UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 01-50017
	)	
JUSTIN URIAH COOKIE	)	Chapter 7
Soc. Sec. No. 363-78-8587	)	
Debtor.	)	
	)	
	)	
ANGELA D. FORD	)	Adv. No. 01-5005
f/k/a Angela D. Cookie	)	
Plaintiff,	)	
	)	DECISION RE:
-vs-	)	DISCHARGEABILITY OF CERTAIN
	)	DIVORCE-RELATED DEBTS
JUSTIN URIAH COOKIE	)	
Defendant.	)	

The matter before the Court is a complaint to determine the dischargeability of certain divorce-related debts filed by Plaintiff Angela D. Ford. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order and judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the credit card debts and debt on a 1999 Malibu that were assigned to Defendant-Debtor in his divorce from Plaintiff in 1999 are non dischargeable under 11 U.S.C. § 523(a)(15).

I.

Angela A. Ford ("Ford") and Justin U. Cookie ("Cookie") were divorced in December 1999. As agreed by the parties at the time of the divorce, Cookie was ordered by the divorce court to pay certain marital debts, including a secured debt owed to First Security Bank on a 1999 Chevrolet Malibu and credit card debts owed to G.E.

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Capitol Corporation (consolidation loan), Sentinel VISA, and USAA Mastercard. Ford received the secured debt owed to GMAC on the couple's other car, a 1996 Chevrolet Cavalier, and she assumed liability for credit card debts owed to Black Hills Federal Credit Union VISA, Fleet Mastercard, and Norwest VISA. They each took responsibility for their respective student loans.

Excluding the vehicle and student loan debts, Ford received $6,700 of the marital credit card debt. The Cavalier she received had a debt of $6,900 against it. Ford's student loans at the time were in deferred status. Cookie received $10,900 in marital credit card debt. His Malibu had a debt against it of $22,000. The amount of his student loans at that time is unknown.

The parties agreed that Cookie would have custody of the couple's young daughter approximately 51% of the time so that he would still qualify for base housing and other dependent benefits from the Air Force, with whom he was enlisted. Since each party was to have roughly equal custody of their daughter, child support was not ordered at that time. Uninsured medical costs for her were to be divided *pro rata* based on the parties' respective incomes. At the time of the divorce, Cookie earned $2,435 per month from the Air Force and Ford earned $1,548 per month working as an accountant.

In August 2000, Ford obtained primary custody of her and Cookie's daughter. Cookie was ordered to pay $465 monthly in child support, which includes his share of daycare. Both parties incurred legal expenses related to this change in custody.

In September 2000, Cookie remarried. His present wife has one daughter. The couple are expecting another child momentarily. Cookie and his current wife moved from base housing into a new home. His name is not on the title to the new home, only his wife's, but he helps make the mortgage payments.

On January 16, 2001, Cookie filed a Chapter 7 petition in bankruptcy. His current wife did not file with him. At the time of his petition, Cookie was still with the Air Force. According to Cookie's Schedules I and J, Cookie's monthly net income was $2,096.87. His wife worked at a local hospital as a registered nurse and her monthly net income was $2,079.21. Their stated monthly expenses included $825 for a mortgage, taxes, and home insurance, $1,000 for food, and $680 for repayment of his wife's debts. Their total scheduled monthly expenses exceeded their stated income by $718.92.

Cookie did not schedule an ownership interest in any real property. He listed minimal personal property and declared it all exempt. He listed his student loan debt at $5,500. He stated he owed back child support of $1,500. His general unsecured claims

totaled $32,194.22. The total included a large deficiency claim on the Malibu he took in his divorce from Ford. It also included several credit card debts, including those that he and Ford had divided at the time of their divorce.

On February 14, 2001, Ford file a complaint against Cookie seeking a determination that the debts he assumed in their divorce were non dischargeable under either 11 U.S.C. § 523(a)(5) or § 523(a)(15). After completion of discovery and the disposition of motions, a trial was held April 24, 2001. Appearances included Patricia A. Meyers for Plaintiff Ford and Lawrence R. Bihlmeyer for Defendant-Debtor Cookie.

Ford testified about some of the details regarding her and Cookie's divorce, their financial circumstances at that time, and her present financial circumstances. She said of their divorce that they divided the debt and related property based on their respective earnings at the time of the divorce. She had no expectation of additional support from Cookie, other than child support.

