

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
ALFRED TURCO, ) CASE NO. BK98-81521  
) A98-8064  
DEBTOR(S). )  
\_\_\_\_\_) CH. 7  
ALFRED TURCO, )  
Plaintiff(s), )  
vs. )  
)  
LYNN TURCO, )  
)  
Defendant(s). )

MEMORANDUM

Hearing was held on July 14, 1999, on the Adversary Complaint. Appearances: Gary Smolen for the plaintiff and Donald Roberts for the defendant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background

The debtor/plaintiff and his former spouse, the defendant, were divorced by a Decree of Dissolution entered in the District Court of Sarpy County, Nebraska, in March of 1998. The Decree of Dissolution, in addition to determining child custody and support, divided the property and the debts between the parties. As part of the property division, the court provided that Mrs. Turco was awarded the family residence subject to any outstanding mortgage and granted a lien against the residence to Mr. Turco in the sum of \$14,000.00. The lien becomes due and payable on the earliest occurrence of the petitioner's remarriage, the sale of the residence, or the youngest child reaching legal age. Interest does not accrue until the principal is due.

With regard to debts, paragraph 9 of the Decree specifies that each party shall pay 50% of the listed debts and hold the other party harmless. The total amount of the debts is

approximately \$50,000.00, with each party to pay approximately \$25,000.00 worth.

Within two months of the filing of the Decree of Dissolution, Mr. Turco filed this Chapter 7 bankruptcy case. He has brought this adversary proceeding requesting the court determine that his obligation under the property division is dischargeable.

#### Decision

The obligations of the debtor to pay 50% of the family debts in the approximate amount of \$25,000.00, as specifically defined in paragraph 9 of the Decree of Dissolution of Marriage, is nondischargeable.

#### Discussion

The Bankruptcy Code at 11 U.S.C. § 523(a)(15) provides that obligations, such as those which are the subject of this adversary proceeding, shall not be discharged unless either

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, . . .if 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)(A) and (B).

Although it is not necessary to reach both prongs of the test if the court determines that the debtor is able to make the payments, in this case both prongs of the test will be discussed and ruled upon.

#### A. Ability to Pay 11 U.S.C. § 523(a)(15)(A)

First, the debtor does have the ability to pay such debt from his income. At trial, it became clear that, although Exhibit 1 showed that the debtor received a base salary of \$1,500.00 per month, he actually receives a base salary, as of this date, of \$1,625.00 per month equating to a \$125.00 per

month increase. The evidence shows that the debtor receives commission income in addition to his base salary and that the commission income fluctuates throughout the year. However, his income has been consistent over the last several years. Additionally, as of the first of August, 1999, the debtor's child support obligation is reduced from \$500.00 per month to \$400.00 per month because one of the children has reached the age of majority.

The Decree of Dissolution requires that he provide health insurance for his children. He has purchased a separate health insurance policy and pays a premium of approximately \$24.00 per month for the required health insurance coverage. However, Mrs. Turco, through her employment, has full health coverage for the children. The parties could easily stipulate to a modification of his Decree obligations with regard to health insurance. With such a stipulation, his obligation would be reduced by \$24.00 per month, translating into an additional \$24.00 per month net income to him.

For the tax year 1998, Mr. Turco was eligible for a refund of \$795.00. This means that his employer has over withheld approximately \$800.00 per year which is actually available as net income, which means his net monthly income is increased by approximately \$66.00.

Finally, his child support obligation is deducted from his paycheck. He gets paid biweekly and half of the monthly child support obligation is deducted from each check. Because he gets paid every two weeks, he receives twenty-six paychecks in a year. The child support obligation is only deducted from twenty-four paychecks and, therefore, he has an additional \$200.00 of net cash available to him in the last two checks, for a total of \$400.00, or \$33.00 per month on an annualized basis.

Adding together the additional \$125.00 per month from his base pay, the \$66.00 per month from the over withheld income taxes, the \$100.00 per month net he will now receive because of the reduction in his child support, the additional \$400.00 he has available from the two checks that are not needed for his child support obligation, and then adding to that the \$24.00 per month he now pays for health insurance, which is unnecessary, it appears that he has approximately \$348.00 a month available to apply on the property division obligations.

In addition to the income situation, a significant portion of Mr. Turco's share of the debt may be paid by the trustee through liquidation of Mr. Turco's lien on the residence and other bankruptcy estate property.

Although it may take many years for Mr. Turco to pay off his Dissolution of Marriage Decree obligation, it can be done by applying all of the net income referred to above, negotiating with certain creditors, and compromising certain obligations, etc. Therefore, his obligation is not dischargeable.

B. Benefit to Debtor vs. Detriment to  
Former Spouse. 11 U.S.C. § 523(a)(15)(B)

Even if the evidence referred to above did not show that Mr. Turco was able to make full payment of the obligation, the second prong of 11 U.S.C. § 523(a)(15) provides that the debt shall not be discharged unless discharging it would result in a benefit to the debtor that outweighs the detrimental consequences to his former spouse. In this case, the benefit to the debtor is that he would have approximately \$348.00 per month available to spend on what he felt was appropriate, and would not have to worry about collection efforts. The detrimental consequences to his former spouse significantly outweighs such a benefit.

Mrs. Turco is not in bankruptcy and does not desire to file bankruptcy. She holds two jobs to support herself and the children. She has already been sued by one or more creditors and has entered into agreements with others regarding the debt obligations. If Mr. Turco takes responsibility for his portion of the debt obligations, Mrs. Turco believes that she can refinance her home, with the current equity, even subject to his lien, and pay all or a goodly portion of her share of the Dissolution of Marriage Decree obligation. However, if Mr. Turco is allowed to discharge his share of the Dissolution of Marriage Decree obligation, she will be solely liable for the debt, will not be able to refinance her home and will not be able to make her required payments. She will then either be subject to judgments, garnishments and execution proceedings, perhaps losing her home and/or her vehicle, or she will be required to file for bankruptcy protection. Her options are limited and not appealing to her.

The benefit to Mr. Turco of discharging the debts is significantly outweighed by the detriment to Mrs. Turco if

such debts are discharged. Therefore, the obligation imposed upon Mr. Turco by the Decree of Dissolution of Marriage is nondischargeable.

Separate journal entry to be filed.

Dated: August 4, 1999

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:  
**15 ROBERTS, DONALD**

Copies mailed by the Court to:  
Gary Smolen, 1904 Farnam St., Suite 702, Omaha, NE  
68102  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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<u>DEBTOR(S).</u>	)	
	)	CH. 7
ALFRED TURCO,	)	Filing No.
Plaintiff(s),	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
LYNN TURCO,	)	DATE: August 4, 1999
	)	HEARING DATE: July 14,
<u>Defendant(s).</u>	)	1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Adversary Complaint.

APPEARANCES

Gary Smolen, Attorney for plaintiff/debtor  
Donald Roberts, Attorney for defendant

IT IS ORDERED:

The debtor's obligations imposed by the Decree of Dissolution of Marriage are nondischargeable. See Order entered this date.

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

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