UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	**Case No. 97-2457-CH**
BILLIE F. GUSKE,	:	
	:	**Chapter 7**
Debtor.	:	
- -	:	
BARBARA M. GUSKE,	:	**Adv. No. 97-97186**
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
BILLIE F. GUSKE,	:	
	:	
Defendant.	:	
	:	

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ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

This matter came on for trial on September 28, 1998, the parties appearing in person and with their attorneys of record, Gary R. Hassel for the plaintiff and Jerrold Wanek for the defendant. The proceeding was submitted upon written briefs and arguments. The briefs having been submitted the court deems the matter submitted for findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. §152(b)(2)(I).

PLEADINGS

The complaint, as amended, alleges that the debt owed by the defendant to the plaintiff is nondischargeable pursuant to the provisions of 11 U.S.C. §523(a)(2)(A), false pretenses, false representation, or actual fraud, and §523(a)(15), property settlement agreements arising out of a divorce.

Defendant has generally denied the allegations of the complaint.

FINDINGS

1. Defendant-Debtor (herein Bill) filed a chapter 7 petition on May 27, 1997. He scheduled Plaintiff-Creditor (herein Barbara) as an unsecured creditor with a claim of unknown value. This claim was scheduled as disputed, contingent, and unliquidated.

2. The parties were formerly wife and husband having been married on December 5, 1969.

3. The marriage of the parties was dissolved by decree filed on April 10, 1992, in the Iowa District Court, Dallas County, D.M. No. 3451 (Exh. A).

4. On March 30, 1991, the parties represented that they had a net worth of $241,925.00. (Exh 2)

5. This decree was a consensual decree as the parties had agreed upon the terms of the decree. The decree provided for a division of the property and debt of the parties. The decree provided that neither party was to pay alimony to the other.

6. The decree provided that Bill was to receive as his sole and separate property the following: all shares of stock in Bill's businesses as well as all accounts thereof; a 1989 Oldsmobile Cutlass; and, his personal property in his possession. This business

was a profitable business at the time of the agreement between Bill and Barbara and resulting decree, but failed some time after the decree.

7. The decree provided that Barbara was to receive as her sole and separate property the following: her savings accounts, retirement annuity, stock fund and company accounts; a 1988 Oldsmobile Delta 88 automobile; her personal property in her possession; and, the marital residence.

8. The marital debt was also divided between the parties. Bill was to assume all debt on his businesses; his personal credit card debt; and, all debt not expressly ordered paid by Barbara.

9. Barbara received the marital residence subject to the indebtedness thereon which she was to pay and hold Bill harmless from any liability therefor. She was also to pay the debt on two credit cards held by her.

10. One of the terms of the decree provided as follows:

> "That Respondent (Billie F. Guske) shall pay to Petitioner (Barbara M. Guske), as and for property settlement, the sum of $30,000.00, without interest, within 5 years from the date of this decree; provided further, that any amount not paid within said 5 year period shall then draw interest at the rate of ten per cent (10%) per annum until paid."

11. Bill has paid approximately $1,400.00 of this debt and filed his bankruptcy petition to discharge the balance of that debt.

12. Bill had no intention of paying that debt when he signed the decree on or about April 10, 1992. This intention was never conveyed to Barbara and she signed off on the decree believing that she would be paid the entire $30,000.00.

13. Bill gave his address as 2830 Gilmore Avenue, Des Moines, IA 50312 at the time he filed his petition. This home is owned by Sharon Engeldingher, and Bill lives in that home with Ms. Engeldingher.

14. He scheduled his occupation as insurance agent for Brenton Investment and Insurance. His scheduled gross income was $2,249.60 per month with a net income of $1,665.20 per month. Bill deducted a payment of $36.00 per month for a 401K. He also receives $800.00 per month for disability and renewal income for a total net monthly income of $2,465.20.

15. His Schedule J shows a total expenditure of $2,574.65 per month. This includes the following monthly expenditures: rent - $600.00; home maintenance - $25.00; food - $300.00; recreation - $100.00; and, misc. expenses and lunches - $150.00.

16. Schedule J reveals an installment payment of $519.99 per month.

17. Bill acquired a 1996 Chevrolet Blazer on April 29, 1997 when he traded his 1993 GMC Jimmy for said vehicle (Exh 7).

18. The 1993 GMC was given a value of $18,745.00 at the time of the trade but $12,441.17 was owed on this vehicle for a net trade-in allowance of $6,303.83. He paid $30,020.00 for the 1996 Blazer and financed $25,401.67 at 11.24% interest. The monthly payments are $519.99 for 66 months beginning June 13, 1997.

19. Bill is 61 years of age (b/d 10/12/37). He claims a physical disability in that he has a heart condition which limits his ability to work as a result of fatigue. He anticipates that surgery will have to be performed which will hopefully improve his physical well being.

20. Bill enjoys hunting and fishing. He is a serious hunter and hunts deer, geese, ducks, and moose. Walking is an important element of these endeavors.

21. Bill states that he will not pay Barbara even if this court orders him to pay the debt.

22. Barbara is 54 years of age (b/d 4/8/44) and lives at 300 Gray, Waukee, IA 50263.

23. She lives there with her 32-year-old son who does not pay rent or utilities. He does things around the house such as yard work and inside maintenance.

24. Barbara's home is a four-bedroom home which she received as part of the property settlement from the dissolution of marriage in 1992.

DISCUSSION

11 U. S. C. §523(a)(2)(A)

The first issue is the dischargeability of Bill's debt to Barbara under 11 U.S.C. § 523(a)(2)(A). Barbara seeks to have the debt owed by Bill declared nondischargeable. Bill argues that the debt was not fraudulently incurred, and should therefore be dischargeable. The Code section at issue provides:

> § 523. Exceptions to discharge.
>
> (a) A discharge under section 727 of this title does not discharge an individual debtor from any debt –
> (2) for money, property, services, or an extension, renewal, refinancing of credit, to the extent obtained by –
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insiders financial condition . . . .

11 U.S.C. § 532(a)(2)(A).

The standard of proof under § 523 is a preponderance of the evidence. See Grogan v. Garner, 489 U.S. 279, 286-87 (1991).

The creditor must prove the following elements to prevail under §523(a)(2)(A):

> (1) the debtor made false representations;
> (2) at the time made, the debtor knew them to be false;
> (3) the representations were made with the intention and purpose of deceiving the creditor;
> (4) the creditor justifiably relied on the representations; and,
> (5) the creditor sustained the alleged injury as a proximate result of the representations having been made.

In re Van Horne, 823 F.2d 1285, 1287 (8th Cir.1987), as modified by Field v. Mans, 516 U.S. 59, 74-75, 116 S.Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that §523(a)(2)(A) requires "justifiable, but not reasonable, reliance").

The first three elements may be considered together by asking whether Bill knowingly made false representations with the intention and purpose of deceiving Barbara.

In executing the stipulated dissolution of marriage decree Bill represented that in return for the marital assets which he received by benefit of the decree that he would pay Barbara $30,000.00 to equalize the property settlement.

The alleged fraud must have existed at the time the debt was incurred to provide a basis for excepting a debt from discharge, In re Scarlata, 127 B.R. 1004 (N.D. Ill.1991), aff'd, 979 F.2d 521 (1992). "A mere promise to be executed in the future is not sufficient to make a debt dischargeable, even though there is no excuse for the subsequent breach." In re Homer, 45 B.R. 15 (Bankr. W.D. Mo. 1984) (citing 1A L. King, Collier on Bankruptcy ¶ 17.16, pp. 1638-39 (15th ed. 1976)). A breach of contract is not necessarily a misrepresentation for purposes of § 523(a)(2)(A). Leeb v. Guy (In re Guy), 101 B.R.