Ford stated that the following amounts are presently owed on the credit card debts that existed at the time of their divorce (the first three were assigned in the divorce to her, the last three were assigned to Cookie):

CREDITOR	TOTAL DEBT	REQUIRED MONTHLY PAYMENT
B.H.F.C.U. VISA	$1,902.28	$ 68.00
GE Capital (consolidation loan)	7,361.47	308.94
Sentinel VISA	2,500.00	70.00
USAA Mastercard	1,567.94	30.00
Fleet Mastercard	2,300.00	45.00
Norwest VISA	2,708.00	55.00

Ford also stated that she is still liable on the Malibu debt assigned to Cookie. For the Malibu, which Cookie allowed the creditor to repossess, $11,843.62 is presently owed on the deficiency with payments at $404 a month.

Ford presently earns $2,523.96 per month from two jobs. Her monthly expenses are $1,510.92, excluding debt repayment. Her expenses will increase by $240 in May 2001 due to an increase in rent. Ford owes additional credit card debt of her own totaling $4,500 on which she pays $93 a month, she still owes $21,262.53 in student loans, on which she pays $195 monthly, and she still owes $4,344.22 on the Cavalier, on which she pays $173.09 per month. In addition, Ford currently owes some medical and legal expenses totaling $2,442.86. By working two jobs and keeping her expenses in check, Ford says she has about a $50 cushion at month's end. She testified that she consequently has no ability to pay those debts assigned to Cookie in the divorce.

At the trial, Cookie presented amended Schedules I and J based

on his and his wife's present financial circumstances.[1] He said he currently takes home $2,096.87 a month. It was unclear whether this net income figure included the non taxable $840 housing and subsistence allowance he receives from the Air Force. Cookie said his wife's present income is now only $1,335.45, which is $743.73 less than when they filed. She has also changed employers. Their stated monthly expenses are $4,665, which is $230 less than when Cookie filed bankruptcy. The reduction reflected several changes: a decrease of $225 in their home mortgage, taxes, and insurance expense; a decrease of $50 in utilities; a decrease of $10 in water and sewer charges; a decrease of $25 in telephone costs; and an increase in child support payments of $80. Cookie estimated that his family would incur an additional $665 per month in expenses after their baby is born. He was unsure whether some or all of that was included in the $1,000 food expense set forth on his amended Schedule J.

Cookie testified that if his family returned to base housing, he would no longer receive the $600 housing allowance from the Air Force, but that he would still receive $240 (non taxable) for subsistence. He also would no longer incur utility costs of $285 per month. Finally, Cookie testified that his continued

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[1] These amendments have not been filed and noticed by Cookie in Bankr. No. 01-50017 as required by Fed.R.Bankr.P. 1009(a).

delinquency on debts could lead to a dishonorable discharge from the Air Force. There was no evidence of the specific circumstances under which that would occur and what other options he had to address his debt to the Air Force's satisfaction.

II.

In 1994, Congress added § 523(a)(15) to the Bankruptcy Code to enhance the rights of a non-debtor, former spouse holding a marital property settlement claim. Previously, the rights of marital claimants were limited to § 523(a)(5), which provides that only alimony and child support payments may not be discharged. The new section provides:

> (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-
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> > (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-
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> > > (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). Under this provision, a marital debt is presumptively non dischargeable unless the debtor can demonstrate that he does not have the ability to pay the debt or that the benefit to him in receiving a discharge is greater than the detriment to his former spouse. *In re Crosswhite*, 148 F.3d 879, 884-86 (7th Cir. 1998)(burden shifts to the debtor to demonstrate that debt falls under one of the two exceptions within § 523(a)(15)); *Fureigh v. Haney (In re Haney)*, 238 B.R. 432, 434-35 (Bankr. E.D. Ark. 1999); *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996))(cites therein). The marital debt need not be owed to the spouse or former spouse but may be owed to a third party. *Henson*, 197 B.R. at 303.

The non-debtor spouse's threshold burden is to merely show that they hold a divorce-related claim that is not covered by § 523(a)(5). *Straub v. Straub (In re Straub)*, 192 B.R. 522, 527-28 (Bankr. D.N.D. 1996); *Henson*, 197 B.R. at 302-03. The burden then shifts to the debtor to show *either* that he does not have the ability to pay the debt *or* that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 55-56 (B.A.P. 8th Cir. 1998); *Henson*, 197

B.R. at 303 (*citing Bodily v. Morris (In re Morris)*, 193 B.R. 949 (Bankr. S.D. Cal. 1996)). The debtor must make this showing by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

Under subsection (A), the Court must look at the debtor's ability to pay the debt -- now and in the future. *Henson*, 192 B.R. at 304. "[T]he inquiry begins with an analysis of the debtor's current financial circumstances, but ends with an inquiry whether that situation is fixed or is likely to change in the foreseeable future." *Straub*, 192 B.R. at 528. Section 523(a)(15)(A) does not restrict the Court's inquiry to a debtor's "present" ability to pay the debt. *Id.* at 528.

