UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re:	:	**Case No. 01-05529-CH**
GERALD KENNETH LINT,	:	**Chapter 7**
Debtor.	:	
MELANIE LUNDSTROM, A/k/a MELANIE JO LINT,	:	**Adv. No. 02-20003**
Plaintiff,	:	
v.	:	
GERALD KENNETH LINT,	:	
Defendant.	:	

ORDER— COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

This matter came on for trial on December 3, 2002, the parties appearing in person and with their attorneys of record. John P. Roehrick represented Plaintiff Melanie Lundstrom. Robert C. Oberbillig represented Defendant Gerald K. Lint. 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 October 25, 2001, Defendant Gerald K. Lint (hereinafter Jerry) filed a petition for chapter 7 relief with the United States Bankruptcy Court, Southern District of Iowa. Jerry had previously filed petitions for chapter 13 relief on October 5, 2000, and November 20, 2000. Both chapter 13 petitions were dismissed.

2. Plaintiff Melanie Lundstrom (hereinafter Melanie) is the former spouse of the debtor (the dissolution decree restored Melanie's name to Lundstrom from Lint).

3. Jerry and Melanie were married on April 26, 1980, in Freemont, Nebraska. They have three sons Jeremy, Chad, and Daniel.

4. Sometime in 1999, Jerry filed a petition for dissolution of the marriage with the Iowa District Court for Polk County, and trial on the matter was set for July 28, 1999.

5. Prior to trial, Jerry and Melanie entered into an agreement and stipulation that resolved all the matters in dispute. As part of the stipulation and settlement, Melanie and Jerry agreed that the real property that had been their home had a value of $100,000.00 with equity valued at $34,000.00. Both parties agree that the value was an estimate and not based on an appraisal. Melanie testified that it was the parties' intent to divide the equity in the home equally.

6. The stipulation was read into the record, and the district court adopted the stipulation into the dissolution decree. The district court entered the decree dissolving the marriage on August 11, 1999.

7. The dissolution decree provided for the division of the parties' personal property, pension plans, and debts. It provided that neither party would receive alimony. Melanie did not receive any maintenance or support from Jerry. The district court granted the parties joint custody of their two minor sons with Jerry receiving primary physical care of the boys. The district court ordered Melanie to pay $411.33 monthly for child support.

8. Concerning the real estate, the dissolution decree provided in relevant part:

> The marital home and property locally know as 3612 E. 40th in Des Moines, Polk County, Iowa, and legally described as LOT 4, Christy Lea Manor, Plat 3 is awarded to the Petitioner, and the title to such home is hereby quieted in the name of the petitioner, Gerald Kenneth Lint, as against the Respondent; and all of the Respondent's interest in the above-described property is hereby transferred to the Petitioner. This Decree shall serve as a muniment of title for such quieting of title without the need for further deed. The Clerk of the Court of Polk County is directed to issue a certificate of change of title in conformity with this paragraph and direct such change of title to the auditor of Polk County. The Petitioner shall, within a period of one year from July 28, 1999, re-finance the mortgage on this home in his name only, and pay to the Respondent the amount of $17,000.00 plus interest at a rate of 7 3/4 percent compounded annually, and a lien is created by this decree in favor of the Respondent against the above-described property in the amount of $17,000.00 plus interest at a rate of 7 3/4 percent compounded annually. In the event the Petitioner is unable to re-finance the home within one year of July 28, 1999, the home shall immediately be listed for sale in a reasonable manner at a fair market value, and upon sale of the home and property, the Respondent's lien shall be satisfied from the proceeds of the sale….

9. Jerry took possession of the house in August 1999. Prior to that time, Melanie had made the mortgage payments, and the payments were current. Jerry put siding on the garage and painted the house.

10. Jerry attempted to refinance the house for a sufficient amount to pay Melanie the $17,000.00. In January of 2001, the house was appraised for the purpose of

refinancing. The appraisal valued the house "as is" at a high value of $70,000.00. It estimated necessary repairs to the house would cost $8,250.00. The appraisal also included an estimate of $6,950.00 for repairs that would improve the home's marketability. The financial institution declined to provide refinancing in excess of the existing mortgage amount.

