

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
CRAIG HARRY JERINA,)	CASE NO. 02-32129 HCD
)	CHAPTER 7
DEBTOR.)	
)	
)	
PAMELA J. MAIN,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 02-3066
)	
CRAIG HARRY JERINA,)	
)	
DEFENDANT.)	

Appearances:

Joseph D. Bradley, Esq., attorney for plaintiff, 105 East Jefferson Boulevard, Suite 512, South Bend, Indiana 46601; and

Tamara L. Renner, Esq., attorney for defendant, Banik & Renner, 217 South Fourth Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 26, 2003.

Before the court is the Complaint Objecting to Dischargeability of Debts filed by Pamela J. Main (“plaintiff” or “Pamela”) against her former spouse Craig H. Jerina (“defendant” or “Craig”) on July 10, 2002. The defendant filed a timely answer on August 6, 2002. Trial on the complaint was held on January 14, 2003. The court then took the matter under advisement. For the reasons that follow, the court grants the plaintiff’s complaint.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The marriage of the plaintiff and the defendant was dissolved on August 30, 2000, by Decree of Dissolution of Marriage in the Elkhart Circuit Court. The Decree entered judgment in favor of the plaintiff and against the defendant in the amount of \$100,000 as an alimony judgment, payable as periodic spousal maintenance in weekly payments of \$467.91 for 260 weeks, commencing on September 15, 2000. *See* Jt. Ex. 1, ¶ 16.¹ In addition, the Decree ordered the plaintiff to receive weekly land contract payments on the sale of the marital residence, to make timely payments on the mortgage, and to remit one-half of the remaining amount to the

¹ Paragraph 16 of the Decree of Dissolution of Marriage provides:

Wife is granted an alimony judgment against Husband in the sum of One Hundred Thousand Dollars (\$100,000) payable to the Wife as periodic spousal maintenance for two hundred sixty (260) weeks in the amount of Four Hundred Sixty-seven and 91/100 dollars (\$467.91) per week commencing on the 15th day of September, 2000. The Husband will secure these payments by a decreasing term policy of insurance on his life in an amount sufficient to cover the unpaid balances under paragraph # 16, naming Wife as beneficiary. The spousal maintenance payments provided in this paragraph shall be treated for all purposes as alimony pursuant to Section 71 of the Internal Revenue Code. All payments shall be deductible to Husband and taxable to Wife for income tax purposes. In the event of Wife's death, all payments hereunder shall terminate.

plaintiff, beginning September 1, 2000.² The complaint alleged that the alimony judgment against the defendant, the current unpaid balance of which is approximately \$80,000, is a nondischargeable debt under 11 U.S.C. § 523(a)(5) and that the other obligations of the defendant were nondischargeable under § 523(a)(15).³

The defendant filed his answer, generally denying the complaint, on August 6, 2002. Trial on the complaint was held on January 14, 2003. When the trial commenced, the parties agreed that the only obligations remaining to be resolved were the alimony judgment and the land contract sale.

The first person to take the witness stand at trial was the defendant Craig Harry Jerina. He testified that he and Pamela, the plaintiff, were married in 1980 and that they had one child, Matthew, who now was almost 22. The defendant operated Corporate Graphic Solutions (“CGS”), which sold business forms and specialty products, from 1982 until he sold the business for \$4,000 in October 2001. He now is self-employed as All-Source Graphics, Inc., doing business as American Solutions for Business. He is the sole shareholder and employee, he stated, and he sells business forms and specialties, as he did in Corporate Graphic Solutions. The witness has service agreements with D. C. Pummill Business Forms, Inc., Writeguard Business Forms, and American Solutions for Business. He uses these businesses as a billing service; they process orders, send invoices and payables, keep a percentage as a processing fee, and pay him the remaining proceeds. He pointed out, as an example, that Pummill paid him \$19,742 in proceeds for his work, after they deducted a processing fee. He added

² Paragraph 12 of the Decree of Dissolution of Marriage provides:

The parties have sold the marital residence . . . on land contract, and each [has] received net proceeds of \$30,000. The \$15,642.00 in proceeds held in a trust account shall be distributed to Wife. Husband shall receive the weekly land contract payments. Husband shall timely pay the mortgage and Husband shall remit one-half of the remaining amount weekly to wife, beginning September 1, 2000.