Under subsection (B) of § 523(a)(15), the debtor must demonstrate that "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[.]" The point in time to weigh these benefits and detriments to each party is at the time of the dischargeability trial, not when the divorce order was entered. *Haney*, 238 B.R. at 435; *Henson*, 197 B.R. at 303. This allows the Court to fully examine the benefits of the "fresh start" to the debtor and any change in circumstances in employment or other good or bad fortune which may have befallen, or predicably may befall, the parties. *Haney*, 238 B.R. at 435; *Henson*, 197 B.R. at 303. In considering changed events, and particularly the

benefits of discharge given one party, the current and future financial circumstances of the parties are to be analyzed. *Henson*, 197 B.R. at 303 (*citing Dressler v. Dressler (In re Dressler)*, 194 B.R. 290 (Bankr. D.R.I. 1996), and *Taylor v. Taylor (In re Taylor)*, 191 B.R. 760 (Bankr. N.D. Ill. 1996)). Net worth alone is not determinative; the totality of the circumstances must be considered. *Gamble v. Gamble (In re Gamble)*, 143 F.3d 223, 226 (5th Cir. 1998). Factors to consider include: the amount of debt involved and available repayment terms; the current income of the debtor and former spouse and their respective current spouses; the current assets and liabilities of the debtor and the former spouse and their respective current spouses; the health, job skills, training, age, and education of the debtor and the former spouse and their respective current spouses; the dependents of the debtor and the former spouse and their respective current spouses and any special needs which they may have; changes in financial circumstances for the debtor or former spouse since the divorce; the amount of debt that may be discharged by the debtor; and the good faith of the parties. *See Hart v. Molino (In re Molino)*, 225 B.R. 904, 909 (B.A.P. 6th Cir. 1998).

III.

From the evidence presented regarding the parties' present and future circumstances, the Court concludes that Cookie has not met his burden of proof under either subsections (A) or (B) of

§ 523(a)(15).[2] Accordingly, the credit card debts and the debt on the Malibu that he assumed in his divorce from Ford shall be non dischargeable.[3]

Under § 523(a)(15)(A), Cookie has not shown that he does not have the ability to pay these debts. In essence, he testified that he is willing to work a second job and substantially reduce some expenses to pay current bills and repay his present wife's debts, which are not being discharged in this bankruptcy. That same ability to maximize income and reduce unnecessary expenses thus exists to pay the subject debts arising from his previous marriage.

Further, Cookie has not shown that all his present expenses and debts are reasonable and necessary. Cookie and his family continue to live beyond their means, especially in light of their decision to voluntarily reduce his wife's working hours as a nurse. He did not demonstrate how increased child care expenses would negate, or at least significantly reduce, any additional income his wife would earn if she worked a full work week. No reasonable explanation was given for their very large monthly food and

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[2] Cookie conceded that the subject debts fall under § 523(a)(15). The Court has adopted that conclusion for the purpose of this Decision.

[3] The Court has not included Cookie's student loans as part of the non dischargeable debts. The Court has assumed that Ford has no liability on them. If that is not correct, Ford should request an amended decision, order, and judgment.

miscellaneous household expense of $1,000. He could not testify how much, if any, of that sum reflected expenses for the new baby. Cookie did not explain why the purchase of off-base housing, which has increased their expenses, was appropriate or necessary.

Cookie also has not met his burden under § 523(a)(15)(B) of showing that the benefits he will receive from a discharge of these debts outweighs the detriments Ford will suffer if the subject debts are discharged. Ford has maximized her employment potential, her working hours, and her income. She has adopted a lifestyle commensurate with her income. She makes appropriate efforts to keep her expenses in check and to pay her bills. She has no other resources to tap to get the subject debts paid. Most important, if Ford had to assume the subject marital debts, her ability to responsibly meet her basic living expenses and those of her child would be significantly impaired.

In contrast, Cookie has not shown that he and his family's basic needs would not be met if these debts are not discharged and he is required to pay them over time. A discharge of these debts would only foster their voluntarily changes in lifestyle. He has not, in good faith, made an effort to pay these debts since the divorce. He has not maximized his earning potential. He has not adopted a lifestyle appropriate for his income. Accordingly, the scales tip in Ford's favor under subsection § 523(a)(15)(B).

Fellner v. Fellner (In re Fellner), 256 B.R. 898, 904-05 (B.A.P. 8th Cir. 2001).

An order and judgment will be entered declaring the subject debts non dischargeable.

So ordered this 25 day of May, 2001.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Deputy Clerk

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
MAY 25 2001
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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