961, 978 (Bankr. N.D. Ind. 1988). Without proof of intent, mere breach by Bill of his commitment to pay the cash property settlement does not establish misrepresentation at the time that Bill entered into the stipulated decree.

The question for purposes of a fraud analysis is whether or not Bill intended to pay the $30,000.00 at the time he executed the stipulated dissolution of marriage decree. Direct proof of intent is nearly impossible to obtain, so a creditor may present evidence of the surrounding circumstances from which intent may be inferred. In re Van Horne, 823 F.2d 1285, 1287 (8th Cir.1987).

In resolving what was said and intended when Bill and Barbara entered into the stipulated decree, the court must look at the facts and circumstances surrounding the signing of the consent decree. However, the court is aided by Bill's testimony that he had no intention of paying the cash award when he signed the decree.

The real issue is whether Barbara was aware of Bill's intentions at the time of the signing of the stipulated dissolution of marriage decree.

The court finds that Barbara was unaware of his intent at the time the decree was entered but became aware of this some time after the marriage was dissolved.

The deception perpetrated by Bill caused Barbara to lower her guard regarding the signing of the consent decree. She did not secure her position with liens on Bill's property or require different terms to better enforce collection of the property settlement.

The court concludes that Barbara has shown by a preponderance of the evidence as follows:

(1) Bill made false representations to Barbara. He falsely represented that he was going to pay the $30,000.00 property settlement.

(2) Bill knew these representations were false when he made them at the time he signed the consent decree.

(3) These representations were made with the intention and purpose of deceiving Barbara.

(4) Barbara justifiably relied upon these representations and was unaware of Bill's deceit when she signed the consent decree.

(5) Barbara sustained injuries as a proximate result of Bill's false and deceitful statements. She agreed to a property settlement which was not part of the bargain and which was inequitable as accepted by the court.

11 U. S. C. §523(a)(15)

Since the court has ruled that the debt is excepted from discharge pursuant to 11 U. S. C. §523(a)(2)(A) the court will not consider the issues raised under 11 U. S. C. §523(a)(15).

ORDER

IT IS THEREFORE ORDERED that the debt of Billie F. Guske, a.k.a. Bill Franklin Guske, to Barbara M. Guske is excepted from discharge pursuant to 11 U. S. C. § 523(a)(2)(A).

FURTHER, Barbara M. Guske shall have judgment against Billie F. Guske, a.k.a. Bill Franklin Guske, in the amount of $28,600.00, plus interest at the rate of ten percent (10%) per annum from April 10, 1997, and the costs of this proceeding.

Dated this _____ day of September, 1999.

_____
Russell J. Hill, Chief Judge
United States Bankruptcy Judge

United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT

No. 99-6070SI

In re: Billie Franklin Guske	*	
	*	
Debtor	*	
	*	
Barbara M. Guske	*	
	*	Appeal from the United States
Plaintiff - Appellee	*	Bankruptcy Court for the
	*	Southern District of Iowa
v.	*	
	*	
Billie Franklin Guske	*	
	*	
Defendant - Appellant	*	

Submitted: December 29, 1999
Filed: January 13, 2000

Before KOGER, Chief Judge, KRESSEL and WILLIAM A. HILL, Bankruptcy Judges.

KOGER, Chief Judge.

Debtor Billie Franklin Guske appeals the Judgment of the Bankruptcy Court excepting his debt to Barbara M. Guske from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). For the reasons that follow, we reverse and remand the cause to the Bankruptcy Court for further findings.

Factual Background

The Debtor and Barbara Guske were married on December 5, 1969. On or about March 30, 1991, the parties executed a financial statement that indicated they had a net worth of $241,925.00. On or about April 10, 1992, the parties were divorced by the Iowa District Court, Dallas County, Iowa. The parties, who were represented by the same attorney in the dissolution proceedings, signed a consent dissolution decree which the state court approved. Among other things, the decree provided that neither party was to pay alimony to the other. In addition, the decree awarded certain stock and personalty to the Debtor and awarded certain real estate and personalty to Ms. Guske. In addition, the dissolution decree awarded Ms. Guske a judgment for $30,000 payable interest free within five years. The wording of the relevant provision was as follows:

> That Respondent [Billie F. Guske] shall pay to Petitioner [Barbara M. Guske], as and for property settlement, the sum of $30,000.00, without interest, within 5 years from the date of this decree; provided further, that any amount not paid within said 5 year period shall then draw interest at the rate of ten per cent (10%) per annum until paid.

The Debtor had paid approximately $1,400 toward the $30,000 obligation under the dissolution decree by paying some insurance premiums during the five-year interest-free period.

On May 27, 1997, some forty-seven days after the full unpaid balance became due under the dissolution decree, the Debtor filed his voluntary petition for relief under Chapter 7 of Title 11 of the United States Code. On August 20, 1997, Barbara Guske filed a Complaint to Determine Dischargeability wherein she asserted that the Debtor's debt to her pursuant to the dissolution decree was nondischargeable under 11 U.S.C. § 523(a)(15), which renders nondischargeable certain debts relating to property divisions in connection with a divorce or separation. Ms. Guske amended her Complaint on August 21, 1997, to also assert a § 523(a)(2)(A) cause of action based on fraud.

On September 1, 1999, following a trial, the Bankruptcy Court entered an Order and Judgment finding and ordering that the $28,600.00 remaining on the unpaid balance plus

interest at 10% per annum from April 10, 1997, was nondischargeable under 11 U.S.C. § 523(a)(2)(A). Because the Bankruptcy Court determined the debt to be nondischargeable under § 523(a)(2)(A), it expressly declined to address the issues raised under § 523(a)(15).

Standard of Review

We review findings of fact for clear error and legal conclusions *de novo*. See O'Neal v. Southwest Mo. Bank (In re Broadview Lumber Co.), 118 F.3d 1246, 1250 (8th Cir. 1997); Hartford Cas. Ins. Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 214 B.R. 197, 199 (B.A.P. 8th Cir. 1997); see also Fed. R. Bankr. P. 8013. Because the Bankruptcy Court applied the correct legal principles and standard for nondischargeability under § 523(a)(2)(A), our review of its factual findings thereunder is under the clearly erroneous standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.746 (1948); accord In re Waugh, 95 F.3d 707, 711 (8th Cir. 1996); Chamberlain v. Kula (In re Kula), 213 B.R. 729, 735 (B.A.P. 8th Cir. 1997).

Discussion

The Bankruptcy Court correctly held that in order to establish nondischargeability of a debt by reason of 11 U.S.C. § 523(a)(2)(A), the plaintiff must prove, by a preponderance of the evidence, five discrete elements. Those are:

1) that the debtor made a representation;
2) that at the time the debtor knew the representation was false;
3) that the debtor made the representation deliberately and intentionally and with the intention and purpose of deceiving the creditor;
4) that the creditor justifiably relied on such representation; and
5) that the creditor sustained the alleged loss and damage as the proximate result of the representation having been made.

See In re Ophaug, 827 F.2d 340 (8th Cir. 1987), as refined by Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995); see also Merchants Nat'l Bank of Winona v. Moen (In re Moen), 238 B.R. 785, 790 (B.A.P. 8th Cir. 1999).

In its Order, the Bankruptcy Court found that Ms. Guske met her burden of proving each of the elements of fraud under § 523(a)(2)(A). After carefully reviewing the entire record, we respectfully disagree. We concur that the record contains sufficient evidence to support a finding that Ms. Guske met her burden as to the first three elements, as well, perhaps, as the fifth element. However, because the record before us is devoid of any evidence regarding justifiable reliance, we find that Bankruptcy Court clearly erred in concluding that Ms. Guske met her burden of proving that element under § 523(a)(2)(A).

