

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In Re:	:	Case No. 01-4713-CH
	:	
RODNEY RAY SUHR,	:	Chapter 7
	:	
Debtor.	:	

KELLY RAE SUHR,	:	Adv. No. 01-20135
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
RODNEY RAY SUHR,	:	
	:	
Defendant.	:	

ORDER— COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

This matter came on for trial on June 19, 2002, the parties appearing in person and with their attorneys of record. John M. Miller represented plaintiff Kelly R. Suhr. Terry L. Gibson represented defendant Rodney R. Suhr. At the conclusion of the trial, the court took the matter under advisement. Post-trial briefs have been received, and the court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & 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. § 157(b)(2)(I). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. On September 10, 2001, Defendant Rodney Ray Suhr (hereinafter Rod) filed a petition for chapter 7 relief with the United States Bankruptcy Court, Southern District of Iowa.

2. Plaintiff Kelly Rae Suhr (hereinafter Kelly) is the former spouse of the debtor (the dissolution decree restored Kelly's maiden name of Cappel; however, the complaint was filed in the name of Kelly Rae Suhr). Rod scheduled Kelly as a creditor holding a secured claim of \$4,071.00 secured by a garnishment, an unsecured priority claim for alimony and child support in the amount of \$1,883.00, and a general unsecured claim for a property settlement in the amount of \$90,000.00.

3. Rod and Kelly were married on April 17, 1988, in Atlantic Iowa. They have two children, Colton born on February 27, 1996, and Aaron born on July 11, 1997.

4. On December 26, 2000, Kelly filed a petition for dissolution of the marriage in the Iowa District Court for Cass County.

5. In her dissolution petition, Kelly made an application for temporary maintenance and support for herself and that of the children. She also requested temporary attorney fees and suit money. Kelly attached an agreement that she had drafted to the petition. The agreement provided in part that Rod would move out of the marital residence and that Kelly could "use the Citizen's State Bank account as needed to pay monthly bills and purchase items for the children." Both Rod and Kelly signed the agreement.

6. The Iowa District Court for Cass County entered a minute order dated January 2, 2001. The order notes that the matter of the petitioner's (Kelly) application for relief during the pendency of the action came on for hearing that day, and petitioner's counsel represented that the parties had reached an agreement. The order then includes the full text of the agreement referenced in paragraph 5 of these findings.

7. On July 9, 2001, the district court entered the decree dissolving Rod's and Kelly's marriage. The decree provided in part as relevant herein:

- (a) The parties were granted joint custody of the children with their primary care being placed with Kelly.
- (b) Rod was ordered to pay child support. The district court determined that the net profit of \$39,636.00 from his cattle-buying operation in 2000 was a reasonable basis from which to determine his child support payments. Using that figure, the district court calculated his gross monthly income to be \$3,333.00, his net monthly income to be \$2,546.00, and set his monthly payments at \$830.00 per month for the two children. This amount would fall to \$563.00 for Aaron, when Colton became ineligible for support payments. The order portion of the decision stated that the required amount was \$863.00 per month, however, upon motion by Rod, the district court corrected the amount.
- (c) Rod was also ordered to provide health insurance coverage for the children and pay eighty percent of all medical, dental, orthodontic, mental health, and optical expenses for the children that are not covered by insurance or other benefits and that exceed \$250.00 per child.
- (d) Kelly received the marital residence located at 1504 East 18th Street, Atlantic, Iowa.
- (e) Rod was ordered to pay the mortgage on marital residence owing to Norwest Mortgage, Inc., by December 31, 2001. Until the loan was paid in full, he was to make timely monthly payments. At the time of the dissolution, \$74,900.00 remained owing on the mortgage.
- (f) Rod was ordered to have the AT&T stock and the Lucent Technologies stock released as security for the marital debts owed to Citizens State Bank

by December 31, 2001. These stocks were awarded to Kelly, and she was to have them free and clear of any debt.

