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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re] Case No. 00-52194-ASW
]]
Breen Zentner,] Chapter 7
]]
Debtor(s).]]
_____]]
Karen Lent,] Adversary No. 00-5222
]]
Plaintiff,]]
]]
vs.]]
]]
Breen Zentner,]]
]]
Defendant.]]
_____]

MEMORANDUM DECISION
DETERMINING DEBT TO BE DISCHARGEABLE

Before the Court is a complaint by Karen Lent ("Creditor") against Breen Zentner ("Debtor"), who is the debtor in this Chapter 7 case.¹ The complaint seeks a determination that a debt is excepted from Debtor's bankruptcy discharge pursuant to §523(a)(15).

Creditor is represented by Michelle Brenot, Esq. and Debtor is represented by Judson T. Farley, Esq. The matter has been tried

¹ Unless otherwise noted, all statutory references are to Title 11, United States Code ("Bankruptcy Code"), as applicable to cases commenced on April 21, 2000.

1 and submitted for decision. This Memorandum Decision constitutes
2 the Court's findings of fact and conclusions of law, pursuant to
3 Rule 7052 of the Federal Rules of Bankruptcy Procedure.

4
5 I.

6 FACTS

7 The parties were married for three years. The marriage was
8 dissolved in 1997, but issues concerning property and liabilities
9 remained in litigation after termination of the marital status.

10 Debtor commenced this bankruptcy case by filing a Chapter 7
11 petition on April 21, 2000. At that time, he had paid none of a
12 \$5,000 debt owed to Creditor.

13 Creditor's claim is based on an order made in the marital
14 dissolution action on March 13, 2000, directing Debtor to pay
15 Creditor \$5,000 at the rate of \$250 per month, on account of a
16 community debt. However, Debtor contends that the \$5,000 debt was
17 incurred by Creditor's use of her own credit card for the benefit
18 of herself and her mother. Debtor testified that the parties had
19 no joint credit card accounts and no credit card debt was incurred
20 for his benefit, with the exception of six restaurant meals for
21 which Debtor had agreed to pay. He said that Creditor would "use
22 credit cards for flyer miles then go to the credit union and pull
23 cash out" -- Creditor had a "number of" credit cards before
24 marriage that were solely hers and she would use those "to charge
25 large amounts for her and her mother's well being then go to the
26 credit union with her mother's signature and pull out \$10,000 at a
27 time" -- Debtor said that he did not make payments on Creditor's
28 cards, but she "paid them in full with large chunks of money".

1 Debtor testified that he was 45 years old at time of trial and
2 "pre-diabetic", suffering from "extremely high blood sugar" that
3 requires daily testing, and "loss of eyesight, hard to concentrate
4 sometimes" -- his late parents were diabetic and he believes that
5 his prognosis is "bad and not going to get better". Debtor said
6 that he had "lost a couple of weeks' work" due to his illness and
7 his employers are aware of his condition, but it "generally" does
8 not affect his ability to work because he does not deal with
9 customers when he is unable to concentrate.

10 Debtor testified that he is a high school graduate but did not
11 attend college or receive any vocational training -- he had been a
12 machinist for "a little while" and a janitor, but has been "selling
13 cars" for some fifteen years. At time of trial, Debtor had been
14 employed as a salesman at Toyota of Santa Cruz for about one month.
15 He said that he left his previous job at a Nissan-Dodge-Volkswagen
16 dealership after approximately eight months because he was not
17 earning enough and "wanted to increase my lifestyle a little bit"
18 -- he had been "doing terrible" at Nissan, averaging \$1,800 gross
19 per month and netting \$1,200 to \$1,300 monthly, but hoped the move
20 would enable him to average \$2,500 to \$2,800 gross per month and
21 net approximately \$1,800 monthly. Prior to working at Nissan,
22 Debtor worked at Toyota of Santa Cruz for five years but moved to
23 Nissan when business declined. Debtor testified that, in his
24 experience as an automobile salesman, "on occasion" he had made up
25 to \$4,000 "on a good month" but there is "no real science to it, it
26 can vary"; e.g., fifteen sales could generate earnings of \$1,500 or
27 \$4,000 because "it's a commission driven business" and the
28 commission on a given sale could be low or high, one "can never

1 tell". He also said that the business is "very seasonal" and sales
2 tend to drop 30% to 50% at the end of the summer; the months of
3 January to March are "really bad", with slow sales and salespeople
4 being terminated, "might as well be picking lettuce".

5 Debtor testified that, at Toyota, his minimum "draw" is the
6 greater of a guaranteed wage or a commission based on sales and he
7 receives \$750 on the 15th of each month, which is later deducted
8 from whatever he earns for the full month; he can "count on" the
9 wage minimum of approximately \$1,400 to \$1,500 per month and has no
10 other source of income. Debtor's federal income tax return for
11 2000 shows adjusted gross income of \$36,707, which he said was
12 "extremely good"; the return for 2001 shows adjusted gross income
13 of \$33,009 and he testified that he was unemployed for a month that
14 year due to poor health. Debtor said he was with Toyota during
15 those two years and his income then was the highest it had been in
16 fifteen years, which is why he returned there after earning only
17 \$24,000 a year at Nissan. The evidence includes Debtor's paycheck
18 stubs for the months of October 2001 through April 2002 -- those
19 show gross monthly earnings ranging from \$1,500 to \$2,934 and net
20 monthly earnings ranging from \$1,345 to \$2,400, averaging \$2,125
21 gross and \$1,851 net. The evidence also includes copies of
22 Debtor's bank statements² for the periods of March 14, 2000 through
23 May 11, 2000; June 14, 2000 through October 13, 2000; November 14,
24 2000 through January 12, 2001; January 15, 2002 through March 13,

26 ² Debtor testified that he has only one bank account and
27 all deposits to it are from his paychecks, except that some
28 proceeds from selling "p.a. equipment" for approximately \$600 were
deposited between May 14, 2002 and June 13, 2002 -- Debtor said
that the sale occurred while he "pretty much liquidated all my
materials to stay afloat".

1 2002; and April 12, 2002 through June 13, 2002 -- those show
2 monthly total deposits ranging from \$1,340 to \$3,719, averaging
3 \$2,295. Debtor testified that the last statement reflected
4 unusually high earnings due to a sale at Capitola Auto Mall in
5 which all local dealerships participated, "pretty much just an
6 accelerated pace sale" where he "happened to get real lucky and
7 sell quite a few cars all at once"; he said that "maybe every eight
8 months I can do that if I really try hard and they have a good
9 sale". Debtor stated that he also earned more than usual in his
10 first month at Toyota, due to "some special sales" and working an
11 "extreme amount of hours" in order to "make a strong showing" and
12 keep the new job.

13 Debtor testified that his monthly expenses at time of trial
14 were essentially the same as those set forth on the schedules filed
15 in his bankruptcy case,³ with two exceptions: rent had increased
16 by \$100; and he had incurred a \$178 lease payment for a 2001 Toyota
17 Echo. The bankruptcy schedules show monthly expenses totalling
18 \$1,865, so the two increases bring the sum to \$2,143. Debtor
19 testified that his monthly net income did not always cover his
20 monthly expenses. For example, he was often unable to pay rent in
21 full when due, but the landlord has been willing to accept late
22 payments (and charge a fee); a ledger from the landlord shows
23 twelve such instances between March 9, 1999 and April 22, 2002.
24 Debtor also testified that he made only the minimum monthly payment
25 of \$30 on each of his two credit cards, which were "maxed at \$500
26

27 ³ The expenses are itemized as follows: \$895 rent, \$40
28 utilities, \$30 telephone, \$30 cable television, \$400 food, \$150
clothing, \$20 medical/dental, \$150 transportation, \$50 recreation,
\$50 auto insurance, \$50 "haircuts, etc.".

1 each" and incurring interest at the rate of 18%.

2 Debtor testified that his assets at time of trial remained
3 essentially as set forth on the schedules filed in the bankruptcy
4 case. Those show no real property interests and personal property
5 worth \$5,000. The schedules list a 1989 Mazda, which Debtor said
6 he sold in 2001 for \$750 to use as a downpayment on the leased car
7 that "my bosses helped me get". He testified that he has acquired
8 no other assets since filing bankruptcy, except a guitar subject to
9 a purchase-money lien of approximately \$200. He said that he used
10 to have a savings account with a \$5 balance but the credit union
11 closed it due to lack of activity. Debtor does not expect to
12 receive any inheritances other than \$12,000 already inherited from
13 his parents (which he said he spent "refurbishing" Creditor's house
14 during the parties' marriage).

15 Debtor's tax returns for 2000 and 2001, respectively, show
16 charitable donations by cash or check totalling \$2,291 and \$3,350.
17 He testified that "I'm Catholic and I give money to my church", "I
18 give it all year long and use some of my tax [refunds] to pay that
19 amount also" to such causes as Catholic charities and victims of
20 September 11, because "I figure that's where my money is going to
21 go if I have any extra".

22 Creditor testified that, at time of trial, she had been
23 unemployed for two months after being laid off, and her income
24 consisted of \$1,220 in monthly unemployment benefits. Her most
25 recent employment lasted for approximately one year, as an
26 administrative assistant at Our Lady of Fatima Villa, earning \$400
27 to \$500 net per week. Prior to that, she had received assignments
28 for temporary work through Manpower, which lasted one or two weeks

1 at a time and paid approximately \$9 per hour. Creditor testified
2 that she had incurred two loans of \$7,000 each for "training", the
3 most recent for web page design; she did not recall whether she
4 completed the design course, but had never been employed in that
5 field. She said that she was looking for work as an administrative
6 assistant but expected to earn less than she had at Our lady of
7 Fatima Villa because "there's a recession" and "people are paying
8 cheaper now, lower wages". Creditor testified that she believed
9 her 2001 federal tax return showed adjusted gross income of
10 \$23,000, and that the 2000 return showed "maybe \$10,000 at the
11 most".⁴ Creditor said that she had not taken tenants into her home
12 since the marriage was dissolved, and lives alone.⁵

13 Creditor testified that she inherited her mother's house in
14 September 1996; she valued it at \$300,000 in the marital
15 dissolution action during 1999, based on the last time it was
16 appraised.⁶ She had no opinion of the house's current fair market
17 value, or knowledge of recent sales for similar properties; she
18 described the house as 1,200 square feet with 3 bedrooms and 1
19 bath, in Mountain View. She said that she has never borrowed
20 against the house and does not "owe anything on" it, though one of
21 her creditors is "probably trying to get a lien" on it. Creditor
22 testified that the only personal property in her mother's estate

23
24 ⁴ No documents concerning Creditor's financial condition
25 were offered in evidence except an "Income and Expense Declaration"
that she filed in the marital dissolution action in 1999.

26 ⁵ Debtor testified that, during the marriage, he paid \$500
27 monthly "to stay in a room in her house", and that Creditor "was
renting out some of the rooms in the house" after she inherited it.

28 ⁶ Debtor testified that, when Creditor inherited the house,
she told him it was worth \$500,000, but Creditor testified that she
did not recall doing so.

1 was \$200,000 cash, all of which was left to her brother.⁷ She said
2 that her only personal property assets consist of her household
3 furniture, a Nissan automobile that she bought from Debtor's
4 employer for \$18,000 (which is now fully paid for and worth "maybe"
5 \$5,000 or \$10,000), and "maybe" \$1,000 in a retirement account; she
6 used to have \$3,000 in a money market account but "spent it on
7 bills".

8 Creditor testified that she owes approximately \$11,600 on
9 credit cards and approximately \$10,000 on a "credit line", all
10 representing debts incurred during marriage for the joint benefit
11 of the parties; she said that she has not used those accounts since
12 the marriage was dissolved, and the creditors have closed them due
13 to delinquent payments. Creditor's declaration filed in the
14 marital dissolution action during 1999 showed those debts to total
15 \$40,000, and she testified that she has paid them down to their
16 current levels since that time -- however, the interest rate is
17 "high" and, though she pays as much as she can, she is "getting
18 behind". Creditor testified that she had paid off one credit card
19 by having an attorney settle the balance of over \$10,000 for
20 \$1,250, but she had not attempted to settle the others because she
21 "didn't think it was necessary".

22 Creditor seems sincere, but her testimony about her expenses at
23 time of trial was internally inconsistent to some extent: she said
24 that her monthly expenses did not exceed her income of \$1,220; but
25 she also said that her earnings at Our Lady of Fatima Villa had not
26 been enough to cover "basic living expenses" (which earnings were

27
28 ⁷ Debtor testified that Creditor "inherited real cash to
distribute how she felt", but he did not know the amount of any
such inheritance.

1 at least \$400 net per week, or equivalent to approximately \$1,600
2 per month); and she also said that she could pay "basic living
3 expenses" such as property taxes, insurance, food, and utilities,
4 but could not also pay the credit card debts incurred during the
5 parties' marriage; and she also said that, "relatively recently",
6 she was not current with payments on her credit cards for Macy's
7 and Mervyn's (with balances of \$500 and \$300, respectively).
8 Creditor's declaration filed in the marital dissolution action
9 during 1999 shows monthly expenses totalling \$4,896.24, but she
10 testified that the figure represented what she "was used to living
11 on" before her mother died in 1996, rather than her actual expenses
12 in 1999 -- she said that "mom gave me money to spend once in a
13 awhile, [Debtor] liked to help me charge up the bills". Creditor
14 said that her annual real property taxes and homeowner's insurance
15 are approximately \$560 and \$600, respectively; electricity and gas
16 average \$60 per month in the summer and \$220 per month in the
17 winter; she also pays for garbage collection and water, and
18 "need[s] a lot of work on the house".