At the outset, we note that although Ms. Guske amended her Complaint to add the § 523(a)(2)(A) cause of action well before trial, counsel for both parties seemed to have forgotten this fact at trial. In his opening statement, counsel for Ms. Guske stated, "this action lives or dies entirely on this Court's interpretation and application of 11 U.S.C. Section 523(a)(15)." He made no mention of § 523(a)(2) in his opening statement. The trial then proceeded in a manner that conformed to counsel's statement: the evidence and arguments focused almost exclusively on the cause of action under § 523(a)(15). In fact, the first mention of § 523(a)(2)(A) came at what appeared to be the conclusion of the Debtor's testimony when, after the Debtor admitted he never intended to pay Ms. Guske (discussed more fully below), the Court prompted the Debtor's attorney that he might want to ask the Debtor some questions pertaining to § 523(a)(2)(A). Even then, neither attorney asked more than a few questions relevant to that cause of action. Finally, at the conclusion of the presentation of evidence and argument, which had been based almost exclusively on the elements of § 523(a)(15), counsel for Ms. Guske orally moved to amend the Complaint to add a basis of recovery under § 523(a)(2)(A) "for purposes of amending to conform to proof," apparently having forgotten that the Complaint had already been so amended long before trial.

Nevertheless, we reviewed the record and transcript very carefully for any evidence tending to support each of the elements of § 523(a)(2)(A). As the Bankruptcy Court found, the Debtor admitted at trial that he had no intention of ever paying his ex-wife the $30,000

property settlement obligation under the dissolution decree, essentially because he did not have the money to pay her. Specifically, the Debtor testified:

Q. [BY MS. GUSKE'S ATTORNEY]: Was it ever your intent to pay [Barbara] any of that property settlement?

A. [BY THE DEBTOR]: No, sir.

Q. You signed a decree that said you would, didn't you?

A. Well, I also told her I'd never pay her.

Q. All right. You told her you never intended to pay her off?

A. That's right.

At what appeared to be the conclusion of the Debtor's testimony,[1] the Court asked the Debtor about this again:

THE COURT: Did you tell Barbara Guske that you weren't going to pay that?

THE WITNESS: I sure did.

THE COURT: You had no intention of paying it?

THE WITNESS: I told her that for sure.

THE COURT: And when the Court, the Iowa district court, ordered you to pay that $30,000, you had no intention of paying it?

THE WITNESS: No, sir.[2]

After this testimony, it should have been relatively easy for Ms. Guske to prove a § 523(a)(2)(A) cause of action because intent is very often one of the most difficult, if not *the* most difficult element to prove. Because a debtor rarely, if ever, admits he made a promise to pay an obligation which he never intended to pay, and since the court cannot look inside

[1] As discussed more fully below, it is extremely rare for a debtor to admit under oath that he entered into an agreement to pay an obligation with no intent to fulfill that obligation. It is not surprising that this testimony caught the attention of the Bankruptcy Judge.

[2] It was at this point when the Court asked Debtor's counsel where he stood on § 523(a)(2)(A) and suggested to Debtor's counsel that it would be a good idea if he would ask some questions to clear that up.

the debtor's head to determine intent, courts have been required to formulate various lists and tests to help them determine intent based on the surrounding circumstantial evidence. See e.g., In re Moen, 238 B.R. at 791 (because direct proof of intent is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred) (quoting In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987)). Needless to say, this is often a difficult and time consuming task. Very luckily for Ms. Guske, however, that was not the case here: the Debtor freely admitted he never intended to pay the debt and thereby set a foundation (perhaps unwittingly) for proving a § 523(a)(2)(A) cause of action.

Clearly, the first three elements of fraud have been met at this point: the Debtor made a representation by signing the dissolution decree that he would pay the $30,000 obligation; the representation was admittedly knowingly false; and the debtor admittedly intended to never pay his wife, despite the promise to do so.

However, the record contains no evidence that Ms. Guske justifiably relied upon the representation contained in the dissolution decree. We recognize that the standard for showing justifiable reliance as established by the Supreme Court in Field v. Mans is fairly low and that a party may justifiably rely on a misrepresentation even when she could have ascertained its falsity by conducting an investigation. See Sanford Institution for Savings v. Gallo, 156 F.3d 71, 74 (1st Cir. 1998) (citing Restatement (Second) or Torts § 540, 541 cmt. a (1976)). "However, the reliance on misrepresentations known to the victim to be false or obviously false is not justified; falsity which could have been discovered by senses during a cursory glance may not be relied upon." Id. at 75 (citations omitted). In other words, if there are any warning signs (i.e., obvious or known falsities, see Restatement § 541) either in the documents, in the nature of the transaction, or in the debtor's conduct or statements, the creditor has not justifiably relied on his representation. Id.

In the case at bar, by signing the consent decree, the Debtor represented that he would pay Ms. Guske $30,000. There was no evidence that the Debtor made any affirmative representation to Ms. Guske that he would pay her the money or honor the provisions of the dissolution decree. To the contrary, as quoted above, the Debtor testified twice that he had told his wife he never intended to pay her. This testimony set the groundwork for an obvious

defense to the § 523(a)(2)(A) action because if the Debtor had told Ms. Guske from the beginning that he did not intend to pay the debt, there clearly could be no justifiable reliance on her part.

Unfortunately, however, no one asked Ms. Guske (who followed the Debtor on the witness stand) whether the Debtor had ever told her that he did not intend to pay her. Although Ms. Guske testified from page 69 of the transcript to page 124 of the transcript, the only statement relevant to reliance came when she said she expected to be paid when they got the divorce. We recognize that the Bankruptcy Court may have discredited the Debtor's testimony on this issue.[3] However, it was Ms. Guske who bore the burden of proving she relied on the Debtor's representation that he would pay her the $30,000, and that her reliance was justifiable. Despite being presented with the opportunity and patent reason to do so, she never rebutted his statement that he had told her that he did not intend to pay the $30,000. A simple denial by her would have been sufficient to put the issue in play, but her total silence in response to his direct testimony left that testimony essentially uncontroverted.

Likewise, we believe Guske's testimony that she "expected [to receive the money] when we got the divorce," without more, is not enough to meet her burden of proving she justifiably relied on the dissolution decree, particularly considering the Debtor's uncontroverted testimony that he would not pay her. Although Ms. Guske was not required to conduct any investigation as to the truth of the Debtor's representation by signing the consent decree that he intended to pay the money, the evidence indicates that there were "obvious warning signs" of its falsity, namely, that he told her he would not pay it.

As a result, because the record contains no evidence that the plaintiff met her burden of proving she justifiably relied upon any alleged misrepresentation by the debtor, we conclude that the Bankruptcy Court's determination that the debt to her was

[3] On the issue of justifiable reliance, the Bankruptcy Court's Order merely states "The court finds that Barbara was unaware of [the Debtor's] intentions at the time of the signing of the stipulated dissolution of marriage decree," and that "Barbara justifiably relied upon these representations and was unaware of Bill's deceit when she signed the consent decree."

nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) was clearly erroneous. See Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); In re Waugh, 95 F.3d 707, 711 (8th Cir. 1996); Chamberlain v. Kula (In re Kula), 213 B.R. 729, 735 (B.A.P. 8th Cir. 1997).

Finally, we wish to comment that we believe the appropriateness of a § 523(a)(2)(A) action in typical cases involving marital obligations is questionable. Although the possibility exists that a case giving rise to a § 523(a)(2)(A) action in the marital obligation context may come along, we believe that under normal circumstances, debts arising out of marital dissolutions are more appropriately addressed under either § 523(a)(5) or § 523(a)(15).

In this case, the Bankruptcy Court expressly declined to address the alternative § 523(a)(15) action because he determined the debt was nondischargeable under § 523(a)(2)(A). Consequently, we believe it is appropriate to remand the matter for findings under the alternative § 523(a)(15) cause of action. Upon remand, the bankruptcy court's review shall be limited to the evidentiary record previously established in the trial of the adversary proceeding.