³ The Decree ordered the plaintiff to pay certain debts to KeyBank (for a horse trailer loan, Visa account, and line of credit), MBNA (for the L.L.Bean debt), and Marathon. She also was required to hold the plaintiff harmless from those debts. However, at the commencement of the trial, the parties agreed that these obligations had been satisfied or no longer represented an obligation of the plaintiff.

that his contracts with the companies do not restrict him from working for other companies. He could continue to search for jobs, therefore. However, he believed he now was too overqualified to be hired as a sales representative.

The dissolution of marriage action was filed on October 7, 1999, and the decree was issued August 2000. *See* Jt. Ex. 1. During the pendency of the dissolution, Craig testified, he paid Pamela provisional maintenance payments of \$450 a week and support payments for their son. Once the decree was entered, Craig's obligation under the judgment was \$467.91 weekly in alimony payments; no support payments were required. Craig was expected to pay his son's college expenses and a weekly amount, \$41 per week, for spending money as long as he remained a full-time student. He also was ordered to maintain medical insurance for their son.

The defendant testified that the decree awarded the assets and liabilities of CGS to the defendant, but required him to indemnify the plaintiff and to hold her harmless from all liabilities of the business. *See id.* ¶ 18. The value of the business was discussed when the decree was being negotiated, and his accountant arrived at a book value of about \$12,000, he stated. According to the defendant, his expertise as its chief operator, manager and sales person was the company's main asset.

On cross-examination, the defendant testified that he was paid a salary as a salesman until he got fired at the end of 2001. He explained that he and Al Johnson, of Johnson Sales Corporation, merged their businesses in July 1998. The merger worked well for a couple of years; gross sales were around \$1.8 million, and the defendant's salary was around \$112,000.⁴ He also had the use of three company vehicles and cell phones, and entertainment was paid for by the company. He even received a distribution from the business of around \$23,000. After he lost his interest in the business, however, he had to pay all his own expenses. When

⁴ The defendant's 2000 federal income tax return lists his salary from Corporate Graphics Solutions as \$112,996. His 2001 federal income tax return lists his salary as \$112,306. *See* Jt. Exs. 10, 11.

he signed the agreement to sell the business, the company was doing well. However, both the September 11 calamity and the recession negatively affected his business, just as business was affected everywhere. The defendant testified that he applied for many jobs without success. For that reason, he started his own company out of necessity. At that point, he considered trying to modify the decree and even considered filing bankruptcy.

The defendant presented a list he had prepared of the "Items Paid to Pam." *See* Def. Ex. 1. He read the payments to the court: They included \$450 a week in maintenance for 2000 (which is an annual amount of \$23,400); her nursing school costs; the down payment on her Dodge Dart; their son's support (tuition, housing on campus, and \$41 a week); half of his retirement; half of the sale of their Dodge truck; half the down payment on the land contract; and half the proceeds from the house sale, minus the realtor's fee (which came to \$43,000 for each of them). He noted that his wife was listed on the books as an employee of the company and was paid \$23,400 in 1999, but she wouldn't work for the company. The defendant also listed alimony payments of \$21,056 to Pamela in 2001.

The defendant testified that the \$100,000 in the divorce decree was a compromise value because they could not agree on a valuation of the business. He stated that, according to his attorney, if it was called alimony, he could deduct it from his taxes but Pamela would need to report it as income.

In 2002, he stated, his total expenses amounted to \$57,196, of which the business expenses were \$29,315.20. His total income was \$32,107.52. *See* Jt. Exs. 2, 3. The difference was paid by withdrawing retirement money out of an IRA, he explained. He does not expect to do better in 2003. He stated that he liquidated the retirement benefits to meet his obligations to his wife and son.