- (g) Rod was ordered to pay Kelly “rehabilitative spousal support” in the amount of \$1,000.00 per month for eighty-four months. The spousal support shall cease on Kelly’s remarriage or the death of either party.
- (h) Rod was ordered to pay Kelly \$90,000.00 in \$10,000.00 annual installments beginning on October 1, 2001. After nine years, any unpaid balance would earn 5% annual interest.
- (i) Rod was ordered to contribute \$2,000.00 to Kelly’s attorney fees and pay court costs of \$135.00.
- (j) Each party received the personal property in his or her possession. Each received a vehicle and was required to pay the debt owed against it and hold the other harmless for said debt. Kelly received a 2000 Dodge Durango, and Rod received a 2001 Dodge 4 x 4 Dually Quad Cab.
- (k) Rod was awarded any life insurance in his name; the Waddell and Reed account; the interest in Suhr Bros. Trucking, Inc.; the interest in Cattle Feeders I, L.L.C.; the interest in cattle, feed, supplies, and equipment in connection with Rod’s cattle feeding business; and any checking account in his name. Rod was to hold Kelly harmless from any encumbrances on this property.
- (l) Rod was ordered to assume and hold Kelly harmless from debts owed by Suhr Bros. Trucking, Inc., and Cattle Feeders I, L.L.C. He was also to assume and hold Kelly harmless from any debt owed to Suhr Bros. Trucking, Inc.; Cattle Feeders I, L.L.C.; Carol Suhr; Citizens State Bank; Doug Willet; Firststar Equipment; Gary Bailey; First Whitney Bank; Marvin Sorenson; Stuart Sale Barn; Madison County Livestock; Guthrie Livestock Pavillion; and Red Oak Livestock.

8. The state court entered an order, file stamped August 6, 2001, dated September 6, 2001, finding Rod in contempt for failing to pay certain bills pursuant to the stipulation incorporated into the temporary order. The state court sentenced him to five days in the Cass County Jail, but suspended the sentence and allowed him to purge his

contempt by paying the specified bills by September 15, 2001. The bills amount to \$5,477.26.

9. On October 10, 2001, this court entered a consent order lifting the automatic stay and allowing Citizens State Bank to proceed with the sale of the Dunlap Cattle, repossession of personal property collateral, and Rod's cattle.

10. On November 16, 2001, the chapter 7 trustee abandoned the estate's interest in 200 shares of AT&T stock; accounts receivable from Venteicher d/b/a Massena Livestock Sales and Janet Cappel; 2001 Dodge truck; 2000 Wilson gooseneck trailer; chute, scales, fans, clippers; cattle; and a 2000 Dodge Durango. The trustee abandoned the property because it was fully secured to Citizens State Bank. The trustee also abandoned a cash bond posted to the Cass County Court due to the offset right of the county. He also abandoned golf clubs and a counterclaim because they were burdensome and of minimal value to the estate.

11. On November 16, 2001, the chapter 7 trustee filed a notice of sale stating his intention to sell Rod's interest in Suhr Bros. Trucking for \$1,000.00, subject to court approval.

12. On November 20, 2001, Kelly, with the aid of her father Thomas R. Cappel, refinanced the existing debt on the home located at 1504 E. 18th St., Atlantic, Iowa. The existing indebtedness was paid and a new mortgage was granted to Wells Fargo Home Mortgage. In return, Wells Fargo provided \$120,000.00. This arrangement included the financing of a 2002 Chevrolet Tahoe Sport Utility Vehicle, which Kelly purchased for \$30,000.00. At the trial, Kelly testified that the 2000 Dodge Durango that

she received in the dissolution decree was not large enough to accommodate her and the two children. Also, it caused her back pain to lean over and place items in the back of the vehicle, hence the necessity for the newer, larger vehicle.

13. On December 20, 2001, Citizens State Bank commenced an adversary proceeding seeking to deny Rod a discharge, or alternatively, except its claim from discharge. Citizens State Bank alleged, that after liquidation of the cattle subject to its security interest, \$290,100.00 of indebtedness remained. Subsequently, the parties entered into a settlement agreement resolving all the issues of the adversary proceeding. Under the settlement, Citizens State Bank received a judgment for \$150,000.00, and the judgment was nondischargeable.

14. On Schedule I, Current Income of Individual Debtor, Rod identified his occupation as a self-employed cattle feeder and as employed by Suhr Trucking. He put his current monthly gross wages, salary, and commissions as \$1,653.00 or \$19,836.00 annually. From this amount, \$413.25 was deducted for taxes and social security, leaving a total net take home pay of \$1,239.75. Rod did not include any income from the operation of a business or farm, and he did not attach a detailed statement concerning his cattle feeding operation.

