce Decree Amendment, to receive additional monies as part of the parties' property settlement. If Mrs. Morse were to elect today to remain in the marital home, she would be required to pay the Debtor approximately \$14,000<sup>6</sup> even though the actual equity in the home is only \$5,000<sup>7</sup> and even though the Debtor already received \$28,000 in 1996. Payment of the \$14,000 would occur despite the Debtor's failure to make payments on the Fleet Mortgage for over a year and despite the fact that every payment by Mrs. Morse on the Fleet Mortgage is a payment which increases the amount the Debtor is entitled to receive as his share of the equity.<sup>8</sup> The Court finds the current property settlement provisions inequitable especially because the Debtor essentially converted both his share of the equity in the marital home and Mrs. Morse's share of equity in the marital home into exempt equity in his Grafton home in return for his agreement to pay the Fleet Mortgage. The Debtor then

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<sup>5</sup> At the time of the parties' divorce in 1994, both parties valued the property at \$118,000. In 1996, the Debtor valued the property at \$111,000. Mrs. Morse valued the home at \$100,000 in 1998 and at \$104,000 at the time of trial.

<sup>6</sup>  $\$104,000 - \$76,000 = \$28,000$  and  $\$28,000 / 2 = \$14,000$

<sup>7</sup>  $\$104,000 - \$99,000 (\$71,000 + \$28,000) = \$5,000$

<sup>8</sup> Every reduction in the amount owed on the Fleet Mortgage increases the parties' equity in the marital home. The increase in equity will not be shared equally by the parties, however, if Mrs. Morse is required to pay the Fleet Mortgage in full. The reason for the inequality is the fact that the equity calculation under the Divorce Decree Amendment does not take into account the Fleet Mortgage but only the first mortgage.

sold the Grafton home on the eve of trial without accounting for \$17,000 in proceeds which he admits he received at the closing.

Although the Debtor stated at trial that he does not expect to receive any monies on account of his equitable interest in the marital home and would in fact waive his interest in the equity, the Divorce Decree and Divorce Decree Amendment do not contain any provision for waiver. Unless the parties return to state court and seek to have the property settlement further amended,<sup>9</sup> Mrs. Morse will be required to provide the Debtor with his one-half share of the equity at the time she makes her election either to remain in the marital home or to sell it. Although the state court may see fit to further amend the Divorce Decree and the Divorce Decree Amendment, or the Debtor may waive any claim to equity in the marital home, such action cannot restore to Mrs. Morse her share of the equity in the marital home which was “borrowed” by the Debtor in 1996 and converted to cash by him in 1999.

For these reasons, the Court finds that Mrs. Morse has satisfied her burden under section 523(a)(15)(B). The detriment of discharging the Debtor’s obligation to indemnify Mrs. Morse outweighs the benefit to the Debtor of discharging his obligation to indemnify Mrs. Morse for her payment of the Fleet Mortgage obligation.

#### **IV. CONCLUSION**

In conclusion, the Court finds that the Debtor has not met his burden of production of evidence with respect to 11 U.S.C. § 523(a)(15)(A) and that Mrs. Morse has satisfied her burden of persuasion with respect to 11 U.S.C. § 523(a)(15)(A) and (B). Accordingly, the Debtor’s obligation to indemnify Mrs. Morse for payment of the Fleet Mortgage is nondischargeable. This opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

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<sup>9</sup> A recent New Hampshire Supreme Court case explained that a property distribution will not be modified without a showing of fraud, undue influence, deceit, misrepresentation, or mutual mistake. See Sommers v. Sommers, No. 97-299, 1999 WL 446095, at \*3 (N.H. July 2, 1999). At trial the parties agreed that it is very difficult to modify a property settlement in state court.

DATED this 5<sup>th</sup> day of January, 2000, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge

**EXHIBIT A**

**Itemization of the Debtor's Assets, Liabilities, Income, and Expenses as of December 13, 1999**

Assets

Furniture	\$2,000.00
Automobiles	1,400.00
Cash	390.00
Life Insurance	10,000.00

Liabilities

Outstanding Debt	\$0
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Monthly Income

Gross Income	\$1,352.17
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Monthly Expenses

Child Support and Insurance	\$515.66
Income Taxes	229.01
Rent	550.00
Fuel	55.00
Food	129.90
Utilities	144.25
Insurance	136.87
Clothing	45.00
Transportation	219.17
Medical/Dental	5.00
Other	42.67
Total	2,072.53

Disposable Income	<\$720.36>
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**EXHIBIT B**

**Itemization of Mrs. Morse's Assets, Liabilities, Income, and Expenses as of November 1, 1999**

Assets

Marital Home	\$104,000.00
Furniture	0
Automobiles	8,450.00
Cash	500.00
Pension	25,000.00

Liabilities

Outstanding Debt	\$99,000.00
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Monthly Income

Gross Income	\$2,553.00
Child Support	424.34
Contribution	500.00
Total	3,477.34

Monthly Expenses

Income Taxes	\$746.00
First Mortgage	708.00
Second Mortgage	254.00
Home Maintenance	50.00
Real Estate Taxes	226.00
Fuel	85.00
Food	550.00
Utilities	192.00
Insurance	109.00
Clothing	160.00
Transportation	341.00
Medical/Dental	144.00
Other	84.00
Loan Payments	127.00
Savings	87.00
401(k)	125.00
Pop-up Camper	60.00
Total	4,048.00

Disposable Income	<\$570.66>
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