IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	
Henry Gary Anderson, III,	Chapter 7
Debtor.	Case No. 96-79651-W
Beverly H. Anderson,	Adversary Proc. No. 97-80170
Plaintiff,	
vs.	**JUDGMENT**
Henry Gary Anderson, III,	
Defendant,	

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the following debts of the Defendant are excepted from discharge: (1) payment of one-half of the mortgage payments on the marital home, including any arrearage due to his failure to make past payments; (2) payment of one-half of the expenses associated with the upkeep and maintenance of the marital home in the amount of $472.59, plus future expenses; (3) payment of one-half of the appraisal costs in the amount of $225.00; (4) the payment of one-half of the taxes, with one-half equaling $553.99 for 1996 and $447.89 for 1997, and insurance related to the marital home, (5) the payment of the remaining $5,050.00 in the Savings Investment Plan, (6) payment of $1,750.00 attorney's fees to the law firm of Smith and Murphy, and (7) payment of the daughter's $410.00 dental bill.

John G. Waite
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
December 9, 1997.

16 L

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	
Henry Gary Anderson, III,	Chapter 7
Debtor.	Case. No. 96-79651-W
Beverly H. Anderson,	Adv. Pro. No. 97-80170
Plaintiff,	
vs.	**ORDER**
Henry Gary Anderson, III,	
Defendant,	

This matter comes before the Court as a result of a complaint filed by Beverly H. Anderson ("Plaintiff"). Plaintiff asserts that certain debts owed to her by Henry Gary Anderson, III ("Defendant") should be excepted from discharge pursuant to 11 U.S.C. 523(a)(5) or (15).[1]

After considering the pleadings, joint pre-trial order, pre-trial brief, and arguments presented at the hearing, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on December 31, 1996.

2. For over twenty-one years, the Plaintiff and Defendant lived as a family, with two

[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101, et seq., will be by section number only.

JW-1 of 12 –

15c

children having been born of their marriage. A divorce was granted to the Plaintiff in October of 1996. Since that time, the Defendant has been unable or unwilling to obtain regular or long-term employment. Defendant has filed bankruptcy and resides with a friend who provides monetary support. Since the divorce, the Plaintiff, in order to support herself and her daughter, obtained a better paying job which requires a daily commute of approximately 140 miles.

3. The family unit was stable economically during the majority of the marriage, with the income produced by Defendant substantially exceeding the income produced by the Plaintiff. During his last ten years of marriage to the Plaintiff, the Defendant maintained steady employment with Westinghouse at the Savannah River Plant and received $52,791 gross income from Westinghouse in 1994. Defendant's employment with Westinghouse terminated in June 1995. Defendant's adjusted gross income in 1995 was $51,778, and of that amount $31,975 reflects payments from Westinghouse.

4. The Plaintiff made material contribution to the marriage through her career as wife, mother, and homemaker and was primarily responsible for the nurturing of the children. Plaintiff worked outside the home for three years prior to the divorce and all monies she earned were used for the family. When the Defendant lost his job with Westinghouse, Plaintiff worked with Defendant as independent representatives with Excel Telecommunications (Excel).

5. The Defendant left the marital home on December 9, 1995. The Plaintiff obtained a divorce on the grounds of adultery by order of the Family Court, dated October 22, 1996. This order was modified to some extent by a second Family Court order, dated December 18, 1996 which provided, inter alia:

a. Defendant was ordered to pay child support in the amount of Fifty Nine and

30/100 ($59.30) per week, plus an administrative fee of three (3%) percent. Ancillary to said support is a $410.00 dental bill incurred on behalf of the minor child.

b. Defendant was ordered to pay one-half of the mortgage payments on the marital home to NationsBank in the amount of Six Hundred Six and 53/100 ($606.53) Dollars per month until the marital home is sold.

c. Defendant was ordered to reimburse Plaintiff for one-half of all expenses incurred by Plaintiff for upkeep and maintenance of the marital home in the amount of Four Hundred Seventy-two and 59/100 ($472.59) in addition to one-half of all future expenses on the marital home. Defendant is responsible for one-half of the $550.00 appraisal cost.

d. Defendant is responsible for one-half of all the taxes and insurance payable on the marital home. Therefore, Defendant is responsible for $553.99, which represents ½ of the 1996 property taxes on the marital home, and $447.89 which represents ½ of the 1997 property taxes on the marital home.

e. Defendant is responsible for one-half of all marital debts of the parties as shown by the parties' Financial Declarations.

f. Defendant is to pay to Plaintiff the sum of Five Thousand Fifty and no/100 ($5,050.00) Dollars, said amount equaling one-half of the remaining money from a Savings Investment Plan with Westinghouse.

g. Plaintiff is entitled to one-half of Defendant's Westinghouse/Savannah River Site retirement and to one-half of Defendant's Air National Guard ("Guard")

retirement, both through a qualified domestic relations order.[2]

h. Defendant is to pay to the law firm of Smith and Murphy the sum of One Thousand Seven Hundred and 50/100 ($1,750.00) Dollars for attorney's fees.

i. Plaintiff is entitled to periodic alimony; however, due to Defendant's underemployment, the Family Court has not yet set the amount of monthly alimony or when such payments are to commence.

6. Other than child support payments, Defendant has failed to make any of the payments ordered by the Family Court. Defendant filed his Chapter 7 bankruptcy petition on December 31, 1996.

7. Since the divorce, despite a B.S. in business administration from the University of South Carolina, and significant work experience, the Defendant has been unable or unwilling to obtain regular or long-term work.

a. From the date his employment with Westinghouse ended in June 1995 and the date his employment with Lewis Bus Lines began in July 1996, the Defendant's only employment was with the National Guard and as an independent representative with Excel Telecommunications (Excel).

b. A letter from Lewis Bus Lines introduced into evidence at trial indicates that Defendant was terminated from Lewis Bus Lines in April 1997 for numerous refusals to work when asked.

---

[2] Defendant does not dispute Plaintiff's entitlement to the retirement.

c. Defendant began to work for Sears Roebuck & Company at the end of May 1997 but was terminated after four months, in September 1997, due to violations of store policy.

d. Even though he is no longer otherwise employed, Defendant does not work his Excel business more than three (3) hours per month, and he works one weekend a month for the National Guard, or approximately sixteen (16) hours per month.

8. The Defendant has received support from a friend since the time he moved into her home, if not before, at the end of 1996. Her 1996 income, $33,663.00, greatly exceeded the income of Defendant, $13,635.00. As of May 1997, Defendant paid no rent to his friend and paid no electric, water, or cable bills. Also, Defendant uses one of his friend's automobiles as his primary vehicle. She has loaned Defendant $10,000.00 and has paid another $1,181.28 on his behalf. Furthermore, Defendant's friend received an $8,000.00 personal loan and used $3,520.00 of that amount to purchase items at the Trustee's bankruptcy auction of Defendant's personal property for Defendant's continued use of said property.

9. Since the divorce, Plaintiff has increased her income despite having a limited education of only two years of secretarial studies in order to provide needed support for the family. Plaintiff increased her income from approximately $20,000.00 to $32,000.00 by obtaining a job in Columbia, South Carolina, to which she must commute approximately 140 miles each day.

10. Because of the Defendant's failure to pay the ordered obligations, Plaintiff has been unable to meet her living expenses and those associated with the support of her daughter; she has been unable to make payments to county taxing authorities who have scheduled a tax sale of the

marital home. Furthermore, she has been unable to make her mortgage payments which has resulted in NationsBank filing a complaint seeking foreclosure of the mortgage on the marital home under which Plaintiff will be responsible for any deficiency. Any obligation of Defendant as co-maker of the NationsBank note appears to have been discharged in bankruptcy.

CONCLUSIONS OF LAW

Section 523 (a)(5) provides in pertinent part:

> "A discharge . . . does not discharge an individual debtor from any debt — (5) to a spouse, former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a . . . divorce decree . . . ." (emphasis added).

This Court has previously held that for a marital debt to be non-dischargeable under this section, the debt must be (1) payable on behalf of the child or former spouse and (2) be in the nature of alimony, maintenance, or support. Scott v. Scott (In re Scott), 194 B.R. 375 (Bkrtcy. D.S.C. 1995). In the present case while the obligations are payable on behalf of Plaintiff, the real issue is whether such obligations constitute support or maintenance or are in fact obligations in the nature of a property division.

When a separation agreement that allocates obligations is involved, the court must determine whether it was the intention of the parties that an obligation constitute support rather than property settlement. Brabham v. Brabham (In re Brabham), 184 B.R. 476 (Bkrtcy. D.S.C. 1995). In the present case, however, a settlement negotiated by the parties is not involved. The only document is the divorce decree itself, and the bankruptcy court may look beyond any labels attached to the obligations by the Family Court. Carrigg v. Carrigg (In re Carrigg), 14 B.R. 658 (Bkrtcy. D.S.C. 1981).

Each case under Section 523 is fact intensive and distinguishable from other cases. In discerning whether an obligation is in the nature of support courts have utilized a litany of factors,[3] and while one factor may be determinative in one case, it may be of no consequence in another. See

---

[3] The following are factors that have been used to determine whether a particular obligation is in the nature of alimony or support for the purposes of Section 523 (a) (5) or merely a division of the marital assets and liabilities:

(1) the nature of the obligation assumed (the necessities of life);
(2) whether the obligation provided for a lump sum or periodic payments;
(3) the amount of support a state court would reasonably have granted;
(4) whether the debtor's sole responsibility for the assumed obligation terminates upon the death of either party or remarriage of the former spouse or the age of majority in the children;
(5) the amount of child support awarded by the state court;
(6) the relative earning power of the parties;
(7) the financial resources of each spouse;
(8) whether there are minor children to be provided for;
(9) the adequacy of support absent the debt assumption;
(10) the parties' negotiations and understanding of the provision (intent);
(11) the intent of the state/family court where a court order and not a separation agreement is involved;
(12) waiver of right to alimony;
(13) level of education or work skills of the parties;
(14) the age of the parties;
(15) the physical health of the parties;
(16) the probably need for future support;
(17) the property brought to the marriage by each party;
(18) the business opportunities of the parties;
(19) whether payments are intended to be economic security;
(20) the length of the marriage;
(21) the context and placement of the disputed provision as it is found in the decree;
(22) the amount actually necessary for the spouse's present support due to financial need;
(23) whether the debtor treated payments as tax deductible (alimony) or nondeductible (property settlement).
(24) whether designation in context of state court award of alimony was made by trier of fact (jury); and
(25) the benefits each party would have received had the marriage continued.

John B. Butler, III, The Bankruptcy Handbook § 16.68 (1996).

e.g., Hixson v. Hixson (In re Hixson), 23 B.R. 492, 495 (Bkrtcy. S.D. Ohio 1982)("Each case must be decided upon its own merits after a consideration of the respective facts and surrounding circumstances.").

In the present case, the divorce decree indicates that the marital home be sold and the net proceeds, if any, be equally divided. Until that time the house was to be maintained and expenses were to be equally divided. To a great extent and without contrary evidence, such provision is indicative of terms of a property division. Therefore, the Court finds that the Plaintiff has failed to meet her burden of proof in showing that payment of one-half of the mortgage payments on the marital home, payment of one-half of the expenses associated with the upkeep and maintenance of the marital home in the amount of $472.59, plus future expenses and the appraisal costs, the payment of one-half of the taxes and insurance related to the marital home were in the nature of support or maintenance. In addition, the payment of the remaining $5,050.00 in the Savings Investment Plan, appears to be a property division. Payment of attorney's fees to the law firm of Smith and Murphy are incidental to the property division award and do not fall within Section 523(a)(5).

However, if a debt does not fit within the parameters of Section 523(a)(5), the debt may be excepted from discharge under Section 523(a)(15). That section provides that a discharge does not discharge a debtor from any debt:

> not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce . . . or in connection with a . . . divorce decree . . . 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; or
> > (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse . . . .

The burden of proof pursuant to this section is by a preponderance of the evidence and rests upon the Defendant.

> However, the majority of courts have found that the burden of proof under § 523(a)(15)(A) and § 523(a)(15)(B) falls upon the Debtor.
>
> > Moreover, Section (A) of 523(a)(15) requires a showing that the Debtor does not have the ability to pay. If the burden is placed on the Plaintiff to show the Debtor does not have the ability to pay, the Plaintiff would want to fail to meet the burden. Similarly, section (B) requires a showing that discharging the debt would result in a greater benefit to the Debtor. Again, if the burden is on the Plaintiff, the Plaintiff would want to fail to meet the burden. Thus, by the very nature of Section 523(a)(15), the burden of the exceptions must shift to the Debtor.
>
> In re Hill, 184 B.R. 750, 753 (Bkrtcy.N.D.Ill.1995). Also see In re Florez, 191 B.R. 112 (Bkrtcy.N.D.Ill.1995); In re Phillips, 187 B.R. 363 (Bkrtcy.M.D.Fla.1995); In re Florio, 187 B.R. 654 (Bkrtcy.W.D.Mo.1995); In re Comisky, 183 B.R. 883 (Bkrtcy.N.D.Cal.1995); In re Anthony, 190 B.R. 429 (Bkrtcy.N.D.Ala.1995); In re Silvers, 187 B.R. 648 (Bkrtcy.W.D.Mo.1995); In re Carroll, 187 B.R. 197 (Bkrtcy.S.D.Ohio 1995) and In re Becker, 185 B.R. 567 (Bkrtcy.W.D.Mo.1995). This Court agrees with the conclusion reached by the majority of the courts and this Court's previous opinions in In re Scott and In re Strong.

In re Campbell, 198 B.R. 467 (Bkrtcy.D.S.C. 1996).

In the present case, the Plaintiff urges the court to consider the Defendant's underemployment as a factor in determining ability to pay, a factor which other jurisdictions have considered. See Johnston v. Henson (In re Henson), 197 B.R. 299 (Bkrtcy. E.D. Ark. 1996)(Despite lack of income, the court determined that the debtor had failed to prove inability to pay because the debtor was a "well educated, employable, healthy male who can work, but does not. . . . Despite his education, skills, and previous employment, he has chosen to limit his income and employment.");

Schmitt v. Schmitt (In re Schmitt), 197 B.R. 312 (Bkrtcy. W.D. Ark. 1996)(refusing to discharge debt even though debtor did not have present income because the debtor had the ability to rebound economically in the future); Humiston v. Huddelston (In re Huddelston), 194 B.R. 681, 690 (Bkrtcy. N.D. Ga. 1996)(Even though the debtor lacked current income, he had the ability to pay because he possessed a wide variety of employable skills. "In light of the voluntary nature of his underemployment and his failure to pursue more lucrative opportunities, the Debtor cannot now claim entitlement to a discharge based upon his inability to pay his marital obligations.") Florio v. Florio, (In re Florio), 187 B.R. 654, 657 (Bankr W.D.Mo. 1995)(in refusing to discharge the debt under subsection (A), the Court stated that the debtor "voluntarily reduced her income . . . and now asks the Court to find that she does not have the ability to pay a debt. The Court cannot sanction such behavior."); Slover v. Slover, 191 B.R. 886 (Bkrtcy. E.D. Okl. 1996)(when considering ability to pay, the court must consider the income a debtor is capable of producing).

While this argument is convincing, the Court does not, however, have to make this determination because Section 523(a)(15) is written in the disjunctive, and the Court finds that, pursuant to subsection (B), discharging the debts of Defendant would result in a detriment to Plaintiff that would outweigh any benefit the Defendant would receive from such discharge.

Despite Plaintiff's increased income, she is unable to pay her obligations including those associated with the support and educational expenses of at least one child. Without these payments from the Defendant, the Plaintiff will most likely lose the marital home to foreclosure or tax sale and may be forced herself to file a bankruptcy case. Defendant, on the other hand, has discharged substantial debts in his bankruptcy case and has purposely failed to obtain or maintain regular, long-term work, relying instead to a great extent on another for his support.

Based upon the totality of the circumstances, the Court finds that the detriment to the Plaintiff of the discharge of these debts exceeds the benefit it would provide the Defendant. Therefore, payment of one-half of the mortgage payments on the marital home, including any arrearage due to his failure to make past payments; payment of one-half of the expenses associated with the upkeep and maintenance of the marital home plus future expenses; payment of one-half of the appraisal costs in the amount of $225.00; payment of one-half of the taxes and insurance related to the marital home; payment of the remaining $5,050.00 in the Savings Investment Plan, payment of $1,750.00 attorney's fees to the law firm of Smith and Murphy; and payment of the daughter's $410.00 dental bill are debts that are nondischargeable pursuant to Section 523(a)(15)(B).

As to the marital debts listed on Plaintiff's financial declarations, namely the loan from Security Federal, the car loan, the Visa debt, and the debt owed to General Freight, even though the Family Court ordered parties to share marital debts equally, the Family Court orders do not reveal that the Defendant is otherwise legally responsible to the creditors for these debts, and therefore this court does not except them from discharge. It is therefore

ORDERED that the following debts owed by Defendant to Plaintiff are excepted from discharge:(1) payment of one-half of the mortgage payments on the marital home, including any arrearage due to his failure to make past payments; (2) payment of one-half of the expenses associated with the upkeep and maintenance of the marital home in the amount of $472.59, plus future expenses; (3) payment of one-half of the appraisal costs in the amount of $225.00; (4) the payment of one-half of the taxes, with one-half equaling $553.99 for 1996 and $447.89 for 1997, and insurance related to the marital home, (5) the payment of the remaining $5,050.00 in the Savings Investment Plan, (6) payment of $1,750.00 attorney's fees to the law firm of Smith and Murphy,

and (7) payment of the daughter's $410.00 dental bill.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
December 9, 1997.

12