

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 02-05840

ADVERSARY PROCEEDING NO: 02-80281

JUDGMENT

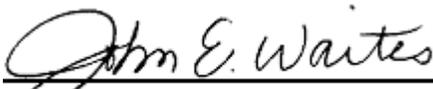
The relief set forth on the following pages, for a total of 2 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**02/07/2003**



Entered: 02/07/2003

  
US Bankruptcy Court Judge  
District of South Carolina

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Timothy Wayne Mansell,  
Debtor.

Sandra Fulcher Beverly, f/k/a  
Sandra Fulcher Mansell,  
Plaintiff,

v.

Timothy Wayne Mansell,  
Defendant.

C/A No. 02-05840-W

Adv. Pro. No. 02-80281-W

**JUDGMENT**

Chapter 7

Based upon the Findings of Fact and Conclusions of Law in the attached Order, Sandra Fulcher Beverly (“Plaintiff”) is granted the relief sought in her Complaint, and Timothy Wayne Mansell’s (“Defendant”) obligation to pay the debt represented by First Union’s second mortgage encumbering Plaintiff and Defendant’s former marital residence is excepted from discharge pursuant to 11 U.S.C. §523(a)(15).

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 02-05840

ADVERSARY PROCEEDING NO: 02-80281

ORDER

The relief set forth on the following pages, for a total of 13 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**02/07/2003**



Entered: 02/07/2003

*John E. Waites*

US Bankruptcy Court Judge  
District of South Carolina

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Timothy Wayne Mansell,  
Debtor.

Sandra Fulcher Beverly, f/k/a  
Sandra Fulcher Mansell,  
Plaintiff,

v.

Timothy Wayne Mansell,  
Defendant.

C/A No. 02-05840-W

Adv. Pro. No. 02-80281-W

**ORDER**

Chapter 7

THIS MATTER comes before the Court upon the Complaint filed by Sandra Fulcher Beverly (“Plaintiff”) seeking to except from discharge Timothy Wayne Mansell’s (“Debtor” or “Defendant”) obligation to pay the second mortgage on Plaintiff and Defendant’s former marital residence and to hold Plaintiff harmless from the claims of First Union, the second mortgage holder, pursuant to 11 U.S.C. §523(a)(15).<sup>1</sup> Defendant agrees that he is obligated to pay the second mortgage on the former marital residence pursuant to the parties’ Settlement Agreement that was incorporated into the parties’ divorce decree; however, he argues that he lacks the ability to pay this debt and that discharging the debt results in a benefit to him that outweighs the detrimental consequences to his former spouse or children. After considering the pleadings, evidence, and arguments, the Court makes the following Findings of Fact and

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<sup>1</sup> Further references to the Bankruptcy Code shall be by section number only.

Conclusions of Law.<sup>2</sup>

### **FINDINGS OF FACT**

1. Plaintiff and Defendant were married on December 16, 1993. They have two sons, ages thirteen and ten.

2. Plaintiff and Defendant are divorced. The parties entered into a Settlement Agreement that addresses custody, visitation, child support, marital property and debt division, and other issues on October 14, 1997. On December 2, 1997, the Superior Court for Richmond County, Georgia entered a Final Judgment and Decree of Total Divorce (the “Divorce Decree”) that incorporates the parties’ Settlement Agreement.

3. As part of the Settlement Agreement, Defendant agrees to convey his interest in the former marital residence. Defendant did so by executing a quit-claim deed to Plaintiff on October 14, 1997. 4.

Also as part of the Settlement Agreement, Defendant agrees to be solely responsible for the second mortgage payments and to hold Plaintiff harmless from this obligation to First Union.

5. The second mortgage and promissory note were originally in the amount of \$20,000 and provide that sixty monthly payments of \$424.24 shall be made beginning on August 25, 1997. The second mortgage and note were secured by two vehicles, a 1984 Chevrolet Blazer and a 1992 Chevrolet Corsica, and Plaintiff and Defendant’s marital residence. The parties estimate the balance owed on the second mortgage and note at the time of the trial to be approximately \$16,000.

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<sup>2</sup> The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

6. Defendant defaulted on his payments to First Union, and, as a result, the two vehicles that were also security for the debt were repossessed. Plaintiff used one of these vehicles as her primary means of transportation until it was repossessed.

7. Plaintiff filed a contempt action against Defendant in the Superior Court of Richmond County, Georgia, and the court entered an Order on May 11, 2000 finding Defendant in contempt and ordering him to pay the debt owed to First Union. In addition, the court ordered Defendant to pay Plaintiff \$3,600 to compensate her for the loss of her vehicle. Defendant has paid the \$3,600 obligation as ordered by the Superior Court.

8. On May 14, 2002, Defendant filed a Chapter 7 bankruptcy case.

9. Plaintiff has remarried. She currently does not work. In the past, Plaintiff has worked part-time as a medical transcriptionist, earning between approximately \$800 and \$1000 per month. Her reason for not working is to care for her children. She believes she does not live in a safe neighborhood, and she believes it is important for her to be at home when her children return from school. Further, if Plaintiff worked, the cost of child care and transportation would exceed the benefit of working outside the home on a full-time basis.

10. Plaintiff's new husband, Douglas P. Beverly ("Mr. Beverly"), earns approximately \$1,600 per month. Plaintiff also rents the former marital residence that is encumbered by the second mortgage at issue. Plaintiff charges \$590 per month rent, which is \$50 more than the first mortgage monthly payment. The \$50 profit is usually applied to maintenance costs and therefore does not regularly supplement Plaintiff's income. Combining Mr. Beverly's income with Defendant's monthly child support payment of \$400,

Plaintiff's household income is approximately \$2,000 per month.<sup>3</sup>

11. Plaintiff's household expenses are her obligation to pay the first mortgage on the former marital residence, and this monthly payment is approximately \$550. Her new husband also makes monthly child support payments totaling \$430 to two former spouses who have custody of his children. Plaintiff's other expenses are normal living expenses. Plaintiff does not make a house payment on her current residence because her mother-in-law allows her and her family to reside there at no charge. In addition, Plaintiff does not make a car payment because her mother-in-law allows her to use an automobile whenever Plaintiff wishes. Therefore, Plaintiff has approximately \$1,600 per month to pay for the remaining normal monthly living expenses of her household of four.

12. Defendant works as a facilities coordinator at the Medical College of Georgia Health, Inc. He grosses \$2,970.68 per month and nets \$2,006.86 per month. Per year, Defendant grosses approximately \$35,648.16 and nets approximately \$24,082.32.

13. Defendant has also remarried. His new wife, Karin Ann Mansell ("Ms. Mansell"), is a registered nurse who also works at the Medical College of Georgia Health, Inc. She currently works part-time in order to care for her ailing son who recently received a kidney transplant. On her part-time schedule, she grosses approximately \$2,477.16 and nets \$1,802.76 per month. She believes that, when her son recovers in several months, she can resume a full-time schedule and earn approximately \$45,000 per year. She also receives \$300 per month in child support from her former husband but does not receive alimony. Combining Defendant's and Ms. Mansell's salaries along with the child support Ms. Mansell receives,

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<sup>3</sup> The Court notes that Defendant does not pay Plaintiff alimony.

Defendant's net household income before expenses is \$4,109.62 for a family of three.

14. Defendant's household expenses have recently increased voluntarily. Defendant admitted at trial that he contributes to the current household expenses as best as he can. These expenses include the recent purchase of a new marital residence by Ms. Mansell that has a monthly mortgage payment of approximately \$800, an increase from the \$425 per month Defendant paid as rent or a mortgage payment as reflected in his Schedule J. Defendant also admitted at trial that, for a time after he remarried, he paid all of the couple's household expenses from his income. In addition, he paid Ms. Mansell's credit card debt totaling approximately \$550 in order to assist her in obtaining financing for the new marital residence.

15. Defendant suggests that his ability to pay the second mortgage is also limited because of his obligation to support Ms. Mansell's child who has recently undergone an organ transplant operation. Ms. Mansell testified that she believes she will have to pay future medical expenses for her son totaling \$1,500 per month and that, for the month of January 2003 alone, she has already paid approximately \$600 for her son's anti-rejection medications. Ms. Mansell anticipates that Medicare will pay eighty percent of her son's medical expenses for a period of three years, and she admits that there may be programs that assist transplant patients with their extraordinary medical expenses. At the time of trial, Ms. Mansell had not yet investigated these programs.

16. Defendant has not adopted Ms. Mansell's child. Defendant provides medical insurance for the child, and Ms. Mansell's medical insurance policy also covers her son. In addition, Ms. Mansell testified that her child's father makes regular child support payments and that he pays one-half of her son's medical expenses.

## **CONCLUSIONS OF LAW**

Divorce property settlements are generally discharged in bankruptcy; however, §523(a)(15) establishes that a claim incurred by a debtor in a divorce or separation proceeding can be excepted from discharge if it is not of the kind of claim described in §523(a)(5) unless (A) the debtor does not have the ability to pay the debt from income or property not reasonably necessary for the maintenance or support of the debtor or his or her dependant or (B) discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor. The party seeking to have the debt excepted from discharge has the burden to establish that the claim was incurred in a divorce or separation proceeding and that the claim is one other than the kind described in §523(a)(5). See Baker v. Baker (In re Baker), 274 B.R. 176, 195 (Bankr. D. S.C. 2000) (citing Morgan v. LeRoy (In re LeRoy), 251 B.R. 490, 504 (Bankr. N.D. Ill. 2000) and Waits v. Kyzer (In re Kyzer), C/A No. 99-06445-W, Adv. Pro. No. 99-80375-W (Bankr. D. S.C. May 24, 2000)); Oswald v. Asbill (In re Asbill), 236 B.R. 192, 196 (Bankr. D. S.C. 1999). Upon proving these points, the burden shifts to the defendant to prove that he or she does not have the ability to pay the debt or to prove that the discharge of the debt results in a benefit to the defendant that outweighs the detriment to the spouse, former spouse, or child of the debtor. See Baker, 274 B.R. at 197. The burden of proof must be met by a preponderance of the evidence. See Asbill, 236 B.R. at 196 (citing In re Campbell, 198 B.R. 467 (Bankr. D. S.C. 1996); In re Scott, 194 B.R. 375 (Bankr. D. S.C. 1995)). Because subsections (A) and (B) of §523(a)(15) are written in the disjunctive, a defendant must meet the showing required on only one of the two prongs of §523(a)(15) to prevent the debt from being excepted from discharge. See Baker, 274 B.R. at 197.

At trial, the parties stipulated that the claim at issue was incurred in a divorce proceeding and that it is one other than the kind described in §523(a)(5). Accordingly, the burden is upon Defendant to prove

either he lacks the ability to pay the second mortgage or that the benefit of the discharge outweighs the detriment to Plaintiff.

When considering §523(a)(15)(A), the Court must apply an “ability to pay” test that is the equivalent of the disposable income test used in Chapter 13 confirmation proceedings pursuant to §1325(b)(2). See Baker, 274 B.R. at 197; Asbill, 236 B.R. at 196. Under the disposable income test, a marital obligation will be discharged under §523(a)(15)(A) if repaying it would prevent debtors from reasonably supporting themselves and their dependents. See Hammermeister v. Hammermeister (In re Hammermeister), 270 B.R. 863, 877 (Bankr. S.D. Oh. 2001) (citing Carroll v. Carroll (In re Carroll), 187 B.R. 197, 200 (Bankr. S.D. Oh. 1995)). Thus, the Court must review Defendant’s income and expenses and determine whether he can afford payment of such reasonably necessary expenses plus the second mortgage payment.

Defendant asserts that he does not have the ability to pay the second mortgage obligation because of his numerous other bills. At trial, Defendant initially relied on his Schedule J to reflect his total personal monthly expenses, and Schedule J indicates monthly expenses of \$1,831.66. Defendant and Ms. Mansell then testified that their monthly living expenses have presently increased to approximately \$2,650 and project total future monthly expenses of approximately \$4,100. In large part, two expenses explain this increase. The first is Ms. Mansell’s purchase of a new marital residence. The new monthly mortgage payment is \$800, an increase from Defendant’s previous rent or mortgage payment of \$425, and with the larger house comes an increase in utilities, property taxes, and maintenance costs. The second projected major expense is the medical expenses related to Ms. Mansell’s son for whom Ms. Mansell expects to pay \$1,500 per month. As to Defendant’s net monthly household income, Defendant currently earns

\$2,006.86, and Ms. Mansell currently earns approximately \$1,800 as a registered nurse. See Hammermeister, 270 B.R. at 878 (including the new spouse's income in determining the debtor's disposable income). Without considering medical expenses, Defendant's household income exceeds the present living expenses by approximately \$1,150. If the Court considers the medical expenses, it would appear that Defendant lacks the ability to pay the debt at issue. However, for the following reasons, the Court questions whether it should recognize certain expenses in determining Defendant's disposable income.

As to the increase in household expenses stemming from Ms. Mansell's new residence, the Court will not accept the higher mortgage payment as a basis for Defendant's inability to pay. Indeed, this increase in housing costs nearly doubles what Defendant was paying for rent or a mortgage when he lived alone and filed his bankruptcy petition as well as when Defendant and Ms. Mansell first began living together after they married. See, e.g., Hammermeister, 270 B.R. at 879 (disallowing some of the debtor's expenses as being artificially inflated). Defendant also shares this expense with Ms. Mansell who earns significant income as a registered nurse. In addition, the Court notes that the purchase of a new home only one month before trial and with the knowledge of the son's significant medical problems gives the appearance of voluntarily increasing living expenses which distorts the disposable income analysis.<sup>4</sup>

Regarding the medical expenses of Ms. Mansell's son, the Court will not consider these costs as

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<sup>4</sup> Although household expenses will certainly increase when a new member joins a family unit, the Court notes that nearly all of Defendant's expenses have increased if not doubled since he filed his Schedule J in May 2002. As examples, the Court lists Defendant's following expenses: electric and gas bill rose from \$64 per month to \$150 per month, water bill rose from \$36 per month to \$50 per month, internet service increased from \$19.95 to \$29, home maintenance increased from \$50 to \$75, and food or groceries increased from \$220 to \$400.

Defendant's obligation for several reasons including because Ms. Mansell's son is not the legal dependent of Defendant. See, e.g. Budp v. Romer (In re Romer), 254 B.R. 207, 213 (Bankr. N.D. Oh. 2000) (finding that, where there was no legal obligation to support a roommate or the debtor's adult sons, these expenses were disallowed). Defendant admits that he has not adopted Ms. Mansell's son. Moreover, the evidence does not indicate that Ms. Mansell's son is a dependent of Defendant to the extent that he presently reasonably relies or should rely on Defendant's income to pay for his medical expenses. The son has medical insurance coverage under at least two policies, Defendant's and Ms. Mansell's, and the son's biological father pays one-half of the medical expenses. The Court also notes that the biological father could be the subject of a further action or claim for additional child support because of the costs attributable to his son's illness. In addition, the full brunt of these expenses is not immediately facing Defendant's new family unit. Indeed, in addition to payments from health insurance, Ms. Mansell testified that Medicare currently pays eighty percent of these medical expenses and will continue to do so for three years, a time period during which Defendant could greatly reduce the debt owed to Plaintiff. Further, Ms. Mansell admits that other programs may exist to aid families whose children receive organ transplants, and she acknowledges that she has not yet investigated these programs to determine her son's eligibility. In essence, although Defendant's new family unit may face paying significant medical costs in the future, these costs are not yet being incurred to the extent projected, and it appears that Ms. Mansell's son has several other sources that can assist with or pay his medical expenses, including his biological father. See, e.g. Gezma v. Rogan (In re Rogan), 283 B.R. 643, 648 (Bankr. D. Conn. 2002) (finding that a debtor's immense medical expenses will eventually abate and ruling that he has the ability to pay his obligations). Moreover, for purposes of considering dischargeability, the Court believes that Defendant should not be

able to sacrifice the interests of his former wife and natural children in order to voluntarily pay toward the extraordinary expenses of Ms. Mansell's son no matter how sympathetic the circumstances.<sup>5</sup>

The Court will now determine, pursuant to §523(a)(15)(B), whether discharging the debt results in a benefit to Defendant that outweighs the detrimental consequences to Plaintiff. When performing a detriment / benefit analysis, courts exercise their equitable powers, evaluate the lifestyles of the parties, and make a value judgment in deciding which party suffers the most. See Seybt v. Seybt (In re Seybt), C/A No. 01-03549-W, Adv. Pro. No. 01-80128-W, 2002 WL 342346, at \*4 (Bankr. D. S.C. Jan. 14, 2002) (citing Phillips v. Phillips (In re Phillips), 187 B.R. 363, 369 (Bankr. M.D. Fla. 1995)). To make this value judgment, courts typically rely on a totality of the circumstances approach and consider a variety of factors, including the income and expenses of both parties, whether the non-debtor spouse is jointly liable on the debts, the number of dependents, the nature of the debts, the reaffirmation of any debts, and the non-debtor spouse's ability to pay. See id. (citing Lipira v. Kaczmariski (In re Kaczmariski), 245 B.R. 555, 564 (Bankr. N.D. Ill. 2000); Sparagna v. Metzger (In re Metzger), 232 B.R. 658, 665 (Bankr. E.D. Va. 1999)). Other factors include the current assets of the parties and their respective spouses, the health, job skills, training, age, and education of the parties and their respective spouses; changes in the parties' financial condition since the entry of the divorce decree; the amount of debt that has been or will be discharged in the bankruptcy, and the parties' good faith. See Asbill, 236 B.R. at 197 (citing In re Armstrong, 205 B.R. 386 (Bankr. W.D. Tenn. 1996)).

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<sup>5</sup> The Court also recognizes that, if the debt is not discharged, Defendant could request that the Family Court consider a change of circumstances in adjusting its original award and determination between Plaintiff and Defendant.

In this case, the Court believes Defendant did not prove that the discharge of this obligation would result in a benefit to him that outweighs the detrimental consequences to Plaintiff. The Court reaches this conclusion for three reasons. First, the former marital residence, which is encumbered by the second mortgage in question, is Plaintiff's (and her children's) only tangible asset. She has no retirement plan and no vehicle and owns no other real property or securities. In contrast, Defendant's new family has recently purchased a new home, and Defendant has a retirement savings plan with a present value of over \$6,300 to which he contributes. Both Defendant and Ms. Mansell own late-model cars. If Defendant does not pay the second mortgage, Plaintiff will be liable for the obligation, and, after reviewing her family's income and expenses, the Court anticipates Plaintiff will be unable to make both the first and second mortgage payments and that she will likely lose the property.<sup>6</sup> Defendant dismisses the importance of this asset as he argues that the rental income the property generates is minimal and that, even if Plaintiff loses the property, she and her children will continue to reside in the home that her mother-in-law provides for them. These specious arguments, however, ignore the fact that this property is Plaintiff's only asset. Losing this property would cause Plaintiff to suffer a significant detriment, and she should not be penalized because she receives from other family members the use of a vehicle, which was necessitated by Defendant's default, and a modest home. While Defendant's fresh start would be enhanced if this \$16,000 debt were discharged, Defendant has still enjoyed the benefits of bankruptcy protection and discharged unsecured, nonpriority debt totaling approximately \$57,000. In addition, the Court has previously noted the financial

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<sup>6</sup> Subtracting Mr. Beverly's child support payments from Plaintiff's family's income, it appears that Plaintiff's family has approximately \$2,200 per month to pay for normal living expenses. The total of the first and second mortgage payments is approximately \$975.

conditions of Plaintiff's family and Defendant's family, and the facts reflect that Defendant can meet his living expenses and will not suffer a hardship in paying this obligation to the extent that Plaintiff would if the debt were discharged.<sup>7</sup> Finally, the Court notes that payments on the second mortgage can be substantially satisfied within three years.<sup>8</sup> Although Defendant cites the expenses of Ms. Mansell's son as one factor in preventing him from paying the second mortgage, Ms. Mansell admitted that Medicare would assist paying these expenses for three more years. The timing suggests that Defendant could pay the obligation he owes pursuant to the Divorce Decree and then shift his focus to voluntarily assisting Ms. Mansell's son when Medicare benefits expire. In sum, the totality of the circumstances indicates that the benefit of the discharge of the debt represented by the second mortgage held by First Union is outweighed by the detriment to Plaintiff.

#### **CONCLUSION**

From the arguments discussed above, it is therefore,

**ORDERED** that Defendant's obligation to pay the debt represented by First Union's second mortgage encumbering Plaintiff and Defendant's former marital residence is excepted from discharge pursuant to §523(a)(15).

**AND IT IS SO ORDERED.**

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<sup>7</sup> Indeed, Plaintiff could work full-time as a medical transcriptionist and plausibly pay the second mortgage, but Plaintiff would then incur child care and transportation costs or leave her children alone after school in an unsafe neighborhood.

<sup>8</sup> The evidence also indicated that First Union was, at one point, willing to negotiate a settlement of the second mortgage by discounting the debt.