

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 04-40764 )  
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BRADLEY W. O'FARRELL )  
 )  
Debtor )  
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MOLLIE O'FARRELL )  
 )  
Plaintiff )  
 )  
vs. ) PROC. NO. 04-4023  
 )  
BRADLEY W. O'FARRELL )  
 )  
Defendant )

**DECISION ON DISCHARGEABILITY**

At Fort Wayne, Indiana, on April 2, 2006

By this adversary proceeding, the plaintiff has asked the court to declare that the debtor's obligation to her constitutes a nondischargeable debt pursuant to § 523(a)(15) of the United States Bankruptcy Code. At issue are two separate obligations imposed by the divorce agreement. The first obligation is that of the debtor to pay one-half of the plaintiff's student loans. The second is the \$10,000 remaining on the judgment set forth in the dissolution decree. Following trial and the filing of post-trial briefs, the matter was taken under advisement.

The marriage of Brad and Mollie O'Farrell was dissolved on May 11, 2000 in the White Circuit Court. Pursuant to the property settlement agreement incorporated into the divorce decree the debtor was to, among other things, pay one-half of the student loans incurred by the plaintiff during the marriage, as those payments became due, and also to pay the sum of \$50,000 in semi-

annual installments. Of the latter obligation, a balance of \$10,000 remains to be paid.

As it applies to this case, § 523(a)(15) of the Bankruptcy Code<sup>1</sup> makes non-dischargeable debts which are “not of the kind described in [523(a)(5)]” but which are, nonetheless, obligations “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 . . .” 11 U.S.C. § 523(a)(15). These types of domestic relations obligations will be discharged only if the debtor does not have the ability to pay the debt from income or property not reasonably necessary for the maintenance or support of itself or a dependant, or if discharging the debt would result in a benefit to the debtor outweighing the detrimental consequences to its spouse, former spouse, or child. 11 U.S.C. § 523(a)(15)(A) & (B).

The plaintiff bears the initial burden of proving that the debts in question do not fall into § 523(a)(5) and, if they do not, that they were “incurred by the debtor in the course of a divorce or in connection with a divorce decree or similar agreement.” Here, there is no question that these debts are outside the scope of § 523(a)(5). Neither is there any question that the \$10,000 balance of the judgment is a debt which was incurred in the course of the divorce or in connection with the divorce decree. The court, however, questioned whether the obligation regarding the student loans was an obligation incurred in connection with the divorce decree, because it appeared that there was no explicit obligation that the one party would indemnify or hold the other harmless from the debt, neither was the debtor to make payments to anyone in particular. As a result, the court directed the parties to file briefs directed to that issue. Having considered the issue, the court concludes that there is such an obligation. Prior to the divorce, Mr. O’Farrell did not have any obligation with regard to

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<sup>1</sup>This case is governed by the law as it existed prior to October 17, 2005.

the student loans. They were incurred by Mrs. O'Farrell in her name alone. The divorce decree changed that, at least to some extent, and imposed an obligation on him to make payments, as they became due and owing, for half of the amount due on the loans. Although the decree does not provide that the parties would indemnify or hold the other harmless, the debtor had no obligation to pay this debt until ordered to do so by the state court in connection with the divorce. It constitutes a debt for the purpose of § 523(a)(15). Accord, In re Gibson, 219 B.R. 195 (6th Cir. BAP 1998); In re Beggs, 314 B.R. 401, 416 (Bankr. E.D. Ark. 2004); In re Burton, 242 B.R. 674, 678 (Bankr. W.D. Mo. 1999); In re McClain, 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998).

Since the debtor has an obligation to pay both debts under the divorce decree, the burden shifts to the debtor/defendant to prove either of the two exceptions that would make the debt dischargeable. The first is that he “does not have the ability to pay such debt from income or property of the debtor not reasonably necessary for the maintenance or support of the debtor or a dependant of the debtor...” 11 U.S.C. § 523(a)(15)(A). The court concludes that the debtor has failed to carry his burden on this point.

According to the debtor's testimony, he generally makes about \$50,000 per year, but recently has been making about \$20,000 in addition to that by taking advantage of overtime opportunities presented by his employer. Even though the debtor says that his expenses completely deplete his income, some of those expenditures include things not reasonably necessary for the maintenance or support of the debtor or his dependants. For example, he contributes six percent of his income to his retirement plan which has a current balance of about \$20,000. Voluntary contributions to retirement plans are not always reasonable and necessary expenses. See e.g., In re Hansen, 244 B.R. 799, 802 (Bankr. N.D. Ill. 2000)(examining contributions to retirement plans for determinations of

disposable income in the Chapter 13 context). Simply terminating the contributions to that plan would give the debtor at least \$250 each month with which to pay these debts. Furthermore, the debtor has the ability to cash-out at least a portion of his retirement account to help pay them. The debtor has resources available to him to pay these debts, even if doing so may be less than pleasant.

Since the debtor has failed to prove that he lacks the ability to pay, the court must proceed to determine whether the evidence presented satisfies the second alternative exception under §523(a)(15)(B). The debtor's obligation to the creditor will be discharged if he can prove that doing so "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)(B). This evaluation is based upon the totality of the circumstances and requires the court to balance the economic consequences to both the debtor and the creditor of discharging the debt. Crosswhite, 1996 WL 756745 at \*7-8.

The plaintiff and debtor/defendant each maintain custody of and support two of the four children from their marriage. The debtor/defendant resides with his daughter and Teresa Cobalt in a house owned by Ms. Cobalt's mother. His son resides closer to the college he is attending. Debtor testified that he is unable to purchase a house or car of his own due to his financial constraints. He is, however, able to meet his monthly expenses without Ms. Cobalt's assistance, and is able to contribute to his employer-provided retirement plan and pay his son's college tuition.

The plaintiff resides with a gentleman friend, Albert Fritz, in his home with the parties' other two children. Although she is currently employed, the income she receives does not enable her to support herself and her children. She relies on Mr. Fritz's financial assistance, without which she has a monthly deficit of about \$2,000. During her marriage to the debtor, the plaintiff attended college and pursued a career in nursing. After becoming seriously ill a few times, she was advised

that it might behoove her to find another line of work where she would be less likely to contract illnesses and she has done, although at a reduced level of compensation, causing her to have to rely upon Mr. Fritz.

Although the issue is a close one, the court concludes that the debtor has failed to meet his burden. Though the debtor testified that his living circumstances are less than ideal and that his future income potential is uncertain, the debtor has not demonstrated that the benefit he would receive outweighs the detriment to the plaintiff should the debts be discharged. The plaintiff's financial condition is also less than ideal. Without substantial financial assistance, she is not able to pay her bills as they come due. If the debtor's obligation is discharged, bankruptcy seems to be her only option. Under these circumstances, the debtor has failed to prove that his benefit outweighs her detriment.

Debtor's obligation to pay half of the student loan debt and the \$10,000 remaining on the judgment as set forth in the dissolution decree are not dischargeable. Judgment will be entered accordingly.

/s/ Robert E. Grant  
Judge, United States Bankruptcy Court