15. Rod's Schedule J, Current Expenditures of Individual Debtor, lists the following monthly expenses:

Rent or home mortgage	\$310.00
Food	200.00
Clothing.....	50.00
Laundry and dry cleaning.....	100.00
Medical and dental expenses.....	200.00
Transportation (not including car payments	350.00

Recreation	50.00
Charitable contributions	25.00
Homeowner's or renter's insurance	26.00
Life insurance.....	100.00
Health insurance.....	100.00
Auto insurance	121.66
Conseco Cancer insurance	70.50
Auto installment payment	565.18
Divorce settlement payment to Kelly \$10,000/yr	833.33
House payment per divorce decree	800.00
Alimony, maintenance, and support paid to others.....	1,863.00
<u>Regular expenses from the operation of a business</u>	<u>200.00</u>
Total monthly expenses	\$5,964.67

16. Rod filed an amended Schedules I & J on June 3, 2002. In the amended Schedule I, he identified his occupation as trucker/dispatcher, and stated that his monthly income was \$0. He also stated that his employment was terminated in mid-May. Prior to that time he was earning \$850.00 per week for a monthly income of \$3,683.00, or approximately \$44,200.00 annually. Payroll deductions amounted to \$612.40 per month, leaving a net monthly income of \$3,070.60. Rod further stated that his loss of employment necessitated him moving into his mother's residence, and that he anticipated moving into an apartment when he found work. At that point his expenses would be \$600.00 for rent, utilities, and other household items.

17. Amended Schedule J provides the following expenses:

Rent or home mortgage.....	0.00
Telephone.....	100.00
Food	400.00
Clothing.....	50.00
Laundry and dry cleaning.....	50.00
Medical and dental expenses.....	0.00
Transportation (not including car payments	200.00
Recreation	150.00
Charitable contributions.....	25.00
Homeowner's or renter's insurance	0.00

Life insurance.....	0.00
Health insurance.....	215.00
Auto insurance	133.00
Conseco Cancer insurance	0.00
Auto installment payment	565.18
Divorce settlement payment to Kelly \$10,000/yr	833.33
Alimony, maintenance, and support paid to others.....	1,000.00
Payments for support of add'l dependents not living at your home	555.81
Auto license.....	12.00
<u>Gifts for children, clothing, etc</u>	<u>25.00</u>
Total monthly expenses	4,314.32

18. Rod testified that at the time he filed for bankruptcy protection, he worked for Suhr Trucking. Initially, he did not earn a set wage, but in December of 2001, his salary was set at \$850.00 per week. Suhr Trucking terminated his employment on May 28, 2002. He was unemployed from that date until he started working for Oriental Trading Company. Rod testified that he earns \$9.00 per hour or \$360.00 per week at this job. He states that his total wages during 2001 were \$6,112.00 and his net income from the cattle business was \$3,879.00.

DISCUSSION

Kelly commenced this adversary proceeding seeking a determination that certain obligations incurred in connection with Rod and Kelly's dissolution decree should be excepted from discharge. In particular, Kelly claims that Rod's obligations under the dissolution decree to pay her \$1,000.00 per month for eighty-four months; make payments to her for the benefit of their two children; pay in full the loan secured by the mortgage on the marital home, approximately \$74,900.00; pay the debts secured by the AT&T and Lucent Technology stock; pay her \$90,000.00 in nine annual installments of \$10,000.00; contribute \$2,000.00 toward her dissolution attorney fees; and hold her harmless from

certain enumerated debts connected with the cattle feeding business, constitute debts of alimony, maintenance, or support. She argues that said debts are excepted from discharge pursuant to 11 U.S.C. § 523(a)(5). Alternatively, the debts are nondischargeable property settlement debts pursuant to 11 U.S.C. § 523(a)(15).

Rod does not dispute that his child support payments and the \$1,000.00 per month for rehabilitative spousal support are excepted from discharge under § 523(a)(5). However, he disputes the characterization of any of the other obligations as alimony, maintenance, or support. He argues that they are property settlement debts in the purview of § 523(a)(15), and he is unable to pay those debts. Further, he argues that his benefit from discharging the debts outweighs the detrimental consequences to Kelly.

NONDISCHARGEABILITY UNDER 11 U.S.C. § 523(a)(5)

The Bankruptcy Code provides that a debt to a spouse, former spouse, or child of the debtor for alimony, maintenance, or support is not dischargeable. 11 U.S.C. § 523(a)(5). "[T]he question of whether a particular debt constitutes alimony, maintenance, or support or rather constitutes a property settlement is a question of federal bankruptcy law not of state law." Moeder v. Moeder (In re Moeder), 220 B.R. 52, 55 (B.A.P. 8th Cir. 1998), (citing Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997) (citing Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983) (quoting H.R. REP. NO. 95-595, 95th Cong. 2nd Sess. at p. 364, 1978 U.S. Code Cong. & Ad. News at p. 6319 (1977)). The bankruptcy court is not bound by the state court definitions of alimony, maintenance, and support, nor is it bound by a dissolution decree's characterization of the awards. In re Williams, 703 F.2d at 1057. The label given

to an award is unimportant; it is the actual nature of the debt that determines its dischargeability. Scholl v. McLain (In re McLain), 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999).

Relative financial situations, intent, and circumstances at the time the dissolution decree was entered are relevant for determining what function the award was intended to serve. Post-dissolution financial circumstances do not factor into determining whether the debts at issue were in the nature of support at the time of the dissolution. See Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986) (expressly rejecting a “needs” test in § 523 (a)(5) determinations); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984). "The crucial issue in making this determination is the intent of the parties and the function the award was intended to serve at the time of the divorce." In re Moeder, 220 B.R. 52 at 55. The court must discern not only the intent of the parties, but also the intent of the state court. In re McLain, 241 B.R. at 419-20.

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.

Kelly is correct that courts have used the following factors in an effort to divine the intent of the parties and the state court as to the real nature of the obligations connected with dissolution decrees.

1. Whether there was an alimony award entered by the state court.
2. Whether there was a need for support at the time of the decree; whether the support award would have been inadequate absent the obligation in question.
3. The intention of the court to provide support.
4. Whether Debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances.
5. The age, health, work skills, and educational level of the parties.
6. Whether the payments are made periodically over an extended period or in a lump sum.
7. The existence of a legal or moral "obligation" to pay alimony or support.
8. The express terms of the debt characterization under state law.
9. Whether the obligation is enforceable by contempt.
10. The duration of the marriage.
11. The financial resources of each spouse, including income from employment or elsewhere.
12. Whether the payment was fashioned in order to balance disparate incomes of the parties.
13. Whether the creditor spouse relinquished rights of support in payment of the obligation in question.
14. Whether there were minor children in the care of the creditor spouse.
15. The standard of living of the parties during their marriage.
16. The circumstances contributing to the estrangement of the parties.
17. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties.
18. Tax treatment of the payment by the debtor spouse.

In re Coffman, 52 B.R. 667, 674-75 (Bankr. D. Md. 1985) (and citations contained in footnote 6 at p. 674). When the intent of the parties and the state court is not clear, the court may use the factors to help in its determination.

The parties do not dispute that the dissolution court and the parties intended that Rod make payments for the support and benefit of his two sons. Likewise, they do not dispute that they and the dissolution court intended that the monthly \$1,000.00 payments to Kelly for rehabilitative spousal support are in the nature of alimony, maintenance, or support.

Accordingly, the court determines that these obligations are excepted from discharge pursuant to § 523(a)(5).

Turning to Rod's obligation to pay \$2,000.00 towards Kelly's attorney fees from the dissolution proceeding, the court notes that in Iowa, the allowance of attorney fees is not a matter of right. Marriage of Liebich, 547 N.W.2d 844, 851 (Iowa App. 1996). Their award or denial lies within the broad discretion of the state court. Marriage of Goodwin, 606 N.W.2d 315, 324 (Iowa 2000). The state court must assess the parties' financial position, the needs of the party requesting an allowance of fees, and the ability of the other party to pay the fees in order to determine whether such an award is warranted. See Marriage of Liebich, 547 N.W.2d at 851 (including the additional factor of whether the requesting party was required to defend on appeal when requesting appellate attorney fees).

