SO ORDERED.

SIGNED this 20 day of October, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

ROBERT E. MCFADDEN
MELBA M. MCFADDEN
aka Mary Carlson,

Debtors.

Case No. 05-43981
Chapter 7

JOWANA MCFADDEN,

Plaintiff,

vs.

ROBERT E. MCFADDEN,

Defendant.

Adversary No. 05-7143

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Complaint to Determine Dischargeability of Debt.[1] Plaintiff, Jowanna C. McFadden, the former spouse of Defendant/Debtor, Robert E.

[1]Doc. 1.

McFadden, contends that Defendant should not be allowed to discharge the debt that he was ordered to pay her, pursuant to the Journal Entry entered by the District Court of Morris County, Kansas on September 19, 2005, relying on 11 U.S.C. § 523(a)(15).[2] She also contends she has a judicial lien on the real property that Defendant received in the divorce, in the amount of the debt he owes her, that cannot be avoided by his bankruptcy discharge.

Defendant, conversely, contends that he is financially unable to pay the debt, and that any judgment lien in Plaintiff's favor provided in the parties' divorce should be extinguished. The Court has conducted an evidentiary hearing, where Debtor appeared *pro se*, and after reviewing and fully considering the evidence, and applicable law, is prepared to rule. This adversary proceeding is a core proceeding,[3] and this Court has jurisdiction to decide it.[4]

I. FINDINGS OF FACT

Debtor, Robert E. McFadden (hereafter "Debtor"), and Jowanna C. McFadden (hereafter "Jowanna") were divorced October 20, 2004 by the District Court of Morris County, Kansas. Almost a year later, on September 19, 2005, the parties entered into an agreed Journal Entry disposing of the parties' property, and settling matters regarding "custody, visitation, child support, maintenance and property division." Although the parties quickly agreed on the division of property after the divorce decree was entered in late 2004, an 11-month delay ensued before the Journal Entry

[2]This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective. All statutory references to the Bankruptcy Code are thus to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified.

[3]28 U.S.C. § 157(b)(2)(I) and (K).

[4]28 U.S.C. § 1334(b).

concerning property division and custody was entered. The dispute centered around the amount of time the two children of the marriage would live with Jowanna during the summer.

Between the date of the divorce and the date the Journal Entry dividing the property was actually entered, Jowanna wrecked the parties' 1997 Jimmy GMC, valued at $4,750; the parties had originally agreed this car would become solely Debtor's property. Debtor knew the vehicle, which did not have insurance coverage to repair damages incurred in an accident, had been wrecked at the time the Journal Entry was entered, so he knew he would actually be receiving a vehicle that was worth much less than $4,750. He nevertheless allowed the Journal Entry to be filed, ostensibly because he had been able to resolve other issues to his satisfaction.

The most relevant portions of the divorce decree related to this dispute are found on pages 3 and 5, respectively. This language comes after all the real property is set over to Debtor:

> Petitioner [Debtor] within 90 days shall pay to Respondent (Jowanna) the sum of $10,000. Petitioner shall pay Respondent's attorney fee in the amount of $1,600. Her attorney shall have the right to proceed directly against Petitioner in his own name in the event that the amount stated shall not be paid within 90 days from the date hereof.
>
> The foregoing cash settlement and Respondent's attorney fees shall be deemed in the nature of a mortgage and shall attach to the real property until satisfied.
>
> IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the real estate [is] set over to Petitioner [and he] shall have full ownership and all right, title and interest ..., subject to the encumbrances thereon.[5](sic).

Jowanna does not claim the $11,600 judgment is for alimony, maintenance or support, and the Journal Entry specifically provides that neither party is required to pay child support or maintenance,

[5]The words in brackets, and a comma after the term "right, title and interest" have been added by this Court as its best interpretation of the parties' intent, after hearing the evidence and reviewing the content of rest of the Journal Entry.

even though Debtor has custody of the parties' two children the vast majority of the year. Accordingly, it appears the intent of the judgment awarding Jowanna $10,000, plus payment of her attorney fees, was solely to equalize the division of property.

At the time of the trial in this case, the evidence was clear that Debtor has far more expenses than income. Although he included all his present monthly income, as well as averaged income for his new wife, who can occasionally work as a substitute teacher, on the income exhibit, the evidence showed that his new wife is soon expected to deliver another child, which will increase expenses and reduce income, at least for some period of time. His summary showed the monthly expenses that had to be deducted from income, all of which appeared eminently reasonable, as well as two "payments" of $56 and $100, each, for debts that were or could have been discharged in his bankruptcy, had he not reaffirmed them.

This compilation showed he is presently $459.98 short each month in meeting these monthly expenses. Other than some rather weak attempts to question the reasonableness of a few isolated expenses, all of which expenses the Court finds reasonable, Jowanna could not demonstrate that Debtor, with any reasonable belt-tightening, was anywhere close to being financially able to pay the debt he owes her. Although Debtor has almost exclusive custody of the parties' two children, she is not obligated to pay, and does not pay, anything for their support; many of the expenses are attributable to raising these children. Further, Debtor has offered to "work with" his former spouse in making small monthly payments to her, but she has refused anything but the full amount due.

Testimony also revealed that the itemized monthly expense sheet did not include numerous real expenses this family incurs, but which are not reflected on the expense sheet, because Debtor cannot afford to pay those expenses. An example was that his new wife needs dental work, as does

Debtor, but neither can afford it at this time. The children all need dental work now, but they are having to spread out, over several months, the necessary treatment so they can attempt to make payments as they go. Another example concerns the two older vehicles Debtor and his wife now drive—which are 9 and 10 model years old, respectively. Debtor testified that he has to spend more for gasoline than he would like, because he does not have the money to fix a non-operable 15 year old car that might get better gas mileage if he had the money and time to install a new engine. The expense exhibit also reflected a $20 monthly clothing cost "from thrift store" for the family of five—soon to be six, which this Court finds to likely be understated for a family with three, and soon four, growing children.[6] This was one of many examples showing that this family is taking every step possible to keep afloat.

Yet another example of the dire financial straits in which Debtor finds himself is that he funded (through wage deduction) a health savings account, but because he could not afford to actually pay for many of the health expenses actually incurred, he ended up forfeiting almost half of that account because he could not present "paid" receipts for reimbursement. Clearly if Debtor had any extra money at all, one would assume he would have used it to receive the value of the health savings account he had paid for, and reduce his post-petition medical debt. So although the expense sheet reflects monthly payments for certain items, such as health expenses, the evidence is that Debtor is not always making those payments as they become due, because he does not have the income to cover all claimed expenses. The evidence could not have been more clear that despite having received a discharge of all other dischargeable debts on May 11, 2006, this family cannot now make ends meet.

[6]In fact, Debtor's new wife has another child who does not live with them, but who visits occasionally and for whom they have additional expenses.

Testimony also revealed that Debtor had received post-petition gifts from his father, who tried to help him save his home from foreclosure after he got several thousand dollars behind in mortgage payments because his income does not meet his necessary expenses. He indicated his father has "sold all he owns" to help him save his home, so this is clearly not an infinite resource.

Jowanna questioned whether Debtor still owned certain equipment and property listed in his bankruptcy schedules that might be sold to pay this debt. The evidence was clear that Debtor sold most of it to try to get enough money together to pay the $11,600 (before he filed the bankruptcy), and to keep utility-type expenses paid on a $10,000 "commercial property" until it could be sold, pending the parties' resolution of the child custody issue. He was required to pay close to $1,000 per month for utilities and upkeep on that property because it could not be sold during the pendency of the divorce, which was delayed by the child custody dispute. The little property he still has is not worth much, he cannot sell it, and he uses two older tractors to take hay off a few acres, which is used to feed the horse his (and Jowanna's) daughters own—the only recreation he can provide them.

According to his schedules, Debtor lives in a modular home on some acreage in a rural area valued at approximately the same amount as the mortgage debt against it. Accordingly, although Jowanna and her attorney claim a judicial lien against this real estate, those liens may presently be essentially valueless, absent appreciation of the property, or reduction of the debt against it.

Debtor filed this Chapter 7 proceeding on October 12, 2005, just three weeks after the delayed Journal Entry was finally filed. In his bankruptcy schedules, Debtor listed Jowanna's $10,000 claim, and her attorney's $1,600 claim, in Schedule F, as unsecured non-priority claims. At no time during the bankruptcy proceeding did Debtor file any proceeding to avoid the judicial lien that was created by entry of the divorce judgment.

II. CONCLUSIONS OF LAW

Plaintiff argues that the $11,600 debt is non-dischargeable pursuant to § 523(a)(15), which excepts from discharge debts incurred though a divorce proceeding other than those covered by § 523(a)(5), unless the debtor can show an inability to pay the debt or that discharging the debt will provide benefits to the debtor that outweigh any detrimental effects on the former spouse and/or children of the debtor. Judge Flannagan explained the burden of proof in § 523(a)(15) cases in *In re Hall*,[7] as follows:

> The majority of courts addressing § 523(a)(15) have held that the non-debtor spouse must prove that the debtor incurred the debt in the course of a divorce or separation. Upon such showing, the burden shifts to the debtor who, to obtain discharge of the debt, must show either inability to pay the debt under § 523(a)(15)(A) or that the discharge would result in benefit to the debtor outweighing the detrimental consequences to the former spouse under § 523(a)(15)(B). "The courts have analyzed the terminology in [Section] 523(a)(15) as creating a 'rebuttable presumption' that the divorce obligation is nondischargeable unless the Debtor proves one of the exceptions set forth in subsection (A) or (B) of Section 523(a)(15).

Defendant does not contest the fact that the debt in this case was incurred as part of his divorce, and the Journal Entry admitted into evidence, as well as the stipulation of the parties contained in paragraph 6 of the Pretrial Order,[8] so prove. Therefore, the debt will be found non-dischargeable under § 523(a)(15) unless Debtor proves that one of the exceptions found in § 523(a)(15)(A) or (B) is applicable.

A. Defendant has easily rebutted the presumption that the divorce obligation is nondischargeable, *in personam,* pursuant to § 523(a)(15)(A), because he clearly lacks the ability to pay the $11,600 debt.

[7]285 B.R. 485, 487-88 (Bankr. D. Kan. 2002) (citations omitted).

[8]Doc. 20.

The primary test for determining whether a debtor can repay the debt is the Chapter 13 disposable income test.[9] The appropriate time for applying this test is at the time of the § 523(a)(15) trial.[10] The Court is not required to look only at the debtor's current financial status when determining whether he has the ability to repay the debt, but may also consider the debtor's prior employment history and potential future employment prospects.[11]

The evidence in this case shows Debtor clearly has more monthly expenses than income. Jowanna tried to assert that if Debtor had not agreed to reaffirm some debts that would otherwise be dischargeable, then he would have had the ability to pay her debt. But that position overlooks the evidence. Although the income/expense sheet shows an expense of $56 and $100 per month, respectively, representing payments on what were apparently dischargeable debts absent a reaffirmation, the Debtor testified he usually cannot pay those amounts because he does not have the funds.[12] This testimony was ultimately believable, because the income/expense exhibit showed a $459.98 deficit each month, even assuming his wife can and does continue to work.

Even if Debtor had not reaffirmed debt, and even if one removed the $156 from the monthly budget, Debtor would still be over $300 short each month. And, as earlier stated, the expense sheet fails to include reasonable and necessary expenses, such as money for deferred medical and dental care and car repairs that might assist with gas mileage, let alone money to purchase replacement cars in the future. Jowanna also quibbled that the $3.00 cost of gasoline Debtor used to determine travel

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[9] *In re Jodoin*, 209 B.R. 132, 142 (9th Cir. BAP 1997); *In re Johnson*, 212 B.R. 662, 667 (Bankr. D. Kan. 1997).

[10] *Id*.

[11] *See In re Molino*, 225 B.R. 904, 908 (6th Cir. BAP 1998).

[12] One of the debts Debtor reaffirmed was one to Tampa State Bank, for repayment of the 1997 GMC Jimmy. So Debtor is trying to pay off a debt that could have been at least partly reduced by return and sale of the car that Jowanna essentially totaled post-divorce.

expenses is now overstated. This Court can and did at the trial take judicial notice that the price of gasoline has fluctuated between $2 and $3 per gallon during the pendency of this case, and it is not unreasonable for Debtor to have used this cost in an exhibit that he used for this trial, especially since he noted that gasoline did cost $3 at the time the exhibit was prepared. Even if gasoline costs less than $3 per gallon today, there is no certainty that it will stay at one price. Furthermore, even if it did, Debtor still would not have sufficient income to pay the subject debt.

The Court finds that Debtor has easily sustained his burden of proving, under § 523(a)(15)(A), that he does not have the ability to pay this debt from income or property not reasonably necessary to be expended for his maintenance or support, or that of his dependents. Therefore, Defendant is entitled to an *in personam* discharge of the $11,600 debt pursuant to § 523(a)(15)(A).

B. Debtor cannot avoid Plaintiff's judicial lien on real estate.

Although Jowanna (or her divorce lawyer) will not be able to collect the debt Debtor owes them against Debtor personally (*in personam)*, that does not complete the Court's inquiry. Jowanna asserts that the debt owed to her, including the $1,600 attorney fees, is secured by a judicial lien on the real estate now owned by Debtor, which lien she contends cannot be avoided or discharged. The Court agrees.

First, Debtor bears the burden of proving all the elements required to avoid Jowanna's judicial lien.[13] The term "judicial lien" is defined by § 101(36) to mean a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Although the Journal Entry doesn't use the term "judicial lien" to describe that interest, it is clear that is what the parties intended when they stated that the amount due "shall be deemed in the nature of a mortgage and shall attach to the

[13]*In re Brasslett*, 233 B.R. 177, 189 (Bankr. D. Me. 1999) (finding that similar judicial lien created in divorce decree to equalize property division could not be avoided).

real property until satisfied," and that Debtor would be the owner "subject to the encumbrances thereon."

Debtor asks the Court to declare that the judicial lien be avoided, without providing legal support for that request. The Court finds that whether Debtor can avoid this judgment lien is governed by § 522(f)(1), which provides, in pertinent part:

> Notwithstanding any waiver of exemptions, but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is –
>
> (A) a judicial lien, other than a judicial lien that secures a debt–
>
> (I) 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 separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and
>
> (ii) to the extent that such debt –
>
> (I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and
>
> (II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; ....

Debtor may thus avoid Jowanna's lien only if he can satisfy three elements: (1) the lien is a judicial lien, (2) the lien impairs an exemption to which he is otherwise entitled; and (3) the lien was fixed on an interest of Debtor in the property before her judicial lien was fixed.[14]

[14] *In re Rittenhouse*, 103 B.R. 250, 252 (D. Kan. 1989) (holding whatever interest in homestead debtor received through divorce decree was conveyed already subject to spouse's lien).

The Journal Entry establishing the debt expressly states that the subject lien is to be treated "in the nature of a mortgage," and that the debt is meant to be an "enbumbrance" on the real property, so Debtor satisfies the first element. It is also uncontroverted that the lien impairs Debtor's homestead, and thus the second element is satisfied. Thus, the only real issue is whether § 522(f)(1) permits Debtor to avoid the fixing of Jowanna's lien on the property interest that he obtained in the divorce decree. Jowanna does not cite to § 522(f)(1) in the Pretrial Order, or at trial, but she does generally argue that her judicial lien cannot be avoided.

The United States Supreme Court decision, *Farrey v. Sanderfoot,*[15] is germane to this issue, as it analyzed § 522(f)(1). In deciding that the debtor in that case could not avoid his ex-spouse's judicial lien, the Court explained, as follows:

> The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid "the fixing" of the lien on the debtor's interest in property. The gerund "fixing" refers to a temporal event. That event--the fastening of a liability--presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, unless the debtor had the property interest to which the lien attached at some time *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1).[16]

The Supreme Court further held that it was a question of state law whether the debtor had possessed an interest in the real property, to which the judicial lien attached, before that lien was fixed.[17]

In a case similar to this one, *In re Hilt*,[18] Judge Flannagan analyzed Kansas law on the question of what property interest exists in each spouse immediately before, and then after, a divorce decree

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[15]500 U.S. 291 (1991).

[16]*Id.* at 296 (emphasis in original).

[17]*Id*. at 299.

[18]175 B.R. 747 (Bankr. D. Kan. 1994).

is entered. The divorce court granted Margaret Hilt the homestead, and granted her husband, Leonard Hilt, a money judgment to equalize the division of marital assets. That money judgment was expressly secured by a judicial lien on the homestead. Margaret Hilt then filed for Chapter 7 relief and claimed the homestead exempt under Kansas law. The case was later converted to a Chapter 13 proceeding. Debtor sought to avoid her former spouse's judicial lien in the property, and the creditor to whom the former spouse had assigned his judicial lien objected to confirmation.

The bankruptcy court examined Kansas divorce law, found primarily in K.S.A. 60-1610(b), K.S.A. 23-201(b), and *Cady v. Cady*,[19] and determined that the filing of a divorce petition creates a species of common ownership in all property owned by either or both of the married persons at the time the divorce proceeding is initiated. The court further found when a divorce decree ultimately grants property to one spouse or the other, a wholly new fee simple interest is created, and it is that new fee simple interest to which the former spouse's judicial lien contemporaneously attaches. To satisfy this condition for lien avoidance, Margaret Hilt would have had to have a preexisting fee simple interest in the homestead, which under state law she did not have prior to the entry of the divorce decree. Instead, her preexisting interest was the common interest of both spouses in all the marital assets; that interest was necessarily extinguished upon the filing of the divorce decree.[20]

The *Hilt* court also considered the Congressional purpose behind lien avoidance, as did the Supreme Court in *Sanderfoot*. That purpose is to allow debtors to "undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled

[19]224 Kan. 339 (1978).

[20]*In re Hilt*, 175 B.R. at 755.

to his exemptions."[21] The bankruptcy court compared the policy behind § 522(f)(1) with the state's paramount interest in obtaining a "just and reasonable division of property,"[22] for divorcing parties, and held that a fair reading of § 522(f)(1) also promotes the state's interest.

This court agrees with Judge Flannagan's analysis of state divorce law, as it impacts the application of § 522(f)(1). Under the facts of this case, a joint marital estate in the subject real property was created in both spouses on the date Debtor, Robert McFadden, filed his divorce petition, and in all other property owned by either spouse. The Journal Entry dividing the parties' interests, entered some months later, then granted Debtor a new fee simple interest in the real property, and that same decree simultaneously granted Jowanna' judicial lien, with the intent of equalizing the division of property. Because Debtor never possessed his new fee simple interest before her judicial lien was "fixed," he may not use § 522(f) to avoid her lien. This holding also serves to preserve the Morris County court's intent to justly and reasonably divide the marital property.[23]

Accordingly, although Jowanna McFadden cannot garnish Debtor's wages or bank account, or take other similar action to collect the $11,600 debt owed her, because Debtor has been discharged of his *in personam* liability to pay the debt to her and her attorney, nothing would prevent Jowanna from filing a lien foreclosure petition[24] in state court to enforce her *in rem* rights in the real property

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[21]*Farrey v. Sanderfoot*, 500 U.S. at 297-98.

[22]K.S.A. 60-1610(b).

[23]*See In re Hartman*, No. 04-42526 (Bankr. D. Kan. February 3, 2005) and *In re Rothwell*, 04-41153 (Bankr. D. Kan. February 3, 2005) (where this judge held in both cases that the debtor could not avoid the judicial lien created by the Journal Entry dividing the parties' property by filing bankruptcy).

[24]The testimony alluded to there being little equity in the real estate, at least at the time the bankruptcy was filed a year ago, and it would make little sense to foreclose if there was no remaining equity to partly or fully satisfy the $11,600 debt. Obviously, if the holder of the mortgage on the real property only bid the amount of the debt against it at any Sheriff's sale, Jowanna would be required to in essence pay off the mortgage, then re-sell the property (after Debtor's redemption period expired) in the hopes she could re-sell it to capture all or part of the $11,600 owed to her. Accordingly, although she has a judicial lien, it may today be valueless.

in which she previously had some ownership interest prior to the entry of the September 9, 2005 Journal Entry, by operation of state law or otherwise.

The Court also declines to use its equitable or other powers to settle the parties' respective complaints about the other former spouse's failures to abide by the terms of the property settlement order. Each complain the other failed to turn over various items of personal property set over to the other. Accordingly, for example, the Court will not deduct the value of the GMC Jimmy at the time of its appraisal against the $11,600 debt, even though Jowanna destroyed its value in part or in full, because Debtor knew the vehicle had been damaged prior to the entry of the Journal Entry, but allowed it to be filed, and did not thereafter appeal it.

Further, Jowanna claimed that most of the personal property she was to get in the divorce had never been turned over to her; Debtor claimed it was still at the house and she could pick it up any time. Similarly, Jowanna admitted that Debtor was entitled to the wrecked GMC Jimmy sitting in her boyfriend's yard, and he could get it any time. The Court encourages the parties to follow through on these commitments, so no further proceedings, which neither party seems able to afford, will be necessary. That said, if the parties believe they need to enforce provisions of the divorce decree, other than the dischargeability issue, or enforceability of the judicial lien, which issues this Court does decide, they should return to the Morris County court for such relief.

III. CONCLUSION

The Court finds that Plaintiff, Jowanna McFadden, met her initial burden of proving that the $11,600 property division and attorney fee debt was incurred though a divorce proceeding. Defendant, Robert E. McFadden, then met his burden of proving that he does not have the ability to pay the debt from income or property that is not reasonably necessary for him to expend for his own maintenance,

and that of his dependents. Accordingly, the Court grants judgment in favor of Defendant, Robert E. McFadden, and against Jowanna C. McFadden, on her claim that the debt should be deemed not discharged under 11 U.S.C. § 523(a)(15).

The Court finds that Plaintiff, Jowanna McFadden, does have a judicial lien that cannot be avoided, in the amount of $11,160, against the real property owned by Debtor, but that this judicial lien can only be enforced *in rem*.

IT IS, THEREFORE, BY THIS COURT ORDERED that judgment shall be entered in favor of Defendant on Plaintiff's Complaint to Determine the Dischargeability of the debt, under 11 U.S.C. § 523(a)(15), and against Plaintiff, Jowanna McFadden. The Court further orders that the $11,160 debt is a judicial lien on Debtor's real property, which lien has not been avoided by Debtor's bankruptcy discharge.

IT IS FURTHER ORDERED that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

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