

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE

James E. Lowery,

Case No. 98-26783

Debtor.

Chapter 7

Cheryl Lowery Hall,

Plaintiff,

v.

Adv. Pro. No. 98-1098

Jimmy Earl Lowery,

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT OBJECTING TO DISCHARGE OR TO DETERMINE DISCHARGEABILITY OF
CERTAIN DEBTS**

The Court conducted a trial in this matter on February 2, 1999. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On December 2, 1997, a Final Decree for Divorce was entered with the Circuit Court of Shelby County, TN for the Thirtieth Judicial District at Memphis between the Cheryl Lowery Hall, (“Hall”), and James E. Lowery, (“Lowery”). The Final Decree of Divorce provided that the debtor, James Lowery, “shall be responsible for \$4,457.31 of the parties’ MasterCard, the entire balance on the Dillard’s credit card, all his hospital bills and shall be equally responsible for taxes on the parties’ real property.” The Final Decree further stated that “Mr. Lowery shall either use the proceeds from the sale of the assets received in the divorce or refinance these through his credit union and shall immediately take the necessary steps to refinance or pay off these debts.” The Final Decree further provided that “Mr. Lowery is to pay the sum of \$2,000.00 to Ms. Lowery (Hall) as alimony in solido for attorney fees at the rate of \$100.00 per month.

At the time of the parties' divorce, Lowery was employed by the Memphis Fire Department. According to his testimony at trial, Lowery made approximately \$38,000/year in said employment. Sometime after his divorce, Lowery voluntarily quit his job at the Fire Department. Lowery currently works three days a week at the Tobacco Junction, Incorporated as a cashier and stock person making \$6.50/hour.

Lowery has three children for which he is under court orders to pay child support. The first order requires him to pay \$580/month for two of his children. The second order requires him to pay \$264/month for his other child. According to his testimony at trial, Lowery is behind on both these payments. Lowery testified that he is paying 40% of his weekly pay towards these obligations.

Approximately three months before filing bankruptcy, Lowery received a lump sum retirement payment in the amount of \$20,000. At the trial, Lowery testified that he used some of this money to pay back loans from relatives and that he lost \$8600 of the payment at the casinos in Tunica. Lowery did not use any of this money to make payments on the couples' Dillards card or MasterCard. Lowery also did not use any of the money towards the \$2000 alimony in solido owed to Hall.

Lowery does not own a car nor does he have his own place to live. He currently pays \$100/month to sleep on a friend's couch. He has no utility bills and no phone bills. According to his own testimony, Lowery has not asked his present employer to increase his hours nor has he asked Juvenile Court to temporarily reduce his child support payments. Lowery also testified that he has only applied for jobs at Georgia Paper, Dupont, and Sandusky Equipment. He has not sought any other employment, either inside or outside of Millington, TN.

II. CONCLUSIONS OF LAW

11 U.S.C. § 523(a)(15)

Subsection (a)(15) excepts from discharge 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 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). Section 523(a)(15) has the effect of making all divorce-related obligations subject to a presumption of nondischargeability. *Cleveland v. Cleveland (In re Cleveland)*, 198 B.R. 394,

397 (Bankr.N.D.Ga.1996); *Schmitt v. Eubanks (In re Schmitt)*, 197 B.R. 312, 315 (Bankr.W.D.Ark.1996). This court has exclusive jurisdiction to determine if the debt in question is nondischargeable. 11 U.S.C. § 523(c)(1); see *In re Smither*, 194 B.R. 102, 106 (Bankr.W.D.Ky.1996) (noting that § 523(c)(1) grants federal courts exclusive jurisdiction over § 523(a)(15) matters while granting concurrent jurisdiction with state courts over § 523(a)(5) matters).

A. Burden of Proof

Before the court can review the evidence presented at the trial, the court must first determine on whom the burden of proof rests. Since Congress amended § 523 and added subsection (a)(15), several courts have grappled with the issue of burden of proof. Some courts have strictly followed *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991), which held that in an action brought under § 523(a) the burden of proof lies with the plaintiff to prove all of the elements of his or her case by a preponderance of the evidence. See *Greenwalt v. Greenwalt (In re Greenwalt)*, 200 B.R. 909 (Bankr.W.D.Wash.1996) (finding that in a § 523(a)(15) proceeding the plaintiff has the motivation and ability to demonstrate that the debtor has the ability to pay the obligation in question and to prove that the detrimental consequences of discharge outweigh the benefits the debtor would otherwise gain); *In re Dressler*, 194 B.R. 290 (Bankr.D.R.I.1996) (finding that shifting the burden to the defendant debtor is unnecessary to carry out § 523(a)(15)'s purpose); *In re Butler*, 186 B.R. 371 (Bankr.D.Vt.1995).

The majority of courts, however, has ruled that the plaintiff creditor only has the burden of proving that (a) the debt is not a debt which is nondischargeable under § 523(a)(5), and (b) the debt was incurred "in the course of 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 ..." in order for it to be nondischargeable under § 523(a)(15). See *In re Smither*, 194 B.R. 102, 107 (Bankr.W.D.Ky.1996). If the plaintiff meets this burden of proof, then the burden shifts to the debtor who must either prove an inability to pay the debt under § 523(a)(15)(A) or that a discharge of the debt would result in a benefit to the debtor that outweighs the detrimental consequences of a discharge to the spouse, former spouse, or children of the debtor under § 523(a)(15)(B) regarding the consequences of the discharge on the respective parties.

B. Ability to Pay

The court will measure the debtor's ability to pay as of the date of the trial. In making this determination, the court will not focus on a single moment in time or mere "snapshot" of the debtor's financial strength. Rather the court will look to the totality of the circumstances, including the debtor's future earning potential, as well as his or her income as of the date of the trial. *Smither*, 194 B.R. at 107; *Dressler*, 194 B.R. at 300; *Belcher v. Owens (In re Owens)*, 191 B.R. 669, 674 (Bankr.E.D.Ky.1996).

To determine the amount of income that a debtor earns for purposes of § 523(a)(15), several courts have used the "disposable income" test. *Greenwalt*, 200 B.R. at 913; *Smither*, 194 B.R. at 108; *Dressler*, 194 B.R. at 304; *Slover v. Slover (In re Slover)*, 191 B.R. 886, 892 (Bankr.E.D.Okla.1996); *Owens*, 191 B.R. at 674. Some courts have used the "undue hardship" test found in § 523(a)(8). *In re Comisky*, 183 B.R. 883 (Bankr.N.D.Cal.1995); *In re Straub*, 192 B.R. 522 (Bankr.D.N.D.1996). However, the language of subsection (a)(15) is almost identical to the language found in § 1325(b)(2); therefore, this court finds the "disposable income" test to be the appropriate standard by which to determine the debtor's ability to pay.

Several courts have enumerated several factors for this court to consider regarding the debtor's ability to pay:

1. The debtor's "disposable income" as measured at the time of trial;
2. The presence of more lucrative employment opportunities which might enable the debtor fully to satisfy his divorce-related obligation;
3. The extent to which the debtor's burden of debt will be lessened in the near term;
4. The extent to which the debtor previously has made a good faith effort toward satisfying the debt in question;
5. The amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and condition of those debts;
6. The value and nature of any property the debtor retained after his bankruptcy filing;
7. The amount of reasonable and necessary expenses which the debtor must incur for the support of the debtor, the debtor's dependents and the continuation, preservation and operation of the debtor's business, if any;
8. The income of debtor's new spouse as such income should be included in the calculation of the debtor's disposable income;
9. Any evidence of probable changes in the debtor's expenses.

Smither, 194 B.R. at 108-09; *Cleveland*, 198 B.R. at 398. A debtor has the ability to pay an obligation, for purposes of § 523(a)(15)(A), if the debtor has sufficient disposable income to pay all or a material part¹ of a debt within a reasonable amount of time.

¹The *Smither* court held that a court may grant a partial discharge of § 523(a)(15) debts. In so holding, the court followed the student loan discharge analysis. 194 B.R. at 109. The *Cleveland* court also indicated that it would likely allow partial discharges; however, the court found that it did not need to decide that issue. 198 B.R. at 400 n. 8. Likewise, this court does not need to decide this issue in the instant case.

III. ORDER

It is therefore **ORDERED** that the Complaint Objecting to Discharge or To Determine Dischargeability of Certain Debts is **GRANTED**.

The attorney's fee is not dischargeable

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: April 13, 1999