The state court considered the evidence, and determined that Kelly's financial situation required the allowance of attorney fees. Likewise, it determined that Rod had the ability to pay those fees. Therefore, this court concludes that the allowance of attorney fees was in the nature of maintenance and support, and the obligation is excepted from discharge by 11 U.S.C. § 523(a)(5). See Holliday v. Kline (In re Kline), 65 F.3d 749, 751 (8th Cir. 1995) and Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983).

Kelly also contends Rod's obligation to pay for the dishonored checks is a debt for support. The court agrees. Rod freely entered into the agreement whereby Kelly could "use the Citizen's State Bank account as needed to pay monthly bills and purchase items for the children." At the hearing on temporary support, the state court incorporated the agreement into its minute order, thereby expressing its intent that the agreement provided temporary support. Further, the state court found Rod in contempt and sentenced him to be incarcerated for failing to abide by the terms of the agreement, lending further weight to a finding that the obligation was one of temporary support.

The court notes that Rod argues that certain purchases that Kelly made from the account could not be characterized as necessary for her or the children's support. However, the state court reviewed the purchases and identified those that Rod should not be responsible for paying. The remaining items were considered appropriate. Accordingly, the court finds that those debts identified in the state court's order, finding Rod in contempt for failing to pay certain bills pursuant to the stipulation, are excepted from discharge pursuant to § 523(a)(5).

Turning to the remaining debts at issue, the court finds that these are not of the type described in § 523(a)(5). The court finds that these debts are part and parcel of the division of the parties' cattle feeding business and other assets. The court bases its determination on the following factors. The dissolution decree expressly provides for monthly support payments to Kelly, and it is clear that the court considered her need for support and provided for that need. The state court considered the parties' ages, education, work skills, length of marriage, and the parties' respective earning capacities when arriving at the support amount. There is no evidence in the record to indicate that tax consequences were a consideration in the state court's division of the property, and no suggestion that Kelly relinquished some right to support in exchange for the terms of the property division.

Rather, it is apparent from the record that Kelly and Rod each had rights, obligations, and interests in the home and the cattle feeding business. The state court determined that Kelly was not interested in continuing in that business, while Rod was interested in pursuing it. The state court awarded Rod the assets of the cattle business, along with the bulk of the

parties' financial liabilities. Kelly received the marital home and the ownership of other property.

Accordingly, the remaining debts are not excepted from discharge under § 523(a)(5). They are property settlements debts and their dischargeability is properly considered under 523(a)(15).

NONDISCHARGEABILITY UNDER 11 U.S.C. § 523(a)(15)

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, 11 U.S.C. §§ 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 11 U.S.C. § 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. In re Moeder, 220 B.R. at 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).

Federal law ultimately determines whether a debt is or is not dischargeable under 11 U.S.C. § 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 0[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").

Iowa Code § 598.21 provides court authority to dispose of marital property and award custody of minor children in a divorce proceeding. The section states unambiguously that the state court is to divide the property between the parties. Along with the disposition of property, the "allocation of marital debt inheres in the property division." In re the Marriage of Johnson, 299 N.W. 2d 466, 467 (Iowa 1980).

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) 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 court finds that Kelly has established that the debts at issue were incurred from the dissolution decree and were not for alimony, maintenance, or support. Each of the debts was addressed in the decree, and the decree contains express "hold harmless language." The burden then shifts to Brian to prove dischargeability under either subsection (A) or (B).

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 11 U.S.C. § 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 an 11 U.S.C. § 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 11 U.S.C. § 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 than twenty (20) days and no more than forty (40) after the order for relief. Fed. R. Bankr. P. 2003(a). Therefore, an 11 U.S.C. § 523(a)(15) adversary proceeding should be commenced no later than 100 days after the order for relief. 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 uses 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. In this respect, the court maintains consistency within the district. 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 11 U.S.C. § 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). 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). As the language is almost identical to that of 11 U.S.C. § 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).

