U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
MATTHEW STEVEN HENRY,	§	**Case No. 03-80972-HDH-7**
	§	
Debtor.	§	
	§	
MATTHEW STEVEN HENRY,	§	
	§	
Plaintiff,	§	**Adversary No. 04-3122**
	§	
vs.	§	
	§	
JOI MARIE SHAHAN,	§	
	§	
Defendant.	§	
	§	

MEMORANDUM OPINION ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

Came before the Court for trial, the Complaint to determine dischargeability of debt, pursuant to §§ 523(a)(4) and (15),[1] filed by Matthew Steven Henry. This memorandum opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.[2] The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 151, and the standing order of reference in this district. This matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A), (I) and (O).

On January 4, 2005, this Court considered the above adversary proceeding in which

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[1] Counsel for Mr. Henry withdrew the § 523(a)(4) claim at trial, and any objection to the Debtor's exempt property statement contained in the complaint was abandoned and not pursued by Mr. Henry. Therefore, the Opinion will only discuss the § 523(a)(15) claim.

[2] At the end of the trial, the Court complimented counsel for both sides for a well tried case.

Plaintiff, Matt Henry, seeks to except from discharge certain indebtedness arising from his divorce decree with his ex wife, Joi Shahan, the Debtor herein ("Debtor"). In the divorce decree, Debtor assumed responsibility for certain credit cards in Plaintiff's name, but has made only a modest amount of payments on such cards. According to Plaintiff, the total amount unpaid by Debtor is about $22,000.

Bankruptcy Code Section 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 from 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.

For such a debt, the non debtor spouse bears the burden of proof to show that the debt at issue arose out of a divorce proceeding and is not covered by § 523(a)(5), then the burden shifts to the debtor to prove that either she is unable to pay the debt or the detriment of not discharging the debt outweighs the benefits of payment to the spouse. *See Garza v. Garza (In re Garza)*, 217 B.R.197, 205 (Bankr. N.D. Tex. 1998). The parties agree and the Court finds that Mr. Henry has carried his burden of showing that the debt arose out of a divorce decree and is not covered by

§ 523(a)(5). Therefore, the Court will address whether the Debtor has carried her burden to show either her inability to pay, pursuant to § 523(a)(15)(A), or that the benefit to her by discharging the debt would outweigh the detriment to Mr. Henry, pursuant to § 523(a)(15)(B).

"An analysis of the debtor's ability to pay must examine the debtor's present circumstances and future financial prospects including an ability to make minimum monthly payments, rather than a snapshot of the debtor's current ability to pay." *Garza*, 217 B.R. at 205. The primary test for determining a debtor's ability to pay under § 523(a)(15)(A) starts with the "disposable income test" found in § 1325(b), and then takes into account the prospective income that the debtor should earn and the debtor's reasonable expenses. *Id.* In the present case, the Debtor testified about her current finances. She is a body piercing specialist and her current husband is a tattoo artist. They live in Plano, Texas and work near downtown Dallas. They have a number of expenses, most of which appear to be common expenses for a couple.

The Debtor testified that they are behind in their payments on their vehicle, utilities and most of their other categories of bills and expenses. The Debtor owes taxes for the last 4 years. Apparently, the Debtor and her husband, both independent contractors, are not setting aside funds to pay taxes for this year. The bank account records admitted at trial suggest that Debtor uses most of the funds deposited on a monthly basis and often overdraws the account.

Applying the modified disposable income test discussed in *Garza*, it does not appear that Debtor and her current spouse are even able to pay their present obligations as they become due. They do not appear to have much by way of disposable income to apply to the obligations to plaintiff. The Debtor and her spouse appear to work in low paying jobs which also require them to pay part of their work expenses, as they are only independent contractors. Their present bills

exceed their present income. Prospectively, although Mr. Henry testified that he thought the Debtor and her spouse were "underemployed" and could get higher paying jobs, the Court finds that the evidence presented at the trial shows that any possibility of higher paying employment opportunities is only speculative.[3]

The Court finds that Debtor has carried her burden and has shown that she has an inability to pay under § 523(a)(15)(A); therefore, it will not address § 523(a)(15)(B).

A separate judgment will be entered in favor of the Debtor consistent with this memorandum opinion.

SIGNED: 1/12/05

Harlin D. Hale
United States Bankruptcy Judge

[3] One scenario presented by Mr. Henry would require the Debtor to go back to college and then obtain a medical degree.