For the foregoing reasons, the judgment of the Bankruptcy Court is reversed and remanded for further findings pertaining to the cause of action under § 523(a)(15).

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY APPELLATE PANEL,
EIGHTH CIRCUIT

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re:	:	**Case No. 97-2457-CH**
BILLIE FRANKLIN GUSKE,	:	
	:	**Chapter 7**
Debtor.	:	
- -	:	
BARBARA M. GUSKE,	:	**Adv. No. 97-97186**
Plaintiff,	:	
vs.	:	
BILLIE FRANKLIN GUSKE,	:	
Defendant.	:	

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ORDER UPON REMAND

This matter is before the court upon remand from the United States Bankruptcy Appellate Panel for the Eighth Circuit.

On September 1, 1999, this court entered its order excepting the debt of Billie Franklin Guske to Barbara M. Guske from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and judgment was granted to Barbara M. Guske against Billie Franklin Guske in the amount of $28,600.00 plus interest and costs. This court declined to address the issues under § 523(a)(15) because of the above ruling.

On January 13, 2000, said United States Bankruptcy Appellate Panel reversed that judgment and remanded the matter for further proceedings pertaining to the cause of action under 11 U.S.C. § 523(a)(15).

FINDINGS OF FACTS

1. Defendant/Debtor (hereinafter Billie) filed a Chapter 7 petition on May 27, 1997. He scheduled Plaintiff/Creditor (hereinafter Barbara) as an unsecured creditor with a claim of unknown value. This claim was scheduled as disputed, contingent, and unliquidated.

2. The parties were formerly wife and husband having been married on December 5, 1969.

3. The marriage of the parties was dissolved by decree filed on April 10, 1992, in the Iowa District Court, Dallas County, D.M. No. 3451.

4. On March 30, 1991, the parties represented that they had a net worth of $241, 925.00.

5. The dissolution decree was consensual in nature as the parties agreed upon its terms. The decree provided for a division of the property and debts of the parties. The decree provided that neither party was to pay alimony to the other.

6. The dissolution decree provided that Billie was to receive as his sole and separate property the following: all shares of stock in Billie's businesses as well as all the business accounts; a 1989 Oldsmobile Cutlass; and his personal property in his possession. The businesses were profitable at the time of the agreement between Billie and Barbara and resulting decree, but failed some time after the decree.

7. The dissolution decree provided that Barbara was to receive as her sole and separate property the following: her savings accounts, retirement annuity, stock fund

and company accounts; a 1988 Oldsmobile Delta 88 automobile; her personal property in her possession; and the marital residence.

8. The marital debt was divided as follows: Billie was to assume all debt on his businesses; his personal credit card debt; and all debt not expressly ordered paid by Barbara. Barbara received the marital residence subject to the mortgage. She was to pay and hold Billie harmless from any liability for the mortgage. Barbara was also to pay the debt on two credit cards that she held.

9. One of the terms of the decree provided:

> "That respondent (Billie F. Guske) shall pay to Petitioner (Barbara M. Guske), as and for property settlement, the sum of $30,000.00, without interest, within 5 years from the date of this decree; provided further, that any amount not paid within said 5 year period shall then draw interest at the rate of ten per cent (10%) per annum until paid."

10. The decree provided that if Billie paid premiums for life, auto, or real estate insurance at Barbara's request and for her benefit, then he could charge that amount off against $30,000.00 property settlement. Billie has paid approximately $1,400.00 against this debt. He filed his bankruptcy petition to discharge the balance of the debt.

11. Billie had no intention of paying the debt when he entered into the agreement or when he signed the decree on or about April 10, 1992. He never advised either the Iowa District Court judge presiding over the dissolution of marriage case at the time of the entry of the stipulated agreement or Barbara of his state of mind.

12. In his bankruptcy petition, Billie gives his address as 2830 Gilmore Avenue, Des Moines, IA 50312. This home is owned by Sharon Engeldinger. Its value

is $250,000.00. Billie testified that he and Ms. Engeldinger reside together as husband and wife. Their relationship has been ongoing since June of 1992.

13. Billie scheduled his occupation as insurance agent for Brenton Investment and Insurance where he is paid on commission. His scheduled income is as follows:

Monthly gross wages
Brenton Investment and Insurance..... $2,249.60

Payroll deductions
Payroll taxes and social Security.....468.40
Insurance.....$49.00
Dental.....$31.00
401k.....$36.00

NET INCOME FROM WAGES.....$1665.20

Additional income

Disability and renewals.....$800.00

TOTAL MONTHLY INCOME.....$2465.20

14. Billie receives $800.00 per month in disability payments, $400.00 per month from Banker's Life and Casualty and $400.00 per month from Vulcan Life. In addition to this income, he receives income from renewals. The amount varies month to month. Billie testified that he received $300.00 one month and $169.00 the previous month. The renewal income was scheduled along with the disability as $800.00 per month. No monthly value was attributed to the renewals.

15. Billie's scheduled monthly expenditures are as follows:

Rent payment.....$600.00
Electricity.....$85.00
Telephone.....$55.00
Home maintenance.....$25.00
Food.....$300.00

Clothing.....$50.00
Laundry and dry cleaning.....$35.00
Medical/Dental.....$210.00
Transportation.....$160.00
Recreation/Newspapers.....$100.00
Charitable contributions.....$30.00
Insurance
Homeowners/renters.....$25.00
Life.....$178.66
Auto.....$51.00
Installment payments.....$519.99
Miscellaneous/Meals/Lunches Out.....$150.00

Billie's scheduled monthly expenditures are 2,573.99.

16. On April 29, 1997, less than one month before filing his Chapter 7 petition, Billie traded his 1993 GMC Jimmy for a 1995 Chevrolet Blazer. The 1993 GMC was valued at $18,745.00 at the time of the trade; $12,441.17 was still owed leaving a net trade-in allowance on the vehicle of $6.303.83. The total cash delivered price of the 1996 Blazer (tax, license, Universal insurance, and lien fee included) was $31,705.50. Billie financed 25,401.67 at 11.24% interest. The monthly payments are $519.99 for sixty-six (66) months beginning June 13, 1997. According to the Federal Truth-in-Lending Disclosures, the total cost of the vehicle will be $40,623.17.

17. Billie entered into a reaffirmation agreement with Magna Bank, N.A. reaffirming the debt secured by the 1996 Blazer. The agreement stated that $25,620.69 was owed on the date that the bankruptcy petition was filed.

18. In addition to the 1996 Blazer, Billie scheduled the following personal property, wearing apparel, $1,000.00; 12 ga. Beauilli Automatic shotgun, $500.00; Savage Modle [sic] 99 High power rifle, $500.00; one (1) savings and two (2) checking accounts, with a combined balance less than $100.00; a 401k retirement account and

stock with Brenton valued at $7,100.00; and an Interstate Assurance Company policy providing a $100,000.00 death benefit with the debtor's interest valued at $3,967.65.

19. Billie was 59 years of age at the time he filed his petition (birth date 10/12/37). He claims that he is physically disabled due to a heart condition. The heart condition results in fatigue, which, in turn, limits his ability to work. He anticipates corrective surgery will be performed which will hopefully improve his physical condition.

20. Billie states that he will not pay Barbara even if this court orders him to pay the debt.

21. Barbara lives at 300 Gray, Waukee, IA 50263. Her adult son, Michael, resides with her. Michael is Billie's adoptive son.

22. Michael does not pay rent, nor does he otherwise make a significant financial contribution to the household. He does grocery shopping, lawn and home maintenance, and cooks occasionally.