In this case the court finds that the proper measure of Rod's income is the wage that he earned while working for Suhr Trucking. Rod indicated on his amended schedule that he earned \$850.00 per week for a monthly income of \$3,683.00, or approximately \$44,200.00 annually. Payroll deductions amounted to \$612.40 per month, leaving a net monthly income of \$3,070.60.

The court notes that this figure is significantly higher than the \$1,653.00 monthly or \$19,836.00 annually that Rod initially claimed on the Schedule I that he filed with his

petition. However, the number is comparable to the \$39,636.00 that the state court found that he earned. The evidence presented at trial showed that Rod had the ability to draw income from the trucking company and the set amount of \$850.00 per week corresponds to the draws he was taking. The court also notes that Rod did not identify any income whatsoever from his cattle buying and feeding efforts.

Further, the court places no weight whatsoever on Rod's argument that he has been reduced to taking a \$9.00 per hour job operating a forklift in Red Oak. Prior to and for a period of time after filing for bankruptcy, Rod drove trucks and operated a trucking business. There is nothing in the record to show that he cannot earn a living by driving a truck. Doing so might well take him away from the area for extended periods of time and prevent him from pursuing cattle buying and feeding, however, that factor is of no moment in determining his ability to earn income.

Likewise, the court is unpersuaded by Kelly's argument that Rod can return to the cattle feeding business on a large scale. Based on the evidence provided to the court, Rod has not made money in the cattle feeding industry in the recent past. At least the tax returns offered into evidence show the parties had negative gross income for 1998, 1999 and 2000. The state court found that the cattle business generated \$39,636.00 of profit in 2000. However, this amount was more than offset by a loss from the trucking business, and one of the primary uses of the trucking company was to transport the cattle.

More importantly, their major financier, Citizen State Bank, recently liquidated all cattle and came up over \$290,000.00 short on its loans. Citizens State Bank commenced an adversary proceeding alleging numerous bad acts by Rod. Although the proceeding

evidentially settled with Rod agreeing to \$150,000.00 nondischargeable judgment, the court is skeptical that this bank will be financing any large volume cattle buys for Rod anytime soon.

The court further notes that Rod scheduled debts for cattle purchases to the Guthrie Livestock Auction for \$28,000.00, the Madison County Auction \$32,500.00, the Omaha Market Center for \$45,000.00, Marvin Sorenson for \$38,261.10, and Stuart Sales Co. for \$67,000.00. Also, the Omaha Market Center, Red Oak Livestock Market, and Donald Wolfe have commenced an adversary proceeding alleging in part damages of \$75,000.00. Based on these claims, the court agrees with Rod that it is doubtful that he will return to large-scale cattle feeding in Southwest Iowa, anytime in the near future.

Accordingly, the court will base Rod's income on the amount he earned trucking. The court finds that Rod's net monthly income for § 523(a)(15) purposes to be \$3,070.00.

Rod initially scheduled his monthly expenses as \$5,964.67. This amount included an \$800.00 house payment from the dissolution decree that he was not paying, and a pro rata \$833.33 property settlement payment that he was not paying. It also included \$200.00 from the operation of a business with no attached documentation. Since Rod has never paid the house payment or the property settlement payment, and he did not provide documentation of the business expense, the court finds that those items are not reasonably necessary for his or his dependents' support. Subtracting those amounts leaves his monthly expenses at \$4,131.

Kelly does not contend that any of the other items are unnecessary expenses, and the court is reluctant to construct a budget for Rod. The court is quizzical about the

practicality of the 4x4 Dodge Dually and its accompanying expense; however, the court is not prepared to say that Rod cannot make effective use of the vehicle.

Accordingly, the court finds that Rod's reasonable monthly expenses are \$4,131.00. Subtracting this amount from his net income leaves Rod with a monthly deficit of \$1,061.00.

The court pauses to note that Rod's child support payments have decreased by over \$300.00. Using that amount would still leave Rod deficient by over \$700.00. The court also notes that this reduction is apparently a result of Rod's lower wage at his new job, and other purported changes in circumstances. Such 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 the court's analysis, and bolsters the court's decision to use that date rather than affording the parties the opportunity to manipulate their income and expenses.

