

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 00-13202-MWV  
Chapter 7

David F. Nettles, Jr.,

Debtor

Anita Jo Nettles,

Plaintiff

v.

Adv. No. 01-1052-MWV

David F. Nettles, Jr.,

Defendant

*Douglas A. McMillan, Esq.*  
*Attorney for the Plaintiff*

*David F. Nettles Jr., Pro se*

**MEMORANDUM OPINION**

The Court has before it the complaint of Anita Jo Nettles (“Plaintiff”) seeking a determination by this Court that an amount owed to her by the Debtor, her former husband, David Nettles, Jr. (“Defendant”), is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15). A trial on the complaint was held on November 19, 2001, at which the Plaintiff was represented by counsel and the Debtor/Defendant was *pro se*.

**JURISDICTION**

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).

## FACTS

The parties were married on June 19, 1993 and divorced on November 27, 2000. At the time of the divorce, in order to roughly equalize the parties' pension assets, the Plaintiff was awarded \$5,767.87. (Pl.'s Ex. 1, ¶ 4). Paragraph 6 of the same divorce decree awarded the Defendant \$768.37, representing the proceeds from the sale of a boat which had not been paid to the Defendant. (Pl.'s Ex. 1, ¶ 6). These two awards resulted in a net due to the Plaintiff of \$4,999.50.

Paragraph 7 of the divorce decree provided that the proceeds of the marital homestead would be divided equally subject to the above adjustments. (Pl.'s Ex. 1, ¶ 7). On November 26, 2000, the Debtor filed his petition under Chapter 7 of the Bankruptcy Code. On August 10, 2001, the marital homestead was sold. The amount in question, \$4,999.50, is currently being held in escrow from the Defendant's portion of the sale proceeds subject to the ruling of this Court.

## DISCUSSION

Section 523(a)(15) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from 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).

Unlike most § 523(a)(15) complaints, there is no issue of the Defendant's ability to pay in the instant case. The amount in question, \$4,999.50, is being held in escrow and, thus, the Court must find that the Defendant has the ability to pay.

The issue then before the Court is whether the benefit of the discharge of this obligation of the Debtor outweighs the detriment to the Plaintiff pursuant to 11 U.S.C. § 523(a)(15)(B). For the following reasons, the Court finds that it does not.

The testimony of the Defendant indicates that he has a Bachelor's of Science degree and a Master's in Business Administration, although he testified that he had not taken advantage of the Master's Degree. The Defendant had been laid off just days before the trial. However, there was evidence that he earned in excess of \$60,000 for each of the two years prior to 2001. Although he is presently unemployed, he testified that he was not currently seeking other employment, but trying to negotiate a better severance package than what was offered to him. The evidence further indicated that the Defendant's job was eliminated and that he was not laid off for cause.

The Plaintiff testified that she resided with her son, age 6, to whom she was the primary caregiver. She also testified that she has a high school degree and attended four quarters of college at Ohio State, but did not obtain a degree. Additionally, she is currently employed by First Essex Bank in their mortgage department. Her total income, including child support from the Defendant, is approximately \$43,000 and she has retirement accounts totaling approximately \$20,000.

This Court has previously ruled that the Plaintiff has the burden of proof on the "greater benefit" exception, which was affirmed by the District Court. Migneault v. Migneault (In re Migneault), 243 B.R. 585 (Bankr. D. N.H. 1999). In re Migneault also affirmed this Court's ability to take into consideration

the Defendant's future earning capacity. Id. at 590. In the instant case, the Plaintiff has met her burden. Other than the fact that the Defendant would be able to keep the \$4,999.50 if it was not excepted from discharge, there is no evidence that this benefit outweighs the detriment to the Plaintiff. The Plaintiff is, at present, their child's primary care giver. She only has a high school degree. Her income includes child support, which may be at risk due to the Defendant's current unemployed status. Despite this current state of unemployment, it is clear that the Defendant has a superior earning capacity based on both his education and history of employment.

While the Defendant, at trial, did point out some minor inconsistencies in the Plaintiff's financial forms, the Court finds that these were of little consequence and did not override Plaintiff's meeting of her burden of proof.

Based on the above, the Plaintiff's complaint is granted, and the sum of \$4,999.50, currently being held in escrow, is excepted from discharge pursuant to section 523(a)(15) of the Bankruptcy Code.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 28<sup>th</sup> day of November, 2001, at Manchester, New Hampshire.

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Mark W. Vaughn  
Chief Judge