11. Jerry listed the property for sale with Next Generation Realty in January 2001. He set the sale price at $115,000.00. Jerry received no offers on the house.

12. Jerry defaulted on the existing mortgage, and a petition to foreclose the mortgage was filed on January 18, 2001. Both Jerry and Melanie received notice of the foreclosure action.

13. A sheriff's sale of the real estate was held on November 4, 2001. Melanie did not receive any proceeds from the sale.

14. In his chapter 7 case, Jerry scheduled Melanie as holding an unsecured claim for $17,000.00 arising from the property settlement provided in the dissolution decree.

15. At the time of the hearing, Jerry was forty-five years of age and in good health. On Schedule I – Current Income, Jerry identified his occupation as Union Carpenter and his employer as Carpenter Union # 106. Jerry did not schedule any monthly income from employment. He stated that he received $293.00 per month in child support and $618.00 per month in food stamps. On his Statement of Financial Affairs, Jerry stated that he earned $3,600.00 as of filing in 2001, $40,000.00 in 2000, and $40,000.00 in 1999. However, Jerry testified that he was unemployed for significant

period of times during 1999, 2000, and 2001. He also testified that he earned approximately $23,000.00 in 2001. The dissolution decree states that his annual income is $36,054.00. Melanie provided evidence from the union hall that Jerry worked 1499.5 hours in 2000, 897.5 hours in 2001, and 1730.25 hours through September of 2002. Jerry testified that he earns $20.50 per hour in base wages with time and a half over eight hours per day.

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

Rent or home mortgage	$0.00
Electricity and heating fuel	210.00
Water and sewer	53.00
Telephone	30.00
Food	350.00
Clothing	50.00
Laundry and dry cleaning	30.00
Medical and dental expenses	20.00
Transportation (not including car payments)	80.00
Recreation	50.00
Charitable contributions	25.00
Total monthly expenses	$898.00

16. On his statement of intentions, Jerry indicated that he would surrender the house.

17. At the time of the trial, Melanie was forty-four years of age and in good health. She resided with her parents at their home.

18. At the time of the dissolution of marriage, Melanie earned approximately $20,000.00 according to the decree. However, she subsequently lost her position and took other employment at a lower rate of pay. At the time of the trial, she worked as an office

manager earning $10 per hour. Melanie provided evidence showing her gross wages for 2002 through October 31, were $11,800.00 and her net pay was $9,859.10.

17. Melanie provided the following expenses:

Rent	$0.00
Electricity	85.00
Water and sewer	35.00
Telephone	25.00
Cable TV	50.00
Food	100.00
Clothing	50.00
Medical and dental expenses	30.00
Transportation	75.00
Recreation	100.00
Household insurance	25.00
Health insurance	15.00
Auto insurance	35.00
Visa credit card	15.00
Child support	293.00
Total monthly expenses	933.00

DISCUSSION

Melanie commenced this adversary proceeding seeking a determination that an obligation incurred in connection with her and Jerry's dissolution decree should be excepted from discharge. Melanie claims that Jerry owes her $17,000.00 plus interest based on the property division provisions of the dissolution decree. She argues that the debt is a nondischargeable property settlement debt pursuant to 11 U.S.C. § 523(a)(15).

At the outset, the court notes that the parties extensively argued whether the dissolution decree provided a judgment for $17,000.00 in favor of Melanie against Jerry, and whether the foreclosure sale of the real estate extinguished her lien and claim. Jerry contends that he and Melanie agreed that they would equally share in the equity in the

former marital home. Said contention was borne out by the testimony of both parties. Jerry argues that the $17,000.00 and the lien securing the amount was tied inexorably to the equity in the home. When Melanie did not protect her lien by bidding on the property at the foreclosure sale, the lien and consequently the obligation was extinguished. Essentially, Jerry argues that the debt does not constitute his personal obligation to Melanie, but rather an in rem obligation against the real estate. The court is not persuaded.

First, the court notes that the parties entered into a stipulation dividing their marital property, and the state court incorporated the stipulation into the dissolution decree. While a property settlement agreement is a contract between the parties, it does not become a final contract until the dissolution court approves and incorporates it into the dissolution decree. Prochelo v. Prochelo, 346 N.W.2d 527, 529 (Iowa 1984). "When the stipulation is merged in the dissolution decree, it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties." Id. Accordingly, the determining factor in interpreting the decree is the intent of the dissolution court as gleaned from the decree and other proper evidence. In re the Marriage of Ruter, 564 N.W.2d 849, 851 (Iowa App. 1997). "Extrinsic evidence may be considered 'not to show the language means something different than what is said in the instrument [decree] involved, but to show what is meant by what is said.'" Id. quoting Peters v. Peters, 214 N.W.2d 151, 157 (Iowa 1974).

In this matter, the dissolution decree provides that Jerry shall "pay to the Melanie the amount of $17,000.00 plus interest at a rate of 7 3/4 percent compounded annually." The court finds this language to be unambiguous and clarification unnecessary.

To the extent that the parties intended that each share equally in the equity of the house, the court finds this fact unimportant to the obligation created by the decree. Jerry and Melanie provided financial statements to the court valuing the home and identifying encumbrances against it. The court accepted those values when it approved the stipulation. Accordingly, for purposes of the decree, the value was set at the time the decree was entered. Jerry was then granted the house, and Melanie was granted a claim for $17,000.00. The fact that Jerry neither refinanced nor sold the property within the parameters set forth in the decree, ultimately allowing the mortgage on the property to be foreclosed, has no bearing on the amount of Melanie's claim.

Parenthetically, the court notes that the disposition of the marital home was only one provision of the property settlement agreement. As such, it was only one bargaining chip in the agreement, and quite probably impacted other provisions including the determination that no alimony or support would be provided to either party. Accordingly, the dissolution court would appropriately consider these factors when approving the stipulation.

Second, the parties argue at length over the significance of the lien that the district court placed on the home to secure Melanie's claim. However, in the context of this dischargeability proceeding said lien is of no importance. The Bankruptcy Code defines a lien as a "charge against or an interest in property to secure payment of a debt or

performance of an obligation." 11 U.S.C. § 101(37). This definition comports with Iowa law that holds that a lien is "a charge upon property for the payment of a specific obligation that is independent of the lien" that serves as security for the debt or obligation of the property owner." Federal Land Bank of Omaha v. Boese, 373 N.W.2d 118, 120 (Iowa 1985). "Debt" means a liability on a claim, 11 U.S.C. § 101(12), and "claim" is broadly defined to include any right to payment or right to an equitable remedy for breach of performance if the breach gives rise to a right to payment, 11 U.S.C. § 101(5). Significantly, 11 U.S.C. § 523 excepts from discharge certain enumerated debts.

Third, and finally, Iowa courts have long recognized that the statute providing for division and disposition of marital property in dissolution cases, now Iowa Code § 598.21, constitutes a "special declaration of statute to the contrary" of the homestead exemption. Daniels v. Morris, 6 N.W. 532 (Iowa 1880); Luedecke v. Luedecke, 192 N.W. 515 (Iowa 1923); Kobringer v. Winter, 263 N.W.2d 892 (Iowa 1978). A state court presiding over the dissolution of a marriage may enter an appropriate order disposing of the homestead. As early as 1866, the Iowa Supreme Court held that a homestead is not liable for an ordinary judgment for alimony. Byers v. Byers, 21 Iowa 268, 1866 WL 295 (Iowa 1866); see also Whitcomb v. Whitcomb, 2 N.W. 1000, 1004-05 (Iowa 1879) (same, citing Byers).

In Byers, the Iowa court stated:

> In the divorce suit the wife obtained no special order in relation to the children (if there are any), or the property of the husband. Admitting, that under section 2537 of the Revision, the court might have set apart the homestead to her absolutely, or for a qualified period; admitting (though not deciding) that it might have made the alimony a lien upon the homestead and other property, still it did not, but rendered

> a simple money judgment for the amount, directing this to be enforced in default of payment by execution in the usual manner.

Id.

The court notes that the former section 2537 became section 598.21 in the present code. Also, former sections 2485 and 2489 are now contained in section 624.23. Section 624.23 provides that "judgments are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all the defendant may subsequently acquire, for the period of ten years from the date of the judgment." The Iowa Supreme Court has also held that judgment liens do not attach to exempt homestead property. Lamb v. Shays, 14 Iowa 567, 569-70 (Iowa 1863). The court deduces that the Iowa court considered the relevant law in arriving at its decision.

The court can find no case expressly overturning Byers. In fact, the Daniels case cited above for the proposition that § 598.21 is a special declaration of statute to the contrary of the homestead exemption statute indicates that Byers is good law, and does not conflict with its holding. Daniels v. Morris, 6 N.W. at 533. Quite probably in response to Byers, courts presiding over dissolutions often provide a lien on the homestead to secure payment of awards. See e.g. Id. (attachment granted by court in conjunction with annulment action valid against homestead); Luedecke v. Luedecke, 192 N.W. at 516 (lien for alimony, attorney fees, and costs of the action made a lien on all of defendant's real estate); Heminway v. Wood, 3 N.W. 794, 796 (Iowa 1879) (a judgment for alimony was made a special lien upon the land); Slack v. Mullenix, 66 N.W. 99, 101 (Iowa 1954) (stating that the general rule in divorce actions is that the court may make alimony and support money awards, liens on the husband's realty, but holding that an installment

alimony or support money judgment does not constitute an automatic lien for future unpaid installments); Kobringer v. Winter, 263 N.W.2d at 893 (a lump sum alimony award made a lien on real estate upon a nunc pro tunc order to correct an omission in the order upon remand); Smith v. Brown, 513 N.W. 2d 732, 732-33 (Iowa 1994) (husband awarded property settlement secured by lien on lien on family residence); Davis v. Davis, 292 N.W. 804, 808 (Iowa 1940) (lien granted against all husband's real property).

The court concludes that this is the procedure followed by the district court in the parties' dissolution case. The court awarded Melanie $17,000.00 as part of the property settlement, then it made that award a lien on the homestead that it awarded to Jerry, thereby, providing that Melanie could enforce her claim against their former marital residence notwithstanding Jerry's claim of homestead exemption.

Accordingly, the court finds that Melanie has an in personum claim against Jerry. As a holder of a personal claim, she may bring an adversary proceeding to determine the dischargeability of her debt subject to the provisions of the Bankruptcy Code.

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).

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 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 '[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).

Melanie has not alleged that her claim against Jerry is one for alimony, maintenance, or support and excepted from discharge pursuant to 11 U.S.C. § 523(a)(5), but rather one for property settlement to be excepted pursuant to 11 U.S.C. § 523(a)(15). Upon review of the record and the evidence contained therein, the court finds that Melanie has established that the debt at issue was incurred from the dissolution decree and was not for alimony, maintenance, or support. The burden then shifts to Jerry 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 the debt. In this respect, the court maintains consistency within the district. See In re Jordan, 95-1312-CJ, Adv. 95-95108, slip op. (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).

At the time he filed his bankruptcy petition, Jerry's schedules showed that he received $293.00 per month in child support and $618.00 per month in food stamps for a monthly income of $911.00. His Statement of Financial Affairs showed that he had earned $3,600.00 as of filing in 2001; however, Jerry did not include any amount of wages in his monthly income. Jerry testified that he was unemployed for significant period of times during 1999, 2000, and 2001. He also testified that he has received unemployment compensation when not working. Jerry did not include the benefit amounts in his monthly income. Further, his financial statement showed that he had earned $40,000.00 in 2000, and $40,000.00 in 1999. He also testified that he earned approximately $23,000.00 in 2001. The dissolution decree states that his annual income is $36,054.00. Melanie provided evidence from the union hall that Jerry worked 1499.5 hours in 2000, 897.5 hours in 2001, and 1730.25 hours through September of 2002. Jerry testified that he earns $20.50 per hour in base wages with time and a half over eight hours per day. Jerry did not specify the amounts withheld from his paycheck.

Based on the record before it, the court finds that Jerry is capable and anticipates earning well over the $911.00 per month shown on his schedule of monthly income. The court finds that the dissolution amount of $36,000.00 per year is the correct measure of his earning potential. The court notes that Jerry will earn this amount from his carpentry

work alone, and based on the fact that he had worked 1499.5 hours as of September 2002, this figure is probably conservative. There will be added to this the $293.00 per month in child support until his youngest son reaches the age of majority in two years. The court also notes that this amount does not include any unemployment benefits during the slow period for construction.

Accordingly, the court finds that Jerry's gross monthly income is $3,000.00 plus $293.00 for the child support. Even assuming a 40% withholding for taxes, insurance, union dues, and retirement, Jerry will take home $2,093.00 per month (3000 x 60% = 1800 + 293 = 2093).

From this amount, Jerry has monthly expenses of $898.00. The court notes that this amount does not include an expenditure for housing. At the time he filed for bankruptcy Jerry, was living at the former marital home which was subsequently sold at sheriff's auction. However, he did not amend his bankruptcy schedules, nor did he provide evidence at the trial of housing expense.

The court reiterates the burden of showing inability to pay a debt in connection with a dissolution decree is on the debtor. Accordingly, the court finds that Jerry has at least $1195.00 (2093 – 898 =1195) in monthly disposable income which can be used to pay his debt to Melanie. The court is cognizant that the child support payments will cease in approximately two years; however, at that time the parties' youngest son should be able to provide for his own expenses.

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

Section 523(a)(15)(B) requires the court to determine whether the benefit to Jerry of discharging the debt outweighs the detrimental consequences to Melanie. 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.

The crux of the section is an equitable consideration, and the oft-stated maxim is that he who asks for equity must do equity. In this case, the court finds that Jerry has not proceeded in an equitable manner. First, he did not comply with the provisions of the dissolution decree, provisions to which he agreed in the settlement agreement. He moved into the house in August of 1999, but did not make any payments on the mortgage until he filed his second chapter 13 case on November 20, 2000. The decree required that he attempt to refinance the mortgage within the year following July 28,1999, and if he could not do so, then immediately place the house for sale. Jerry did not comply with these provisions. The record shows that he did not attempt to refinance until 2000, and the house was not appraised until January of 2001. Jerry listed the house for sale in January of 2001; however, a petition to foreclose the mortgage was filed on January 18, 2001.

Further, the court finds that Jerry was less than candid in filling out his schedules. He lists his monthly income as $911.00, but does not include any amount of wages or unemployment compensation. His statement of financial affairs show income of just $3,600.00 in 2001; however, Melanie provided evidence from the union that he worked

897.5 hours that year. At $20.00 per hour straight time, Jerry earned at least $17,940.00 in 2001. This sum is exclusive of his time-and-a-half over eight hours per day.

The evidence also shows that Melanie has lived up to her duties under the dissolution decree. She vacated the house in a timely fashion, and although Jerry complained of the condition of the house when he moved into it, there is no evidence that Melanie committed waste to the property. She made the house payments, and the mortgage was current when she moved out. Jerry does not claim that Melanie has been delinquent in making child support payments.

Further weighing in favor of Melanie is the fact that she lost her former employment and took a substantial reduction in pay. Her gross wages for 2002 through October 31 were $11,800.00 and her net pay was $9,859.10 for a monthly net of $822. Melanie currently lives with her parents in order to keep her expenses manageable. She states her monthly expenses as $933.00. This amount includes the child support payment she makes. Although she will be relieved of the child support payment in two years and it is unclear for how long she will continue to earn at a diminished rate, it is clear that Jerry's financial situation is significantly better than Melanie's.

Based on the foregoing, the court concludes that discharging Jerry's debt to Melanie would work a far greater detriment to her than it would benefit Jerry. According the court will not discharge the debt.

ORDER

IT IS THEREFORE ORDERED that Gerald Kenneth Lint's debt of $17,000.00 plus 7 3/4% interest from July 28, 1999, compounded annually, to Melanie Lundstrom is not discharged.

Dated: _____

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