23. Barbara's residence is a four-bedroom home that she received as part of the property settlement pursuant to the dissolution of marriage decree in 1992. At the time of the dissolution, the home was subject to a $50,000.00 balloon mortgage. The current value of home is approximately $88,000.00. Barbara refinanced the balloon mortgage when it came due in October of 1992. The amount of the mortgage now encumbering the home is approximately $39,900.00.

24. Barbara currently works two jobs. She works 7:00 a.m. to 4:30 p.m., Monday through Friday at Employer's Mutual. At 5:00 p.m., she begins work at Sears in

Merle Hay Mall. She works 6 nights per week at Sears for an average of 30-32 hours. If she has a night off from Sears, she will work at Employer's Mutual to "catch up." She also will work Saturday at Employer's Mutual. Barbara does not receive additional pay for the extra time spent at Employer's Mutual. An average workweek for Barbara is well in excess of 70 hours.

25. Barbara's income is as follows:

Monthly wages
- Employer's Mutual gross..... $2,380.84

Payroll deductions
- Payroll taxes and social security.....$586.73
- Insurance.....$11.92
- Dental.....$0.00
- 401k.....$119.04

Other income
- Sears net monthly income.....$796.88

NET INCOME FROM WAGES.....$2460.03

TOTAL MONTHLY INCOME.....$2460.03

26. Barbara provided the following list of monthly expenditures.

- Mortgage payments (1st and 2nd for siding).....$742.26
- Electricity.....$200.00
- Water and sewer.....$50.00
- Telephone.....$60.00
- Cable television.....$50.00
- Home maintenance.....$50.00
- Food.....$215.00
- Clothing.....$80.00
- Laundry and dry cleaning.....$30.00
- Medical/Dental..... $18.00
- Transportation.....$170.00
- Recreation/Newspapers.....$25.00
- Insurance
  - Auto.....$30.43
- Installment payments

Automobile.....$226.19
Discover.....$200.00
MasterCard.....$200.00
Sears.....$200.00
Miscellaneous/Meals/Lunches Out.....$250.00
Haircuts.....$15.00

Barbara's stated monthly expenditures are $2,811.88. In answers to interrogatories, Barbara indicated that combined, she owed in excess of $16,000.00 to Discover, MasterCard, and Sears. The $200.00 monthly payment to each of these creditors is not indicative of a minimum payment. Barbara tries to pay more than the monthly minimum on her credit cards, as well as her mortgage payments, in an attempt to get the obligations paid off.

27. In addition to the home, Barbara's assets include a checking account, a savings account of $1,000.00, a 1996 Oldsmobile Ciera, and a retirement account with a surrender value of over $88,000.00 as of 1996.

28. Barbara's mother transferred title to her home to Barbara. This home, valued at between $30,000.00-$35,000.00, is being sold on contract to Richard Knight. Barbara did not produce the contract. She testified that she invested the proceeds and only withdrew enough to pay for her mother's funeral expenses. She additionally testified that she does not feel that the money is hers alone, but should be divided equally among the siblings. Barbara did not produce a will or any other evidence demonstrating an intent by her mother to divide the property or proceeds. She did not provide any evidence, other than her testimony, of an obligation to share this asset.

29. Barbara was 53 of age at the time Billie's bankruptcy petition was filed (birth date 4/8/44). She takes medication for high blood pressure due to stress and has an ulcer.

DISCUSSION

Barbara asserts that the $30,000.00 debt for which Billie is responsible under the terms of their Dissolution Decree is nondischargeable pursuant to 11 U.S.C. § 523 (a)(15). Billie argues that he is unable to pay this debt, or, alternatively, that discharging this debt would result in a benefit to himself that outweighs the detrimental consequences to Barbara.

Section 11 U.S.C. § 523(a)(15) provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor for 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) is meant to cover debts arising out of a divorce or separation decree that are not in the nature of alimony, maintenance or support. The legislative history indicates that this section is aimed at those property settlement agreements in divorce or separation proceedings whereby a spouse agreed to reduced

support in return for a larger property settlement. 140 Cong.Rec. H10752, H10770 (daily ed. Oct. 4, 1994). However, as §523(a)(15) is written, it covers all property settlement provisions arising out of a divorce or separation proceeding.

Together, §§ 523(a)(5) and (a)(15) make virtually all debts owed to a child or former spouse that arose in divorce proceedings nondischargeable. Rush v. Rush (In re Rush), 237 B.R. 473, 475 (B.A.P. 8th Cir. 1999). Debts for alimony, maintenance, and support are nondischargeable at the outset. 11 U.S.C. § 523(a)(5). However, the Code requires a creditor spouse to actively protect a right to payment of a debt arising in divorce proceedings that is not alimony, maintenance, or support. The creditor spouse must request the court to except the debt from discharge. 11 U.S.C. §523(c)(1). The request must be made within sixty (60) days from the first date set for the meeting of the creditors. Fed. R. Bankr. P. 4007(c). If no such request is made within the allotted time, the debt is discharged. 11 U.S.C. § 523(c)(1).

If a timely request is made, the Code provides that the debt is nondischargeable unless the debtor meets one of the two exceptions provided in § 523(a)(15). The section is written in the disjunctive. The debtor need only meet the requirements of one of the two exceptions for the debt to be discharged. Moeder v. Moeder (In re Moeder), 220 B.R. 52, 54, 55 (B.A.P. 8th Cir. 1998).

In a nondischargeability action under 11 U.S.C. § 523(a)(15), the creditor spouse must first establish that the debt at issue was incurred from a separation agreement, dissolution decree, or other court order, other than one for alimony, maintenance, or support. The burden then shifts to the debtor to prove dischargeability under either

subsection (A) or (B). Ginter v. Crosswhite (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); In re Rush, 237 B.R. at 475; In re Moeder, 220 B.R. at 56; Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 139-40 (B.A.P. 9th Cir. 1997).

The standard of proof under § 523 is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). "It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate." Smith v. United States, 557 F.Supp. 42, 51 (W.D. Ark. 1982) aff'd, 726 F.2d 428 (8th Cir.1984). The party with the burden of proof must provide evidence to prove his or her position is reasonably probable, not merely possible. Sherman v. Lawless, 298 F.2d 899, 902 (8th Cir. 1962). If the proven facts equally support each party's position, "the judgment must go against the party upon whom rests the burden of proof." Id.

Federal law ultimately determines whether a debt is or is not dischargeable under § 523(a)(15); however, applicable nonbankruptcy law must be analyzed to determine whether the debt was incurred from a separation or dissolution decree. Gibson v. Gibson (In re Gibson), 219 B.R. 195, 203 (B.A.P. 6th Cir. 1998). "As the Supreme Court stated in Grogan, 498 U.S. at 283-84, 'the validity of a creditor's claim is determined by rules of state law[,]' and '[w]e use the term 'state law' expansively herein to refer to all nonbankruptcy law that creates substantive claims." Id.; see also Carlisle v. Carlisle (In re Carlisle), 205 B.R. 812, 816 (Bankr. W.D. La. 1997)("the creation and enforceability of obligations in a divorce settlement are governed by state law").

In Iowa, the "allocation of marital debt inheres in the property division." In re the Marriage of Johnson, 299 N.W. 2d 466, 467 (Iowa 1980). A stipulation of settlement is a contract between the parties that becomes a "final contract" when it is approved by the court and incorporated into the dissolution decree and order. In re the Marriage of Lawson, 409 N.W. 2d 181, 182 (Iowa 1987). When the dissolution decree is construed, '"[e]ffect must be given to that which is clearly implied as well as that which is expressed.'" Id., quoting Cooper v. Cooper, 158 N.W.2d 712, 713 (Iowa 1968).