Rebecca Butler, an attorney in Elkhart for twenty years in domestic relations, testified that she was the attorney for the plaintiff in the divorce proceeding. She stated that the parties had agreed on the spousal maintenance of \$450 per week and the support payments for their son during the pendency of the dissolution.

They could not agree on the value of the business, however. According to Ms. Butler, Craig had argued that the business was worth nothing, that he himself was the business. She testified that Craig said he would quit the business, let Pamela settle the debts, go down the street and start another business. When asked whether the value of the business was ever placed at \$200,000 or higher, she said that not even the wife's business valuation expert got to a figure that high. Since the business evaluator told her it would cost \$6,000-10,000 to have a full valuation of the business, the plaintiff decided to use the figures of the defendant's CPA.

Ms. Butler testified that Pamela had been in a nursing LPN degree program involving 60 hours of work and classes a week, a program which ended in December 2000. Pamela could not be employed while she was attending school, she said. She wanted to become a Registered Nurse, but stopped with the one-year LPN degree. The witness was asked about paragraph 16 of the decree, which granted the wife an alimony judgment "of \$100,000 payable to the Wife as periodic spousal maintenance for 260 weeks in the amount of \$467.91 per week." Jt. Ex. 1, ¶ 16. She explained that Craig was paying Pamela \$450 each week before the divorce and that Pamela had depended on that amount. The new provision in the decree was set at \$467.91. In addition, custody of Matt was awarded to Pamela. The decree was entered in August 2000.

The witness stated that, on October 2, 2001, Craig filed a petition seeking modification of the spousal maintenance because his circumstances had changed and he no longer reasonably could pay that amount. Ms. Butler, as counsel for the wife Pamela, filed a memorandum of law opposing the petition, asserting that maintenance was not modifiable under Indiana law.⁵ After the state court held a hearing on the issue, the attorney for the defendant withdrew the petition.

⁵ Ms. Butler testified that, under Indiana law, a spousal maintenance order cannot be modified by the court when the parties agreed to it in their settlement documents. She entered in evidence her memorandum of law to the Elkhart Circuit Court and cited Indiana Code 31-15-2-17. See Pl. Ex. 5. She also testified that the maintenance decree could not have included the value of the business under Indiana law, because future income is not a divisible asset in a dissolution action.

Ms. Butler testified that, under the decree, Craig agreed to pay the accumulated marital debts. None of the obligations was assigned to Pamela. *See id.* ¶ 10. After the marital residence was sold by land contract, the plaintiff and defendant each received about \$45,000 from the home sale because the sale proceeds were shared by the two of them.

The next to testify was Max Walker, Jr., an attorney in Elkhart for thirty years who has focused on domestic relations almost exclusively for the last ten years. He represented the defendant in the divorce action. He stated that Craig's business interest was the contentious issue. According to the attorney, he and Craig relied on the valuation provided by the corporate accountant because a formal business valuation was too expensive. Focusing on the "alimony judgment" provision, the attorney agreed that it granted the wife \$100,000. That amount represented her half of the value in the husband's business and the marital estate as a whole, he testified. It was called alimony to make it deductible to the husband and reportable on the wife's taxes. He stated that, from his point of view, it was called alimony for tax purposes. The attorney pointed out that paragraph 18 of the decree stated that the "Husband is awarded the parties' entire ownership of Corporate Graphic Solutions, Inc., subject to his assumption of all liability in connection therewith." He believed that Craig was awarded the business and that Pamela was given a balancing asset, the \$100,000. As he explained, those were the only items of any substantial significance, and that allocation was a division of the property from the marriage. He testified that there was an actual six-hour mediation of the business valuation of CGS. He felt that the defendant's opinion of valuation vacillated during the negotiations. Either he or the accountant suggested that the balance sheet value of the business was \$10,000.