19 Creditor testified that Debtor had agreed during the parties'
20 marriage to reimburse her for half of many joint expenses but did
21 not, such as: costs to "help him get the CD off the ground";
22 clothing; and the \$18,000 automobile purchase. Debtor disagreed
23 with those contentions. He testified that he has had a "hobby of
24 creating music for my listening pleasure" since he was 13 years
25 old, has "a home system", and has "produced a total of three
26 musical recordings" -- during the "last few months" of the parties'
27 marriage, he "was working on a small project" with his brother, but
28 did not believe that Creditor contributed any funds toward it.

1 Debtor also testified that the parties moved to Santa Cruz a year
2 after Creditor inherited her mother's house, and Debtor paid all of
3 the rent and "the bills" -- he said that Creditor did not buy him
4 clothes; she did give him a leather coat as a gift, but she took it
5 when the marriage ended and gave it to her brother.

6
7 II.

8 ANALYSIS

9
10 A. Standards

11 The Bankruptcy Code is "designed to afford debtors a fresh
12 start, and we interpret liberally its provisions favoring debtors",
13 see In re Bugna, 33 F.3d 1054, 1059 (9th Cir. 1994). Bankruptcy
14 Code §523(a) provides limited exceptions to the general policy of
15 discharge, but those are to be construed narrowly, see In re Riso,
16 978 F.2d 1151 (9th Cir. 1992). The standard of proof for claims
17 asserted under §523(a) is preponderance of the evidence, Grogan v.
18 Garner, 498 U.S. 279 (1991).

19
20 B. Provisions and Application of §523(a)(15)

21 Creditor relies upon the exception from discharge provided by
22 §523(a)(15) for any debt that is:

23 ... not of the kind described in paragraph (5)
24 [i.e., not in the nature of support] that is
25 incurred by the debtor in the course of a divorce
26 or separation or in connection with a separation
27 agreement, divorce decree or other order of a
28 court of record, [or] 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

1 debtor and, if the debtor is engaged in a
2 business, for the payment of expenditures
3 necessary for the continuation, preservation, and
4 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.

5 The parties' respective burdens are allocated as explained by
6 In re Jodoïn, 209 B.R. 132 (9th Cir. BAP 1997) ("Jodoïn") and
7 applied by In re Myrvang, 232 F.3d 1116 (9th Cir. 2000)
8 ("Myrvang"). First, the creditor has the burden of proving that
9 the debt is within the scope of §523(a)(15), *i.e.*, that it is not
10 in the nature of support, and that it was incurred in the manner
11 required by the Code (*e.g.*, through marital dissolution). Then the
12 burden shifts to the debtor to prove either lack of ability to pay
13 (what Jodoïn refers to as the "ability test"), or that discharge of
14 the debt would benefit the debtor more than it would harm the
15 debtor's spouse, former spouse, or child⁸ (what Jodoïn refers to as
16 the "detriment test") -- since the two tests are stated in the
17 disjunctive, it is not necessary to reach the second one concerning
18 detriment if the debtor meets the first one by showing inability to
19 pay. Jodoïn holds that both tests are to be applied to the
20 parties' respective financial conditions at the time of trial
21 rather than on the date of bankruptcy, and Myrvang proceeded on
22 that basis without discussing *the issue*.

23 _____
24 ⁸ The statute considers harm only to the debtor's spouse,
25 former spouse, or child, not harm to any other kind of creditor.
26 For example, In re Dollaga, 260 B.R. 493 (9th Cir. BAP 2001) holds
27 that a debtor's marital dissolution attorney lacks standing to seek
28 exception from discharge under §523(a)(15) for the attorney's claim
against the debtor when the debtor's former wife and child are not
liable for the debt (taking no position on whether standing would
exist if the former wife and child were liable for the debt). In
this matter, the creditor seeking a determination of non-
dischargeability is the former wife of the debtor, so no issue of
standing arises.

1 C. Type of Debt

2 Counsel stated at trial that the parties agree that the subject
3 debt is not in the nature of support, and was created by an order
4 made in their marital dissolution action. Accordingly, the debt is
5 within the scope of §523(a)(15).

6 Creditor contends that the subject debt was incurred for
7 Debtor's benefit while Debtor denies that it was, and both parties
8 testified at some length about the spouses' respective
9 contributions to the marital community (or lack thereof). However,
10 the issue of whether Debtor should be liable for the subject debt
11 is not before this Court; he already is liable, though his
12 bankruptcy discharge may relieve him of having to pay the
13 liability. It is undisputed that the debt was created by an order
14 made in the marital dissolution action on March 13, 2000 and Debtor
15 does not claim to have appealed from that order before filing
16 bankruptcy on April 21, 2000. Under such circumstances, the pre-
17 petition State Court order must be given collateral estoppel and/or
18 res judicata effect as to the fact of Debtor's liability and the
19 amount of such liability, leaving the Bankruptcy Court to determine
20 only whether the debt representing the liability is dischargeable
21 in bankruptcy, see In re Comer, 27 B.R. 1018 (9th Cir. BAP 1983),
22 affirmed, 723 F.2d 737 (9th Cir. 1984). Accordingly, Debtor is
23 liable to Creditor for payment of a \$5,000 debt, which was found in
24 the parties' marital dissolution action to be a community debt, and
25 which the parties agree is not in the nature of support -- the sole
26 issue before this Court is determination of whether that debt is
27 excepted from Debtor's Chapter 7 discharge by virtue of
28 §523(a)(15).

1 D. Ability Test

2 As discussed above, it is Debtor's burden to show that he is
3 unable to pay \$5,000 "from income or property of the debtor not
4 reasonably necessary to be expended for the maintenance or support
5 of the debtor or a dependent of the debtor". Jodoin holds that the
6 "primary" test by which to determine ability to pay is that of
7 §1325(b)(2), which measures the "disposable income" required to be
8 devoted to a Chapter 13 repayment plan:

9 We also agree with the bankruptcy court that the
10 "disposable income" test that is delineated in
11 Code § 1325(b) provides an excellent starting
12 point for measuring a debtor's ability to pay
13 under § 523(a)(15)(B)" [sic; should be subsection
14 (A)]. [citation and footnote omitted] Some
15 courts have been reluctant to use this test in
16 the divorce situation where parties have been
17 known to sacrifice their own financial well-being
18 to spite their ex-spouse. However, a proper
19 application of the test should take into account
20 the prospective income that the debtor should
21 earn and the debtor's reasonable expenses.
22 [citation omitted] These types of adjustments
23 are appropriate and should not cause courts to
24 reject the disposable income test as an excellent
25 reference point. [footnote omitted].

26 Jodoin, at 142. The Ninth Circuit has not ruled on the issue:

27 The parties have not briefed, and we do not
28 decide, whether the disposable income test of 11
29 U.S.C. § 1325(b)(2) is the exclusive method that
30 a bankruptcy court must employ in determining
31 ability to pay under § 523(a)(15)(A). We note,
32 however, that courts have employed a variety of
33 approaches in determining a debtor's ability to
34 pay a divorce-related debt. See [Jodoin] (the
35 disposable income test provides an "excellent
36 reference point" for determining ability to pay);
37 Greenwalt v. Greenwalt (In re Greenwalt), 200
38 B.R. 909, 913 (Bankr.W.D.Wash.1996) (stating that
39 the majority of courts adopt the disposable
40 income test); Humiston v. Huddelston (In re
41 Huddelston), 194 B.R. 681, 688-89 (Bankr.N.D.Ga.
42 1996) (employing a totality of the circumstances
43 test); Comisky v. Comisky (In re Comisky), 183
44 B.R. 883, 884 (Bankr.N.D.Cal.1995) ["Comisky"]
45 (employing the undue hardship test from 11 U.S.C.
46 § 523(a)(8)); Florio v. Florio (In re Florio),

1 187 B.R. 654, 657 (Bankr.W.D.Mo.1995) (test for
2 ability to pay should be determined on a
case-by-case basis).

3 Myrvang, at 1120, n.3.

4 Of the several cases cited by Myrvang, only Comisky considered
5 a Code section other than §1325(b)(2) concerning disposable income
6 (the rest proceeded on a case by case basis and addressed the
7 totality of the circumstances). The Bankruptcy Court in Comisky
8 looked to §523(a)(8) pertaining to student loans, but did so in the
9 context of deciding whether a debt might be partially excepted from
10 discharge and partially discharged:

11 When the court examines James' income and
12 expenses, it is clear that he does not have the
13 ability to pay all of his debt to Susan, which is
14 now about \$25,000.00 with accrued interest. How-
15 ever, it is equally clear that over a reasonable
16 period of time he could afford to pay part of the
17 debt. The issue before the court is therefore
18 whether section 523(a)(15)(A) mandates judgment
19 for the debtor if he cannot pay the whole debt,
20 or whether the court can fashion an equitable
21 remedy whereby part of the debt is discharged and
22 part is not. [¶] There are no appellate cases
23 dealing with section 523(a)(15), as the section
24 has only been in effect some nine months. No
25 other bankruptcy courts have published decisions
26 dealing with the issue. However, the court
27 finds analogous cases regarding student loan
issues to be helpful in deciding this case. [¶]
Section 523(a)(8) of the Code is similar to sec-
tion 523(a)(15) in that it provides for a non-
dischargeable debt with two exceptions. It pro-
vides that a student loan is not dischargeable
unless it is either more than seven years old or
making the debt non-dischargeable would impose an
undue hardship on the debtor. In In re Yousef,
174 B.R. 707 (Bkrtcy.N.D.Ohio 1994), Bankruptcy
Judge Speer held that where the debtor would
suffer undue hardship if forced to pay all of the
student loan, but could pay part of it, the court
has discretion to declare only part of the debt
nondischargeable. This approach seems fair and
sound, and is directly applicable to the issue
now before this court.

28 Comisky did not apply §523(a)(8) as a means of measuring the

1 debtor's ability to pay, but for the quite different purpose of
2 finding discretion to except only part of the debt from discharge.
3 With respect to the issue of ability, §523(a)(8) is more dissimilar
4 from §523(a)(15) than is §1325(b)(2). Under §523(a)(8), a debt for
5 a student loan is excepted from discharge unless doing so "will
6 impose an undue hardship on the debtor and the debtor's dependents"
7 -- under §523(a)(15), a debtor who is not engaged in business must
8 show inability to pay the subject debt "from income or property of
9 the debtor not reasonably necessary to be expended for the
10 maintenance or support of the debtor or a dependent of the debtor"
11 -- under §1325(b)(2), "disposable income" for a debtor who is not
12 engaged in business is defined as "income which is received by the
13 debtor and which is not reasonably necessary to be expended -- (A)
14 for the maintenance or support of the debtor or a dependent of the
15 debtor, including charitable contributions [as defined]". Both
16 §523(a)(15) and §1325(b)(2) expressly require debtors to pay only
17 such income (if any) as is "not reasonably necessary" for the
18 support of the debtor or a dependent, whereas §523(a)(8) requires
19 debtors to pay unless "undue hardship" results. On its face,
20 "undue hardship" may well be a higher standard than "not reasonably
21 necessary" for support, and the identical language of both
22 §523(a)(15) and §1325(b)(2) referring to income that is "not
23 reasonably necessary" for support suggests that those two sections
24 mean the same thing, which arguably is something different from,
25 and less than, the "undue hardship" standard of §523(a)(8). As
26 both Jodoiu and Myrvang note, courts have been flexible in
27 measuring ability to pay under §523(a)(15), and this Court agrees
28 with Jodoiu that such an approach is necessary to account for all

1 of the variable factors present in a marital dissolution case,
2 e.g.:

3 ...in the divorce situation where parties
4 have been known to sacrifice their own
5 financial well-being to spite their ex-spouse.
6 However, a proper application of the test
7 should take into account the prospective
8 income that the debtor should earn and the
9 debtor's reasonable expenses.

10 Jodoin, at 142. In this case, there is no evidence that Debtor has
11 been depressing his earning ability, inasmuch as he has been an
12 automobile salesman for fifteen years and is not qualified by
13 education or experience to enter some other field that is far more
14 lucrative. Further, the evidence shows that he works fulltime and
15 has been making an effort to increase his earnings by moving to a
16 new job and working overtime. Under the circumstances of this
17 case, the disposable income test of §1325(b)(2) is the appropriate
18 means for measuring Debtor's ability to pay. With respect to that
19 test in the context of Chapter 13, In re Smith, 207 B.R. 888 (9th
20 Cir. BAP 1996) holds that the totality of the circumstances must be
21 considered on a case by case basis.

