

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

William Daniel Turner, a/k/a/ William Daniel
Turner, Jr.,

Debtor.

Lynn L. Turner and Joseph O. Burroughs, Jr.,

Plaintiffs,

v.

William Daniel Turner, a/k/a/ William Daniel
Turner, Jr.,

Defendant.

C/A No. 98-06604-W

Adv. Pro. No. 98-80267-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Debtor's obligation to the Plaintiffs arising out of the Divorce Decree filed March 13, 1995 is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).

Columbia, South Carolina,

May 14, 1999.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

MAY 17 1999

✓ Gray for Pla ✓ Ward for Pla ✓ Strait for defendant

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

✓ Young for defendant
✓gmt index

VANNA L. DANIEL

Deputy Clerk

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U.S. DISTRICT COURT
DIST OF SOUTH CAROLINA
ENTERED

MAY 17 1999

V.L.D.

ORDER

Chapter 7

THIS MATTER comes before the Court upon the complaint of the Plaintiffs, Lynn L. Turner ("Ms. Turner") and Joseph O. Burroughs, Jr., Esquire ("Mr. Burroughs"), seeking a determination that a debt in the amount of \$131,873.81 arising from the property settlement of the parties¹ in their divorce proceedings is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).²

Ms. Turner is the former spouse of the Debtor/Defendant, William Daniel Turner, a/k/a William Daniel Turner, Jr. ("Debtor" or "Mr. Turner"). Mr. Burroughs was Ms. Turner's attorney during the divorce proceedings.

After receiving the evidence, including the Stipulation of Facts filed by the parties, and

¹ The parties have stipulated that of the \$131,873.81 debt owed, \$2,699.30 represents attorneys fees the Debtor was ordered to pay to the Plaintiff Lynn Lybrand Turner through the Plaintiff Joseph O. Burroughs, Jr.

² Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

weighing the credibility of the witnesses, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.³

FINDINGS OF FACT

Mr. Turner filed for relief under Chapter 7 in this court on July 31, 1998. Ms. Turner is the ex-wife of the Debtor and a creditor in this Chapter 7 asset case. The parties obtained a Decree of Divorce which was entered on March 13, 1995 ("Decree"). Further marital issues were resolved by subsequent Order entered on May 4, 1995. The South Carolina Court of Appeals reviewed this matter and by order filed March 6, 1997 affirmed the Decree. A petition for Writ of Certiorari was denied by the South Carolina Supreme Court on February 23, 1998.

At the divorce hearing in 1994, Ms. Turner was 39 years old, with a high school education. She had been employed in office management and bookkeeping. Prior to and during the marriage, Ms. Turner was employed as a bookkeeper and receptionist in Mr. Turner's accounting business. She had also worked for Mr. Turner's accounting business for a short time after the parties separated. At the time of the divorce hearing, she was employed at a real estate agency and earned \$2,150.00 per month. At the divorce hearing, Mr. Turner, a CPA, was 53 years old and owned an interest in an accounting business with locations in both Mullins and North Myrtle Beach, South Carolina. His income was \$3,791.00 per month. Since the divorce, Ms. Turner has continued to work as a bookkeeper and Mr. Turner has continued to work as a certified public accountant in his own practice.

³ 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.

In the Decree, the Family Court judge apportioned one-third of the marital property or \$172,943.00 to Ms. Turner and two-thirds to Mr. Turner. The Family Court judge ordered Mr. Turner to pay Ms. Turner's share either in cash or in assets, excluding his accounting practice and the strip shopping center, within ninety (90) days of the date of the Decree. Mr. Turner was further ordered to pay to Ms. Turner \$2,699.30 towards her attorneys' fees through her attorney, Joseph O. Burroughs, Jr. The marital debts were also equitably divided.

Ms. Turner has received her car, furniture and not quite \$15,000.00 cash from the sale of the marital residence which has reduced the amount of the ordered property settlement, and there now remains unpaid and due to Ms. Turner the sum of \$131,873.81 which includes the \$2,699.30 attorneys fees reimbursement the Debtor was ordered to pay. The parties have stipulated this debt is in the nature of a property settlement and not an award of support.

Ms. Turner filed this adversary proceeding on November 6, 1998, asking that the debt owed to her in the amount of \$131,873.81 be declared non-dischargeable pursuant to § 523(a)(15) as being a debt "not of the kind described in paragraph (5) that is incurred in the course of a divorce...or in connection with a divorce decree or other court of record."⁴ The summons was issued on November 9, 1998, and the affidavit of service on file with the Clerk of Court indicates service by mail was effected November 16, 1998. The last day to file nondischarge actions in the Debtor's Chapter 7 case was November 10, 1998. The Debtor then filed his answer in response to the complaint.

⁴The parties stipulated at the beginning of trial, and in the joint pretrial order issued by this Court, that the debt which is the subject of this action was incurred by the Debtor in the course of a divorce or separation agreement or in connection with a separation agreement, divorce decree or other order of a court and that the subject obligation was not of the kind described in § 523(a)(5).

At the adversary hearing on May 4, 1999, Ms. Turner testified to the following information:

INCOME:

| | |
|----------------------|------------|
| Gross monthly income | \$1,733.00 |
|----------------------|------------|

| | |
|---|------------|
| TOTAL NET MONTHLY TAKE HOME PAY (after deductions for taxes and medical insurance) | \$1,205.83 |
|---|------------|

EXPENDITURES:

| | |
|---------------------|-----------|
| Credit Cards | \$ 112.00 |
| Car payment | \$ 405.00 |
| Car insurance | \$ 63.00 |
| Life insurance | \$ 18.00 |
| Car expenses | \$ 127.00 |
| Medical & dental | \$ 26.00 |
| Clothing & personal | \$ 84.00 |
| Groceries | \$ 112.00 |
| Telephone | \$ 72.00 |
| Storage rental | \$ 35.00 |

| | |
|-------------------------------|------------|
| TOTAL MONTHLY EXPENSES | \$1,054.00 |
|-------------------------------|------------|

Ms. Turner testified that she is now 43 years old and works as a bookkeeper. In addition to her high school education, she has taken three hours of college credits at Francis Marion. Ms. Turner has no legal dependents but does assist her 24 year old son from time to time by making his \$280.00 per month truck payment. She also testified at the hearing that since the divorce she has had to change employers, taking a cut in pay. At the time of the divorce, she was working for a real estate agency but now works as a bookkeeper for Myrtle Beach Yacht Club. The job change was necessary because the real estate agency did not provide her with any medical insurance benefits, and required her to work extraordinarily long hours and weekends. Ms.

Turner testified that she suffers from degenerative disk disease and has had one surgery already but continues to experience further problems. The medical problems associated with this disease affect her ability to do her job. Ms. Turner also testified that she does not have any 401(k) retirement plan or IRA and that she is required to pay one-half of her medical insurance premium. Additionally, Ms. Turner stated that she owes her mother \$8,000.00 for a loan which was used to pay the legal fees of Ms. Turner's son. Ms. Turner also owes approximately \$4,400.00 on her two credit cards from which cash advances have been taken to pay for her legal fees from the divorce proceedings and the current bankruptcy proceedings. Ms. Turner testified she still has unpaid legal bills from the divorce proceedings and current bankruptcy proceedings of approximately \$6,300.00. Ms. Turner stated that she still has a one-half interest in a lot in Mullins. During the divorce proceedings the lot was valued at \$20,000.00.

Mr. Turner testified that he is 57 years old and continues to work as a certified public accountant. He testified that since filing for bankruptcy, his income from his CPA practice has diminished approximately \$200.00 per month. Since the divorce, Mr. Turner testified that he had purchased a 50% ownership interest in an accounting practice located in Hildebrand, North Carolina for \$40,000.00. Additionally since the divorce, Mr. Turner purchased a one-half interest in a townhouse located in Hickory, North Carolina. His required down payment on this townhouse was approximately \$22,000.00. Mr. Turner also testified that since the divorce and subsequent to his filing bankruptcy, he has opened an \$8,000.00 brokerage account. Mr. Turner testified that his net income from the accounting practice is between \$3,000.00 and \$4,000.00 per month and that he grosses approximately \$7,500.00 per month. Mr. Turner referred to his Schedule I, filed with the bankruptcy petition, for more particular information and this Schedule

was admitted into evidence in this trial. Schedule I reflects the following monthly income:

INCOME: **\$3,429.00**

Payroll Deductions:

| | | |
|-----------------------------------|----------------|------------|
| Payroll Taxes and Social Security | \$1,429.00 | |
| Insurance | \$ 0.00 | |
| Other Deductions | <u>\$ 0.00</u> | |
| Subtotal | | \$1,429.00 |

TOTAL NET MONTHLY TAKE HOME PAY: **\$2,000.00**

| | | |
|----------------------------|-------------------|------------|
| Income from real property | \$3,439.00 | |
| Interest and dividends | \$ 285.00 | |
| Other monthly income - | | |
| S Corporation Distribution | <u>\$1,500.00</u> | |
| Subtotal | | \$5,224.00 |

TOTAL COMBINED MONTHLY INCOME: **\$7,224.00**

Mr. Turner also referred to his Schedule J, filed with the bankruptcy petition, for his monthly expenses and this Schedule was admitted into evidence in this trial. Schedule J reflects the following monthly expenditures:

| | |
|--|-----------|
| Condo mortgage payment | \$ 975.00 |
| Electricity | \$ 135.00 |
| Water and Sewer | \$ 30.00 |
| Telephone | \$ 90.00 |
| HOA | \$ 75.00 |
| Security System | \$ 22.00 |
| TV Cable | \$ 36.00 |
| Home Maintenance | \$ 25.00 |
| Food | \$ 500.00 |
| Clothing | \$ 140.00 |
| Laundry and dry cleaning | \$ 80.00 |
| Medical and dental expenses | \$ 75.00 |
| Transportation | \$ 120.00 |
| Recreation, clubs and entertainment, newspapers, magazines, etc. | \$ 110.00 |

| | | |
|--|------------|------------|
| Charitable contributions | | \$ 30.00 |
| Homeowner's insurance | | \$ 71.00 |
| Life insurance | | \$ 45.00 |
| Auto insurance | | \$ 0.00 |
| Disability insurance | | \$ 32.00 |
| Homeowner's insurance - Condo | | \$ 32.00 |
| Taxes | | \$ 110.00 |
| Alimony, maintenance, and support paid to others | | \$ 600.00 |
| Regular expenses from operation of business, profession, or farm | | \$3,234.00 |
| Insurance | \$ 257.00 | |
| Mortgage Interest | \$2,175.00 | |
| Repairs | \$ 349.00 | |
| Taxes | \$ 410.00 | |
| Utilities | \$ 31.00 | |
| Bank Charges | \$ 12.00 | |
| Other: | | |
| Electricity - Condo | | \$ 105.00 |
| HOA - Condominium | | \$ 125.00 |
| Maintenance - Condo | | \$ 110.00 |
| Mortgage on Condo | | \$ 505.00 |
| Property taxes - Condo | | \$ 50.00 |
| Storage rental | | \$ 50.00 |
| Telephone - Condo | | \$ 110.00 |

TOTAL MONTHLY EXPENSES: **\$7,622.00**

During the course of his testimony, Mr. Turner acknowledged placing a \$90,000.00 mortgage on the Mullins Farm which is comprised of 66 acres, on January 21, 1998 payable to his former wife, Joan Turner. Mr. Turner stated that the purpose of this mortgage was for "alimony" which the Debtor further testified to was current. The Debtor also testified that the Court ordered spousal support to Joan Turner was \$309.00 per month while Debtor's schedule J lists "Alimony, maintenance, and support paid to others" at \$600.00 per month. Debtor stated that he pays the required payment directly to the Family Court Clerk's office and pays an additional \$300.00 directly to Joan Turner. Debtor further testified that he had transferred a \$3,000.00

public service bond to Joan Turner after the Decree was entered and also on occasion pays her extraordinary expenses such as dental expenses. Mr. Turner testified that for the 1997 tax year he incurred approximately \$75,000.00 in capital gains income in addition to his regular salary income. In discussing the Debtor's rental property, Mr. Turner testified that he continues to receive rental income from his property. He deposits this income into a separate account and from this account he pays the costs and expenses associated with the rental property. While Mr. Turner testified that the rental income and rental expenses result is a "wash", the separate account has approximately \$12,000.00 in net proceeds. The mortgage on the shopping center rental property is in default. The Chapter 7 trustee and mortgage holder on the shopping center have an interest in the disposition of these proceeds.

CONCLUSIONS OF LAW

Divorce property settlements are generally dischargeable in bankruptcy; however, two exceptions are found in § 523(a)(15). Section 523(a)(15) provides as follows:

(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) [alimony, maintenance or support] 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).

This Court has previously found that the burden of proof to prove the initial requirements in the first paragraph of § 523(a)(15) should rest with a plaintiff but the burden of proof in the affirmative defenses of § 523(a)(15)(A) and § 523(a)(15)(B) rest upon the debtor. In re Campbell, 198 B.R. 467 (Bkrtcy.D.S.C. 1996).

Therefore, Ms. Turner has met her burden of proof of timely filing an adversary proceeding and has also met the prerequisites of § 523(a)(15) based upon the stipulations of the parties that the \$131,873.81 debt is a debt not of the kind described in paragraph § 523(a)(5) and was 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. The burden will now be upon Mr. Turner to show either the inability to pay the § 523(a)(15) debt or that the detrimental consequences to Ms. Turner are outweighed by the benefits to him of a discharge of these debts. As in the other subsections of § 523(a), such a burden of proof must be met by a preponderance of the evidence. In re Campbell, 198 B.R. 467 (Bkrtcy.D.S.C. 1996).

The Plaintiff having met the prerequisites to § 523(a)(15), the Court must now first determine whether the Debtor has the ability to pay the debts pursuant to § 523(a)(15)(A). The Court must apply an "ability to pay" test which equates to the Chapter 13 confirmation "disposable income" test of § 1325(b)(2). In re Asbill, 98-05819-W, C-98-80194-W (Bkrtcy. D.S.C. 03/15/99) and In re Campbell, 198 B.R. at 473, 474 citing In re Hill, 184 B.R. 750, 754, 755 (Bkrtcy.N.D.Ill. 1995). This Court will examine the parties' financial conditions, as of the time of this trial, including the benefits that a debtor may have received from a discharge of other debts in a Chapter 7 case. In re Campbell, 198 B.R. 467 (Bkrtcy.D.S.C. 1996).

A review of Mr. Turner's living expenses leads this Court to conclude that some are overstated or not reasonably necessary to be expended for the maintenance and support of the Debtor, specifically the Debtor's food expenses and his generous payments and transfers to his first wife beyond the amounts required by the Family Court Order. The Court concludes that Mr. Turner's payments and transfers to his first wife are a clear indication of his ability to pay the Plaintiff's debt. Mr. Turner testified that he has no dependents. Mr. Turner further testified that he is maintaining two (2) residences, one in South Carolina and one in North Carolina, and he does not receive any financial assistance from the co-owner and co-resident of the North Carolina townhouse.

Mr. Turner has the greater income and the ability to pay; he also has a greater income potential than the Plaintiff. The Debtor likewise not only has a greater investment history but also possesses a greater ability to produce income from investments. Finally, the Plaintiff has the greater health problems which threaten her ability to earn an income.

Considering these factors, the Court finds that pursuant to § 523(a)(15)(A), Mr. Turner has failed to meet his burden in demonstrating that he does not have the ability to pay the debt to Ms. Turner.

However, because the tests under § 523(a)(15) are disjunctive, the Court must now determine, pursuant to § 523(a)(15)(B), whether the detrimental consequences to Ms. Turner are outweighed by the benefit of the Debtor's fresh start.

Initially, the Court is mindful that Mr. Turner is discharging over \$89,846.00 of other debts in this proceeding. The actual amount of the debt to be discharged will be determined after

the Chapter 7 trustee completes the liquidation of this Debtor's assets.⁵ This Debtor will greatly benefit from the discharge of his scheduled debts.

Additionally, considering Mr. Turner's acquisition of assets after the divorce, the distribution of assets to nondependents, and the encumbrance of nonliened assets prior to the filing of his bankruptcy petition some six years after the divorce, the Court questions his good faith in filing bankruptcy and in conducting this dischargeability litigation.

The Court must weight the needs of the parties and balance the equities under the specific facts of each case. In re Asbill, 98-05819-W, C-98-80194-W (Bkrcty. D.S.C. 03/15/99). In this case, the evidence indicates that if this debt is not discharged, the Debtor should be able to meet his living expenses and the payment of expenditures necessary for the continuation, preservation, and operation of the Debtor's business. If, however, the debt is discharged, it will be very difficult, if not impossible, for Ms. Turner to pay her debts, including her attorneys fees, as she had contemplated, much less save any money, a real concern given her employment and medical condition. In such a situation, the equities and factors to be considered under § 523(a)(15)(B) weigh in favor of Ms. Turner.

Considering the totality of each party's circumstances, including the lack of good faith in the Debtor's conduct, this Court concludes that the Debtor has failed to meet his burden under § 523(a)(15)(B) of convincing the Court that the benefit of the discharge of this debt outweighs the detrimental consequences to Ms. Turner. For all of these reasons, it is the finding of the Court that the \$131,873.81 debt owed to the Plaintiff is nondischargeable pursuant to 11 U.S.C. §

⁵The Court notes that of the \$246,135.00 in unsecured debt which Mr. Turner is attempting to discharge, \$131,873.81 of that debt is owed to Ms. Turner.

523(a)(15).

Additionally, the Debtor's Chapter 7 case has been declared an asset case by the Chapter 7 trustee. The liquidation of this Debtor's estate will produce assets from which the Debtor's allowed claims will receive a distribution. Therefore, because Ms. Turner's claim is the largest general unsecured claim, without priority, which has been filed in the case, the debt owed to Ms. Turner shall be reduced by the amount of distributions she receives from the liquidation of the estate.

AND IT IS SO ORDERED.

Columbia, South Carolina,
May 14, 1999.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
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