In closing, the witness stated that he had handled many divorces and knew that decrees of alimony, maintenance and support were nondischargeable in bankruptcy. He conceded that he knew that paragraph 16 would count as a nondischargeable debt.

The plaintiff Pamela Main then took the stand. She is employed as an LPN nurse in the emergency room of Elkhart General Hospital. She testified that her income came from the hospital and from the land contract payments that Craig split with her. Reviewing her federal tax return for the year 2000, she stated that her income that year was \$2,261. She was a full-time student that year. Her federal tax return for 2001, when she worked at Elkhart General Hospital as a nurse, reflected an income of \$25,466. She earned no other substantial income, she testified; in fact, she had withdrawn funds from her retirement account to fix the roof on her house that year. *See* Jt. Exs. 13, 14. Her pay stub from Elkhart General for the year 2002 indicated \$34,320 in gross income. *See* Jt. Ex. 16.

The plaintiff testified concerning her expenses. She purchased a home on a land contract in August 2000 for \$130,000. She put down \$30,000 (the funds she received from the sale of the other house) and makes \$890 monthly payments. She testified to a list of her expenditures:

\$890 land contract monthly payments

\$319 monthly automobile payments

Support for son Matt when he lives with her (when not on campus at Ivy Tech)

\$2,400-2,600 in monthly household expenses:

\$70 a month for the telephone.

\$60 a week for gasoline (\$20 for her, \$40 for Matt)

\$300 for utilities a month

\$400 a month for groceries

\$1,000 a year for real estate taxes

\$600 for house insurance

\$350 every six months for her car insurance

\$550 every six months for Matt's car insurance

The plaintiff testified that those figures offered a thumb-nail sketch of her monthly expenses. She added that the list should include the costs for clothing, laundry, dry cleaning, repairs on home or automobiles, and other items. For that reason, she said, her expenses are higher than those figures reflected. She testified that her net take-home pay was about \$2,100-2,200 a month. If she did not have the \$467 monthly spousal payment, she stated,

she would not be able to meet her living expenses. It was her expectation that the \$467 was a continuing payment that was part of her income. Furthermore, she had borrowed from her retirement funds, to make repairs on her home, and had not continued her education to get an RN degree because she could not afford the payments to continue her studies.

At the conclusion of her testimony, the parties rested and presented their concluding arguments. The court then took the complaint under advisement.

Discussion

The issues before the court are (1) whether the \$100,000 “alimony judgment” is classified as alimony or a property settlement, and whether it is dischargeable in the defendant’s bankruptcy; and (2) whether the land contract payments that the defendant is required to share with the plaintiff constitute a property settlement award that is dischargeable in his bankruptcy. If those obligations to his former spouse are in the nature of alimony, maintenance or support, they are nondischargeable under 11 U.S.C. § 523(a)(5). If the obligations are in the nature of a division of the marital assets, they are dischargeable. *See Kolodziej v. Reines (In re Reines)*, 142 F.3d 970, 972 (7th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). The court, when considering these issues, follows a few guiding principles:

First, whether or not the debt is a maintenance obligation is a matter of federal bankruptcy, rather than state, law. Also, we are not bound by the labels attached to the obligation. Next, we note that the exceptions to discharge of a debt are construed strictly against a creditor and liberally in the debtor’s favor. Lastly, we observe that a party seeking to establish an exception to discharge bears the burden of proof.

Id. (citing cases).

1. 11 U.S.C. § 523(a)(5)

The Bankruptcy Code reflects policies that protect a debtor and a debtor’s spouse and children. When the debt at issue arises from a divorce or settlement agreement, however, the “policy of protecting and

favoring the debtor is tempered.” *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998). A marital obligation that arises from a divorce decree is excepted from a bankruptcy discharge if the obligation is owed to a former spouse or child and is a debt for alimony, maintenance or support of the debtor’s former spouse or child.

11 U.S.C. § 523(a)(5);⁶ *see also In re Reines*, 142 F.3d at 972; *DeKalb County Div. of Family and Children Services v. Platter (In re Platter)*, 140 F.3d 676, 682 (7th Cir. 1998) (noting that § 523(a)(5) “is a carefully drafted statute”). The party contesting the dischargeability of such an obligation has the burden of establishing, by a preponderance of the evidence, that the debt is actually in the nature of alimony, maintenance or support; however, this exception is construed more liberally than the other § 523 exceptions from discharge. *See Crosswhite*, 148 F.3d at 882 (citing 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 523.05 (15th ed. rev. 1998)); *Nay v. Hegerty (In re Hegerty)*, 227 B.R. 852, 856 (Bankr. S.D. Ind. 1998).

A bankruptcy court determines whether an obligation is in the nature of alimony, support, or maintenance by looking to federal bankruptcy law, *see Hegerty*, 227 B.R. at 856, but it looks to state law for guidance.

The main principle guiding bankruptcy courts in determining whether a debt is nondischargeable alimony, maintenance or support is the intent of the parties or the state court in creating the obligation and the purpose of the obligation in light of the parties’ circumstances at the time. If the intent is not explicitly expressed, the bankruptcy court must attempt to infer the intent by examining the underlying facts of the case.

⁶ Section 523(a) provides that an individual debtor is not discharged from any debt –

. . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that –

(A) such debt is assigned to another entity . . . ; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5).

4 *Collier on Bankruptcy* ¶ 523.11[6] at 523-82; *see also In re Reines*, 142 F.3d at 973 (stating that the classification of the debt depends on the intent of the parties).

If no clear intent is expressed, the court must look beyond the labels given by the parties or the court in an agreement and must consider, instead, such factors as the relative incomes and needs of the parties when the obligation was established, the amount and outcome of the property division, whether the obligation terminates at a named time, and whether the payments are made in a lump sum or in regular payments over a long term. *See 4 Collier on Bankruptcy* ¶ 523.11[6] (listing factors). In this circuit, the factors to consider in assessing the parties' or the court's intent include: (1) whether the decree includes a provision for payment to the former spouse; (2) whether the provision creating the obligation is situated in the midst of provisions allocating property; (3) whether there is an indication that the provision was intended to balance the relative income of the parties; and (4) whether the provision describes the character and method of payment. *Balvich v. Balvich (In re Balvich)*, 135 B.R. 327, 333 (Bankr. N.D. Ind.) (listing the factors found in *In re Coil*, 680 F.2d 1170, 1172 (7th Cir. 1982), and *In re Woods*, 561 F.2d 27, 29 (7th Cir. 1977)), *aff'd*, 135 B.R. 323 (N.D. Ind. 1991). However, the end result of such an exercise can be "a mixed bag with factors pointing in both directions." *In re Reines*, 142 F.3d at 973.

In this case, the plaintiff asserts that the "alimony judgment" provision is exactly what the state court decree says it is — periodic maintenance payments over a five-year period. It was a continuation of the defendant's former weekly payments to his wife and of the agreed temporary maintenance payments of \$450 weekly during the pendency of the dissolution. With the advice of counsel, the parties labeled the \$100,000 judgment "alimony" and for the purpose of "spousal maintenance." The defendant now contends, however, that the term "alimony" was used in order to save tax dollars, and that the award actually was a property division, an allocation of the value of the defendant's interest in his business, CGS.

The court first finds that the parties agreed to an alimony provision and incorporated it into the settlement agreement that was approved by the state court. In Indiana, a settlement agreement that becomes part of a final divorce decree is a binding contract. See *Rothschild v. Devos*, 757 N.E.2d 219, 223 (Ind. Ct. App. 2001). When the intent of the parties is expressed clearly in the language of that agreement in dissolution proceedings, the unambiguous language controls. See *Cochran v. Rodenbarger*, 736 N.E.2d 1279, 1281 (Ind. Ct. App. 2000). In considering whether the obligation was in the nature of alimony, maintenance or support, as those terms are used in § 523(a)(5), therefore, the court finds significant the provision's express and clear designation of "alimony judgment" and "periodic spousal maintenance." See *In re Balvich*, 135 B.R. at 325 (stating that "[t]he labeling of the obligation as alimony and providing a separate section in the agreement points toward a decision that it was in the nature of support"); see also *Hegerty*, 227 B.R. at 857 (noting that, "when the parties wanted to make it clear that a debt was in the nature of support, they knew how to do it").

