

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
DANIEL W. HUMBARGER,)	Case No. 01-10594
)	Chapter 7
)	
Debtor.)	
_____)	
)	
DANIEL W. HUMBARGER,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 01-5045
)	
MARY HUMBARGER, n/k/a ALBERS,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND OPINION

This adversary proceeding comes before the Court on plaintiff-debtor Daniel Humbarger’s (“debtor”) complaint pursuant to 11 U.S.C. § 523(a)(15)¹ to determine the dischargeability of a property settlement judgment in connection with his 1994 divorce. This matter came on for trial on May 28, 2002. Both parties testified and offered exhibits which the Court received by stipulation. The parties also stipulated to certain facts. The parties did not submit trial briefs. The Court is now prepared to rule.

FINDINGS OF FACT

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

Debtor is incarcerated by the State of Kansas at the Hutchinson Correctional Facility and has been incarcerated since April 1999 as a result of felony convictions for kidnaping and aggravated sexual battery. Debtor will be released no sooner than May 6, 2006. He is 53 years of age and is a high school graduate.

Prior to his incarceration, debtor was engaged in heavy machinery and diesel truck repair, acting as an independent contractor and sole proprietor. He operated his business out of a portable trailer which contained his tools, welder, and other work equipment. He operated this business in the Salina area and ultimately in Lincoln County, Kansas. Debtor presented no evidence of the income he earned from this business prior to his incarceration. There is no evidence of debtor being in poor health. Debtor testified that, when he leaves prison, he will have no home, clothes, tools or skills to support himself.

With respect to debtor's current income and expenses, debtor stated that his bankruptcy schedules in this case reflect neither income nor expenses because they were filed prior to his obtaining prison employment.² Debtor testified that he receives \$1.05 per day, five days a week, or approximately \$21 per month for his prison employment. After deducting a bookkeeping fee of \$1, he nets \$20 per month. Debtor testified that he has monthly expenses of approximately \$80 for soap, shampoo, deodorant and other personal needs. The deficiency is made up from payments by Ronald Diehl and gifts from his family. No evidence was presented concerning debtor's earning potential upon release nor debtor's historical earnings.

Defendant Mary Albers, formerly Mary Humbargar ("Mary"), was married to debtor for some 26 years before being divorced in September of 1994. Debtor and Mary's three children are grown.

² Debtor's statement of financial affairs filed with his bankruptcy petition reflects that debtor's prison income for the year 2000 was \$182.

Mary is 51 and holds a general education diploma. She attended Wichita State University for two years in the 1980's, but did not receive a degree. She is currently employed by High Plains Sand Company of Kanapolis, Kansas where she is paid \$10.25 per hour. In 2001, she earned \$12,895 in income, but has no health insurance or other employment benefits. Her work is to some degree, seasonal. By her account, Mary suffers from osteoarthritis as well as degenerative disk disease. She contends that her condition is degenerative and progressive. Mary takes a number of medications to keep her condition under control. She believes that, someday, she will require surgery and may be deprived of the ability to walk. At trial, Mary appeared to be uncomfortable and had to leave the witness stand because of nausea. Mary remarried in May of 1995.

Debtor and Mary were divorced in Lincoln County, Kansas pursuant to a Decree of Divorce entered in 1994. Under the Property Settlement Agreement filed September 20, 1994 with the divorce decree, a property settlement judgment was entered against debtor in favor of Mary in the amount of \$104,500, payable at \$400 per month commencing October 1, 1994. In addition, debtor was to pay Mary \$2,500 annually, beginning in January of 1995. According to Mary, no payments have ever been made on this property settlement judgment. Finally, debtor was to pay Mary's attorney fees in the divorce in the amount of \$5,500.³ There is no evidence that debtor ever paid Mary's attorney fees.

John Reynolds, a Salina attorney, testified that he had been retained by Mary to collect the property settlement debt and that, in so doing, he had obtained writs of execution on various items of debtor's property. In the course of his investigation, Reynolds discovered not only the tool trailer which was apparently located at debtor's residence, but also a variety of other items including a

³ The debtor listed Mary as the holder of this unsecured claim in his bankruptcy schedules. As of February 20, 2001, debtor valued Mary's judgment in the approximate amount of \$140,000, presumably due to the accrual of interest on the unpaid judgment. It would appear that the attorney fees are not included in this amount.

