

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

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225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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November 13, 2000

Darrell Boyer
Plaintiff, pro se
6560 Beverly Drive
Rapid City, South Dakota 57701

Barbara I. Boyer
Defendant-Debtor, pro se
Post Office Box 604
Spearfish, South Dakota 57783

Subject: *Darrell Boyer v. Barbara I. Boyer*
(*In re Barbara I. Boyer*),
Adversary Proceeding No. 00-5008;
Chapter 7; Bankr. No. 00-50142

Dear Mr. Boyer and Ms. Boyer:

The matter before the Court is the complaint by Plaintiff Darrell Boyer seeking a declaration that certain debts that his former wife Defendant-Debtor Barbara I. Boyer was obligated to pay, as part of their divorce, are non dischargeable under 11 U.S.C. § 523(a)(15). This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Federal Rule of Bankruptcy Procedure 7052. As discussed below, the Court concludes that the subject debts are dischargeable under the exception provided at § 523(a)(15)(B).

SUMMARY OF MATERIAL FACTS. Darrell Boyer and Barbara Boyer divorced in early 1999. Under the parties' agreement, each received some property and each took a share of the marital debts. Barbara Boyer agreed to pay the debts then owed to First Western Bank and a credit union and to pay the remaining debt on the 1994 Aerostar she received. The balance due on these debts was not stated in the agreement. As part of the divorce, she also received about \$12,000 in cash from her husband's employer's savings plan and she received \$1,500 from the sale of the couple's house.

Barbara Boyer ("Debtor") filed a Chapter 7 petition in bankruptcy on March 27, 2000. She included on her schedule of

19.

Re: Darrell and Barbara Boyer
November 13, 2000
Page 2

secured claim holders First Western Bank of Deadwood but she did not quantify the debt. She acknowledged that Darrell Boyer was a co-obligor on that debt. She did not describe or value the collateral for this debt. Debtor also included a vehicle debt, but it was not the same vehicle she received in the divorce.¹ Her secured debts totaled \$15,840.81. On her schedule of unsecured claim holders she included Black Hills Federal Credit Union for \$4,161.56, Darrell Boyer for "Divorce debts and Misc." of \$2,148, and Norwest Bank at \$2,216.23 for an overdraft and the apparent deficiency on the Aerostar. Debtor also stated Darrell Boyer was a co-obligor on the Norwest debt. Debtor's unsecured debts totaled \$23,599.49. Her assets were limited to \$3,213 and in value she declared it all exempt. She has received her discharge of debts.

On June 26, 2000, Darrell Boyer commenced a non dischargeability action against Debtor. He sought a declaration that the debts to First Western Bank, the "Credit Union" (apparently Black Hills Federal Credit Union), and Norwest (Aerostar balance) that Debtor assumed in the divorce are non dischargeable under either 11 U.S.C. § 523(a)(5) or § 523(a)(15).

In the form of an attachment to a motion, Debtor answered the complaint on September 5, 2000. She essentially indicated that she did not have the ability to pay the subject debts and that she needed to put her divorce and financial problems behind her.

Following a pre-trial conference, the Court advised the parties, who were both appearing *pro se*, that the pleadings and attachments indicated that only § 523(a)(15) would apply. The Court also reviewed that statute and the applicable case law that would apply at the trial.

A trial was held October 17, 2000. Both parties still appeared *pro se*. Each submitted several financial documents that indicated their respective incomes and expenses. Based on the records available, Debtor still owed about \$4,600 on three marital debts assigned to her: \$2,600 to the credit union, \$1,500 to Norwest Bank, and \$500 to First Western Bank.

¹ Debtor's statement of financial affairs indicates that this second car secured to First Security may have been repossessed or returned just before she filed bankruptcy. First Security also obtained relief from the automatic stay shortly after the bankruptcy was commenced. Later, First Security filed a proof of claim for \$7,793.41 (unsecured).

Re: Darrell and Barbara Boyer
November 13, 2000
Page 3

Debtor's documents reflected that her current net monthly income is just over \$1,000. She testified, and some of her exhibits indicated, that her expenses total over \$800 per month. Some expenses, however, apparently were for debts that were or should have been discharged through her bankruptcy, including possible pre-petition claims held by her bankruptcy attorney and some utility providers. Between her divorce and her bankruptcy, Debtor spent the \$13,500 in cash that she received in the divorce.

Debtor does not have a high school diploma. She is currently employed as a restorative aid at a nursing home. Her employer hopes to send her to massage therapy school and to share some costs for that education. Debtor must get her G.E.D. first. Debtor has chronic back problems. She often consults a chiropractor, but this care is not covered by the health insurance her employer provides.

Darrell Boyer testified that he has a high school diploma and that he is currently a mine safety inspector for the federal Department of Labor. He has received on-the-job training. Darrell Boyer's annual net income is over \$40,000. His current wife is also employed and earns \$9,000 to \$10,000 per year (gross). They have the usual expenses for a family but not a large cushion of disposable income. The couple recently moved into a new home. Darrell Boyer expressed some concerns that the upcoming presidential election may affect his job security.

Darrell Boyer testified that he has some health problems but none apparently affect his employability or produce high medical care costs not covered by his insurance. The same is true of his wife. Darrell Boyer acknowledged that he is presently making payments on the debts that Debtor was obligated to pay, but that it will be a general hardship for him to continue to do so. He argued that Debtor has not made a good faith effort to pay any of her assigned marital debts since the divorce.

The matter was taken under advisement.

APPLICABLE LAW. As set forth in the Court's earlier letter to the parties, when a timely complaint is filed under § 523(a)(15), a marital debt is presumptively non dischargeable unless the debtor can demonstrate that she does not have the ability to pay the debt or that the benefit to her in receiving a discharge is greater than the detriment to her former spouse if the debt is granted. *Fureigh v. Haney (In re Haney)*, 238 B.R. 432, 434-35 (Bankr. E.D. Ark. 1999); *Henson v. Johnson (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996) (citing generally *In re Straub*, 192 B.R. 522 (Bankr.

Re: Darrell and Barbara Boyer
November 13, 2000
Page 4

D.N.D. 1996) (discussing placement of the burden of proof upon the debtor and the nature of the elements to be proven), and *In re Gantz*, 192 B.R. 932 (Bankr. N.D. Ill. 1996) (burdens of proof)). The marital debt need not be owed to the spouse or former spouse but may be owed to a third party. *Henson*, 192 B.R. at 303.

Once the non-debtor former spouse has shown that the debt he seeks to have declared non dischargeable falls under § 523(a)(15), then the burden shifts to the debtor to show one of the two exceptions under § 523(a)(15) apply: either that the debtor does not have the ability to pay the subject debts or that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. *Haney*, 238 B.R. at 435; *Straub*, 192 B.R. at 528; *Henson*, 192 B.R. at 302-03. The debtor must show one of these exceptions by a preponderance of evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Under the exception at subsection (A) regarding the debtor's ability to pay, the Court must look at the debtor's ability to pay the debt -- now and in the future. *Henson*, 192 B.R. at 304. "As with student loans, the inquiry begins with an analysis of the debtor's current financial circumstance, but ends with an inquiry whether that situation is fixed or is likely to change in the foreseeable future." *Straub*, 192 B.R. at 528. The Court does not look at only the debtor's present ability to pay. *Id.* at 529.

Under the exception at subsection (B), the Court weighs the effects of a discharge of the subject debts at the time of trial, not at the time of the divorce. This allows the Court to fully examine the benefits of the "fresh start" in bankruptcy for the debtor, any change in circumstances since the divorce, and other good or bad fortune that may have befallen the parties. *Henson*, 192 B.R. at 303. Factors the Court may consider include each party's continuing obligations, responsibility for any dependents, their employability, any restrictions to personal life or family detriment that would result, general financial status and needs, and the general merits of each party's position. *Id.* 304.

DISCUSSION. Based on the evidence presented, the applicable statute, § 523(a)(15)(B), and relevant case law, the Court concludes that the benefit Debtor will receive if the marital debts she owes are discharged is greater than the financial detriment that may be imposed on Darrell Boyer if these debts are discharged and he must pay them. Even with additional training, which will

Re: Darrell and Barbara Boyer
November 13, 2000
Page 5

not incur in the near future, Debtor's earning power will always be limited. She will always have back problems. Her expenses will not decrease by any significant measure and will likely increase. With a release from an obligation to pay these debts, however, she will be several steps further down the road in establishing a more sound financial footing.

In contrast, Darrell Boyer is well-paid and receives a number of other good employee benefits, including health insurance, a savings plan, and a retirement plan. This more secure financial foundation will allow him to pay these remaining marital debts over a relatively short period of time without imposing a significant hardship on him or his household. See *Taylor v. Taylor*, 199 B.R. 37, 41-42 (N.D. Ill. 1996) (debt discharged under § 523(a)(15)(B) where more affluent former spouse would suffer only minimal economic and psychological injury from discharge); *Shea v. Shea (In re Shea)*, 221 B.R. 491, 500-01 (Bankr. D. Minn. 1998) (debt not discharged under § 523(a)(15)(B) where the debtor maintained a much higher standard of living than former spouse); *Williams v. Williams (In re Williams)*, 210 B.R. 344, 347-48 (Bankr. D. Neb. 1997) (debt not discharged under § 523(a)(15)(B) where equities were equal).

The Court does not reach a conclusion on whether Debtor made a good faith effort to pay her share of the marital debts before she filed bankruptcy. When the Court weighs the benefits of the discharge to a debtor and the detriments of the discharge to a former spouse under § 523(a)(15)(B), "good faith" is considered only in the context of whether the debtor filed the petition in bankruptcy in good faith and whether the parties have litigated under § 523(a)(15) in good faith. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 908-09 (B.A.P. 6th Cir. 1998) (citing *In re Smither* 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996)). Both of those elements of good faith are present here. However, since § 523(a)(15)(B) does not appear to encompass whether the debtor acted in good faith pre-petition, no conclusion is reached on that issue.

The Court also does not reach a conclusion on whether Debtor has some ability to pay these debts over time. Under § 523(a)(15), Debtor is required to demonstrate only that one of the two exceptions under (a)(15) applies. *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 55 (B.A.P. 8th Cir. 1998). She has done that under § 523(a)(15)(B).

Finally, the Court recognizes that the decision reached today is not necessarily an equitable one. Darrell Boyer is essentially being penalized for having a good job and being more financially

Case: 00-05008 Form id: 122 Ntc Date: 11/13/2000 Off: 3 Page : 1
Total notices mailed: 3

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