However, the court may rely on state law only for guidance; it must determine whether the obligation is nondischargeable under § 523(a)(5) by looking to federal bankruptcy law. In that regard, the court must ascertain the intent of the parties and the divorce court when it created the obligation: whether, at the time the divorce decree was entered, the parties and court intended to provide maintenance or to divide marital property. See *Hill v. Hale (In re Hill)*, 133 B.R. 126, 139 (Bankr. N.D. Ind. 1989); see also *Merrill v. Merrill (In re Merrill)*, 252 B.R. 497, 507 (B.A.P. 10th Cir. 2000); *Kessel v. Kessel (In re Kessel)*, 261 B.R. 902, 908 (Bankr. E.D. Tex. 2001). The language of the decree is evidence of intent but is not dispositive; the court must examine the circumstances and look beyond the labels given to the debts. See *Mitchell v. Mitchell-Long (In re Mitchell)*, 132 B.R. 585, 587 (S.D. Ind. 1991).

The court begins with the clear language of the decree, which describes the character and method of payment of the obligation. Paragraph 16 indicates that the parties intended weekly spousal maintenance payments of \$467.91 for a period of 260 weeks. The plaintiff testified that the provision was meant to balance

her lack of income: The parties intended these payments as a continuation of the payments she had received prior to and during the pendency of the divorce as maintenance payments because she depended on those funds to cover her living expenses while she was in school. However, the defendant testified that he actually intended the payments to be property settlement but labeled them “alimony” in order to receive a tax benefit. The divorce decree’s paragraph 16 states that the spousal maintenance payments “shall be treated for all purposes as alimony pursuant to Section 71 of the Internal Revenue Code.” Section 71, found at 26 U.S.C. § 71, establishes that maintenance or alimony payments are included in the wife’s gross income and are deductible from the husband’s income under 26 U.S.C. § 215. Such language has been found to indicate that the debt is maintenance rather than property settlement. *See, e.g., Johnson-McGunn v. McGunn (In re McGunn)*, 284 B.R. 855, 863 (Bankr. N.D. Ill. 2002); *In re Kessel*, 261 B.R. at 909.

Even though the language of the decree appears unambiguous, the court has considered the additional factors listed above to determine the true nature of the debt at the time of the divorce. At that time, there was a disparity in the income of the parties: Craig’s net income amounted to around \$150,000 and his business was thriving, but Pamela, in school and not working, had virtually no income. The defendant has argued that the obligation was a property division, a sharing of the value of his business, CGS. However, the evidence of record did not present a definitive valuation of that business. No witness suggested that the business was worth \$200,000 at the time of the divorce and that Pamela’s share was therefore \$100,000. The only values suggested were the accountant’s book value of around \$10,000 or \$12,000. The debtor also testified that he sold his part in the business for \$4,000. The court, considering the defendant’s assertion that the \$100,000 judgment actually was the plaintiff’s half of the property division of the value of his business, determines, in light of the dearth of evidence concerning valuation, that the defendant’s assertion lacks credibility.

The court also finds that the payments were intended to offset the inequality in their relative economic positions when they divorced. As such, it determines that the \$100,000 obligation is in the nature of alimony and

maintenance, as it was labeled. The court will not allow the debtor to change his position, now that he is in bankruptcy, and to claim that he intended the debt to be a property settlement instead of alimony. *See In re McGunn*, 284 B.R. at 866 (“The Court rejects [the debtor’s] flagrant attempt to recharacterize as property settlement the obligation he freely and expressly undertook in the State Court for the bankruptcy expediency of discharging maintenance owed to [his ex-spouse].”); *In re Kessel*, 261 B.R. at 909 (“Though not credible to this Court, if one accepts the Defendant’s contention that the payments were characterized as alimony as a ruse to reap some undeserved tax benefits, perhaps it is then ironic that the characterizations utilized were, in fact and in law, the correct and proper description of their nature.”).

The court determines that the plaintiff has met her burden of establishing, by a preponderance of the evidence, that the alimony judgment granted to the plaintiff in paragraph 16 of the Decree of Dissolution of Marriage is in the nature of alimony or maintenance. As such, it is excepted from the discharge of the debtor in his bankruptcy pursuant to 11 U.S.C. § 523(a)(5).

2. 11 U.S.C. § 523(a)(15)

The other issue before the court is the nature of the land contract sale debt. As paragraph 12 of the divorce decree recited, the marital residence was sold on land contract. Craig was ordered to receive the contract payments, to pay the mortgage, and to remit to Pamela one-half the surplus payment amount. The court now considers whether such an obligation of the defendant is excepted from the discharge of the defendant’s bankruptcy under § 523(a)(15), as the plaintiff’s complaint alleges.

It is generally the case that divorce property settlements are dischargeable in bankruptcy. However, § 523(a)(15) provides two exceptions to that rule by setting forth that an individual debtor is not discharged from any debt –

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of 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); *see Crosswhite*, 148 F.3d at 883. The plaintiff has the initial burden of proving that she holds a subsection (15) claim against the debtor, and then the burden shifts to the debtor defendant to prove that he falls within either of the two exceptions found in § 523(a)(15)(A) and (B). *See id.* at 884.

There was no dispute concerning the nature of the proceeds from the sale of the marital residence. The court finds that those proceeds are not a debt for alimony, support or maintenance, as described in § 523(a)(5), and therefore are not excepted from discharge under § 523(a)(5). Nevertheless, it recognizes that it was a debt incurred by the defendant in connection with the divorce decree. The plaintiff therefore has met her burden of demonstrating that her claim falls under § 523(a)(15). Now the court must determine whether the defendant has met his burden of proof under subsections (A) and (B) by a preponderance of the evidence. *See id.* at 884-85; *Turner v. McClain (In re McClain)*, 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998). The tests in (A) and (B) are in the disjunctive; therefore, the property settlement debt is excepted from discharge “unless the debtor can prove (A) he is unable to pay the debt, or (B) the benefit to the debtor of discharge outweighs the detriment to the creditor of discharge.” *In re McClain*, 227 B.R. at 885.

The “ability to pay” inquiry under § 523(a)(15)(A) requires the debtor to demonstrate, by a preponderance of the evidence, that he lacks the ability to pay the marital debts. In this case, however, the court finds that the defendant has not succeeded in establishing that he is not capable of paying this obligation. The debt in question is simply a distribution of funds: Each week, when the defendant receives the land contract payments, he is responsible for paying the mortgage and then remitting one-half of the remaining amount to the plaintiff. The

issue, in the view of the court, is not whether he is able to make that payment but whether “the benefit he receives from not having to pay the debt at issue is greater than the detrimental effects on his former spouse.” *Crosswhite*, 148 B.R. at 885.

Under subpart (B), therefore, the court must engage in an examination of the relative financial situations of the debtor and his former spouse in the totality of the circumstances. *See McClain*, 227 B.R. at 885 (citing *Crosswhite*, 148 F.3d at 883). The parties agreed that their current financial circumstances are similar; both are struggling and neither is generating much income. The court agrees, finding that the basic living costs of the plaintiff and the defendant — rent, utilities, telephone bills, and so forth — are roughly equivalent and are reasonable. There is a significant difference in terms of income over the past several years, however. The plaintiff’s adjusted gross income in 2000, when she was in nursing school, was \$2,261, and in 2001, when she was employed, was \$38,487. She testified that her income in 2002 was substantially the same and probably would remain the same in the future, because her salary was standard in the nursing profession. In contrast, the defendant’s adjusted gross income in 2000 was \$151,538, and in 2001 was \$118,020. He testified that his income in 2002, after he lost his job, could not find employment, and eventually began his own business, was estimated at \$32,107.52. The court has considered other factors, as well. It appears that, since the divorce, the expenses of each party have remained stable, their health is not a negative factor that would influence their financial condition, and their son may graduate from college this year. The defendant argued that the plaintiff can count on a paycheck, and the plaintiff responded that her salary never will increase significantly but that the defendant has the potential to earn a great deal more. The court takes note of the fact that the defendant is single but the plaintiff still supports their son when he is home. For that reason, the plaintiff’s household expenses may vary but the defendant’s expenses are his alone.

When the court applies a balancing test and compares their relative standards of living in the totality of the circumstances, it finds that the defendant’s standard of living is approximately equal to the plaintiff’s — as

they stated, their current financial circumstances are similar. The defendant has not told the court how much money remains from the land contract payments, after the mortgage is paid, to be split between the parties. Nor has he asserted that the benefit he would receive from discharging that debt outweighs the detrimental consequence to the plaintiff from discharging the debt. Without evidence to the contrary, the court determines that the defendant's standard of living will remain about equal to the plaintiff's if the debt is not discharged.

In the end, the court's determination must be based on the shifting burden of proof assigned to the parties under § 523(a)(15). It was the burden of the debtor, under § 523(a)(15)(B), to demonstrate that the benefit to him of discharging the debt outweighs the detrimental consequences to the plaintiff. When the defendant proves only that his standard of living is about the same as the creditor's if the debt is not discharged, then he fails in his burden of showing that the debt should be discharged. Indeed, courts consistently conclude that, when a debtor's standard of living is greater than or equal to the creditor's, a discharge of the debt is not warranted. On the other hand, if the debtor's standard of living falls materially below that of the creditor's, the bankruptcy court may grant a discharge under § 523(a)(15). *See, e.g., Chance v. White (In re White)*, 265 B.R. 547, 556-559 (Bankr. N.D. Tex. 2001) (citing *In re Molino*, 225 B.R. 904, (B.A.P. 6th Cir. 1998)); *see also Mesenbrink v. Eiklenborg (In re Eiklenborg)*, 286 B.R. 718, 723 (Bankr. N.D. Iowa 2002); *Courtney v. Traut (In re Traut)*, 282 B.R. 863, 870-71 (Bankr. N.D. Ohio 2002); *In re Williams*, 210 B.R. 344, 347 (Bankr. D. Neb.1997).

The court concludes that the defendant has the ability to pay the marital residence debt and that the benefit to the defendant of discharging his responsibility for the debt is substantially outweighed by the detriment to the plaintiff. Accordingly, the court determines that the marital residence debt owed by the defendant to the plaintiff is excepted from discharge under § 523(a)(15).

Conclusion

For the reasons stated above, the court grants the relief requested in the Complaint Objecting to Dischargeability of Debts of the plaintiff Pamela J. Main. It finds that the two debts at issue are excepted from discharge in the bankruptcy of the defendant Craig H. Jerina. The court determines that the “alimony judgment” described in paragraph 16 of the Decree of Dissolution of Marriage is in the nature of alimony or maintenance and therefore is nondischargeable pursuant to 11 U.S.C. § 523(a)(5). The court further determines that the land contract payments, proceeds of the sold marital residence, are a nonsupport property settlement award under 11 U.S.C. § 523(a)(15). Because the defendant was unsuccessful in his burden of proving § 523(a)(15)(A) or (B), the court finds that the marital residence proceeds are nondischargeable under that provision. The relief sought in the plaintiff’s Complaint therefore is granted.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT