

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: : Chapter 7
: :
ROBERT VERNON WHITEHEAD, : :
: :
Debtor : Case No. 99-52131 RFH
: :
: :
NANCY HAUSBECK WHITEHEAD, : :
: :
Plaintiff : :
: :
: :
vs. : :
: :
: :
ROBERT VERNON WHITEHEAD, : :
: Adversary Proceeding
Defendant : No. 99-5114

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Plaintiff: KIRBY R. MOORE
Post Office Box 1797
Macon, Georgia 31202-1797

For Defendant: DIANE M. ZIMMERMAN
Post Office Box 7688
Warner Robins, Georgia 31095-7688

MEMORANDUM OPINION

Nancy Hausbeck Whitehead, Plaintiff, filed on September 13, 1999, an Objection to the Dischargeability of Debt Pursuant to 11 U.S.C. § 523. Robert Vernon Whitehead, Defendant, filed on October 1, 1999, a response and a counterclaim. Plaintiff filed on October 7, 1999, a response to Defendant's counterclaim. A trial was held on March 29, 2000. The Court, having considered the evidence presented and the arguments of counsel, now publishes this memorandum opinion.

FINDINGS OF FACT

Plaintiff and Defendant were married in November of 1976. Their three children were born in 1978, 1981, and 1983. Defendant retired from the United States Air Force in February of 1993. Later that year, Defendant went to work in Saudi Arabia. Their three minor children resided with Plaintiff in the United States.

Plaintiff and Defendant had marital problems and signed a Marital Settlement Agreement dated December 23, 1996. The state court entered an order on June 20, 1997, dissolving the marriage.

Plaintiff was awarded possession of the residence and all household furnishings. Defendant is obligated to pay monthly alimony of \$400 until Plaintiff dies or remarries or until Defendant's death. Plaintiff was awarded 42.5 percent of Defendant's monthly military retirement.¹

Plaintiff was awarded custody of their three minor children. Defendant was obligated to pay monthly child support of \$370 per child until each child reaches the age of eighteen.

Plaintiff and Defendant each assumed certain marital obligations. Paragraph 7 of the Marital Settlement Agreement provides, in part, as follows:

7. RESPONSIBILITY FOR DEBTS

A. Husband shall be solely liable for and hold harmless the Wife as to the indebtedness in favor of Sears, AT&T MasterCard, Alaska FCU Visa, Alaska FCU Signature Loan, Express, AAFES (DPP), Citibank Visa, Dillard's, McRaes, Hudson's Target, and Discover Card.

B. Wife shall be solely liable for and hold harmless the Husband as to the indebtedness in favor of Gayfers, Associates Finance, University of West Florida for Wife's student loan, and the Eglin Federal Credit Union automobile loan which encumber the aforementioned 1995 Honda automobile.

¹ The Court announced at the conclusion of the hearing that Plaintiff's share of Defendant's military retirement is Plaintiff's sole and separate property. See Sadowski v. Sadowski (In re Sadowski), 144 B.R. 566 (Bankr. M.D. Ga. 1992).

Plaintiff and Defendant stipulate that the obligations described in paragraph 7(A) are not in the nature of alimony, maintenance or support as those terms are used in section 523(a)(5)(B) of the Bankruptcy Code.² The obligations in paragraph 7(A) total some \$27,000. Defendant made few, if any, payments on the obligations. Plaintiff is jointly liable on the obligations. Some of the creditors have made demands upon Plaintiff for payment.

The obligations in paragraph 7(B) that Plaintiff assumed total some \$30,000. Plaintiff has paid some of these obligations. Plaintiff still owes a balance on her student loan and on her automobile loan.

Defendant returned to the United States from Saudi Arabia in November of 1998. Defendant received a \$10,000 "end of service award." Defendant was unemployed until April 15, 1999. Defendant used the end of service award for his daily living expenses. Defendant did not use any of the funds to pay his obligations under paragraph 7(A) of the Marital Settlement Agreement.

Defendant filed a petition under Chapter 7 of the Bankruptcy Code on June 8, 1999.

Defendant was paying child support for two children when he filed for bankruptcy relief. One of these children

² 11 U.S.C.A. § 523(a)(5)(B) (West 1993).

recently reached the age of eighteen. The sole remaining minor child, now age sixteen, resides with Plaintiff. This child will be eighteen years old in June of 2001. Thus, Defendant's child support obligations will end next summer. The minor child suffers from serious health problems and may become involved in a paternity and child custody dispute with his girlfriend.

Plaintiff has a college degree in education. Plaintiff is an instructor in the field of education. Her total income for 1999 was \$34,855. Plaintiff's current monthly income, from all sources, is \$3,436.59 and her net monthly income is \$2,852.33. Plaintiff's monthly expenses are \$2,855.82. Plaintiff sometimes teaches homebound students. Plaintiff earned about \$800 in 1999 and has earned about \$200 in 2000 from her homebound teaching. Plaintiff suffers from serious health problems and is behind on her car payments. Plaintiff's car, a 1995 Honda Civic, has some 130,000 miles on the odometer.

Defendant is an aircraft mechanic who has the opportunity to work overtime. Since filing for bankruptcy relief, Defendant's monthly income has increased by some \$400 and his expenses have decreased by some \$470. Defendant's current monthly income is \$3,177.49, and his net monthly income is \$2,423.49. Defendant's monthly expenses are about

\$2,213.³ Defendant's child support obligation of \$370 per month will end in June of 2001 when his youngest child becomes eighteen years old.

Defendant has been living with his girlfriend and her son since November of 1998. Defendant pays one-half of the household expenses. The girlfriend's monthly income exceeds her expenses by some \$200. Defendant gave his

³ Defendant testified that his monthly expenses totaled \$2,683 when he filed for bankruptcy relief. Defendant testified that he no longer pays child support for one of his children (\$370) and that he no longer pays insurance on his son's car (\$100).

girlfriend some jewelry when Defendant returned from Saudi Arabia.

CONCLUSIONS OF LAW

Plaintiff contends that Defendant's obligations under paragraph 7(A) of the Marital Settlement Agreement are nondischargeable under section 523(a)(15) of the Bankruptcy Code.⁴ This section provides as follows:

§ 523. Exceptions to discharge

(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

⁴ 11 U.S.C.A. § 523(a)(15) (West Supp. 2000).

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.A. § 523(a)(15) (West Supp. 2000).

Simply stated, section 523(a)(15) provides that certain otherwise dischargeable debts incurred in the course of a divorce or separation are nondischargeable unless the debtor does not have the ability to pay the debts or unless discharging the debts would result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse, or child of the debtor.

Most courts hold that a former spouse must prove that the debts were incurred in connection with a divorce or separation. The burden then shifts to the debtor to prove that the debtor does not have the ability to pay the debts or that discharging the debts would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. See In re Crosswhite, 148 F.3d 879, 884-85 (7th Cir. 1998); Gamble v. Gamble (In re Gamble), 143 F.3d 223, 226 (5th Cir. 1998); Hart v. Molino (In re Molino), 225 B.R. 904, 907 (Bankr. 6th Cir. 1998); Moeder v Moeder (In re

Moeder), 220 B.R. 52, 56 (Bankr. 8th Cir. 1998); Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 139-40 (Bankr. 9th Cir. 1997); Feldmann v. Feldmann (In re Feldmann), 220 B.R. 138, 144 (Bankr. N.D. Ga. 1998); In re Smither, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996); Humiston v. Huddelston (In re Huddelston), 194 B.R. 681, 685-86 (Bankr. N.D. Ga. 1996). Contra Hastings v. Konick (In re Konick), 236 B.R. 524, 527 (Bankr. 1st Cir. 1999) (former spouse must prove that debtor has ability to pay and that benefit to debtor does not outweigh detriment to former spouse); Marquis v. Marquis (In re Marquis), 203 B.R. 844, 852 (Bankr. D. Me. 1997); Dressler v. Dressler (In re Dressler), 194 B.R. 290, 303-04 (Bankr. D.R.I. 1996); Kessler v. Butler (In re Butler), 186 B.R. 371, 374-75 (Bankr. D. Vt. 1995).

Most courts hold that the financial circumstances of a debtor's new spouse or live-in companion should be considered. See In re Crosswhite, 148 F.3d at 888-89 (live-in companion should be considered); In re Gamble, 143 F.3d at 226 (new spouse should be considered); Shellem v. Koons (In re Koons), 206 B.R. 768, 773 (Bankr. E.D. Pa. 1997) (all income of debtor's immediate household is relevant); Halper v. Halper (In re Halper), 213 B.R. 279, 284-85 (Bankr. D.N.J. 1997) (live-in companion should be considered); Beasley v. Adams (In re Adams), 200 B.R. 630, 634 (N.D. Ill. 1996) (new spouse should be considered); Cleveland v. Cleveland (In re

Cleveland), 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996) (live-in companion should be considered); Morris v. Morris (In re Morris), 197 B.R. 236, 243-44 (Bankr. N.D. W.Va. 1996) (new spouse should be considered); Celani v. Celani (In re Celani), 194 B.R. 719, 721 (Bankr. D. Conn. 1996) (new spouse should be considered). Contra Willey v. Willey (In re Willey), 198 B.R. 1007, 1014-15 (Bankr. S.D. Fla. 1996) (girlfriend not considered as it could have a chilling effect on courtship and remarriage); Gantz v. Gantz (In re Gantz), 192 B.R. 932, 936-37 (Bankr. N.D. Ill. 1996) (new spouse considered under section 523(a)(15)(B) but not under section 523(a)(15)(A)).

The fact that a live-in companion may not have a legal duty to continue to provide support to the debtor's household is a factor to be considered. In re Halpen, 213 B.R. at 285; see also In re Crosswhite, 148 F.3d at 890 (dissent) ("girlfriend could be gone on a moment's notice with no purse strings attached").

In In re Konick, the Bankruptcy Appellate Panel for the First Circuit stated:

A view of the case law shows that courts uniformly take into account the debtor's current financial condition, i.e., at the time of trial, when determining whether a claim should be discharged under § 523(a)(15). See, e.g., Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 142 (9th Cir. BAP 1997); In re Brasslett, 233 B.R. at 183; In re Dressler, 194 B.R. at 300-01; Gantz v. Gantz (In re Gantz), 192 B.R. 932, 934-35 (Bankr. N.D. Ill. 1996);

In re Hesson, 190 B.R. at 238. In addition, courts may consider the debtor's future earning capabilities and long-term financial prospects, particularly where the claim is to be paid incrementally over a period of time. See, e.g., Wolfe v. McCartin (In re McCartin), 204 B.R. 647, 654 (Bankr. D. Mass. 1996)[;] Johnston v. Henson (In re Henson), 197 B.R. 299, 303-04 (Bankr. E.D. Ark. 1996); In re Straub, 192 B.R. at 528. "A court may look to a debtor's prior employment, future employment opportunities, and health status to determine the future earning potential of the Debtor." In re Brasslett, 233 B.R. at 184 (quoting Hart v. Molino (In re Molino), 225 B.R. 904, 908 (6th Cir. BAP 1998)).

236 B.R. at 529.

See also Findley v. Findley (In re Findley), 245 B.R. 526, 532 (Bankr. N.D. Ohio 2000) ("each party's projected income should be measured by his or her realistic earning potential, not by lifestyle or other choices which restrict income"); Migneault v. Migneault, 243 B.R. 585, 589 (D.N.H. 1999) (debtor's earning capacity should be considered in evaluating ability to pay); In re Smither, 194 B.R. at 107-08 (court should consider present income and future earning potential); In re Huddelston, 194 B.R. at 687-88 (prospect for change must be considered); Straub v. Straub (In re Straub), 192 B.R. 522, 528-29 (Bankr. D.N.D. 1996) (future ability to pay debt should be considered); see generally In re Crosswhite, 148 F.3d at 889 (court should consider totality of circumstances when balancing the equities under section 523(a)(15)(B)); In re Gamble, 143 F.3d at 226 (totality of circumstances applies under section 523(a)(15)(B)).

Turning to the case at bar, the Court is persuaded that Defendant does have the ability to pay the obligations at issue. Defendant's net monthly income is \$2,423.49 and his expenses are \$2,213. Thus, Defendant's net monthly income exceeds his expenses by \$210.49. Defendant has the opportunity to work overtime. Defendant's monthly expenses will decrease by \$370 in June of 2001 when his youngest child becomes eighteen years old.

The Court is not persuaded that discharging the

obligations at issue would result in a benefit to Defendant that outweighs the detrimental consequences to Plaintiff. Defendant's net monthly income exceeds his expenses by \$210.49. Defendant's monthly expenses will decrease by \$370 in June of 2001 when his youngest child becomes eighteen years old.

Plaintiff's net monthly income is \$2,852.33 and her expenses are \$2,855.82. Thus, Plaintiff's expenses exceed her income. Plaintiff suffers from serious health problems. Plaintiff's monthly family income will decrease by \$370 in June of 2001 when her youngest child becomes eighteen years old. This child suffers from serious health problems and may become involved in a paternity and child custody dispute. Simply stated, Plaintiff's financial condition will not improve in the foreseeable future, and the evidence shows that Defendant's financial condition will improve. Thus, discharging Defendant's obligations contained in paragraph 7(A) of the Marital Settlement Agreement has detrimental consequences to Plaintiff. The benefit to Defendant of discharging the obligations does not outweigh the detrimental consequences to Plaintiff.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 1st day of June, 2000.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court