Coachman camper or trailer, a 1976 pickup truck and another junk vehicle.⁴

Debtor has twice previously been a debtor in this Court, first in 1990 and most recently in 1995. Although a discharge was entered in the 1995 case, it was revoked on October 25, 1999 upon a showing that debtor had failed to disclose his 1990 discharge. Because less than six years had passed between discharges,⁵ a revocation order was entered by then Bankruptcy Judge Julie A. Robinson.⁶

Debtor testified that during the course of his 1995 bankruptcy, the trustee sold his portable tool trailer to Dr. Larry Dragone. Curiously, the docket of the 1995 case does not reflect such a sale. Even after the purported sale of the trailer and tools to Dragone, the debtor was permitted to use them without a fee. The title and registration receipts for 1999, 2000 and 2001 reflect debtor as the owner of the tool trailer.

In 1999, prior to his departure for prison, debtor allegedly assigned his buyer's interest in a contract for deed to purchase a house and five acre tract in rural Lincoln County to one Ronnie Diehl, in exchange for Diehl's agreement to keep him supplied with funds while in prison.⁷ Diehl apparently also claims some interest in the tools.

⁴ According to debtor's amended Schedule B, the 1976 Ford pickup has a value of \$750; debtor claims it as exempt. Neither the camper nor the tool trailer are listed in debtor's schedules.

⁵ 11 U.S.C. §727(a)(8).

⁶ See Case No. 95-10072 (Dkt. No. 91).

⁷ The house was the marital residence of debtor and Mary and had been set over to debtor under the property settlement agreement, with debtor becoming solely responsible for the debt on the contract for deed. Debtor further agreed to hold Mary harmless from payment of this debt.

Both Dragone's and Diehl's interests have been challenged by the trustee in the current case.⁸ Debtor insists that he has no arrangement with either Dragone or Diehl pertaining to the possession or use of either the house or tool trailer upon his release in 2006.

Mary currently files a separate income tax return, because she was once liable for the reimbursement of SRS support paid on behalf of one of her daughters. Her current husband pays their house payment, utilities and other necessities. Mary pays her medical expenses, vehicle insurance, groceries, and credit card payments (incurred for household goods, clothing and medical expense). No evidence was presented concerning the extent of her credit card debt. It does appear that her monthly grocery expense is \$400, her medication expense is \$200, and her insurance expense is \$99.

Based on her 2001 income tax return, \$1,397 was withheld from Mary's wages in 2001. After deducting this and \$28 per month in state taxes from her reported income of \$12,895, Mary's monthly net income is \$930. It is unlikely that Mary has much left over after paying her monthly bills (particularly considering her testimony that her credit card balances included a "couple thousand" dollars debt incurred to assist one of her daughters who "got in a jam").

Mary believes that debtor either has property from which at least some of his debt to her could be paid or that debtor has the expectancy of an inheritance from his father, who has a house in Salina as well as a 40 acre farm in Lincoln County. Again, there was no evidence of the value of such property to be inherited or that it might be left to debtor. Mary does note that while Diehl apparently makes no direct payments to debtor for the house, the contract payments to Bob Albers (the vendor)

⁸ See Adversary No. 01-5314. The trustee's complaint against Diehl and Dragone has since been resolved by agreement of the parties during the pendency of this matter. Diehl has agreed to turn over two trailers in his possession and disclaimed any interest in the real estate (Dkt. 32). Dragone has agreed to an auction of the nonexempt property and division of sale proceeds (Dkt. 34).

are current.

At issue here is whether the property settlement judgment is a debt which may be excepted from debtor's discharge under §523(a)(15). Specifically, the inquiry is whether debtor can pay the \$140,000 money judgment or whether the benefit to debtor from discharging this property settlement judgment outweighs the detriment to the nondebtor former spouse, Mary. Mary contends that debtor's bad faith conduct and failure to pay compels a finding, based largely on equity, that the balance of harm weighs in her favor. Debtor in turn contends that because of his minuscule income and lack of prospect for same until 2006, he is an ideal candidate for a §523(a)(15)(A) discharge of his property settlement obligation to Mary.

ANALYSIS

Before addressing this matter under §523(a)(15), the Court is confronted with the question of whether the property settlement judgment is actually in the nature of support or maintenance and nondischargeable under §523(a)(5).⁹ While Mary initially raised this defense by way of answer to the adversary complaint and included it as an issue in the pretrial conference order, Mary abandoned this theory at trial. She presented no evidence and made no argument that the judgment was in the nature of support.¹⁰

In any event, based upon this Court's review of the divorce decree and property settlement agreement, it is satisfied that the judgment entered in favor of Mary is *not* in the nature of support or

⁹ For the purpose of its analysis, the Court considers that the property settlement judgment also includes the \$5,500 of attorney's fees awarded to Mary. The Court will refer to both of these divorce obligations as the judgment or the property settlement judgment.

¹⁰ As the party seeking to prove that the debt falls within the §523(a)(5) exception to discharge, Mary would have had the burden of proving that the judgment was intended to be a support or maintenance obligation. *See In re Sampson*, 997 F.2d 717, 723 (10th Cir. 1993).

maintenance. Under the property settlement agreement, debtor and Mary waived any right to maintenance from one another and further agreed that there would be no child support awarded. The money judgment entered in favor of Mary appears in the section of the agreement titled “Division of Assets” and is labeled as a “property settlement judgment.” While the characterization of the judgment is not conclusive and in the absence of any evidence to the contrary, it appears to this Court that the judgment was intended to function as an equalization payment for the division of assets, particularly when the actual division of property between debtor and Mary is examined.¹¹ Thus, this Court concludes that §523(a)(5) is inapplicable to the property settlement judgment.

The Court next analyzes this case under §523(a)(15). This exception to discharge 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 or other order of a court of record . . . 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).

The debtor has the burden of proof on both of the alternative grounds for discharge of the

¹¹ See *In re Sampson*, 997 F.2d 717, 722 (10th Cir. 1993) (The label attached to debtor’s obligation in divorce agreement is not controlling or binding upon bankruptcy court); *In re Burton*, 242 B.R. 674, 679-81 (Bankr. W.D. Mo. 1999) (money judgment entered in divorce was intended to equalize the property division and was not in the nature of support or maintenance).

property settlement judgment – the “inability to pay” or the “balancing test”.¹² Ordinarily, the appropriate time for applying these tests is at the time of trial.¹³

Section 523(a)(15)(A) – Inability to Pay

The primary test utilized by the courts for determining the debtor’s ability to pay is Chapter 13’s disposable income test.¹⁴ At first glance, applying the disposable income test, there appears to be little or no doubt that debtor is currently unable to pay the property settlement judgment given his incarceration and prison income. For all practical purposes, debtor is unemployed. However, this Court as well as others takes into account the reason debtor is unemployed or does not have the ability to pay the debt. For example, a debtor’s willful and voluntary unemployment is insufficient to claim an inability to pay.¹⁵

[C]ourts consider whether the circumstances which led to the debtor’s unemployment were beyond his or her control or whether the debtor willfully or negligently caused the unemployment.¹⁶

¹² *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).

¹³ *In re Johnson*, 212 B.R. at 667; *In re Jodoin*, 209 B.R. at 142.

¹⁴ *In re Jodoin*, 209 B.R. at 142; *In re Johnson*, 212 B.R. at 667.

¹⁵ See *In re Molino*, 225 B.R. 904 (6th Cir. BAP 1998) (Debtor who artificially diminished his ability to repay by quitting \$48,000 job and helping new wife in her dog grooming business in return for her supporting him as a dependent did not show an inability to pay); *In re Rappleye*, 210 B.R. 336, 340-41 (Bankr. W.D. Mo. 1997) (Debtor who voluntarily became missionary in his church earning virtually no income could not claim an inability to pay under §523(a)(15)(A)); *In re Burton*, 242 B.R. 674, 681-84 (Bankr. W.D. Mo. 1999) (Debtor who worked in his current wife’s business without pay and chose not to seek gainful employment would have income imputed to him).

¹⁶ *In re Burton*, 242 B.R. 674, 682 (Bankr. W.D. Mo. 1999), citing *In re O’Brien* 165 B.R. 456, 460 (Bankr. W.D. Mo 1994).

It is appropriate to consider such conduct as a factor in determining whether the debt should be excepted from discharge.¹⁷

In *Burton* a nonsupport money judgment was entered against debtor in favor of his former spouse to equalize the division of marital property. The bankruptcy court held that the judgment was nondischargeable. In analyzing the debtor's ability to pay the judgment, the bankruptcy court concluded that debtor's inability to pay was the result of debtor's own choosing. He did not seek gainful employment but instead worked in his current wife's business for free and generated no income. Under these circumstances, the court imputed an income to debtor based upon his previous work experience in an auto salvage business and farming to determine whether he had the ability to pay.¹⁸

The Court's consideration of the Debtor's ability to pay, however, is not limited to a bare assessment of his current income and reasonable expenses. Courts . . . have taken guidance from the analysis employed in . . . student loan discharge cases, which takes into account the "totality of the circumstances," to determine whether a debtor has the ability to pay in the context of §523(a)(15). [citations omitted]. The totality of the circumstances test . . . includes, but is not limited to, an analysis of (1) the debtor's past, present, and reasonably reliable future financial resources . . .¹⁹

Based upon his imputed income, the bankruptcy court concluded that the debtor in *Burton* had the ability to pay the judgment and determined that the judgment was nondischargeable.

In the instant case, the debtor's "unemployment" is due to criminal misconduct. It is apparent

¹⁷ *In re Molino*, 225 B.R. at 908.

¹⁸ 242 B.R. at 682-83.

¹⁹ *Id.* at 682. *See also, In re Molino*, 225 B.R. at 908 (A court may look to a debtor's prior employment, future employment opportunities, and health status to determine the debtor's future earning potential.).

to this Court that debtor's current financial situation is attributable to his own voluntary and willful misconduct for which he should not be entitled to claim an inability to pay.²⁰

Having said that, the Court finds itself in a similar position to that of the *Burton* court in having to determine what amount of income should be imputed to debtor for purposes of determining his ability to pay the judgment. No historical evidence was presented concerning debtor's income prior to incarceration when he operated his machinery and truck repair business. Thus, the Court is left with estimating the income figure that should be imputed to debtor based upon his previous work experience. For this determination the Court observes that debtor obviously has some mechanical skills that would be marketable upon his release from prison. He has a high school education, is in good health, and will be in his mid-50's at the time of his release. While debtor may not be able to resume his own truck repair business, there was nothing in the evidence heard by this Court to suggest that debtor could not in the future become employed as a mechanic at a decent hourly wage. Further, the Court believes that with his work experience as a repair mechanic, upon becoming employed debtor would be able to earn substantially more than the \$12,895 annual income reported by Mary. Moreover, the debtor has no dependents to support and is faced with none of the medical expenses or health issues facing Mary. Debtor did not identify any other nondischargeable debts that he is facing.

Based upon the foregoing, the Court concludes that debtor has not met his burden of showing an inability to pay the judgment. The property settlement judgment is not dischargeable under §523(a)(15)(A).

²⁰ See *In re Champion*, 189 B.R. 516 (Bankr. D. N.M. 1995) (The debtor's financial situation – incarceration without income – was the result of shooting his ex-wife during pendency of divorce and was not dispositive of the question whether \$34,000 attorney fee judgment in divorce decree was intended as nondischargeable support under §523(a)(5). The same criminal act caused both debtor's lack of income and ex-wife's inability to support herself.).

Section 523(a)(15)(B) – Balancing Test

As noted previously, debtor has the burden to show that the benefit of a discharge of the property settlement debt outweighs the detriment to Mary.²¹ Equity weighs against discharge where the debtor has the ability to pay the debt.²²

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: (1) the income and expenses of both parties; (2) whether the nondebtor spouse is jointly liable on the debt; (3) the number of dependents; (4) the nature of the debt; (5) the reaffirmation of any debts; and (6) the nondebtor spouse's ability to pay.²³ The Sixth Circuit Bankruptcy Appellate Panel has identified additional factors for consideration: (1) the amount of debt involved, including payment terms; (2) the current assets, including exempt assets, of both parties; (3) the current liabilities, excluding those discharged by debtor's bankruptcy, of debtor and nondebtor spouse; (4) the health, job skills, training, age and education of both parties; (5) any changes in the financial condition of the parties since the divorce; and (6) the amount of debt which has been or will be discharged in the debtor's bankruptcy.²⁴

The Bankruptcy Appellate Panel for the Sixth Circuit observed that the best way to apply the balancing test is to compare the parties' relative standards of living.

If . . . the debtor's standard of living will be greater than or approximately equal to the creditor's if the debt is not discharged, then the debt should be nondischargeable under the 523(a)(15)(B) test. However, if the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the

²¹ *In re Molino*, 225 B.R. at 907.

²² *In re Florio*, 187 B.R. 654, 658 (Bankr. W.D. Mo. 1995).

²³ *In re Johnson*, 212 B.R. at 667.

²⁴ *In re Molino*, 225 B.R. at 909.

debt should be discharged.

In re Molino, 225 B.R. at 909.

The Court has reviewed the above factors and concludes that there is no clear-cut “winner” of the balancing test. Some factors do not weigh in favor of either party. For example, neither debtor nor Mary currently have dependents. While Mary currently earns more income than the debtor while he remains incarcerated, Mary’s net income is modest at best. The debtor has made no showing that upon his release from prison, he will be unable to earn at least as much as Mary with his present mechanic skills. There is no evidence that debtor’s mechanic skills would diminish during his incarceration. The debtor and Mary are nearly equal in terms of job skills, age and education. Mary’s declining health is a factor in her favor. The 1994 divorce debt at issue here was in the original amount of \$104,500 and appears to this Court to have been entered and agreed upon to more closely equalize the division of property between the parties. This is a factor in Mary’s favor, particularly where the debtor has not shown that he has made any payments toward the debt. The property settlement judgment is not a marital debt and Mary is not jointly liable on the debt, a factor in debtor’s favor. The property settlement judgment is subject to simple interest at the rate of 5% and payable in monthly installments of \$400. As of the first part of 2001, the debt had risen to approximately \$140,000 with accumulated interest. The debtor’s current assets include a 1976 Ford pickup which he has claimed exempt, although he was awarded the parties marital residence, subject to payment of Mary’s equity interest in the house, and the bulk of the parties’ other marital assets in the divorce. The debtor failed to provide evidence of Mary’s current assets other than a vehicle she apparently owns and pays insurance on. The debtor presented no evidence of any other liabilities; the property settlement judgment appears to be the debtor’s only liability. There was no evidence of Mary’s liabilities other than an undetermined amount of credit card debt and the responsibility assigned to her

for student loans in the property settlement agreement.

The debtor has not satisfactorily shown to the Court that his standard of living will be substantially less than that of Mary's if the debt is not discharged. The debtor made no showing of the income he earned as a mechanic before his incarceration nor of the income he could make after his release. The debtor has provided no reason to believe that he would be unable to resume his trade upon his release in 2006. Simply put, the debtor has failed to prove that he lacks the capacity to fund a \$400 monthly payment or that he cannot obtain a standard of living equivalent to or greater than Mary.

The Court refuses to "reward" the debtor's conduct with a discharge of this debt. The debtor has not voluntarily paid one penny toward the judgment since it was entered in 1994. There is no evidence that debtor made any effort to make payments, even during the five year period between his divorce and incarceration, despite having his portable tool trailer and repair business. The debtor then chose to remove himself from society for the next three years. It is evident to this Court that Mary has been deprived of eight years' worth of funds – funds needed "to live decently and independently."²⁵ While the debtor would benefit nicely by having more discretionary disposable income available upon his eventual release and employment, this type of benefit carries little weight.²⁶

After full consideration of the above factors the Court concludes that the debtor has failed to satisfy his burden of proof with respect to the balancing test. The debtor is more equipped and able to make a \$400 monthly payment on this debt than Mary is to lose it. The detriment to Mary outweighs the benefit to debtor. Accordingly, the property settlement judgment is not dischargeable

²⁵ *In re Brasslett*, 233 B.R. 177, 185 (Bankr. D. Me. 1999).

²⁶ *Id.* at 185-86. (Discharge of \$90,000 property settlement judgment would give debtor an opportunity to increase his discretionary disposable income)

under §523(a)(15)(B).

Dated this 1st 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 and Opinion** were deposited in the United States mail, postage prepaid on this 1st day of October, 2002, to the following:

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