Based on its calculations, the court determines that Rod is currently unable to pay the property settlement portion of the dissolution decree. Further, the court finds that Rod will not be able to make those payments in the foreseeable future. He is obligated for the next seven years to pay Kelly \$1,000.00 per month. He is currently behind in those payments. Rod will also continue to make child support payments for at least fifteen years, possibly more if the children attend post-secondary institutions. He also has the other support payments, which he must pay.

The court does not believe that its decision is unduly harsh on Kelly. The property settlement was based on assumption that the cattle business and the trucking business had significant value in excess of their liability. This assumption has not been borne out in

bankruptcy. Upon liquidation of its collateral, Citizens State Bank was left with a deficiency of over \$290,000.00. Various livestock markets and sellers hold unsatisfied claims of over \$210,000.00. Also, the trustee sold Rod's interest in the trucking company for a mere \$1,000.00. The court further notes that Kelly kept the books for the operations, she signed the promissory notes, and for the most part, (if their tax returns give any indication) along with Rod, lived beyond their means. The court finds that over the course of their marriage, Kelly was a knowing partner in their financial and business affairs. Kelly directly and indirectly helped to amass the debt that Rod seeks to discharge in bankruptcy.

In the dissolution, Kelly received the asset with the most significant amount of equity, the marital home. She argued to the state court that its value was \$96,000, while Rod valued it at \$120,000.00. The state court found its value to be \$110,000.00 with equity of \$35,100.00. On November 11, 2001, Kelly refinanced the house and took out a \$120,000.00 loan against the property. The refinancing resulted in an increased mortgage payment and an extension of two years in term. Presumably, Kelly paid off the loan against the 2000 Dodge Durango, thereby eliminating the payments on it, and then traded it with boot from the home equity on a new Chevrolet Tahoe. Kelly's father, Thomas Cappel, signed on as a co-borrower on the new loan.

Kelly is currently working, she receives government assistance, and is entitled to her support payments and the support for the children. She retains her state court remedies to enforce her remaining claims against Rod. Further, it appears the trustee is pursuing assets in the main case, and she will share in any distribution. Based on all the

above facts, the court does not find that Kelly's situation is as bleak as she portrays to the court.

Accordingly, the court finds Rod is unable to pay Kelly's claims under the property settlement portion of the dissolution of marriage decree from income or property not reasonably necessary for his support and the maintenance and support of his dependents or necessary for the continuation of his business. Therefore, said debts are not excepted from discharge.

ORDER

IT IS THEREFORE ORDERED, as follows:

(1) Kelly's claim for \$1,000.00 of "rehabilitative spousal support" per month for eighty-four months and any arrearage in payment is excepted from discharge.

(2) Kelly and the children's claim for child support payments and any arrearage in payments is excepted from discharge.

(3) Kelly's claim for \$2,000.00 in attorney fees to Kelly in conjunction with the dissolution of marriage is excepted from discharge.

(4) Kelly's claim for payment of those items identified in the Iowa District Court for Cass County's order Case No. CDDM002137 dated September 6, 2001, (Plaintiff's Ex. 8), and in the amount of \$5,477.26, is excepted from discharge.

(5) Rod's obligation to provide health insurance coverage for the children and pay eighty percent of all medical, dental, orthodontic, mental health, and optical expenses for the children that are not covered by insurance or other benefits and that exceed \$250.00 per child is excepted from discharge.

(6) Kelly's claim for \$90,000.00 to be made in annual payments of \$10,000.00 due on October 1, of each year beginning October 1, 2001, is not excepted from discharge.

(7) Kelly's claim for approximately \$74,900.00 for payment of the loan secured by the mortgage of the house is not excepted from discharge.

(8) Rod's obligation to secure the release of the AT&T and Lucent Technologies stock is not excepted from discharge.

(9) Rod's obligation to hold Kelly harmless from debts owed by Suhr Bros. Trucking, Inc., and Cattle Feeders I, L.L.C., and hold Kelly harmless from any debt owed to Suhr Bros. Trucking, Inc.; Cattle Feeders I, L.L.C.; Carol Suhr; Citizens State Bank; Doug Willet; Firststar Equipment; Gary Bailey; First Whitney Bank; Marvin Sorenson; Stuart Sale Barn; Madison County Livestock; Guthrie Livestock Pavillion; and Red Oak Livestock is not excepted from discharge.

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