22 The evidence did not suggest that Debtor has any assets of
23 value, or that he receives any income other than that from his
24 employment. His paycheck stubs show that, for the six month period
25 ending two months prior to trial, his average monthly income was
26 \$2,125 gross and \$1,851 net. His monthly expenses totalled \$2,143,
27 with none of the listed items appearing extravagant (or, in the
28 language of §1325(b)(2), "not reasonably necessary" for support).
In fact, the list may be understated because it includes only \$20
for medical and dental expense -- Debtor's paycheck stubs show that
health insurance premiums are deducted from his gross earnings, but

1 some part of his daily testing or other medical expense is probably
2 not covered and might well exceed \$20 per month (e.g., over time,
3 dental work can be very expensive). And the list is incomplete
4 because it fails to reflect the \$60 minimum credit card payments
5 (which will not soon retire balances totalling \$1,000 and accruing
6 interest at the rate of 18%). Further, there is no provision for
7 contributions to a retirement plan or savings account, which would
8 be reasonably necessary expenses for a 45 year old man with health
9 problems. Debtor's paycheck stubs show that his monthly net income
10 exceeded the understated monthly expense total of \$2,143 only once
11 in the six month period represented, in April 2002 when it was
12 \$2,400. It is true that Debtor was earning more by time of trial,
13 having just returned to work at Toyota, where the two best years of
14 his career had been spent in 2000 and 2001 -- but his tax returns
15 show that his adjusted gross income in those years was \$36,707 and
16 \$33,009, respectively, which is only approximately \$3,000 per month
17 gross. Moreover, Debtor testified without contradiction that the
18 business is both "commission driven" and highly seasonal, with some
19 months much slower than others (during which the salesforce might
20 be reduced) and no certainty beyond the \$1,400 to \$1,500 monthly
21 guaranteed wage -- his paycheck stubs bear this out, dropping as
22 low as \$1,838 gross (\$1,681 net) in November 2001 and \$1,500 gross
23 (\$1,345 net) in March 2002. The evidence also showed that Debtor
24 is not always able to pay his expenses in full from income, such
25 that he is frequently late with rent and is paying only the minimum
26 possible on his credit cards. Finally, although Debtor testified
27 that his health does not "generally" affect his ability to work, he
28 also said that there are times when he cannot concentrate well

1 enough to deal with customers and he has had to miss work for "a
2 couple of weeks" due to his illness -- he testified without
3 contradiction that his prognosis is "bad and not going to get
4 better", so it could well be that his ability to earn will decline
5 rather than remain constant or improve.

6 With respect to Debtor's charitable donations of \$2,291 in 2000
7 and \$3,350 in 2001, he testified that "that's where my money is
8 going to go if I have any extra", such as tax refunds or available
9 cash during the year. The Court notes that Debtor may not really
10 have "any extra" to give to charity, because he is incurring 18%
11 interest on credit card balances that are being reduced only by
12 minimum monthly payments, and he is not saving for retirement.
13 Moreover, as Debtor's attorney pointed out in argument at trial,
14 Debtor's income tax liability (which was approximately 7% to 8% of
15 gross income for 2000 and 2001) would increase and offset the
16 charitable contributions to some unknown extent if he did not have
17 the benefit of deductions for the donations. Further, the
18 disposable income test of §1325(b)(2) expressly permits charitable
19 contributions up to 15% of gross earnings within the year of the
20 donation, and the amounts donated by Debtor in 2000 and 2001 are
21 well within that limit.⁹

22 If Debtor had some assurance of net earnings at a level
23

24 ⁹ An argument could be made that charitable donations
25 should not be permitted to absorb assets that could otherwise be
26 devoted to payment of a debt within the scope of §523(a)(15). For
27 example, the fact that Congress included the charitable
28 contribution provision in §1325(b)(2) concerning post-petition
expenses and other sections of the Code concerning pre-petition
transfers (§544, §546, §548 and §707(b)) while omitting it from
§523(a)(15) might mean that Congress did not intend to permit
charitable donations to be made at the expense of a debtor's family
or former spouse. But it is not clear that any surplus funds are
actually available in this case.

1 exceeding the amount "reasonably necessary" for his support every
2 month (i.e., including realistic expenses for retirement savings
3 and reduction of credit card debt, but possibly excluding
4 charitable donations), then he might be considered able to pay the
5 debt that he owes to Creditor. But the evidence at trial did not
6 suggest that either of those conditions exists now or is likely to
7 exist in the near future.

8
9 E. Detriment Test

10 As set forth above, the detriment test is not reached unless
11 Debtor is found able to pay, and that finding has not been made.
12 However, even assuming for the sake of argument that Debtor were
13 able to pay, he would prevail under the detriment test.

14 The detriment test requires a showing that discharge of the
15 subject debt "would result in a benefit to [Debtor] that outweighs
16 the detrimental consequences to" Creditor. Myrvang points out that
17 this test calls upon the Court to balance equities. The Bankruptcy
18 Appellate Panel in Jodoin upheld the Bankruptcy Court's result
19 without analysis of the test -- the Bankruptcy Court noted that:

20 Since the balancing occurs only when the debtor
21 does not lack the ability to pay, it follows that
22 the debtor's ability to pay is no more than one
23 factor to consider in what amounts to a "totality
24 of the circumstances" standard for the balancing
25 under § 523(a) (15) (B). [In re Morris, 193 B.R.
26 949, 952 (Bankr.S.D.Cal.1996)] (debt discharged
despite ability to pay). [¶] The §523(a) (15) (B)
balancing test gives the court the flexibility to
do justice, and even discharge the debt if
appropriate under the circumstances, when the
debtor has the ability to pay under
§523(a) (15) (A).

27 In re Jodoin, 196 B.R. 845, 855 (Bankr.E.D.Cal. 1996).

28 With respect to Debtor's benefit from discharge, his income is

1 subject to seasonal and other fluctuations beyond his control,
2 unlikely to improve significantly, and not always sufficient to
3 cover reasonably necessary expenses as they come due. Debtor is
4 already failing to provide for his retirement and pay off his
5 credit card balances that accrue interest at 18%, so adding the
6 expense of paying Creditor \$5,000¹⁰ (whether in \$250 monthly
7 installments as fixed by the State Court or at some other rate)
8 would merely make Debtor's current bad situation worse. Myrvang
9 holds that §523(a)(15) gives bankruptcy courts discretion to except
10 only part of a debt from discharge, but there does not appear to be
11 room in Debtor's budget for any extra expense. Assuming that
12 Debtor's current expenses were calculated at a realistic level, and
13 assuming that Debtor's income were to return to what it was in 2000
14 and 2001 when he worked for Toyota as he now is, the income would
15 still continue to fluctuate due to the nature of the business and
16 be likely to fall short of expenses in some months.

17 As for the detrimental consequences of discharge to Creditor,
18 she is not a wealthy or young person, her earnings have been
19 limited by some periods of unemployment and temporary employment
20 during the past two years, and she could certainly use the \$5,000
21 at issue here. Nevertheless, it does not appear that her
22 circumstances would be significantly affected by \$5,000 one way or
23 the other. According to Creditor, she is able to live on her
24 income but cannot retire credit card debt consisting of some \$800
25 for department store accounts plus approximately \$21,600 on other
26 accounts that was incurred during the parties' marriage. But if

27
28 ¹⁰ The record does not indicate whether the State Court's
order provided for the \$5,000 to accrue interest while being paid
in monthly installments.

1 Creditor were to receive \$5,000 from Debtor immediately and apply
2 it to the accumulated credit card debts, she would still owe over
3 \$17,000 on those liabilities and the evidence shows that she could
4 not pay that amount from her income either. Further, Creditor owns
5 an unencumbered house that she valued at \$300,000 in 1999 -- the
6 property is likely to have appreciated but, even if it has not, its
7 equity vastly exceeds Creditor's total indebtedness. Moreover,
8 Creditor testified that she was able to have an attorney negotiate
9 a reduction of one credit card debt from over \$10,000 to \$1,250,
10 but has not attempted to do the same with the other accounts.

11 Even if Debtor had the ability to pay, discharge of the subject
12 debt would harm Creditor less than it would benefit Debtor.
13 Creditor was unemployed at time of trial but has a history of doing
14 clerical work that pays enough for her to live on, and was
15 receiving unemployment benefits that covered what she referred to
16 as her "basic living expenses". By contrast, Debtor's fluctuating
17 monthly income has not always exceeded his unrealistically low
18 expense budget, and the business is subject to seasonal reductions.
19 But even if the parties' income circumstances were equal, the fact
20 remains that Creditor has far greater resources than Debtor does --
21 Debtor owns no real property or other assets of value, whereas
22 Creditor owns an unencumbered house that was worth \$300,000 three
23 years prior to the time of trial. Finally, the subject debt is
24 less than 25% of what Creditor needs to retire all of her
25 liabilities, so receiving it would confer only a minor benefit upon
26 her and being deprived of it would not significantly increase her
27 existing burdens. Under all of these circumstances, discharging
28 the subject debt will have relatively little impact on Creditor,

1 while relieving Debtor of that additional expense will avoid
2 stretching his already strained income even further.

3

4

CONCLUSION

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6

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For the reasons set forth above, the \$5,000 debt arising from
the March 13, 2000 order in the parties' marital dissolution action
is not excepted from discharge under §523(a) (15).

8

9

Counsel for Debtor shall submit a form of judgment so
providing, after review as to form by counsel for Creditor.

10

Dated:

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ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

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