UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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IN RE:

PAUL LORENZO — CASE NO. 98-61471

Debtor — Chapter 7

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DAWN J. LORENZO

Plaintiff

vs. — ADV. PRO. NO. 98-70817A

PAUL LORENZO

Defendant

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

## MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is an adversary proceeding commenced by Dawn J. Lorenzo ("Plaintiff") on June 3, 1998. Plaintiff's complaint seeks a determination that a certain debt owed to her by her former spouse, Paul Lorenzo ("Debtor"), is nondischargeable pursuant to §§ 523(a)(5) or (15) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Issue was joined by the filing of an Answer by the Debtor on July 9, 1998.

A trial of the adversary proceeding was conducted on March 22, 1999, in Utica, New York. In lieu of closing arguments, both parties were afforded an opportunity to file memoranda of law. The matter was submitted for decision on May 7, 1999.

## JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(I).

## FACTS

The parties were married on May 21, 1971. At the time of their marriage the Plaintiff held an associate's degree in applied science and the Debtor held an associate's degree in accounting. The Debtor obtained his bachelor's degree in accounting from Canisius College in 1976. In or about 1977 the couple moved to Cortland, New York, along with their two children, born March 25, 1972, and May 30, 1974.

The move allowed the Debtor to assume a position with a local accounting firm. *See* Plaintiff's Exhibit 35 ("Deposition Transcript" or "Tr.) at 9. Within 1½ to 2 years, the Debtor purchased his own accounting practice and at some point also purchased a bookkeeping and tax service. *See* Tr. at 12.

In approximately 1990 the Lorenzos purchased a house at 1017 Marion Drive, Homer, New York ("Marital Residence") at a price of $165,000. The house, situated on one acre plus or minus, was described as having 4,000 to 5,000 square feet, with five bedrooms, living room, dining room, family room, and great room, as well as a 50 foot deck. The couple also purchased the vacant lot adjoining the Marital Residence for about $5,000. The Debtor testified that the monthly mortgage payment on the Marital Residence was $1,218 and that taxes totaled an estimated $5,000/year.

Plaintiff testified that at some point she and the Debtor decided to separate and attempted to work out an agreement without the assistance of lawyers. After several meetings and at least five proposals, apparently both parties sought legal assistance. In November 1995 Plaintiff retained Jon Brenizer, Esq. ("Brenizer") to advise her concerning the terms of an agreement prepared by the Debtor's attorney. *See* Debtor's Exhibit 10. Ultimately, a separation agreement ("Separation Agreement") was signed by the Debtor on December 15, 1995, and by the Plaintiff on January 19, 1996. *See* Plaintiff's Exhibit 32. The Separation Agreement was incorporated into a Judgment of Divorce, dated March 28, 1997. *See* Plaintiff's Exhibit 34.

Pursuant to the terms of the Separation Agreement, the Debtor agreed to pay the Plaintiff "spousal maintenance" of $1,300 per month, beginning December 1, 1995, over a period of ten years. *See id.* at ¶ V[A](1). Said payments were to cease in the event of either party's death or Plaintiff's remarriage. *See id.* Plaintiff's cohabitation with another man was excluded as a grounds for termination of the payments.[1] *See id.* The Debtor also agreed to pay the Plaintiff

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[1] At the time that Plaintiff signed the Separation Agreement, she was living with Leo Dudley ("Dudley"). Plaintiff testified that beginning in the summer of 1995 after Debtor moved out, she resided with Dudley on a sporadic basis. In the latter part of 1995 the arrangement

$350 per month as "additional spousal maintenance" over a period of four years. *See id.* at ¶ V[A](2). There was testimony at the trial that those monies were intended to cover payments on the Plaintiff's vehicle.[2] The Debtor was also required to contribute $150 per month towards Plaintiff's medical and health insurance for a period of two years. *See id.* at ¶ V[B](7). Although under the heading of "Equitable Distribution of Marital Property," such payments were to be treated as spousal maintenance, deductible by the Debtor. *See id.*

Also under the heading of "Equitable Distribution of Marital Property," the Debtor agreed to "pay to the Wife, as hereinafter provided in full and final satisfaction of all claims by the Wife arising out of the marital relationship, equitable distribution of marital property or any other right she may have . . . (i) The sum of $25,000 upon the execution of this agreement; and (ii) The sum of $324,000.00 payable at the rate of $1,800.00 per month without interest commencing one (1) month after the sale of the marital residence by the Husband . . ." *See id.* at ¶ V[B](1)(b). If the Marital Residence had not been sold by July 1, 1997, the Debtor was required to pay the Plaintiff $600 per month. *Id.* In the event that it had not been sold by January 1, 1998, those payments were to be increased to $1,000 per month, and it was not sold by January 1, 1999, he was required to begin making payments of $1,800 per month on February 1, 1999. *Id.* The payments were not to be deductible by the Debtor or included in the Plaintiff's gross income. *Id.* In the event of Plaintiff's death, the Debtor was required to complete the payments to the couple's

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became permanent. She explained that she had moved in with him at a time when she was lonely and confused and afraid to remain in the Marital Residence by herself.

[2] According to the Separation Agreement, Plaintiff retained possession of a 1996 Chevrolet S-10 Blazer and the Debtor retained a 1919 Franklin and a 1993 Cadillac. *See* Plaintiff's Exhibit 32 at ¶ V[B](2).

children and no one else. *Id.*

The Debtor was also required to maintain life insurance for Plaintiff's benefit in the following amounts: (i) $400,000 for five years after execution of the Separation Agreement; (ii) a reduction to $300,000 for the next five years, and (iii) further reduction to $100,000 over the next six years. *See id.* at ¶ V[B](8).

Under the terms of the Separation Agreement, the Marital Residence was to be transferred to the Debtor and the vacant lot next door was to be transferred to the Plaintiff. It was the Debtor's testimony that on December 15, 1995, when he executed the Separation Agreement, he believed that the fair market value of the Marital Residence was approximately $220,000. After being listed on the market for approximately three years, it eventually sold in April 1997 for $160,000. After deducting closing costs, including approximately $150,000 in mortgages, the Debtor realized $3,972.66 from the sale. *See* Debtor's Exhibit 18.

According to the Debtor's tax return filed for 1996, he paid the Plaintiff $21,600 in alimony (($1,300 + $350 + $150)/month X 12 months). *See* Plaintiff's Exhibit 10. Beginning in June of 1997, the Debtor, in accordance with the terms of the Separation Agreement, paid the Plaintiff an additional $1,800 per month. His last payment was November of 1997. He testified that he did not list those payments as alimony on his 1997 tax return. According to the Debtor's tax return filed for 1997 he paid the Plaintiff $21,450 in alimony. *See* Plaintiff's Exhibit 11.

Sometime between 1990 and 1991 the Debtor purchased a building located at 32 Tompkins Street, Cortland, New York, for $200,000. The building was renovated and in approximately April 1995 the Debtor began residing in the two bedroom apartment therein. His tax and accounting practice was located in the building as well. Debtor testified that it had recently been appraised for $170,000 and that there is a mortgage on the property of $160,000. The Plaintiff described it as a Victorian house located in the historic district of Cortland. The Debtor testified that actually it was in the "worst" neighborhood in Cortland, surrounded by student housing, including a fraternity and a sorority in the nearby vicinity.

In addition to ownership in the Marital Residence and the Tompkins Street property, as well as his accounting practice, at the time the parties executed the Separation Agreement, the Debtor had a 35% interest in Cortland Paper Products Co., which he subsequently sold on or about February 20, 1997 to his partner for $23,000. Included in the sale was improved real property valued at approximately $200,000, subject to a mortgage of approximately $88,000. *See* Debtor's Exhibit 12. He also held a 45% interest in a commercial building at 99-101 Main Street ("Main Street Property") in Cortland, as well as a 45% interest in Cortland Fitness Center ("Fitness Center"). In addition, he had an interest in a college bar in Syracuse, New York, known as "Maggies on the Hill" and in a nightclub in Alexandria Bay, New York, known as "Maggies on the Bay." In January 1997 he transferred his 50% interest in the latter to his son, who held the other 50% interest in the business. *See* Plaintiff's Exhibit 22.

According to the Debtor, on or about January 21, 1997, he transferred his interest in the Main Street Property and the Fitness Center to his partner, Christopher Calabro ("Calabro") in exchange for an apparent assumption of any liability that might arise in connection with a lawsuit filed by the original seller of "Maggies on the Hill," as well as the owner of the real property on which the bar was located.[3] The Debtor testified that he was unable to afford to hire an attorney

[3] Calabro and the Debtor were at one time equal shareholders in Maggie's Tavern, Inc. which operated "Maggies on the Hill." In December 1993 Calabro transferred his interest in the corporation to the Debtor. However, apparently Calabro remained a guarantor on both the lease

to protect his interest in the business. According to the partners' agreement, both acknowledged that the obligation on the lease of the real property might exceed $50,000[4] and that the balance owing on the promissory note held by the seller was approximately $20,000. *See* Debtor's Exhibit 13.

The Debtor also testified that in 1997 he was forced to sell several rental properties he owned as a result of a decline in his finances. He testified that he sold the last property in November 1997.[5] On March 10, 1998, the Debtor filed a voluntary petition pursuant to chapter 7 of the Code.

Plaintiff testified that during the course of the marriage the Debtor assumed responsibility for the payment of the monthly expenses including mortgage payments, car payments, utility bills, maintenance, repairs, insurance, taxes, etc. For the last four or five years of their marriage, it was the Debtor's practice to give her $1,300 per month with which to purchase food, gas, gifts, clothes, craft supplies and other personal expenses. However, there was nothing in the testimony of either party to indicate the type of life style the couple was enjoying at the time the Separation Agreement was executed, e.g. vacations, entertaining, luxuries, etc.

According to the evidence provided at trial, the gross receipts of the Debtor's accounting

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of the premises on which the bar was located and the promissory note executed in connection with the sale of the business.

[4]On August 25, 1998, the owner/landlord was awarded $46,749.53 by the New York State Supreme Court, Onondaga County. *See* Debtor's Exhibit 16.

[5] According to the Debtor's Statement of Financial Affairs, he sold real property at 186 South Main Street, Cortland, New York, on March 31, 1997, at 99 Clinton Avenue, Cortland, New York, on July 29, 1997, and at 45 North Main Street, Cortland, New York, on November 12, 1997. Other than the Tompkins Street property housing the Debtor's business and residence, he lists no other real property in his schedules.

business and the profit generated for 1994-1998 were as follows:

| Year | Gross Receipts | Net Profit | Exhibit |
|---|---|---|---|
| 1994 | $251,040 | $ 92,510 | Plaintiff's 36 |
| 1995 | 222,436 | 64,193 | Plaintiff's 37 |
| 1996 | 212,532 | 73,454 | Plaintiff's 10 |
| 1997 | 214,331 | 57,738 | Plaintiff's 11 |
| 1998 | 193,476 | 56,087 | Debtor's 17 |

According to the Plaintiff's testimony, during the course of the marriage she held a number of part-time positions. She did not indicate whether her earnings were combined with those of the Debtor to pay the monthly expenses or whether they were used to supplement the $1,300 the Debtor gave her each month. Between 1977-1978 she worked at K-mart for minimum wages, greeting customers. From 1980-1981, she worked as a receptionist for the Association for Retarded Children. She worked at a home for the elderly between 1984 and 1987, earning approximately $5.50 to $5.70 per hour. From 1990-1993 she worked as a clerk at Ames Department Store, earning $6.50 per hour. Between 1993 and the fall of 1995 she was employed by J.C. Penney as a sales clerk, earning $5.60 to $5.75 per hour. From late 1995 until sometime in 1998, she again was employed by Ames Department Store first as a sales clerk and later unloading trucks. In 1997 her wages totaled $10,300. *See* Defendant's Exhibit 1. Beginning in September 1998 she accepted a temporary ten month position with Headstart, earning $8.08 per hour or approximately $499 every two weeks. She receives no pension or health insurance benefits, but she is entitled to paid vacation.[6]

[6] According to the Plaintiff, her performance will be reviewed with the possibility that she will be rehired for another ten months, beginning in September 1999.

According to the Plaintiff, her monthly expenses are as follows:

| Expense | Amount |
|---|---|
| Food, telephone, rent[7] | $ 600 |
| Clothes, shoes, laundry, drycleaning | 200 |
| Medical, dental, pharmacy | 100 |
| Transportation | 180 |
| Charitable | 50 |
| Automobile loan | 278 |
| Health insurance | 320 |
| Automobile insurance | 120 |
| Taxes (to cover alimony income) | 370 |
| Miscellaneous (counseling, gifts, toiletries) | 200 |
| Total Monthly Expenses[8] | $2,418 |

In response to questions concerning the $324,000 payable upon sale of the Marital Residence at the rate of $1,800 per month, Plaintiff explained that she and the Debtor had discussed the annual expenditures for vacations, dinners, gifts, clothes, necessities, etc., multiplied that amount by ten (years) and divided by two to determine each party's respective expenses. She testified that the Debtor had explained to her that he could afford to pay her $1,300 per month initially until the Marital Residence was sold at which time additional monies would be available since he would no longer have the mortgage obligation and property taxes of approximately $2,000 per month to pay. It was her testimony that she understood that the

[7] Plaintiff testified that currently she pays Dudley rent and also pays for her own telephone bill. The two share the expenses for food, utilities, etc.

[8] Plaintiff acknowledged at trial that she had omitted payments of real property taxes on the vacant lot on Marion Drive but gave no indication of their amount.

$324,000 would allow her to maintain the standard of living they had prior to the separation. She testified that the Debtor had told her that with the additional monthly payments of $1,800 she would have what she would have had if they had stayed together. It was her understanding that the payments of $3,600 ($1,300 + $350 + $150 + $1,800) were intended to provide her with support but that the Debtor indicated to her that it would be too much of a burden if they did not split the payments for tax purposes, earmarking $1,800 as alimony or maintenance, taxable to the Plaintiff, and the other $1,800 as equitable distribution which she would not need to claim as income. Upon questioning by the Court concerning the lump sum payment of $25,000 made to the Plaintiff in approximately May 1996 prior to the sale of the Marital Residence, Plaintiff explained that it was to help her until the Debtor could afford to pay her more money. According to the Plaintiff, the Debtor told her it was something to fall back on in the event that she incurred attorney's fees or he was unable to make any of the $1,300 monthly payments for some reason. Plaintiff testified that she used some of the $25,000 as a downpayment on a car and some of it for attorneys' fees. The balance of approximately $19,600 was placed in savings and/or an individual retirement account.

Brenizer testified that in November 1995 when he was retained by the Plaintiff his primary concern, as well as hers, was that Plaintiff receive ongoing support. It was his testimony that she was not concerned with accurately determining the value of the various marital assets which the Debtor was retaining. He explained that under the terms of the Separation Agreement Plaintiff was to receive a combination of maintenance and equitable distribution which was designed to provide her with support over a number of years until she was eligible to draw on her individual retirement account and Social Security benefits. Brenizer testified that he did not believe that the Plaintiff could live on $1,300 per month, but he recognized that until the Marital Residence was sold and the mortgage payments and property taxes were eliminated as obligations of the Debtor, the Debtor might have a cash flow problem which would prevent him from paying the Plaintiff all she needed for support. At the same time, it was important that the Debtor begin making payments to her in the event that the sale of the Marital Residence was delayed. Accordingly, the parties agreed that Debtor would begin paying her $600 per month if the Marital Residence was not sold within 18 months (July 1, 1997). The payments were to increase to $1,000 per month if it had not been sold within two years (January 1, 1998). If it had not been sold by January 1, 1999, he was required to make payments of $1,800 per month.

Brenizer pointed out that if the $1,800/month payments had truly been equitable distribution, upon her death Plaintiff should have been able to designate to whom they should continue to be made rather than restricting their payment to the couple's children. He also asserted that if the payments had truly represented a division of marital assets, the fact that she was not going to receive a lump sum payment she would have been entitled to receive interest on the $324,000 over the 15 years.

On direct examination, the Debtor acknowledged that the $1,300 monthly payments were intended to maintain or support the Plaintiff and were based on the length of their marriage. They were made payable to her over ten years in order to allow her time to "safely get on her own." With respect to the equitable distribution payments of $1,800, he testified that the two parties discussed the marital assets at length. Based on their estimated value of $700,000, Plaintiff's half interest amounted to approximately $350,000. Subtracting the $25,000 he paid her in June 1996, Debtor agreed to make payments totaling $324,000 over 15 years at which time both he and the

Plaintiff would be approximately 60 years old.

DISCUSSION

Exceptions to discharge are to be narrowly construed in favor of a debtor and against a creditor to effectuate the fresh start purpose of the Bankruptcy Code. *See In re Frey*, 212 B.R. 728, 732 (Bankr. N.D.N.Y. 1996). In this context, courts also recognize the "overriding public policy favoring the enforcement of familial obligations." *Shaver v. Shaver (In re Shaver)*, 736 F.2d 1314, 1315-16 (9th Cir. 1984).

> The rationale for the exemption from discharge for support obligations is threefold: the protection of the spouse who may lack job skills or who may be incapable of working, the protection of minor children who may be neglected if the custodial spouse entered the job market, and the protection of society from an increased welfare burden that may result if debtors could avoid their familial responsibilities by filing for bankruptcy.

*Id.* at 1316 n.3 (citation omitted); *see also Andy Warhol Foundation for Visual Arts, Inc. v. Hayes (In re Hayes)*, 1999 WL 557010 (2d Cir. July 30, 1999) (noting that Code § 523(a)(5) reflects "perceived countervailing social interests."). The burden of proof rests with the Plaintiff to persuade the Court by a preponderance of the evidence that the particular debt should not be discharged. *See Grogan v. Garner,* 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

For purposes of Code § 523(a)(5), the characterization of an obligation as alimony, maintenance or support is a question of federal bankruptcy law. *See Brody v. Brody (In re Brody)*, 3 F.3d 35, 39 (2d Cir. 1993) (citations omitted). The label given an obligation by the parties is not dispositive. *See id.* at 38, 39 (citations omitted). However, it is persuasive evidence, particularly where the language is unambiguous. *See Frey*, 212 B.R. at 734 (citing *Yeates v. Yeates (In re Yeates)*, 807 F.2d 874, 878 (10th Cir. 1986)). For purposes of Code § 523(a)(5), however, it is important to note that an award of property may actually <u>function</u> as support even though identified by the parties as equitable distribution of marital assets. Thus, the Court must look beyond the language of the Separation Agreement to extrinsic evidence to determine the intent of the parties and to the substance of the obligation. *See Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723 (10th Cir. 1993) (citations omitted); *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (8th Cir. BAP 1997) (citations omitted). To this end, the courts routinely examine (1) the language and substance of the Separation Agreement, taking into consideration evidence of the surrounding circumstances at the time of its execution; (2) the financial status of the parties at that time, and (3) the function served by the obligation. *See Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762-63 (3d Cir. 1990).

"'A written agreement between the parties is persuasive evidence of intent.'" *Sampson*, 997 F.2d at 723 (quoting *Yeates* at 878). In this case, the Separation Agreement deals with the issues of maintenance and equitable distribution in separate segments of the document. Section V[A], labeled "Maintenance," provides for payments of $1,300 per month over ten years. The payments are to terminate in the event of either party's death or the Plaintiff's remarriage. The payments are to be deductible from the Debtor's income and according to his tax returns, he deducted them from his earnings beginning 1996. There appears to be no dispute that these payments represent a nondischargeable obligation of the Debtor pursuant to Code § 523(a)(5). It is the obligation found in Section V[B], labeled "Equitable Distribution," specifically subsection (1)(b), which remains an issue for resolution by this Court.

Under the terms of § V[B](1)(b), Plaintiff acknowledged having received $25,000 from the Debtor in approximately May 1996. In addition, Plaintiff was to receive the maximum amount of $324,000, payable over 15 years without interest in monthly installments of $1,800, beginning one month after the sale of the Marital Residence. At the time of the Separation Agreement, neither party was living in the Marital Residence and under the terms of the Separation Agreement, the Debtor was to continue making the monthly mortgage payments until its sale. In the event of the Plaintiff's death, the $1,800 monthly payments were to be made to the couple's children and to no one else until the full amount, namely $324,000, had been paid. In the event of the Debtor's death, there was a life insurance policy in place to assure the continued payment of the obligation. The payments were expressly made not deductible by the Debtor and not includible in the Plaintiff's gross income.

Plaintiff and Brenizer testified that they intended that the monies provide her with support over several years. It was Plaintiff's testimony that she understood from her discussions with the Debtor concerning their net worth that $1,800 per month, in addition to the $1,300 per month payments, would be sufficient to allow her to maintain the standard of living which she might have expected had she continued in the marriage. It was the Debtor's testimony, however, that from his perspective the payments of $1,800 per month merely represented Plaintiff's share in the value of the marital assets and nothing more.

Plaintiff's testimony and that of her attorney "is insufficient to overcome the 'substantial obstacle' posed by the Agreement's clear expression of the parties' <u>shared</u> intent." *Sampson*, 997 F.2d at 723 (emphasis added). Instead of waiving alimony or maintenance, the Separation Agreement contains specific provisions of maintenance or alimony to the Plaintiff. Also of note is the fact that unlike the $1,300 monthly payments labeled as maintenance in § V[A], there is no provision that the payments of $1,800 per month are to cease upon the Plaintiff's remarriage in § V[B]. The fact that they are to be made only to the couple's children in the event of the Plaintiff's death, rather than to anyone whom the Plaintiff might choose, does not overcome the characterization of the payments as equitable distribution or a property settlement. Based on the testimony at the trial, it would appear that the provision was the result of negotiations between the parties just as the provision in the document which allows the Plaintiff to continue to receive support from the Debtor despite her cohabitation with Dudley was. That the payments are secured by life insurance also does not alter the conclusion that the obligation constitutes equitable distribution of their assets. *See id.* The Court notes that the Debtor did not claim the six payments of $1,800 he made to the Plaintiff between June and November 1997 as deductible alimony or maintenance on his 1997 tax return. Admittedly, the tax treatment of a debt in and of itself is not dispositive on the issue of dischargeability. *See Friedkin v. Sternberg (In re Sternberg)*, 85 F.3d 1400, 1406 (9th Cir. 1996) (citations omitted); *see also Tilley v. Jessee (In re Tilley)*, 789 F.2d 1074, 1078 n.3 (4th Cir. 1986) ("finding it hard to believe that [the debtor] would have foregone the substantial deductions available if he had intended to create a support obligation."). However, it is a factor to be considered in the Court's analysis.

In analyzing the obligation sought to be determined nondischargeable, the Court must also examine the financial circumstances of the parties at the time the Separation Agreement was executed to determine whether the $1,800 actually functioned as support. At the time the Separation Agreement was executed, both parties were in good health, both educated and both capable of working. Both of their children were over the age of 21 years and apparently neither was living with either parent. Plaintiff was residing in a mobile home with Dudley, paying him rent and sharing the cost of utilities and food. The Debtor occupied an apartment at the Tompkins Street property, the same location where he conducted his business.

A relevant consideration in examining the financial circumstances of the parties is also their relative earning power. *See Frey*, 212 B.R. at 735 (citing *Tsanos v. Bell (In re Bell)*, 47 B.R. 284, 287 (Bankr. E.D.N.Y. 1985)). Plaintiff testified that in 1995 she was employed as a sales clerk at a local department store on a part-time basis. According to the couple's joint tax return for 1995, it appears that she earned $8,436. *See* Plaintiff's Exhibit 37. Since both of the couple's children were emancipated at the time of the separation, it appears that nothing prevented Plaintiff from working on a full-time basis, albeit at a lower level of earnings than the Debtor given her limited experience and education. In that same year the Debtor realized net profit from his accounting and bookkeeping business of $64,193. *See id.* He also earned supplemental net income of $32,965 during 1995 from his real estate holdings and other business ventures. *Id.* The Debtor testified that his financial problems apparently did not arise until the latter part of 1996.

Prior to their separation, Plaintiff testified that she was accustomed to receiving $1,300 per month from the Debtor to spend on such things as clothes, food, gas, gifts, crafts and entertainment. There was no testimony concerning any vacations taken by the couple, dining out, etc. While there was testimony by the Plaintiff that she understood that the payments of $1,800 per month after the sale of the Marital Residence would provide her with a lifestyle to which she had become accustomed, the only indicia of their lifestyle was the fact that they resided in a large, relatively expensive house on an acre of land in a private neighborhood. *See generally In* *re Hughes*, 164 B.R. 923, 925 (E.D.Va. 1994) (finding, based on the evidence presented, that the couple "entertained lavishly and owned extensive real property and a boat.").

In examining the function served by the obligation at issue, the Court notes that upon execution of the Separation Agreement, Plaintiff was receiving on a monthly basis $1,300 in alimony or maintenance, $350 in additional alimony to assist her with car payments and $150 to be used to help defray the costs of medical and health insurance. In addition, as noted previously, she was gainfully employed. It is noteworthy that when she received the lump sum payment of $25,000 approximately four months after the execution of the Separation Agreement, she was able to deposit approximately $19,600 in a savings account and/or individual retirement account. In this case, Plaintiff acknowledged using a portion of it to pay attorneys' fees and to make a downpayment on a car. An obligation functions as support where it serves to maintain daily necessities, such as food, housing or transportation. *See Frey*, 212 B.R. at 735 (citations omitted). It does not appear that Plaintiff found it necessary to use a significant portion of the $25,000 for such daily necessities. There also was no testimony to indicate that prior to June 1997 when she began receiving the $1,800 payments from the Debtor that she had found it necessary to spend the savings or to borrow money to allow her to maintain herself.

Based on the testimony and the evidence presented, the Court finds that the Plaintiff has failed to establish by a preponderance of the evidence that the $1,800 monthly payments functioned as support. Accordingly, the Court concludes that there is no basis for denying the dischargeability of the debt pursuant to Code § 523(a)(5).

Debts which arise in connection with a divorce decree or separation agreement and are found not to be of a type described in Code § 523(a)(5) are nevertheless nondischargeable unless

(A) the debtor does not have the ability to pay the debts from income or property not reasonably necessary 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 the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse or child of the debtor. *See* 11 U.S.C. § 523(a)(15). Although courts are in disagreement as to which party bears the burden of showing a debtor's inability to pay or a balancing of the equities, this Court has previously found that the burden of proof rests with the plaintiff. *See Frey*, 212 B.R. at 737. In *Frey* the Court concluded that this approach was consistent with the policy that exceptions to discharge are to be narrowly construed in favor of a debtor. *Id.*

The first prong of Code § 523(a)(15) requires the Court to determine whether the Debtor has the ability to pay the debt from disposable income. In determining the Debtor's ability to pay, the date of trial is a relevant starting point. *See In re Christison*, 201 B.R. 298, 308 (Bankr. M.D. Fla. 1996); *In re Smither*, 194 B.R. 102, 107 (Bankr. W.D.Ky. 1996) (citing *In re Hesson*, 190 B.R. 229 (Bankr. D.Md. 1995); *In re Gantz*, 192 B.R. 932, 934 (Bankr. N.D.Ill. 1996). The Court may also consider the Debtor's prospective earning ability. *See Smither*, 194. B.R. at 107-108; *In re McGinnis*, 194 B.R. 917-920 (Bankr. N.D.Ala. 1996) (citing *Collins v. Florez (In re Florez)*, 191 B.R. 112, 115 n.5 (Bankr. N.D.Ill. 1995) (indicating that the court should examine the obligation over a period of time)).

On direct examination, the Debtor verified that in 1998 he drew $45,484.37 from his accounting practice. *See* Plaintiff's Exhibit 13. According to his 1998 tax return, he actually realized $56,087 in profit from his business. *See* Debtor's Exhibit 17. The Debtor was 50 years of age at the time of the trial and there was nothing at the trial to suggest that he will not continue operating his business at a profit over the next several years.

While there was no evidence presented with respect to the Debtor's expenses at the time of trial, Debtor did acknowledge that during 1998 he traveled to Florida to visit his son and daughter and on two separate occasions had flown to Minnesota to visit with friends. *See* Tr. at 65-66. In addition to gifts to his children, including $1,000 in airfare for his daughter, the Debtor testified that he gave a friend's sixteen year old daughter $500 in order for her to take an educational trip to Mexico. *See* Tr. at 103-104. The Debtor also had sufficient funds in 1998 to pay two years of real property taxes. *See* Tr. at 63. In 1998 the Debtor also deposited $8,000 into "Net Investor," described as an Internet trading account. Thus, it appears that the Debtor has disposable income which would enable him to make payments to the Plaintiff over and above the monies found to be alimony/maintenance.

As of January 2000, the current payments of alimony or maintenance will be reduced from $1,650 to $1,300 per month, and the payments will cease altogether the end of 2005. Since filing his petition, the Debtor has been able to take advantage of the "fresh start," and his financial status has improved, in the opinion of the Court, to the extent that he has the ability to pay the (a)(15) debt owed to the Plaintiff to some extent.

Despite having found that the Debtor has an ability to pay, the Court must also consider whether discharging the debt would result in a benefit to the Debtor that outweighs the detrimental consequences to the Plaintiff. *See Smither*, 194 B.R. 110, citing 11 U.S.C. § 523(a)(15)(B). This analysis requires that the Court consider whether it may be equitable to modify the debt under Code § 523(a)(15). Other courts to address the issue have found that where a debtor has sufficient disposable income to pay a part of the debt within a reasonable amount of time, it is within the Court's power to discharge a portion of the debt. *See id.* at 110; *McGinnis*, 194 B.R. at 921. With this in mind, the Court finds that in balancing the equities, the detrimental consequences to the Plaintiff in not receiving any additional monies under ¶ V[B] of the Separation Agreement outweigh the benefit to the Debtor in being able to discharge the entire obligation. She is just able to cover her current expenses with the income she earns, which is currently supplemented by the $1,650 monthly payments from the Debtor. These payments will be reduced to $1,300 beginning January 2000. She shares a residence with Dudley at a cost to her of $100 per month. She does not have disposable income which would allow her to invest in an Internet stock account or to simply give monies away to a friend's daughter. Hopefully, her income will increase over the years ahead but after 25 years of marriage and having raised two children, with limited experience and education, it is unlikely that the increase will ever be substantial. As of January 2006 she will no longer receive any alimony/maintenance from the Debtor on a monthly basis. On the other hand, the Debtor has an established accounting practice from which he obtains an average income. In addition to his business, he also owns the real property where he not only conducts his business but also resides. This allows him to deduct a portion of his expenses associated with the Tompkins Street property, including mortgage interest and property taxes, as business expenses, thereby reducing what would otherwise be personal expenses. By filing for bankruptcy, the Debtor has been able to write-off much of his prepetition unsecured debt. He also testified that he has successfully divested himself of much of his rental property, as well as the other business interests which proved unsuccessful, which drained him financially. It appears that he has clearly been able to take advantage of the "fresh start" and his financial status has improved.

The debt under consideration by the Court amounts to $313,200 ($324,000 - ($1,800 X 6)). The Court concludes that beginning January 1, 2000, in addition to the $1,300 per month in alimony/maintenance, the Debtor shall pay Plaintiff an additional $500 per month for 60 months. Beginning January 1, 2006, upon the discontinuance of the monthly payments of $1,300 in alimony/maintenance, the additional payments shall be increased to $1,500 for 60 more months. Said payments, totaling $120,000, are deemed nondischargeable pursuant to Code § 523(a)(15). Furthermore, they will not be deductible by the Debtor or includible in the Plaintiff's gross income. The balance of the debt, namely $193,200, is deemed to be dischargeable. In addition, the Debtor shall maintain sufficient life insurance to cover this obligation for the Plaintiff's benefit.

Based on the foregoing, it is hereby

ORDERED that the $1,300 per monthlabeled as maintenance set forth in ¶ V[A] of the Separation Agreement is nondischargeable pursuant to Code § 523(a)(5); it is further

ORDERED that $120,000 of the obligation set forth in ¶ V[B] of the Separation Agreement is deemed nondischargeable pursuant to Code § 523(a)(15); and it is further

ORDERED that the Debtor shall maintain sufficient life insurance to cover this obligation for the Plaintiff's benefit; it is finally

ORDERED that $193,200 of the obligation set forth in ¶ V[B] of the Separation Agreement is deemed dischargeable pursuant to Code § 523(a)(15).

Dated at Utica, New York

this 2nd day of September 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge