IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
DANIEL ALLEN WEBSTER,	)	**Case No. 01-10720**
	)	**Chapter 7**
	)	
Debtor.	)	
	)	
	)	
KELLY J. WEBSTER now COLBERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 01-5091**
	)	
DANIEL ALLEN WEBSTER,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This adversary proceeding comes before the Court on plaintiff Kelly J. Webster's (now Kelly J. Colbert) complaint pursuant to 11 U.S.C. § 523(a)(15)[1] to except from discharge a nonsupport divorce obligation owed by debtor Daniel Allen Webster under the parties' 1997 divorce decree. This matter was tried on August 28, 2002 and the Court took the matter under advisement. The Court is now prepared to rule.

FINDINGS OF FACT

Debtor was married to plaintiff for 17 years; they were divorced in 1997, prior to debtor filing this bankruptcy case. Daniel and Kelly had three children, one of whom still lives at home with

[1] All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

Kelly, but has reached the age of majority and holds a part-time job.

In the divorce decree entered on December 11, 1997 in Sedgwick County Case No. 97 D 4447, the court set over the marital homestead, consisting of a 1990 mobile home, to Daniel. In turn, Daniel was to pay the indebtedness secured by the mobile home to Greentree Acceptance (now known as Conseco Finance Servicing Corp.) and to indemnify and hold Kelly harmless from any further obligation with regard to the mobile home debt. This obligation will be referred to as the "Conseco debt."[2]

In addition to the mobile home, Daniel was awarded a Ford truck, a van, the furniture, his clothing, his VIP account (a 401k or retirement account through his employment), and other personalty in his possession.

In the divorce decree, Kelly was awarded her clothing, a 1997 vehicle, and some personal property. Although the parties had at least one minor child at the time of the divorce and Daniel made in excess of $90,000, no child or spousal support was ordered.[3]

According to Plaintiff's Exhibit 3, Conseco filed a petition in March 2001 against Daniel and Kelly in state court to collect the indebtedness and recover possession of the mobile home.[4] In the petition, Conseco alleged that the remaining balance due on the mobile home note is $27,592 and that

---

[2] The Conseco debt was originally incurred by Daniel and Kelly in 1990. They originally financed $32,016 to purchase a new 1990 Skyline mobile home. *See* Plaintiff's Ex. 3.

[3] Daniel testified at trial that he discontinued his 401k contribution sometime in 2001 in order to meet his child support obligation and that this obligation has since terminated upon the child turning 18.

[4] Conseco's action was brought in Sedgwick County District Court, Case No. 01C705. According to other court papers in Exhibit 3, Conseco took a default judgment against both Daniel and Kelly, but subsequently withdrew the journal entry of default judgment on May 3, 2001. Conseco's lawsuit appears to have been initiated and default judgment obtained when the automatic stay was in place.

the home has an estimated value of $21,081, yielding in the best case, a deficiency of approximately $6,500.[5] Unfortunately, at trial of this matter neither party enlightened the Court as to the status of the recovery of the mobile home, whether it has been repossessed or surrendered, or the amount of any deficiency.[6] It is apparent that neither Daniel nor Kelly inhabits the mobile home today.

Daniel filed his bankruptcy case on February 27, 2001. He seeks to discharge not only his obligation to Conseco, but also his obligation to Kelly to indemnify and hold her harmless from Conseco as set out in the divorce decree. Kelly proceeds under §523(a)(15) to except this nonsupport divorce obligation from discharge.

Determining this complaint requires this Court to examine the parties' relative financial circumstances at the time of trial.

Daniel is employed by Boeing Aircraft Corporation where he works as an automated rivet installer. According to Daniel's testimony his income has decreased every year since 1998 when he earned approximately $93,000. His income tax returns support this decline in income. Daniel testified that the decrease is attributable to diminishing availability of overtime. The household adjusted gross incomes for the years leading up to this proceeding are as follows.

---

[5] In Daniel's bankruptcy, Conseco filed a motion for stay relief on May 30, 2001. In that pleading, Conseco alleges that the estimated value of the mobile home is $19,537 and the outstanding balance on the note is $29,661. An order granting Conseco stay relief was entered on June 26, 2001.

[6] In debtor's bankruptcy Schedule D, the debt to Conseco was listed at $27,000 with the value of the mobile home as $0.

Year	Income
1998	$92,806
1999	$83,010
2000	$74,614
2001	$69,840
2002	$58,672[7]

Daniel's current hourly rate of pay is $27.61. On the assumption that he works a full year, or 2,080 hours, his gross compensation would be $57,428 or $4,785.73 per month. Overtime is compensated at time and a half. At the time of trial, he had earned only 30 hours of overtime pay for all of 2002. According to Daniel, he has $131 per month deducted from his paycheck for repayment of a 401k loan and $1,198 per month withheld for taxes, to arrive at monthly net income of $3,456.73. These deductions testified to by Daniel vary from his August 2002 earning statement (Plaintiff's Ex. 10). According to the earnings statement, Daniel currently has the following amounts withheld each two-week pay periood: dues $4.00; 401k loan repayment $60.59; medical insurance $15.00; and taxes $552.94. Thus for an average one month period Daniel's payroll deductions are approximately $1,370.47 and his take home pay is approximately $3,415.26. Daniel previously made contributions to his 401k plan, but no longer does so. He testified that his current 401k balance is approximately $7,000. He expected the 2002 Boeing contract to include a health insurance copayment of $269 per month. This would further diminish his take home pay.

Daniel's wife, Joan, has also been employed in the aircraft industry over the years. However,

[7] Through August, the Court estimates Daniel's income at $39,405 based on eight months at $4785 per month plus $1,243 (30 hrs. @ $41.42) in overtime. Assuming that Daniel received no overtime for the remainder of the year, his gross income would calculate to $58,672 for the year 2002.

she sustained an injury which prevents her from doing aircraft manufacturing work and she has been unable to produce income at her previous levels. Joan was unemployed at the time Daniel filed his bankruptcy and has not been employed during 2002. Joan has a high school education. There was no evidence presented concerning Joan's efforts to find work or of any other limitations that would preclude Joan from becoming employed in a job outside of aircraft manufacturing.

In addition to Daniel's income, Joan's eighteen year old daughter Marian, who lives with Daniel and Joan, receives Social Security survivor benefits on account of her natural father's death. These benefits amount to some $700 per month.[8] While the money is Marian's, presumably these funds will contribute to Marian's support and may therefore be considered as part of the household funds. With the social security benefit, Daniel and Joan's total net income per month is $4,115.

The evidence presented of Daniel and Joan's current estimated monthly expenses is as follows.

Rent	$675	
Electric	$150	
Phone	$150	
Cell Phone/Cable	$103	
Food	$700	(for three people)
Clothing	$100	
Laundry/Dry cleaning	$ 40	
Medical	$150	
Transportation	$200	

[8] Joan testified that these social security survivor benefits terminated in July 2002, due to Marian turning 18. The termination of benefits is currently on appeal according to Joan because Marian is attending high school.

Recreation/entertainment	$ 50
Auto Insurance	$133
Car Taxes	$ 58
Car Payment	$422
Grooming	$120
Cigarettes	$250
Total	$3,301

Kelly's current financial situation is as follows. She is employed at Raytheon as a precision parts finisher and is paid $20.10 per hour. She is married to Dennis Colbert who is a division manager at Raytheon Aircraft Corporation. Dennis is a salaried employee. His annual salary in 2001 was $67,500. Kelly had been laid off from work for about three months in 2002, but was recalled and returned to Raytheon in May. She rarely receives any overtime. Kelly's 18 year old daughter lives with Dennis and Kelly and works part-time. Dennis' 14 year old son from a prior marriage also recently moved in and lives with them.

Kelly and Dennis' tax returns for the past four years reflect adjusted gross income for their household as follows.

Year	Income
1998	$127,677
1999	$112,215
2000	$111,677
2001	$117,616

Dennis' pay stub for a two-week pay period in August 2002 extrapolates to a monthly salary of roughly $6,786 less tax withholding of $1,936. After subtracting his additional deductions each pay period as set out below, his take home pay is $3,648 per month.

Medical Insurance	$ 96
401k contribution	$272
Life Insurance	$ 76
401k loan repayment	$620
Charitable contribution	$ 68
Savings Bond	$ 50
Club	$ 2
Disability	$ 18
Total Other Deductions	$1,202

Kelly's pay stub for a *one week* pay period in August 2002 indicates a gross salary of $804 and tax withholding of $227. She shows other payroll deductions of $56 for savings plan and $21 for savings plan loan repayment. Kelly's take home pay for the week was $499.[9] Dennis and Kelly's combined monthly net income is approximately $5,810.

Pursuant to interrogatory answers and testimony at trial, Dennis and Kelly's monthly expenses are as follows:

House payment (with insurance & taxes)	$1,200
Household maintenance	$ 250
Food	$1,300

[9] Assuming Kelly would work a full year (2,080 hours) at her hourly rate of $20.10, her gross earnings from Raytheon would be $41,808 or $3,484 per month. This conservatively calculates to $2,162 per month take home pay (52 weeks of $499 net pay per week divided by 12 months).

Utilities	$ 350
Telephone	$ 80
Clothing	$ 300
Medical/dental	$ 100
Life and health insurance	$ 100
Car Insurance	$ 167
Car expenses	$ 400
Car payment	$ 612
School	$ 40
Entertainment	$ 220
Incidentals	$ 350
Grooming	$ 100
School lunches	$ 80
Total	$5,649

ANALYSIS

Section 523(a)(15) provides:

> (a) A discharge under section 727 . . . 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 . . . divorce decree . . . 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 . . .; or
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse . . . ;

11 U.S.C. § 523(a)(15).

Plaintiff makes no argument that the debt in question is in the nature of support or maintenance and nondischargeable. Accordingly, § 523(a)(5) is inapplicable.

In this proceeding under § 523(a)(15), the debtor has the burden of proof on the alternative grounds for discharge of the Conseco debt – the "inability to pay" or the "balancing test".[10] Ordinarily, the appropriate time for applying these tests is at the time of trial.[11]

Ability to Pay

As near as the Court can determine, the Conseco debt may be anywhere from $6,500 to $29,000, depending upon what amount, if any, Conseco recovered for the mobile home. Daniel contends that he is unable to pay the Conseco debt, due largely to the elimination of overtime work at his job. Daniel's documentation substantiates a steady decline in household income over the past five years although some of the decline is attributable to his current wife's unemployment. For the year he has only been able to obtain 30 hours of overtime and none of this overtime was earned in recent months.

Daniel has no dependents to support. He testified that his child support obligation for his youngest daughter has ceased due to her turning 18. This daughter lives with Kelly. Only Joan's daughter lives with Daniel and Joan. This child has also reached 18 years of age and Daniel has no legal obligation of support for her.

The primary test utilized by the courts for determining the debtor's ability to pay is Chapter

---

[10] *In re Johnson*, 212 B.R. 662, 666 (Bankr. D. Kan. 1997); *In re Molino*, 225 B.R. 904, 907 (6th Cir. BAP 1998); *In re Moeder*, 220 B.R. 52, 56 (8th Cir. BAP 1998); *In re Jodoin*, 209 B.R. 132, 139-40 (9th Cir. BAP 1997).

[11] *In re Johnson*, 212 B.R. at 667; *In re Jodoin*, 209 B.R. at 142.

13's disposable income test .[12] The Court therefore focuses on Daniel's current financial situation. Based upon Daniel's currently hourly wage of $27.61, his gross income is $4,785 per month. After withholding taxes, health insurance, a 401(k) loan repayment, and union dues from his pay, Daniel has net income of approximately $3,415 per month, before expenses.

The Court declines to include the $700 monthly social security benefit previously received by Joan's daughter even though she is part of the household. It was undisputed that the social security benefit terminated in July. While Joan testified that the termination of benefits was being appealed by her daughter, the possible restoration of this benefit in the future is too speculative to be included in a present disposable income calculation.

Likewise, the Court will not make further allowance for overtime pay. It appears that Daniel has not earned any overtime pay in recent months. Daniel's testimony concerning the unavailability of overtime work was undisputed and credible. The Court will not engage in forecasting Daniel's prospect for working overtime in the future.

Daniel's monthly expenses total $3,301. The claimed expenses appear to be reasonable, except for the $250 a month spent on Daniel and Joan's smoking habit and the $253 monthly phone expense. The Court concludes that the $250 monthly expense for cigarettes is neither necessary nor reasonable to support himself or the other members of the household. A monthly phone expense closer to $100 is more than adequate. Daniel's current disposable income calculates to $517 ($3,415 - $2,898). Daniel and Joan's disposable income would be further enhanced by Joan obtaining employment and restoration of Marian's social security survivor benefit. Based upon the foregoing, Daniel has not satisfactorily proven an inability to pay the Conseco debt under § 523(a)(15)(A).

Balancing Test

---

[12] *In re Jodoin*, 209 B.R. at 142; *In re Johnson*, 212 B.R. at 667.

Having failed to prove an inability to pay, the Court next considers whether the Conseco debt should be discharged under the balancing test. Daniel has the burden to show that the benefit of a discharge of the Conseco debt outweighs the detriment to his ex-wife Kelly.[13]

A variety of factors are considered to determine whether the benefit to debtor in discharging the nonsupport divorce debt outweighs the detriment to the nondebtor spouse. They include: (1) the payment terms of the debt; (2) the current income and expenses of both parties and their spouses; (3) the current assets and liabilities of the parties and their spouses; (4) the health, skills, and earning capacity of each party and their spouses; (5) the age, number, and special needs of the respective households' dependents; (6) recent changes to the respective parties financial conditions; (7) the amount of debt being discharged by the debtor; (8) the non-debtor spouse's eligibility for bankruptcy relief; and (9) whether either or both parties have proceeded in good faith in the instant litigation.[14]

The Court has reviewed and applied the above factors. The Court notes that Kelly and Dennis enjoy a substantially higher standard of living than Daniel and Joan by reason of being a two- income earner family. Their monthly gross household income is approximately $10,270 and their net monthly household income is $5,810.

Dennis and Kelly's monthly household expenses total $5,649. This analysis would suggest that Dennis and Kelly are on a tight budget and have no disposable income left. However, they have substantial payroll deductions for savings plans, savings bonds and charitable contributions which are not reasonably necessary for support and maintenance of the household and would increase their net monthly income by nearly $600 before taxes. Moreover, several claimed expenses exceed an amount that this Court would consider reasonable. An amount of $1,300 for food seems generous,

---

[13] *In re Molino*, 225 B.R. at 907.

[14] *In re Johnson*, 212 B.R. at 667.

notwithstanding the fact that Dennis' 14 year old son lives with them and there are four people in the household. $1000 is a reasonable monthly amount for food. Also, the claimed expense of $220 for entertainment is high. An amount of $150 is more reasonable. Finally, an amount of $350 for unspecified "incidentals" is excessive; there is no indication that such incidentals are necessary for support and maintenance of the household. The Court would allow $75 for incidentals. Dennis and Kelly's monthly expenses, as revised, are $5,004 rather than the $5,649 claimed.

With the revised expenses, together with the increase in net household income, Dennis and Kelly have monthly disposable income of approximately $1,406 ($6,410-$5,004). This compares to Daniel and Joan's monthly disposable income of $517. Dennis and Kelly are more able to pay the Conseco debt, without adversely affecting their standard of living, than are Daniel and Joan.

An application of the *Molino* factors yields the following. If Conseco were to receive a deficiency judgment of $6,500.00, and if the judgment was collected via execution, Daniel could not sustain garnishment of 25 percent of his wages without serious damage to his household.[15] The consequences to Kelly of such a garnishment would be substantially less severe as she is not the principal breadwinner, nor are her wages particularly high compared to Daniel's. Because of Dennis' income, Kelly's current household income is substantially higher than Daniel's. She is in good health and is apparently able to maintain a good job at Raytheon. There is no reason to believe that her employment prospects are any more or less tenuous than Daniel's. In contrast, Daniel's wife Joan is apparently unable to work in the aviation industry and her employment prospects seem more limited. Daniel's bankruptcy schedules only refer to some $16,500 in unsecured debt, not including any debt owed Conseco. Should this Court not except his liability to Kelly on the Conseco debt from this

---

[15]Kan. Stat. Ann. §60-2310 limits wage garnishments for non-support debts to 25 per cent of the debtor's disposable income.

discharge, Daniel's unsecured debt load will have been reduced in this case by only one-third. Finally, the Court observes that Kelly signed the note for the mobile home in 1990 and is jointly liable on the Conseco debt. Kelly's testimony that she never wanted to purchase the mobile home in the first instance does not persuade this Court to tip the balance in her favor. Kelly is eligible to file for bankruptcy relief to discharge her liability on the Conseco debt and may well need to do so whether or not this Court excepts Daniel's indemnity liability from his discharge.[16]

Daniel has met his burden of proof under §523(a)(15)(B). The benefit to Daniel of discharging the Conseco debt outweighs the detrimental consequences to Kelly. Daniel's obligation to hold Kelly harmless on the Conseco debt is discharged. A Judgment on Decision will issue this day.

Dated this 25th day of October, 2002.

____
ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum Opinion** were deposited in the United States mail, postage prepaid on this 25th day of October, 2002, to the following:

David J. Lund
Dewey & Lund, L.L.P.
1010 North Main Street
P.O. Box 635
Wichita, KS 67201

Todd Allison
1600 EPIC Center
301 N. Main
Wichita, KS 67202

[16] *See In re Molino*, 225 B.R. at 907.

Mark J. Lazzo
129 E. Second St.
Wichita, KS 67202

Daniel Allen Webster
8800 E. Harry
Apt. 502
Wichita, KS 67207

D. Michael Case
400 Commerce Bank
150 N. Main
Wichita, KS 67202-1321

U.S. Trustee
500 Epic Center
301 N. Main
Wichita, KS 67202

____
Janet Swonger,
Judicial Assistant