Therefore, this court concludes that as to parties in a dissolution of marriage action, debt allocated subject to the property division is incurred in connection with the dissolution decree. For § 523(a)(15) purposes, no express "hold harmless" language need be included in the dissolution decree if that effect is clearly implied in the order. See In re Gibson, 219 B.R. at 202; see also Johnston v. Henson (In re Henson), 197 B.R. 299, 302-03 (Bankr. E.D. Ark. 1996)("although there is no 'hold harmless' language in the decree or complaint, under Arkansas law, the debtor incurred a debt to [his former spouse] in connection with the divorce proceeding") and King v. Speaks (In re Speaks), 193 B.R. 436, 441 (Bankr. E.D. Va. 1995)("Indeed even in the absence of an explicit agreement, the law will imply an obligation to indemnify where one party incurs a debt for his own benefit which creates liability on the part of another").

The Code provides for an all-or-nothing discharge of the non-support debt at issue. The prefatory language in § 523(a)(15) does not provide for fragmentation of the debt into dischargeable and nondischargeable components based on the debtor's ability to pay or on a cost-benefit analysis. See 11 U.S.C. §§ 523(a)(15)(A), (a)(15)(B); See also In

re Hill, 184 B.R. 750 (Bankr. N.D. Ill. 1995); In re Silvers, 187 B.R. 648 (Bankr. W.D. Mo. 1995).

Some courts have analyzed dischargeability under § 523(a)(15) as of the date the adversary complaint is filed. See In re Hill, 184 B.R. at 754. Other courts believe the proper date is the time of the trial. In re Jodoin, 209 B.R. at 142. These courts appear to be concerned that other dates would provide a "rear view mirror" analysis of the debtor's financial situation which would be inaccurate, and antithetical to congressional intent. Id. This court respectfully disagrees.

If § 523(a)(15) were analyzed as of the filing of the adversary complaint or subsequent trial, the debtor's financial status would be a moving financial target for the plaintiff. Post-petition, a debtor could undertake substantial new debt or dramatically alter living arrangements for the purpose of directly impacting the outcome of a § 523 (a)(15) analysis. In contrast, the order for relief provides a date certain from which the debtor seeks a fresh start and a current depiction of the debtor's finances. As previously stated, the Code requires that an adversary pursuant to § 523(a)(15) be filed no later than sixty (60) days after the first scheduled meeting of the creditors. Fed. R. Bankr. P. 4007(c). The first meeting of creditors must be held no fewer that twenty (20) days and no more than forty (40) after the order for relief. Fed. R. Bankr. P. 2003(a). Therefore, a § 523(a)(15) adversary proceeding should be commenced no later than 100 days after the order for relief. The court does not believe this is an inordinate amount of time, nor would it turn the court's analysis into a history exercise. Further, this starting point

provides a disincentive to creditor spouses from prolonging the time to trial in hopes that the debtor will make good use of the fresh start to improve his or her financial condition.

For the foregoing reasons, this court follows the other court in this district in using the date of the order for relief as the starting point for determining both the debtor's current and future potential ability to pay on the debt. See In re Jordan, 95-1312-CJ, Adv. 95-95108 (Bankr. S.D. Iowa April 17, 1996)(J. Jackwig Decision #194).

Debtor's ability to pay under § 523(a)(15)(A)

The Code provides that a property settlement debt may be discharged if the debtor does not have the ability to pay the debt from income or property not necessary for the support or maintenance of the debtor or the debtor's dependents. 11 U.S.C. § 523(a)(15). As the language is almost identical to that of § 1325(b), the "disposable income test" is a good starting point for the analysis. In re Jodoin, 209 B.R. at 142; Shea v. Shea (In re Shea), 221 B.R. 491, 499 (Bankr. D. Minn. 1998); In re Hill, 184 B.R. at 755. However, the scope of the court's inquiry must necessarily be broad in order to determine the debtor's actual ability to pay. While the court need not construct a budget, its inquiry must encompass the totality of the debtor's financial circumstances, including the extent to which the debtor can manipulate his or her income and expenses. In re Shea, 221 B.R. at 499. Cleveland v. Cleveland (In re Cleveland), 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996). Also included in the inquiry are the debtor's future earning capabilities. Hastings v. Konick (In re Konick), 236 B.R. 524, 529 (B.A.P. 1st Cir. 1999). "'A court may look to a debtor's prior employment, future employment opportunities, and health status to determine the future earning potential of the [d]ebtor.'" Id. quoting, Brasslett v. Brasslett

(In re Brasslett), 233 B.R. 177, 183 (Bankr. D. Me. 1999) quoting, Hart v. Molino (In re Molino), 225 B.R. 904, 908 (B.A.P. 6th Cir. 1998).

The court should also consider the "debt-absorbing" impact of the income of a new spouse or live-in companion in order to achieve certainty in determining exactly how much of the debtor's income and property is truly necessary for maintenance and support. Id. But see, Carter v. Carter (In re Carter), 189 B.R. 521, 522 (Bankr. M.D. Fla. 1995)("The language of 523(a)(15)(A) restricts the determination of the ability to pay solely to the income of the debtor. It is not enhanced by inquiring into the financial circumstances of the defendant's current spouse.") and Willey v. Willey (In re Willey), 198 B.R. 1007, 1015 (Bankr. S.D. Fla. 1996)(considering the income of debtor's girlfriend "could lead to a chilling effect on the courtship and re-marriage of divorced partners"). However, if the debtor and live-in companion adhere to an agreement for the management of the household and allocation of expenses, that agreement will set the parameters for the court's inquiry into the companion's financial affairs. Halper v. Halper (In re Halper), 213 B.R. 279, 284 (Bankr. D.N.J. 1997).

In this case, Billie filed a petition for Chapter 7 protection on May 27, 1997. The commencement of his voluntary bankruptcy case constituted an order for relief. 11 U.S.C. § 301. His petition indicated that he is employed by Brenton Investment and Insurance where he works on a commission basis as an insurance agent. Billie's employment is relatively flexible in that he only works 2 or 3 days per week and sometimes only partial days. He claims that the amount of work that he is able to perform is limited by a heart condition. Billie anticipates corrective surgery in the near

future which will alleviate at least some of the symptoms and allow him to lead a fuller life. He currently receives disability payments in conjunction with his condition.

Billie earns $2,249.60 per month working for Brenton. Monthly deductions for taxes, social security, insurance, and dental amount to $548.40. He contributes $36.00 to a 401k retirement plan. Billie's net income from wages is $1,665.20. In addition to his wages, Billie receives $800.00 per month in disability payments, $400.00 per month from Banker's Life and Casualty and $400.00 per month from Vulcan Life.

Billie also receives income from policy renewals. The right to the income from these renewals was awarded to him as part of the property division in the dissolution of marriage decree. He scheduled the renewal income along with the disability payments without ascribing any value to them. Billie testified that one month he received $300.00 from renewals while the previous month he received only $169.00.

The court appreciates the uncertain nature of the renewal income. However, Billie does, in fact, receive income from the renewals. The right to these payments was considered valuable and awarded in the property settlement of the dissolution. The renewal income should appropriately be considered in the "ability to pay" or "disposable income" analysis.

Billie only offered evidence as to two months of renewal income. If more evidence were available, the court could arrive at a more accurate average monthly income from the renewals. The court must base its calculation from the evidence presented. Therefore, it finds that Billie understated his monthly income by $234.50 ($169 + $300 = $469; $469 / 2 months = $234.50 per month). For purposes of

§ 523(a)(15), the court finds Billie's monthly income to be $2,699.70.

Billie schedules his monthly expenses at $2,573.99. Barbara argues that several of the expenses are inflated. She maintains that Billie's expenses can be reduced by $425.00, and these monies may be paid on the debt owed to her.

Billie disputes the contention that any of his expenses are inappropriate. He argues that in reviewing his expenses, the court should restrict its scrutiny to a search for luxury expenses. See In re Willey, 198 B.R. at 1014. The court disagrees.

The plain language of the section directs the court to determine whether the stated expenditures are "reasonably necessary" for the maintenance and support of the debtor or the debtor's dependents. 11 U.S.C. § 523(a)(15)(A). The court has neither the desire nor the inclination to micromanage a debtor's budget. However, various Code sections require the court to determine the reasonableness of an expense. See, 11 U.S.C. §§ 328(b), 329(b), 330(a)(3), 707(b). The injection of a determination of whether an item qualifies as a luxury is not required by the Code, and it is the court's opinion that such a determination is particularly unhelpful in this analysis.

Barbara argues that monthly expenditures of $100.00 for recreation, $150.00 for miscellaneous expenses and lunches, $25.00 for home maintenance, and $300.00 for food are excessive. She would deny Billie the first three expenses entirely and reduce his food allowance by $150.00 per month. The court disagrees.

Billie correctly points out that the official forms provide for recreational expense. Included in this item are subscriptions for magazines and newspapers. The court will not disallow a recreation expense in its entirety. Likewise, the court recognizes that even in

rental residences, light bulbs must be replaced, cleaning must be done, and a variety small items need repaired. The court does not find this amount unreasonable.

More problematic is the $450.00 allowances for food, lunches, and miscellaneous expenses. Barbara argues that the $150.00 for lunches and miscellaneous expenses should be disallowed entirely. She states that Billie should be held to the Internal Revenue Service standard of $150.00 per person for food. However, Barbara did not enter that standard into evidence.

The court understands that the nature of Billie's employment might require his lunches out, however, his workweek is limited. At trial, Barbara did not explore nor did Billie offer an explanation for the miscellaneous expenses. Billie testified, that as part of his living arrangement, he purchases food for his live-in companion. Based on the limited evidence, the court finds that Billie's stated expense for food, lunches, and miscellaneous expenses is overstated, and $50.00 of the total is not reasonably necessary.

Barbara additionally questions the reasonableness of Billie's rent payments. Billie lives in a $250,000.00 home owned by Sharon Engeldinger (hereinafter Sharon). Billie resides with Sharon, and he testified that they live together as husband and wife. Their relationship has been ongoing since at least June of 1992. Although the two are not legally married and have no children together, the length and characterization of the relationship makes it appropriate to consider the expense-absorbing impact of Sharon's income. However, neither party offered any evidence of her financial condition. Billie did testify that they had an agreement whereby he pays rent, pays half of the phone bill, and buys most of the groceries.

Billie states that he pays Sharon six hundred ($600.00) per month in rent. Copies of fourteen checks bearings dates between and including 3/2/96 and 7/17/97 were entered into evidence to verify the rental commitment. The checks were drawn to the order of Sharon, and did not contain a memo notation. The court would be inclined to accept amount of the rent as stated had Billie produced some checks for $600.00. However the checks in evidence range in amount from $678.00 to as little as $66.00. No checks were produced for some months, and in others, two checks totaling less than $600.00 were written. Billie explained the discrepancy by testifying that some months he did things for Sharon, and she adjusted the rent accordingly. Billie did not elaborate on, nor offer any evidence of the things he did. Based on the lack of evidence and the disparity in the amounts of the checks, the court is skeptical as to the stated amount of the rent.

Based on the evidence presented, the court concludes that the only equitable method of calculating Billie's actual rent is to total the checks in evidence and divide that number by the total number of months covered. The checks total $5,739.00 over a period of seventeen (17) months (March 1996 through July 1997 inclusive). The analysis yields a monthly rental amount of approximately $340.00 per month ($5,739.00 / 17 equals $337.58). The court finds that Billie's actual and reasonably necessary rent is $340.00 per month.

Barbara also takes issue with the reasonableness of Billie's automobile payments. Billie is currently paying $519.99 per month. Less than one month before filing his Chapter 7 petition, he traded his 1993 GMC Jimmy for a 1996 Chevrolet Blazer. The Blazer was priced at $29,995.00, and after the inclusion of taxes, license, lien fee, and

Universal insurance, the total cost was $31,705.50. Billie financed $25,401.67 at 11.24% for 66 months. The total cost of the vehicle, if he makes all the payments, will be $40,623.17. Billie scheduled the value of the Blazer as $25,000.00 on Schedule B of his petition. (Billie's petition is dated 5/20/97; so evidently, he determined that the vehicle depreciated $4,995.00 in the 21 days since he financed it).

Billie stated that he had been looking for a Blazer, and the dealer happened to find the desired vehicle at that time. The GMC was purportedly beginning to have mechanical problems. According to Billie, a rear axle was going bad and other items needed repair. Billie did not offer an estimate of the total cost of repair, but he believed that the difference in his monthly payments would not cover the cost. The Blazer came with a warranty

Billie reaffirmed the debt securing the Blazer in an agreement with Magna Bank dated Aug. 12, 1997.

The court is cognizant that a debtor must have a reliable means of transportation in order to get to work. However, this court has consistently held that a debtor may not in good faith purchase an expensive, "new" vehicle, reaffirm the secured obligation, and discharge the debtor's unsecured debt. To do so in effect forces the unsecured creditors to pay for the purchase of the vehicle at least to the extent that their claims are discharged.

In this case, Billie was paying $492.00 per month for the GMC. He did not offer any evidence of the terms of its financing, however, from the vehicle purchase agreement, the amount owing against it was $12,441.17. Even with its alleged

mechanical defects, the car dealer bought it for $18,745.00, crediting over $6,300.00 against the Blazer. Even though the payments increased only $28.00 per month, the payment period extended, and Billie increased his indebtedness by $12,960.50 on almost the eve of filing for bankruptcy protection. Billie has offered no evidence to prove that he needs this expensive type of vehicle, and the court finds that $519.99 per month for 66 months is excessive and not reasonably necessary for the debtor's maintenance and support.

Finally, Billie schedules payments of $178.00 per month for a $100,000.00 death benefit, insurance policy purchased from Interstate Assurance Co. He claims an exempt interest in the policy of $3,967.65.

Section 523(a)(15)(A) requires the court to determine whether the debt can be paid from income or property not reasonably necessary for the maintenance and support of the debtor and the debtor's dependents. Billie has offered no evidence as to how this policy is necessary to his support. He did not disclose the current beneficiary of the policy. He testified that he has no mortgage to pay and no dependents to send to school.

The court finds that the Interstate Assurance Co. life insurance policy is not reasonably necessary for Billie's maintenance and support. In making such a finding, the court does not suggest that a debtor should be required to liquidate an exempt asset and turn over the proceeds to a creditor spouse. Rather, the court holds that Billie has not proven that the expenditure of $178.00 per month for this policy is reasonably necessary for his maintenance and support.

Also, Billie argues that his heart condition is a major factor in his inability to work and he makes several allusions that the time of his mortal existence may be short. At the risk of being termed callous, the court notes that the 100,000.00 death benefit of his life insurance policy would pay his obligation to Barbara and still leave a significant amount for whatever other purpose he desires.

After reviewing Billie's total financial condition, the court determines that he has the ability to pay the property settlement obligation owed to his former spouse, Barbara. Billie's actual monthly income should be adjusted to $2,699.70 and his reasonable monthly expenses should be reduced by at least $488.00 to $2,085.99. This leaves a monthly surplus of $613.71. Additionally, Billie's $519.99 monthly vehicle payment is not reasonable. Even though the difference in monthly payments is only approximately $28.00, Billie doubled the amount of his indebtedness and extended the term of his loan to 66 months.

Equitable Balancing Under § 523(a)(15)(B)

Section 523(a)(15)(B) requires the court to determine whether the benefit to Billie of discharging the debt outweighs the detrimental consequences to Barbara. In making such a determination, The Code provides no set formula and there is no analogous section to assist the court in making such a determination. The court must view the totality of the circumstances and make a decision on a case-by-case basis. In re Crosswhite, 148 F.3d at 889; In re Gamble, 143 F.3d at 226; In re Hill, 184 B.R. at 756.

In weighing equities, the court begins by noting that neither Billie nor Barbara has been particularly scrupulous in providing information. As mentioned earlier, Billie did

not include monthly income from renewals. Additionally, his statement of financial affairs left out income in 1996, and 1995 from the sale of the Cherry Corner Agency.

Barbara, in turn, after filing this adversary, determined that she was "too busy" to participate in much of the discovery process. Her answers to interrogatories were at times incomplete. Debtor's counsel filed a motion to compel discovery and did not receive a copy of Barbara's income and expenses until the day of the trial. Barbara was less than forthcoming about providing documents and information concerning the disposal of her mother's residence and her interest in the property and proceeds.

A comparison of their financial situations shows Barbara to be better off in the long term. Barbara has more assets and more saved for retirement. She owns her own home and presumably the furnishings in it. Along with the house, Barbara's assets include a 1996 Oldsmobile Ciera, and a retirement account with a cash surrender value of $88,000.00. She also has a retirement plan with Employer's with a value of nearly $4,000.00. She has a checking account and a savings account with approximately $1,000.00. She also has an interest in the contract for sale of her mother's home and the investment account containing the proceeds. Her mother's home was valued at approximately $35,000.00. Although little evidence was forthcoming about the particulars, the court is confident that Barbara has a one-fourth equitable interest in the sale contract, and investment proceeds. The court believes that she feels that her siblings are entitled to an equal share, and she will divide her late mother's property accordingly.

In contrast, Billie lists few assets of significant value. He has the 1996 Blazer, but claims there is no equity in it. In addition to the Blazer, Billie owns a 12-gauge shotgun, a

high power rifle, a 401k retirement account and stock with Brenton valued at $7,100.00, and the aforementioned Interstate Assurance Company policy valued at 3,967.65. He also has a savings account and two checking accounts. When he filed his petition, the balance of these accounts totaled less than $100.00.

In the short term, Billie's financial condition is superior. After discharge, his only debt, absent a finding of nondischargeability of his obligation to Barbara, is his debt on the Blazer. At the time he reaffirmed the debt, Billie owed over $25,000.00 on the Blazer.

However, Barbara is paying $600.00 a month on three credit cards. The combined balance of these cards is in excess of $16,000.00. In addition to the credit card debt, Barbara owes approximately $39,900.00 on the home mortgage, and something less than $10,000.00 secured by her car. She is also making payments on siding for the house. In addition to her minimum monthly payments, she tries to pay ahead on her debts. She also contributes $119.04 monthly to her 401k.

The parties' current income is quite comparable. The dissimilarity comes in how it is obtained. As stated previously, Billie is employed on a commission basis. His income is dependent on the amount of sales he makes. The more he works and the more people he contacts, the greater his income. Currently, when his heart goes out of rhythm, he has trouble breathing, and it is difficult for him to move. Billie says that this limits the amount of work that he can do and naturally limits his income. He does not work a full week and sometimes does not work full days. However, evidence presented at trial put his 1998 income as of August at $22,263.00. This amount did not include the disability

payments or income from renewals. At that pace, his projected income, including disability payments, but not renewals, would be in excess of $43,000.00.

In contrast to Billie, Barbara works approximately 70 hours per week, sometimes even more. She holds down two jobs, one at Employer's Mutual and one at Sears. Her workday begins at 7:30 a.m. and ends 10:00 p.m. She often goes into work at Employer's Mutual on Saturday and nights when not working at Sears in order to "catch up." She does not receive any additional compensation for this time.

In addressing the circumstances in the totality, the court considers the following factors. First, Billie was 59 years of age at the time he filed the petition and anticipates retirement shortly. Without a doubt, he has a heart condition. In order to receive his disability payments, he must undergo periodic physical examinations. Billie anticipates having corrective surgery that may improve his condition. However, his heart condition does not apparently curtail his recreational activities a great deal. He is an outdoorsman and hunter. He hunts deer, quail, pheasant, duck, and goose in their respective seasons. Some of this hunting is done from blinds. Some is done while walking and using a hunting dog. Billie also enjoys fishing.

Barbara was 59 years of age at the time the petition was filed. She takes medication for high blood pressure due to stress. She also has an ulcer. Barbara's medical condition does not affect her recreational activities because, simply put, she has no recreational activities. The vast majority of her time is spent at work.

Second, Billie's living arrangement with Sharon allows him to live in her $250,000.00 home and enjoy its amenities and furnishings. He also has the use of her

boat. Since their relationship began in 1992, Billie has acquired few assets; apparently, Sharon owns most of the possessions.

Barbara lives in the former marital home that she was awarded in the dissolution decree. The home is a four-bedroom residence valued at $88,000.00. Her son (Billie's adopted son), Michael, lives with her. Michael does chores around the house, but pays no rent.

Third, prior to filing for Chapter 7, Billie was current on all payments except for his debt to Barbara. Billie discharged approximately $9,000.00 of debt. The single largest debt was Barbara's property settlement. Discharge of the property settlement is apparently the motivation for the bankruptcy.

Fourth, in remanding this case, the bankruptcy appellate panel (BAP) stated, "Clearly, the first three elements of fraud have been met at this point: the Debtor made a representation by signing the dissolution decree that he would pay the $30,000.00 obligation; the representation was admittedly knowingly false; and the debtor admittedly intended to never pay his wife, despite the promise to do so." Guske v. Guske (In re Guske), 243 B.R. 359, 363 (B.A.P. 8th Cir. 2000). Further, Billie stated that regardless of what this court orders, he would not pay Barbara. He does not come to equity with clean hands.

Fifth, if the property settlement debt is discharged, Billie will benefit by proceeding with his fresh start unhindered by any collection efforts by Barbara. He will be able to pursue his course in life essentially unchanged, because he has made no effort

in the past to pay the debt and no evidence was presented to indicate that Barbara harassed him for payment or actively pursued collection.

The detriment to Barbara is essentially the same. Her life remains unchanged. She will continue to work 70 hours weekly with no opportunity in the foreseeable future for recreation or vacation. If Billie began paying his disposable income to retire the debt, Barbara could cut back on the hours she works at Sears, or quit that second job entirely.

After weighing the equities, the court determines that the property settlement debt should be discharged. Barbara has made no effort to collect any portion of the debt in the five years from the time of their divorce to Billie's bankruptcy filing. She has neither counted on it as a source of income for her necessary expenses nor as a source of payment for any obligation she had to incur. Before their marriage she was employed and managed her finances, this situation apparently continued throughout their marriage. She is far better prepared for retirement that Billie. His added age and poor health make his future far more uncertain. The court appreciates that this conclusion appears to penalize Barbara for her thrift and industry; however, such thrift and industry may save her from ever needing the protection of the Bankruptcy Code's discharge provisions. Accordingly, the court concludes that the property settlement debt should not be excepted from discharge.

In conclusion, the court notes that Billie filed a motion to reopen the record in order to enter evidence of his changed circumstances. That motion was denied. In his post-trial brief, Billie again made mention of his changed circumstances. Because the

court previously ruled on the motion to reopen the record, it did not consider this information.

The court feels this situation is illustrative of the complications that arise when any date other than the order of relief is chosen to be the reference point for its analysis, and lends support to its decision to use that date.

ORDER

IT IS THEREFORE ORDERED that the claim of Barbara M. Guske is DISCHARGED.

Dated this _____ day of November, 2000.

_____
RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT