

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-35769

CHARLES V. HAJKO, JR.

Debtor

SHARON HAJKO

Plaintiff

v.

Adv. Proc. No. 02-3043

CHARLES V. HAJKO, JR.

Defendant

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***NOTICE OF APPEAL FILED:*** November 8, 2002

***DISTRICT COURT No.:*** 3:03-cv-89

***DISPOSITION:*** Judge Phillips affirmed the October 31, 2002 Order of the United States Bankruptcy Court on March 30, 2004, and the defendant/appellant's appeal was overruled.

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Defendant

**MEMORANDUM**

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**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court on the Complaint to Determine Dischargeability (Complaint) filed by the Plaintiff, Sharon Hajko, on February 26, 2002, seeking a determination that certain monetary sums the Debtor was directed to pay her pursuant to a divorce decree are alimony, maintenance, and support and are nondischargeable under 11 U.S.C.A. § 523(a)(5) (West 1993). In the alternative, the Plaintiff contends that these sums are nondischargeable under 11 U.S.C.A. § 523(a)(4) and/or (15) (West 1993 & Supp. 2002).

The trial of this adversary proceeding was held on October 7, 2002. The record before the court consists of ten exhibits introduced into evidence and the testimony of the parties.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

## I

The parties were married on August 18, 1973. The Plaintiff sued the Debtor for divorce in January 1996 in the Fourth Circuit Court for Knox County, Tennessee. After a two-day trial in March 2001, the Plaintiff was granted an absolute divorce by a Final Decree entered on April 23, 2001, as amended by an Amended Final Decree of Divorce entered on June 21, 2001, which was supplemented by a separate Order also entered June 21, 2001 (collectively, Divorce Decree).<sup>1</sup> The Divorce Decree awarded the Plaintiff, among other things, the marital residence, an IRA account with a balance of \$18,009.00, fifty percent (50%) of the Debtor's military retirement pay in the amount of \$933.50 per month, alimony *in solido* in the amount of \$20,000.00

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<sup>1</sup> The Final Decree, which was superceded by the Amended Final Decree of Divorce, was not introduced into evidence.

to be paid in monthly installments of \$150.00, and her attorneys' fees in the amount of \$12,000.00.<sup>2</sup> In addition, the court ordered that the Debtor was responsible for payment of a credit card account with Direct Merchants and for obtaining a release of a judgment lien held by Ridgedale Townhouses.

The Debtor appealed the Divorce Decree, and the Plaintiff was stayed from executing on the retirement pay pursuant to the Divorce Decree pending the appeal. Subsequently, the Debtor voluntarily dismissed the appeal and the Plaintiff's garnishment attached. During the pendency of the appeal and subsequent wage assignment on the retirement proceeds, the Plaintiff did not receive three payments for the months of September, October, and November 2001, totaling \$2,800.50, which remain unpaid and which the Plaintiff seeks to have declared nondischargeable.

In her Complaint, the Plaintiff alleges that the marital obligations owed to her pursuant to the Divorce Decree are nondischargeable under § 523(a)(4), (5), and/or (15). Specifically, she argues that all of the awards constitute support under § 523(a)(5). In the alternative, she asserts that all of the debts are at least within the scope of § 523(a)(15) and that the Debtor has the ability to pay but is simply choosing not to. Finally, the Plaintiff argues that she and the Debtor were in

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<sup>2</sup> Although the state court held that "the [Debtor] shall be responsible for the Plaintiff's attorneys' fees and expenses in the amount of \$12,000.00," it awarded a judgment for this amount against the Debtor in favor of the Plaintiff's divorce attorneys, Douglas J. Toppenberg and Toppenberg & Burke, P.C., rather than the Plaintiff. See Trial Ex. 2. Furthermore, in her Complaint and Trial Brief of Plaintiff Sharon Hajko filed October 3, 2002, the Plaintiff contends that the state court awarded her an additional \$2,048.76 in attorneys' fees in August 2001 associated with the Debtor's failure to make the \$933.50 payments directly to her prior to entry of a garnishment on his retirement proceeds. The Plaintiff accordingly asks the court to determine that attorneys' fees in the total amount of \$14,048.76 are nondischargeable. Because no order or other proof was introduced by the Plaintiff establishing the award of \$2,048.76, the court will only consider the attorneys' fee issue within the context of the \$12,000.00 awarded the Plaintiff in the Divorce Decree.

a fiduciary relationship, and so the unpaid retirement proceeds for September, October, and November 2001, totaling \$2,800.50, are also nondischargeable under § 523(a)(4).<sup>3</sup>

## II

11 U.S.C.A. § 727 (West 1993) provides generally for a discharge of all debts of a Chapter 7 debtor arising prepetition. Section 727(b), however, limits the discharge to those debts “[e]xcept as provided in section 523 of this title . . . .” 11 U.S.C.A. § 727(b). As material to this adversary proceeding, § 523 provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(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—

. . . .

(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;

. . . .

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<sup>3</sup> In her Complaint, brief, and at trial, the Plaintiff alleged that the unpaid retirement proceeds were converted and not dischargeable under § 523(a)(6). However, because the Plaintiff did not identify this issue in the Pretrial Order as an issue for trial, the court will not consider her § 523(a)(6) argument.

(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[.]

11 U.S.C.A. § 523(a) (West 1993 & Supp. 2002). The party seeking a determination that a debt is nondischargeable under all subsections of § 523(a) has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991).

#### A. Dischargeability Under § 523(a)(5)

The Plaintiff argues that all of the sums awarded to her pursuant to the Divorce Decree fall within the purview of § 523(a)(5) and are, thus, nondischargeable. Because § 523(a)(5)(B) allows a debtor to discharge an award labeled alimony, maintenance, or support if such award is not “actually in the nature” thereof, the bankruptcy court must make an inquiry into the intent of the state court award. *See Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1107 (6<sup>th</sup> Cir. 1983). Whether a debt is alimony, maintenance, or support for the purposes of § 523(a)(5) is a matter of federal law, while the underlying obligation to pay support is governed by state law. *Id.* Because

“alimony, support and maintenance are issues within the exclusive domain of the state courts[,]” bankruptcy courts should also rely on state law in making this determination. *Id.* at 1107-08.

In its *Calhoun* decision, the Sixth Circuit provided a framework for declaring when obligations are “actually in the nature of alimony, maintenance, or support” and, thus, nondischargeable under § 523(a)(5). *See id.* at 1109-11. The court set forth a four-step analysis for determining whether an obligation, which was not designated as alimony, maintenance, or support, was nonetheless in the nature of support and therefore nondischargeable. *See id.* The first step is to determine whether the parties or the state court intended to create an obligation to provide support. *See id.* at 1109. Second, the obligation must have the effect of actually providing necessary support. *See id.* Third, if the first two conditions are satisfied, the court is required to determine whether the obligation is so excessive as to be unreasonable under traditional concepts of support. *See id.* at 1110. Fourth, if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of bankruptcy law. *See id.*

In a subsequent case, the Sixth Circuit re-addressed § 523(a)(5) and clarified that *Calhoun* specifically dealt with the assumption of third-party debts that were not specifically labeled support by the trial court. *See Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6<sup>th</sup> Cir. 1993). The question in *Fitzgerald* was whether the “present needs” test applied when the obligation at issue was actually called support by the trial court. *Id.* at 519. Addressing the application of the “present needs” test in that situation, the court stated that “*Calhoun* was not intended to intrude into the states’ traditional authority over domestic relations and the risk of injustice to the non-debtor spouse or children.” *Id.* at 521. Recognizing that the divorce agreement had provisions

specifically dealing with property division and payment of debts, the court stated that there were no factors presented to suggest that the alimony payments were not truly alimony and that “where no one disputes that these payments are anything except alimony payments, Congress has directed that they are not dischargeable.” *Id.* The court also stated that when a state court has identified an award as support, the only question before the bankruptcy court is “whether something denominated as alimony is really alimony and not, for example, a property settlement in disguise.” *Id.*

The Sixth Circuit reaffirmed *Fitzgerald* in *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397 (6<sup>th</sup> Cir. 1998). In *Sorah*, the court reversed the bankruptcy court’s determination, made pursuant to its own independent inquiry, that payments deemed by the debtor’s divorce decree to be maintenance payments were not actually support payments and that the state court’s findings of fact were without support from the record. *Id.* at 399-400. In reversing, the Sixth Circuit held that a state court’s designation of an award as alimony or support should be presumed to be such by the bankruptcy court. *Id.* at 401.

Pursuant to *Sorah*, the bankruptcy court “looks to the structure of an obligation only to determine whether it is in the nature of support.” *Id.* at 403. “In determining whether an award is actually support, the bankruptcy court should first consider whether it ‘quacks’ like support.” *Id.* at 401. If a state court has designated an award to be support, the presence of “traditional state law indicia that are consistent with a support obligation” gives rise to the conclusive presumption that the award is support. *Id.* The *Sorah* court referred to the following indicia but also specifically stated that this list is not all-inclusive:

- (1) a label such as alimony, support, or maintenance in the decree or agreement,
- (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and
- (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits.

*Id.* Other circumstances to be considered include (1) the disparity of earning power between the parties; (2) the need for economic support and stability; (3) the presence of minor children; and (4) marital fault.” *Luman v. Luman (In re Luman)*, 238 B.R. 697, 706 (Bankr. N.D. Ohio 1999) (citing *Singer v. Singer (In re Singer)*, 787 F.2d 1033, 1035 (6<sup>th</sup> Cir. 1986)).

Once the non-debtor spouse has established the presence of the “traditional state law indicia” and satisfied the burden of proof, it then shifts to the debtor to prove the third prong of the *Calhoun* test; *i.e.*, that “although the obligation is of the *type* that may not be discharged in bankruptcy, its *amount* is unreasonable in light of the debtor spouse’s financial circumstances.” *Sorah*, 163 F.3d at 401 (emphasis in original). In making the determination of whether an alimony award is unreasonable, the bankruptcy court must give deference to the state court’s findings of fact. *Id.* at 403. When the state court has “clearly structured the obligation as support[,]” any additional fact-finding is “inappropriate.” *Id.* at 402. Thus, the debtor may not “introduce evidence regarding the resources, earning potential, and daily needs of the non-debtor spouse, either at the time the obligation arose or at the time of the bankruptcy proceeding.” *Id.* at 401-02. If the award is unreasonable, the bankruptcy court may discharge the debt only “to the extent that it exceeds what the debtor can reasonably be expected to pay.” *Id.* at 402 (emphasis in original). However, the *Sorah* court reiterated that “[§] 523 obviously places no limitation upon a state court’s ability to award alimony, maintenance, or support, and the bankruptcy court should not

second-guess the state court support award absent evidence that the burden on the debtor spouse is excessive.” *Id.* (citations omitted).

#### 1. \$20,000.00 Alimony *in solido* Award

Following the Sixth Circuit’s directive in *Calhoun* and *Sorah*, in order to determine if the \$20,000.00 alimony *in solido* award is actually support and nondischargeable under § 523(a)(5), it is necessary to first examine Tennessee state law regarding alimony. Under Tennessee law, alimony is awarded to assist the disadvantaged spouse in becoming self-sufficient and to mitigate the “harsh economic realities of divorce.” *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1999). In making an award of alimony, the most important factor for the trial court to consider is the need of the spouse being awarded alimony, followed next by the ability of the obligated spouse to pay. *Houghland v. Houghland*, 844 S.W.2d 619, 621 (Tenn. Ct. App. 1992).

In Tennessee, there are three types of alimony that can be awarded: rehabilitative alimony, alimony *in solido*,<sup>4</sup> and alimony *in futuro*. See TENN. CODE ANN. § 36-5-101(d)(1) (2001). Tennessee has a statutory preference for rehabilitative alimony. See TENN. CODE ANN. § 36-5-101(d)(1); *Crabtree v. Crabtree*, 16 S.W.3d 356, 358 (Tenn. 2000). However, each case should be based upon the unique facts of that case, and a court may award one of the long-term types of support if it finds the circumstances appropriate. *Anderton*, 988 S.W.2d at 682-83. Tennessee Code Annotated section 36-5-101(d)(1) lists the relevant factors to be considered by a

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<sup>4</sup> As pertinent to this case, “[a]limony *in solido* is an award of a definite sum of alimony and may be paid in installments provided the payments are ordered over a definite period of time and the sum of the alimony to be paid is ascertainable when awarded.” *Burlew v. Burlew*, 40 S.W.3d 465, 471 (Tenn. 2001) (quoting *Waddey v. Waddey*, 6 S.W.3d 230, 232 (Tenn. 1999)).

divorce court in making a support determination, including among others, relative earning capacity, relative education and training, the duration of the marriage, the parties' separate assets, the division of marital property, the standard of living established during the marriage, the relative fault of the parties to the divorce, and any other factors "as are necessary to consider the equities between the parties." See TENN. CODE ANN. § 36-5-101(d)(1)(A) - (L).

Here, the Divorce Decree specifically deemed the \$20,000.00 award to be "alimony *in solido*," payable to the Plaintiff in monthly installments of \$150.00, and authorizing her to garnish the Debtor's military retirement pay if he fails to make these payments. In a separate finding, the state court found that the Plaintiff was not economically disadvantaged relative to the Debtor and denied her request for rehabilitative alimony. Moreover, within the Divorce Decree, there are four separate paragraphs specifically dealing with division of the marital property in addition to the two separate paragraphs specifically dealing with alimony.

The court concludes that the state trial court intended that the \$20,000.00 award of alimony *in solido* be used for the support of the Plaintiff. First, the court specifically labeled the award "alimony." As stated in both *Fitzgerald* and *Sorah*, the specific designation of alimony requires that this court give deference to the state court's labeling and structure of the award. See *Sorah*, 163 F.3d at 401; *Fitzgerald*, 9 F.3d at 520-21. Next, the state court ordered that this sum be paid in equal \$150.00 monthly installments and that these monthly installments be paid directly to the Plaintiff. This meets the second criterion specifically set forth in the *Sorah* test. The court acknowledges that there is nothing in the Divorce Decree stating that the monthly installment payments are contingent upon some event. However, *Sorah* does not require a finding that all

three of the indicia listed be found, but instead instructs this court to look to “traditional state law indicia” which merely *includes* the three enumerated terms. *See Sorah*, 163 F.3d at 401. The court may, therefore, examine the other circumstances existing between the parties, including the factors set forth in Tennessee Code Annotated section 36-5-101(d)(1), such as relative earning capacity, relative education and training, marital fault, and any other factors necessary to consider the equities between the parties.

The Debtor is almost 49 years old and appears to be in good health.<sup>5</sup> He served over 20 years in the United States Air Force prior to retiring from active duty in 1993. While on active duty, he obtained extensive training in the security field, including nuclear security training. Since retiring from the Air Force in 1993, the Debtor has obtained the requisite licenses for, and has worked as, an investment representative or stock broker and an insurance salesman. He has a Bachelor’s degree and is anywhere from six to nine hours from completing a Master’s degree. He lives with his girlfriend, Jessica Tillery (Ms. Tillery), and their 17-month old child. He testified that his income is supplemented by Ms. Tillery’s income. He also testified that he has not been employed since the birth of his child in May 2001 and that he is a “stay at home parent.”

The Plaintiff is 48 years old and in seemingly good health. She works for the Knoxville Comprehensive Breast Center and appears to have worked there for several years.<sup>6</sup> She does not have a college degree and testified to having worked in retail, restaurant service, and

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<sup>5</sup> The Debtor receives a disability allowance from the military; however, there was no proof offered at trial as to the nature of any disability he might have, nor was there any proof offered to show that he was unable to work as a result of any disability. Furthermore, the court found the Debtor articulate and intelligent and could not discern any apparent disability from his appearance or testimony at trial.

<sup>6</sup> There was no testimony as to what position she holds.

house-cleaning over the past several years, in addition to working at her current position. The Plaintiff testified that her 20-year old daughter lives with her, but that she does not receive any supplemental income from this arrangement.<sup>7</sup> She has, of necessity, incurred considerable debt subsequent to the divorce, which she is struggling to pay from her limited income.

The Plaintiff has satisfied her burden of proof that the alimony *in solido* awarded in the Divorce Decree is actually support. This court pays particular deference to the state court's labeling of the award as alimony *in solido*, noting that the state court proceeding lasted for two days, in which the judge heard direct testimony from the parties themselves, the parties' three children, and Ms. Tillery. This court has found nothing to overcome the conclusive presumption that the trial court meant what it said and said what it meant in terming the \$20,000.00 alimony *in solido* as such. The award clearly assists the disadvantaged spouse in this case, the Plaintiff, in mitigating "the harsh economic realities of divorce" and thus comports with Tennessee's purpose in awarding alimony. See *Anderton*, 988 S.W.2d at 683.

Under the *Calhoun* test, the burden now shifts to the Debtor to prove that the obligation is unreasonable based upon his financial circumstances.<sup>8</sup> He has not met his burden. Based upon the directives of *Sorah*, this court will not consider any evidence regarding the Plaintiff's resources, earning potential, or daily needs, either at the time of the divorce or presently. See *Sorah*, 163

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<sup>7</sup> The Plaintiff's testimony leads the court to conclude that this child may be disabled or handicapped and therefore unable to work. The nature of any disability was not, however, disclosed.

<sup>8</sup> Because the award was actually labeled alimony by the state court, this court does not consider the *Calhoun* "present needs" test. See *Sorah*, 163 F.3d at 401; *Fitzgerald*, 9 F.3d at 521.

F.3d at 402. Instead, the court will only consider evidence regarding the Debtor's financial condition at this time.<sup>9</sup>

As to the Debtor's financial circumstances at the time of the divorce, this court again gives deference to the state court's determination. The Divorce Decree was entered on June 21, 2001, just over fifteen months ago after a two-day trial. At the trial on this adversary proceeding, the Debtor introduced as an exhibit his 2001 tax return, which indicated an income sufficient to support the \$150.00 per month payments ordered by the state court. Accordingly, the Debtor has not shown that the alimony award was unreasonable at the time of the divorce.

In fact, the Debtor, both prior and subsequent to the parties' divorce, has engaged in a pattern of conduct designed to deprive the Plaintiff of both her portion of the marital estate and, subsequent to the divorce, the alimony *in solido* to which she is entitled under the Divorce Decree. The findings of the state court set forth in the Divorce Decree best evidence the Debtor's activities prior to the divorce:

1. That on or about January 31, 1996, the Court entered an injunction enjoining the Defendant from disposing of, transferring, selling, mortgaging, or encumbering, any real or personal property, which the Defendant owned solely or in conjunction with another person or entity, or in which he had any interest whatsoever. The Court finds that this injunction was never vacated by the Court, and remained in effect throughout the pendency of these proceedings. The Court further finds that the Defendant willfully and deliberately violated this Order of the Court by, *inter alia*, making gifts to family members; by providing his paramour with \$7,000.00 to purchase land in her name; and by transferring, spending and otherwise disposing of stocks and other financial assets. . . .

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<sup>9</sup> The Debtor has never specifically offered any argument or proof directly in response to this prong of the *Sorah* test; however, the court will treat all evidence submitted as to his financial condition as being offered for the purpose of rebutting both the Plaintiff's § 523(a)(5) and § 523(a)(15) arguments.

2. That the Defendant has failed to file his Federal Income Tax Returns for the years 1996 and 1997, and that this failure contributes to the difficulty in determining the extent of the marital estate, both as of those dates and as of the present. . . .

3. That, based upon the testimony of the Defendant and upon Trial Exhibit 30, the Defendant has failed to account for \$80,689.71 which existed at the time of the parties' separation, and which he was required to protect pursuant to the Court's injunction, but which is no longer part of the marital estate.

4. That the Plaintiff cashed and spent \$16,104.00 which was in her 401(k) and IRA accounts at the time of the separation.

See Trial Ex. 1.

Prior to the divorce, the Debtor and Ms. Tillery had a daughter. Although the Debtor and Ms. Tillery live together, raise the child together, and share rent and household expenses, Ms. Tillery initiated an action against the Debtor in the Juvenile Court for Knox County, Tennessee, for child support. She was awarded monthly child support in the amount of \$360.00 on November 5, 2001, *nunc pro tunc* to October 12, 2001, of which \$234.14 is being deducted from the Debtor's monthly military retirement pay by way of a wage assignment.<sup>10</sup> The child support issues involving the Juvenile Court action commenced by Ms. Tillery were pending during the Debtor's appeal of the Divorce Decree. During the time of the appeal, the Plaintiff was precluded from executing on the Debtor's military retirement pay to satisfy the \$150.00 monthly installment payments required to liquidate the \$20,000.00 alimony *in solido* award. However, after his \$360.00 monthly child support obligation was fixed pursuant to a November 5, 2001 Order out of the Juvenile Court, and an appropriate assignment had been levied against his military retirement pay, the Debtor dropped his appeal of the Divorce Decree. The result of this was that the child

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<sup>10</sup> The balance of the child support obligation is being paid directly by the Debtor.

support assignment took precedence over the Plaintiff's garnishment. Having maximized the assignments against his retirement pay, the Plaintiff was precluded from further garnishment.<sup>11</sup>

In light of the harmonious relationship that exists between the Debtor and Ms. Tillery, the court has no difficulty in concluding that the child support action commenced by Ms. Tillery in the Knox County Juvenile Court was contrived by the Debtor and Ms. Tillery for one purpose - to prevent the Plaintiff from collecting the alimony *in solido* awarded her in the Divorce Decree.

The Debtor has not shown that the award is unreasonable in light of his present financial circumstances. The Debtor has not remarried, but he lives with Ms. Tillery, who he testified not only contributes to the household financially, but also supplements his income. He is well educated and clearly capable of being employed but has chosen, in his own words, to remain at home to be a "stay at home parent." In other words, he continues to pursue his efforts to thwart the Plaintiff's ability to collect the sums awarded her under the Divorce Decree. Under the circumstances, the Debtor did not meet his burden of proof that these payments are unreasonable in light of his financial circumstances.

This court finds that the state trial court intended for the \$20,000.00 award labeled alimony *in solido* to be, in fact, alimony awarded for the support of the Plaintiff. The court further finds that this award, divided into equal monthly installments of \$150.00, is not manifestly unreasonable in light of the Debtor's financial circumstances either at the time of the entry of the Divorce Decree

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<sup>11</sup> Also during this time, the Debtor issued an assignment in favor of his mother for a \$200.00 monthly deduction from his retirement pay which he testified was in satisfaction of a loan on an automobile. The maximum amount of the Debtor's monthly retirement pay subject to assignment or garnishment is 65%.

or presently. Having determined that the \$20,000.00 alimony *in solido* awarded to the Plaintiff pursuant to the Divorce Decree is designated as alimony and is actually alimony, the court holds that this debt is nondischargeable under 11 U.S.C.A. § 523(a)(5).<sup>12</sup>

## 2. Attorneys' Fees

In the divorce action, the Plaintiff requested an award of attorneys' fees in the amount of approximately \$23,000.00, while the Debtor argued that \$2,500.00 was more reasonable. After a hearing, the trial court determined that \$12,000.00 represented "attorney's fees and expenses related to the [Debtor's] failure to abide by the Orders of this Court." Trial Ex. 2. at ¶ 9. The court then ruled that the Debtor "shall be responsible for the Plaintiff's attorney's fees and expenses in the amount of \$12,000.00." Trial Ex. 2. at ¶ 9. The Divorce Decree further provides that the Debtor is required to "pay the Plaintiff's attorney's fees and expenses associated with his contemptuous actions in violating the injunction of this Court in the amount of \$12,000.00[.]" Trial Ex. 2 at ¶ (D).<sup>13</sup> Because the award of attorneys' fees was not labeled alimony by the state court, it is necessary for this court to analyze whether this debt was intended by the state court to be support and alimony by applying the *Calhoun* and *Sorah* factors discussed *supra*.

In this case, the *Sorah* indicia do not weigh in favor of the Plaintiff's argument that the attorneys' fees award was intended to be support. First, the court did not label the award as

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<sup>12</sup> Because this debt is nondischargeable under § 523(a)(5), it is not necessary to consider any arguments pursuant to § 523(a)(15).

<sup>13</sup> To this end, the trial court awarded the Plaintiff's attorneys a judgment in this amount against the Debtor. The court will discuss this aspect of the Divorce Decree *infra*.

alimony, maintenance, or support. Accordingly, the court must perform the *Calhoun* analysis to determine whether the award was intended as support by the trial court. In general, awards of attorneys' fees in divorce judgments are deemed to be in the nature of support and nondischargeable. See, e.g., *McNamara v. Ficarra (In re McNamara)*, 275 B.R. 832, 835 n.2 (E.D. Mich. 2002); *Goans v. Goans (In re Goans)*, 271 B.R. 528, 534 (Bankr. E.D. Mich. 2001); *Hodges v. Martin J. Holmes & Assocs. (In re Hodges)*, 139 B.R. 846, 848 (Bankr. N.D. Ohio 1991). However, in order to determine the intent of the state trial court, it is necessary to again refer to Tennessee state law.

In Tennessee, “[a]n award of attorney’s fees in divorce cases is treated as a form of spousal support, and the award is characterized as alimony *in solido*.” *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001); see also *Fulbright v. Fulbright*, 64 S.W.3d 359, 369 (Tenn. Ct. App. 2001); *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000). If the primary debt underlying the attorneys’ fee award is in the nature of maintenance and support, the attorneys’ fee award is also in the nature of maintenance and support for the purposes of § 523(a)(5). *Adams v. Council, Baradel, Kosmerl & Nolan, P.A. (In re Adams)*, 254 B.R. 857, 861 (D. Md. 2000); *Burns v. Burns (In re Burns)*, 186 B.R. 637, 643 (Bankr. D.S.C. 1992); *Cooley v. Sposa (In re Sposa)*, 31 B.R. 307, 310 (Bankr. E.D. Va. 1983).

When determining whether to award these attorneys’ fees, the divorce court should again consider the relevant factors set forth in Tennessee Code Annotated section 36-5-101(d)(1). *Lindsey v. Lindsey*, 976 S.W.2d 175, 181 (Tenn. Ct. App. 1997); *Houghland*, 844 S.W.2d at 623 (As with any alimony award, in deciding whether to award attorney’s fees as alimony *in solido*,

the trial court should consider the relevant factors enumerated in [Tennessee Code Annotated] § 36-5-101(d).”). Even though fault is a factor when awarding alimony to one party, alimony is not meant to be punitive. *Anderton*, 988 S.W.2d at 682; *Lancaster v. Lancaster*, 671 S.W.2d 501, 503 (Tenn. Ct. App. 1984). It is within the sound discretion of the trial court to make the award; however, a spouse with adequate property and income is not entitled to an award of additional alimony to compensate for attorney’s fees and expenses.” *Lindsey*, 976 S.W.2d at 181. Although the courts have held that such awards are only appropriate when the spouse seeking fees does not have sufficient funds to pay their own legal expenses or requiring payment would deplete their resources, if that party has been awarded additional funds for maintenance and support and such funds are intended to provide the party with a source of future income, the party need not be required to pay legal expenses by using assets that will provide for future income.” *Koja*, 42 S.W.3d at 98 (citations omitted).

Here, it appears that the trial court made a determination to award attorneys’ fees based, in part, on the parties’ ability to pay these fees. The Plaintiff sought over \$23,000.00 in fees, and at trial she testified that she had incurred attorneys’ fees of more than \$50,000.00. In response, the Debtor argued before the trial court that \$2,500.00 in attorneys’ fees was more reasonable. After hearing oral argument on the issue in May 2001, the trial court awarded the Plaintiff \$12,000.00. It appears that the trial court took into account the relative ability of the parties to pay, in addition to the fault of the Debtor in dragging out the proceedings by failing to make payments as ordered. In the Divorce Decree, the trial court specifically stated that it was awarding attorneys’ fees associated with [the Debtor’s] contemptuous actions in violating the injunction of

this Court . . . .” Trial Ex. 2 at ¶(D). In light of that language, it could appear that the trial court was attempting to punish the Debtor by awarding the Plaintiff attorneys’ fees, which is in direct contrast with the purpose of alimony to assist the disadvantaged spouse and not punish the other spouse. *See Anderton*, 988 S.W.2d at 682-83. However, in light of other indications, such as the Debtor’s delay in following court orders and his attempts to drag out the proceeding by appealing the trial court’s orders, the award is not necessarily punitive, but instead seems to reimburse the Plaintiff for being required to continue defending the litigation. Additionally, the court takes notice that a portion of those fees was awarded to the Plaintiff based upon the Debtor’s failure to abide by prior court orders, which eventually ended with the Debtor being jailed for contempt.

Another important factor in this court’s opinion is the placement of the attorneys’ fees award within the Divorce Decree itself. *See* Trial Ex. 1. The Divorce Decree is set out as follows: paragraphs (B), (C), (D), and (E) dealing with property distribution, paragraph (F) dealing with a division of marital debts, and paragraphs (G) and (H) dealing with alimony issues. Paragraph (I) states that the issue of attorneys’ fees is reserved for future hearing and is located directly after the paragraphs dealing with alimony. As such, it appears that the state trial court intended for the award of attorneys’ fees to be more in the nature of support than property distribution.

As to the second and third *Sorah* indicia, the Divorce Decree is unclear as to where the Debtor is to make payment for the attorneys’ fees. There is no indication that these payments are to be reimbursed directly to the Plaintiff. Instead, the trial court awarded attorneys’ fees to the Plaintiff and granted a judgment for those fees to her attorneys.

The fact that the Divorce Decree awarded a judgment in favor of the Plaintiff's attorneys does not preclude a finding that they are in the nature of support. "Payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable." *Calhoun*, 715 F.2d at 1107. In fact, several courts have held that even though awards of attorneys' fees were made directly to the actual attorneys, the awards were nonetheless nondischargeable pursuant to § 523(a)(5). See, e.g., *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 750-51 (8<sup>th</sup> Cir. 1995) (finding that if the debtor was discharged from paying the debt, the disadvantaged ex-spouse would be held liable for the debt to her attorney); *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 n.3 (8<sup>th</sup> Cir. 1983) ("If [the debtor] does not pay the lawyer, [the ex-spouse] will apparently remain liable to him."); *Turner v. Whitney (In re Whitney)*, 265 B.R. 1, 2 n.2 (Bankr. D. Me. 2001) (holding that in action to recover for attorneys' fees awarded directly to the attorney, "[t]here has been no objection to [the attorney's] standing to bring the § 523(a)(5) complaint and no motion requiring her to join her client as a party. It is far better practice for the former spouse to bring, or join in, the complaint."); *Baker v. Baker (In re Baker)*, 274 B.R. 176, 187 (Bankr. D.S.C. 2000) (holding that as long as payments are made on behalf of the spouse, attorneys' fees need not be paid directly to the spouse to be nondischargeable under § 523(a)(5)); *Brasslett v. Brasslett (In re Brasslett)*, 233 B.R. 177, 188 n.21 (Bankr. D. Me. 1999) ("It is generally agreed that the direction of the state court to pay the attorney fees to the attorneys and not to [the ex-spouse] directly does not bar the conclusion that they fall within the embrace of § 523(a)(5).").

In Tennessee, it is common practice for divorce courts to award attorneys' fees directly to the attorneys themselves. See *Palmer v. Palmer*, 562 S.W.2d 833, 839 (Tenn. Ct. App. 1977)

(?In practice such <additional alimony' is frequently designated simply as fee to be paid to the wife's counsel." ). However, the *Palmer* court also stated that ?the justification and principle are the same; i.e., that money ordered to be paid by the husband to the wife's attorney is additional alimony allowed to the wife." *Id.*

In the present case, the Divorce Decree was a judgment between the parties to the action, namely, the Plaintiff and the Debtor herein. Even though the state trial court also stated that it was awarding a judgment for the attorneys' fees in favor of the attorneys, all provisions of the Divorce Decree were enforceable by the Plaintiff as a named party to the actual order. The fact that the attorneys themselves were also given a judgment for the attorneys' fees award does not preclude the Plaintiff from asserting that her obligation in the amount of that judgment, \$12,000.00, is nondischargeable under § 523(a)(5). If the Debtor fails to pay the award, either party has the ability to enforce that provision of the Divorce Decree. The fact that her attorneys could just as easily collect reimbursement of the fees from the Debtor directly does not convince this court that the fees were not in the nature of support.

Based upon the above factors, the court is satisfied that the state trial court intended for the attorneys' fees award to be for the support of the Plaintiff. Accordingly, the court deems the award of attorneys' fees to be incident to the Plaintiff being required to continue to expend such fees based upon the Debtor's failure to pay the alimony awarded. As such, the award would be in the nature of support and fall under the purview of § 523(a)(5).

The second inquiry necessitated by the *Calhoun* test is the “present needs” test, *i.e.*, whether the award was effectively support in light of the recipient non-debtor’s present needs.<sup>14</sup> This court must examine “the practical effect of the discharge . . . upon the [non-debtor] spouse’s ability to sustain daily needs.” *Calhoun*, 715 F.2d at 1109. In this analysis, “substance must prevail over form.” *Luman v. Luman (In re Luman)*, 238 B.R. 697, 709 (Bankr. N.D. Ohio 1999) (citing *Calhoun*, 715 F.2d at 1009). “Thus, a bankruptcy court must also necessarily look at the actual nature of the individual loan to see if there is a real possibility that the creditors will seek redress against the non-debtor spouse on such debts.” *Id.*

As previously discussed, the Debtor has purposefully chosen not to seek employment, despite being qualified in areas of security, investment brokeraging, and insurance sales. On the other hand, the Plaintiff has worked at the same job for several years, and in fact, has held more than one job on several occasions in order to make ends meet. At trial, the Plaintiff testified to having monthly expenses of \$2,828.00 and a monthly income of \$2,290.00, including the military retirement pay received each month from the Debtor. This amount does not include the \$150.00 per month which this court has determined to be nondischargeable, so her actual monthly income will be \$2,440.00, which still leaves her with a monthly deficit of \$388.00. In contrast, the Debtor testified to having monthly expenses of \$892.00 and a monthly income from his military retirement of \$734.74, for a difference of \$157.26. However, the main differences between the financial situations of the Debtor and the Plaintiff are that the Debtor has Ms. Tillery to supplement his income, and he is capable of going out and obtaining gainful employment. The Plaintiff does not

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<sup>14</sup> Because the award was not labeled alimony by the state court, this court must still consider the *Calhoun* “present needs” test. See *Sorah*, 163 F.3d at 401; *Fitzgerald*, 9 F.3d at 521.

have anyone supplementing her income; in fact, she is supporting the parties' daughter. Additionally, she is gainfully employed at a position that she has held for several years. In this court's opinion, it is not necessary that the Plaintiff work more than one job while the Debtor does not work at all.

Moreover, the Plaintiff testified that she has incurred over \$50,000.00 in attorneys' fees, which accrue interest at a rate of 6% per annum. She will be required to pay these attorneys' fees, even if the Debtor does not pay any. Her statement of monthly expenses shows that she is currently paying \$175.00 per month towards these attorneys' fees. Additionally, she testified that she has agreed to cash in her IRA in order to pay on these fees. The Debtor, on the other hand, does not evidence that he is paying any attorneys' fees on his own behalf. Under the "present needs" test, it seems obvious to this court that the attorneys' fees awarded by the trial court "has the effect of providing the support necessary to ensure that the daily needs of the former spouse and any children of the marriage are satisfied." *Calhoun*, 715 F.2d at 1109. Accordingly, the second *Calhoun* prong is met.

Under the *Calhoun* test, the burden now shifts to the Debtor to prove that the obligation is unreasonable based upon his financial circumstances. Once again, as stated earlier in this opinion and for the same reasons therein, the Debtor has not met his burden on this issue.

This court finds that the trial court intended for the award of attorneys' fees to be in the nature of support and that the payment of these attorneys' fees by the Debtor will have the actual effect of providing necessary support to the Plaintiff. *See Calhoun*, 715 F.2d at 1109-1110.

Furthermore, the court finds that the amount is not so excessive to be unreasonable under traditional concepts of support. *Id.* The court therefore finds that this debt is also nondischargeable under 11 U.S.C.A. § 523(a)(5).<sup>15</sup>

### 3. The Direct Merchants Credit Card and Ridgedale Townhouse Judgment

In her Complaint, the Plaintiff seeks a determination that the Debtor's liability on both the Direct Merchants credit card account and the Ridgedale Townhouse judgment be determined nondischargeable. However, the Plaintiff offered no proof at trial regarding the nature of these debts and why they should be nondischargeable. Because the Plaintiff has not met her burden of proof that these debts are nondischargeable, the court finds that they are discharged.<sup>16</sup>

### 4. Unpaid Retirement Proceeds

The Plaintiff also seeks a determination that \$2,800.50, representing the retirement proceeds owed to her for September, October, and November 2001, are nondischargeable. Again, since these payments were not labeled alimony by the trial court, this court must deduce whether the trial court actually intended for the retirement proceeds to be in the nature of alimony, maintenance, or support.

The Divorce Decree specifically provides, in part:

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<sup>15</sup> Because this debt is nondischargeable under § 523(a)(5), it is not necessary to consider any arguments pursuant to § 523(a)(15) as to the \$12,000.00 attorneys' fees award.

<sup>16</sup> The Debtor was granted his discharge on March 7, 2002.

(D) That as part of the property division, the Plaintiff, Sharon D. Hajko . . . shall be awarded 50% of the Defendant's, Charles V. Hajko's . . . military retirement pay. The Plaintiff shall receive 50% per month from Defendant's military retirement pay as the Plaintiff's sole and separate property, payable from his disposable retired pay. . . . Until such time as the division of the military pension has been effectuated, the Defendant shall pay the Plaintiff 50% of his monthly pension directly.

Trial Ex. 1.

Based upon the wording used by the trial court, there is no question that the court intended for this award to be in the nature of a property settlement. Because the debt does not involve alimony, maintenance, or support, the § 523(a)(5) inquiry ends. *See Calhoun*, 715 F.2d at 1109.

#### **B. Dischargeability Under § 523(a)(15)**

In the alternative, if the court finds that any of the marital obligations do not meet the requirements of § 523(a)(5), the Plaintiff seeks a determination of nondischargeability under § 523(a)(15). In order to proceed under § 523(a)(15), the Plaintiff, as the non-debtor spouse, has the burden of proving that the debt is not of the kind described in § 523(a)(5) and that it was incurred in the course of a divorce. *See* 11 U.S.C.A. § 523(a)(15); *Crawford v. Osborne (In re Osborne)*, 262 B.R. 435, 439 (Bankr. E.D. Tenn. 2001). Once met, the burden shifts to the Debtor to prove "one of the affirmative defenses set forth in § 523(a)(15)(A) or (B)." *Osborne*, 262 B.R. at 439. The burden of proof is by preponderance of the evidence. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6<sup>th</sup> Cir. 1998).

There is no dispute that the \$2,800.50 in unpaid retirement proceeds falls within the definition of § 523(a)(15) as having been "incurred by the debtor in the course of a divorce . . .

or in connection with a . . . divorce decree . . . .” The \$2,800.50 was awarded to the Plaintiff pursuant to the Divorce Decree. Additionally, as previously discussed, these unpaid retirement proceeds represent a portion of the property settlement awarded by the state trial court. The burden is upon the Debtor to prove either his inability to pay the debt or that discharge of the debt would result in a benefit to him outweighing any detrimental effect to the Plaintiff.

### 1. The Debtor’s Ability to Pay

A debtor has the ability to pay pursuant to § 523(a)(15)(A) if he “has sufficient disposable income to pay all or a material part of a debt within a reasonable amount of time.” *Osborne*, 262 B.R. at 444 (quoting *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 392 (Bankr. W.D. Tenn. 1996)). The debtor is required to show both a present and future inability to pay. *Molino*, 225 B.R. at 908. When making a determination of the debtor’s ability to pay, the court should consider both present income and prospective earning capacity as of the date of trial. *Osborne*, 262 B.R. at 443. To determine future earning potential, the court may look to “a debtor’s prior employment, future employment opportunities, and health status.” *Molino*, 225 B.R. at 908. If the debtor “artificially diminishes his ability to repay obligations addressable under § 523(a)(15), such conduct becomes a factor appropriately considered by the bankruptcy court in a § 523(a)(15) proceeding.” *Id.*

The facts of *Molino* are similar to those in the case at bar. The debtor argued that he was without the ability to pay when he voluntarily chose to forego his previous well-paying occupation to instead work at a restaurant for approximately \$90.00 per week and to assist his new spouse

with her dog grooming business without pay. *Id.* at 907. The court noted that the debtor had previously been earning an annual salary over \$48,000.00 and that he could potentially find a job that would enable him to pay off the debt at issue. *Id.* The court followed a decision from the Western District of Missouri which held that a debtor who voluntarily chose to become a missionary with no income did not evidence an inability to pay, stating that:

[A]bility to pay under § 523(a)(15) does not necessarily mean at the time of the trial, but requires the court to consider debtor's [sic] future earning capacity. Here, Debtor has voluntarily placed himself in a position of earning less income—virtually no income, in fact—and then claims he is unable to pay his debts. Debtor's decision to become a stake missionary in his church is his decision alone. He chose to place himself in a position of voluntary retirement several years ago. Debtor receives no compensation from his church. Taking a voluntary retirement and working in a voluntary position for the church or a charitable or civic institution is a luxury many people would like to be able to afford. Debtor is not prohibited from making such life-choice decisions, but he cannot do so in order to render himself a pauper in an effort to avoid the lawful support obligations ordered by the Utah dissolution court, or while seeking the protection of the bankruptcy court as a means to avoid those support obligations. When the obligations to Plaintiff are satisfied, Debtor is free to make such life-choices.

*Id.* at 908 (quoting *Johnson v. Rappleye (In re Rappleye)*, 210 B.R. 336 (Bankr. W.D. Mo. 1997) (citations omitted)); *see also Helsel v. Marsh (In re Marsh)*, 257 B.R. 879, 882 (even though the debtor established that he was "on a tight budget, having incurred relocation expenses . . . making less now than in the time he was married to the plaintiff . . . living modestly . . . [with] some other debt [surviving] his Chapter 7 discharge" because he had failed to prove an inability to increase his income in the future, he did not meet his burden under § 523(a)(15)(A)).

In this case, the Debtor showed monthly income of \$797.04 in his schedules, as amended, which included deductions for taxes, insurance, child support, and a property settlement to the Plaintiff. His monthly expenditures as scheduled were \$737.00, including expenses for rent,

utilities, telephone, cable, cellular phone service, food, medical and dental expenses, transportation costs, recreation costs, and life insurance. At trial, the Debtor introduced an exhibit showing his net monthly income as \$734.74. This document evidenced deductions from his gross retirement and disability of \$2,173.00 as follows: taxes (\$70.62), child support (\$234.14), insurance (\$11.84), automobile (\$200.00), and the Plaintiff (\$933.50).<sup>17</sup> The same exhibit listed his daily living expenses totaling \$892.00 plus miscellaneous unknown expenses. On their face, these exhibits might seem to indicate an inability to pay; however, using the guidelines set forth in *Molino*, the court is required to “dig deeper” and determine if the Debtor has a future ability to pay.

As previously discussed, the Debtor pays child support to Ms. Tillery, who is the mother of his young child, in the amount of \$360.00 per month pursuant to the November 5, 2001 Order of the Juvenile Court for Knox County, Tennessee, entered as an exhibit at trial. See Trial Ex. 5. The Debtor testified that he has chosen to stay at home and parent his young child. He also testified that both the child and Ms. Tillery live with him. Additionally, the Debtor testified that Ms. Tillery supplements the household finances. As in *Molino* and *Rappleye*, the Debtor has purposely chosen not to seek gainful employment. The court considers this to be a factor that, along with the Debtor’s training and health, discussed *supra*, evidences that he has substantial capacity to pay this debt both presently and in the future. The court need not again reiterate the extremes to which

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<sup>17</sup> As previously discussed, the Debtor testified that he pays \$200.00 per month to his mother for the automobile he drives and that this amount is deducted from his retirement pay. The court notes first, that this debt was not listed in either his original or his amended bankruptcy schedules and second, that the Debtor listed two automobiles as his personal property in his schedules.

the Debtor has gone to avoid his obligations to the Plaintiff. The Debtor has not met his burden of proof under § 523(a)(15)(A).

## 2. Benefit to the Debtor verses Detriment to the Plaintiff

Even if a debtor has the ability to pay, § 523(a)(15)(B) allows the debt to be discharged upon a showing that the benefit to the debtor outweighs any detriment to the plaintiff. The bankruptcy court should compare the financial condition and standard of living of each party to determine the true benefit of the debtor's possible discharge against any hardship the former spouse . . . would suffer as a result of a discharge." *Osborne*, 262 B.R. at 444 (quoting *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33, 1997 WL 745501, at \*3 (6<sup>th</sup> Cir. Nov. 24, 1997)). Only if the debtor's standard of living will fall "materially" below that of the former spouse by a finding of nondischargeability should the debt be discharged. *Id.*

Although the balancing test should be applied on a case by case basis, the Sixth Circuit has adopted a non-exhaustive list of factors that may be considered by the bankruptcy court in making the comparison:

- 1) The amount of debt involved, including all payment terms;
- 2) The current income of the debtor, objecting creditor and their respective spouses;
- 3) The current expenses of the debtor, objecting creditor and their respective spouses;
- 4) The current assets, including exempt assets of the debtor, objecting creditor and their respective spouses;
- 5) The current liabilities, excluding those discharged by the debtor's bankruptcy, of the debtor, objecting creditor and their respective spouses;
- 6) The health, job skills, training, age and education of the debtor, objecting creditor and their respective spouses;

- 7) The dependents of the debtor, objecting creditor and their respective spouses, their ages and any special needs which they may have;
- 8) Any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree;
- 9) The amount of debt which has been or will be discharged in the debtor's bankruptcy;
- 10) Whether the objecting creditors is eligible for relief under the Bankruptcy Code; and
- 11) Whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the 11 U.S.C. § 523(a)(15) issues.

*Molino*, 225 B.R. at 909 (quoting *In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996)).

Because this list is non-exhaustive, the court may consider any or all of these factors in making its determination.

With regards to these factors, the Debtor had the burden of proof that the discharge of the debt would provide him a benefit that outweighs any detriment to the Plaintiff. He has not met this burden.

As to the first factor, the \$2,800.50 in unpaid retirement proceeds are actually property of the Plaintiff that he has withheld from her. Pursuant to the Divorce Decree, the Debtor himself was required to pay the Plaintiff directly until the payments could be withheld from his military retirement pay by the government. At trial, the Debtor testified that he interpreted the court's order to mean that the Plaintiff could garnish his wages. However, he also acknowledged that he voluntarily appealed the Divorce Decree, thereby thwarting any efforts by the Plaintiff to proceed with execution pursuant to the Divorce Decree. Because the Debtor first forced the Plaintiff to incur additional attorneys' fees by his own misconduct, and then he purposefully has not repaid

to her the retirement proceeds to which she is entitled, the court finds that these amounts are not overly excessive, and thus, this factor does not weigh in the Debtor's favor.

The second, third, fourth, and fifth factors require a comparison of the current income, expenses, assets, and liabilities of the parties. Based upon the proof offered at trial, it appears that the income and expenses of the respective parties is relatively similar. The Debtor has chosen not to pursue employment outside the home and instead lives on his military retirement. He testified that he has a net income per month of \$734.74 and expenses of approximately \$1,000.00. However, he also testified that Ms. Tillery supplements the household finances and makes up the difference.<sup>18</sup> Additionally, the Debtor has discharged approximately \$25,000.00 in unsecured debt.<sup>19</sup> On the other side, the Plaintiff has a full-time job and supplements her income with her portion of the Debtor's retirement pay. She testified that she has a net monthly income of \$2,290.00, with monthly expenses of \$2,828.00. She does not have any additional income from other parties. Although the Plaintiff has a higher monthly income than the Debtor, she also pays more expenses than the Debtor, and the Debtor has voluntarily chosen not to work in order to supplement his income. Primarily because of the actions of the Debtor prior to the divorce, neither party seems to have assets available, and their respective liabilities are fairly even. The court recognizes that neither party seems to live outrageously on their income and that all expenses seem to be reasonable and modest. Accordingly, these factors weigh evenly between the parties.

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<sup>18</sup> There was no testimony as to the exact amount of income offered into the household by Ms. Tillery. It is appropriate to consider a spouse's income in the balancing under § 523(a)(15)(B). Even though the Debtor and Ms. Tillery are not married, they have been living together for quite some time with their young child.

<sup>19</sup> See *supra* n.17.

The court has already addressed the sixth factor in its earlier analysis under § 523(a)(5) regarding the parties' respective health, job skills, training, age, and education. Again, this factor weighs in favor of the Plaintiff.

Both parties testified to having dependents being supported. The Debtor testified that his young child is approximately seventeen months old. This child lives with the Debtor and Ms. Tillery, and the Debtor stays home with the child. He pays \$360.00 per month to Ms. Tillery for the child's support. The Debtor introduced no additional proof regarding expenditures for this child, instead offering simply that there are other, unmeasurable expenses that are not covered by child support.<sup>20</sup> The Plaintiff testified that her twenty-year old daughter, Valerie, lives with her. Valerie does not pay rent and is not employed at this time.<sup>21</sup> The Plaintiff allows Valerie to drive an automobile owned by the Plaintiff. The Plaintiff testified that Valerie has run away in the past, and she expressed concern that Valerie might run away again if she was not properly supervised. In the court's opinion, this factor weighs equally between the parties.

After balancing the above-referenced factors pertinent to this case, and based upon the testimony at trial, the Debtor has failed to meet his burden of proof that a discharge of the past due retirement proceeds would outweigh any detriment to the Plaintiff.<sup>22</sup>

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<sup>20</sup> Trial Exhibit 10 states, in part: "Other expenses for child not covered by child support: ????"

<sup>21</sup> Valerie is also the Debtor's daughter. See *supra* n.8.

<sup>22</sup> Although she did not have the burden of proof, the Plaintiff also argued that there is no detriment to the Debtor by determining that these debts to the Plaintiff are nondischargeable, in that the Debtor by choosing not to work outside the home and producing no income is "judgment-proof." The Plaintiff cannot execute to collect any of the amounts until either the child support order terminates when the child reaches majority or the payments to the Debtor's  
(continued...)

The Debtor has failed to meet his burden of proof as to either § 523(a)(15)(A) or § 523(a)(15)(B). Because the debt will be discharged absent one of these affirmative defenses by a preponderance of the evidence, the \$2,800.50 owed to the Plaintiff for three months' unpaid retirement proceeds is nondischargeable under § 523(a)(15).<sup>23</sup>

### III

In summary, the \$20,000.00 alimony *in solido* award owed by the Debtor to the Plaintiff is nondischargeable under § 523(a)(5). The attorneys' fee award in the sum of \$12,000.00 is also nondischargeable under § 523(a)(5). The unpaid retirement proceeds for September, October, and November 2001, totaling \$2,800.50, are nondischargeable pursuant to § 523(a)(15). The Debtor's liability on the Direct Merchants credit card account and his liability on the Ridgedale Townhouses judgment were discharged pursuant to the Discharge Order entered in his Chapter 7 bankruptcy case on March 7, 2002.

A judgment consistent with this Memorandum will be entered.

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<sup>22</sup>(...continued)

mother on his automobile have been satisfied in full. Accordingly, the Plaintiff argues that the Debtor technically has nothing to lose, whereas the Plaintiff will lose any opportunity to ever collect these awards if they are discharged. The Debtor offered no rebuttal to this argument.

<sup>23</sup> Because the court finds that this sum is nondischargeable under § 523(a)(15), it is not necessary to proceed to whether it is nondischargeable under § 523(a)(4).

FILED: October 31, 2002

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-35769

CHARLES V. HAJKO, JR.

Debtor

SHARON HAJKO

Plaintiff

v.

Adv. Proc. No. 02-3043

CHARLES V. HAJKO, JR.

Defendant

**J U D G M E N T**

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a), it is ORDERED, ADJUDGED, and DECREED as follows:

1. The \$20,000.00 alimony *in solido* and \$12,000.00 in attorneys' fees awarded the Plaintiff, Sharon D. Hajko, pursuant to the Amended Final Decree of Divorce and Order entered by the Fourth Circuit Court for Knox County, Tennessee, on June 21, 2001, in Case No. 71355, are nondischargeable under 11 U.S.C.A. § 523(a)(5) (West 1993 & Supp. 2002).

2. The Debtor's liability to the Plaintiff for unpaid retirement proceeds for September, October, and November 2001, totaling \$2,800.50, is nondischargeable pursuant to 11 U.S.C.A. § 523(a)(15) (West Supp. 2002).

3. All other obligations of the Debtor under the June 21, 2001 Amended Final Decree of Divorce and Order entered in the Fourth Circuit Court for Knox County, Tennessee, in Case No. 71355, which are the subject matter of this adversary proceeding, are discharged.

ENTER: October 31, 2002

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE