

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	Bankr. No. 96-40624
)	
MARGO J. HOFFMAN)	Chapter 7
Soc. Sec. No. 502-72-6534)	
Debtor.)	
)	
HARLAN J. HOFFMAN)	
)	Adv. No. 96-4046
Plaintiff,)	
)	
-vs-)	MEMORANDUM OF DECISION RE:
)	DISCHARGE AND
MARGO J. HOFFMAN)	DISCHARGEABILITY COMPLAINT
)	
Defendant.)	

The matter before the Court is a complaint to deny Debtor a discharge or to render certain debts non dischargeable. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor may receive a general discharge but that her debts to Harlan Hoffman are non dischargeable under 11 U.S.C. § 523(a)(15).

I.

Harlan J. Hoffman and Margo J. Hoffman were divorced on January 16, 1995. The divorce court divided the parties' assets and liabilities equally. Harlan Hoffman was given all equitable interest in some contract for deed pasture land, all livestock, all farming equipment, a Chevrolet pickup, some smaller personalty, one-half of an expected 1994 income refund, one-half of the orthodontist bill, and all the debts secured by this property. The

smaller personalty Harlan Hoffman was given included a satellite dish, a small gate, and a newer freezer.

Margo Hoffman was given the marital home, located on an acreage, a Chevrolet car, her retirement account, one-half of an expected 1994 income tax refund, some smaller personalty, the debts to Sears and Mollet Music, one-half of the debt to the orthodontist, and all the debt secured by this property. The personalty Margo Hoffman was given included two ladders, an old freezer, and a large gate. To further balance the division, Margo Hoffman was ordered to pay Harlan Hoffman an additional \$12,931.00 within one year of the date that she took possession of the marital home. The \$12,931.00 was to bear interest at 6% from that date, also. A state-law-guided child support award was also entered and medical debts for the children were split with Harlan Hoffman paying 39% and Margo Hoffman paying %61. Margo Hoffman also was ordered to pay \$250.00 of Harlan Hoffman's attorneys' fees associated with the divorce and applicable sales tax.

On April 24, 1996, Margo Hoffman was ordered by the divorce court to appear May 28, 1996 and show cause why she had failed to comply with the divorce decree. In particular, the show cause order stated Margo Hoffman had failed to make the equalization payment plus interest, to pay Harlan Hoffman's attorney fees plus interest, and to turn over a small gate. At the show cause hearing on May 28, 1996, the Court found Margo Hoffman in contempt for her failure to abide by the divorce decree. The court gave her ninety days to purge herself by making the payments and delivering the

gate. The Court further concluded that if Margo Hoffman failed to purge herself that a sale of personalty would be ordered on or after September 28, 1996 with the proceeds to be applied to taxes, costs of sale, liens, and then Harlan Hoffman's claim. Finally, the divorce court ordered Margo Hoffman to pay Harlan Hoffman an additional \$200.00 in attorneys' fees related to the show cause action. The contempt order and related findings and conclusions were signed August 27, 1996 and entered August 30, 1996.

On August 22, 1996, Margo Hoffman (Debtor) filed a Chapter 7 petition. She filed schedules and a statement of financial affairs on August 22, 1996, also.

On her schedule of personal property, Debtor listed, among other items, her state government retirement fund of \$25,131.23, her one-fortieth interest in a family partnership that she said yielded an average of \$300.00 per year in interest, and household goods totaling \$1,200.00. She claimed all her personal property exempt.

On October 24, 1996, Harlan Hoffman filed a discharge and dischargeability complaint against Debtor. He first claimed Debtor failed to schedule as assets a satellite television dish, a freezer, a six-foot steel gate, and some ladders and, therefore, should be denied a discharge under 11 U.S.C. § 727(a)(4)(A). His second claim was that Debtor should be denied a discharge of the divorce-related debts she owes him because her unwillingness to abide by the divorce decree and contempt order was willful and malicious under 11 U.S.C. § 523(a)(6). His third claim was that

the divorce decree created a constructive trust of which Debtor was the fiduciary, that she acted in defalcation of the trust when she converted to her own use a small gate that she was ordered to give to him, and that she accordingly should be denied a discharge under § 523(a)(4). His final claim was that Debtor should be denied a discharge of the divorce-related debts under § 523(a)(15), the new non dischargeability subsection regarding divorce-related property divisions.

Debtor answered the complaint on November 13, 1996 with general denials to the first three claims. As to the fourth claim under § 523(a)(15), Debtor stated she does not have the ability to pay Harlan Hoffman the divorce-related debts and "that discharging this debt would not result in a benefit to the debtor which outweighs the detriment to her former spouse. . . ." The Court presumes she meant to state the opposite; that is, that the benefits to her of a discharge *would* outweigh any detriment her former husband suffered if the debts were discharged. Debtor also sought attorneys' fees and costs under § 523(d) on the grounds that Harlan Hoffman's complaint was not substantially justified in law and fact.

A trial was held March 19, 1997. Witnesses included Debtor and Harlan Hoffman. Exhibits received included Debtor's current contract at work, her 1995 and 1996 federal income tax returns, the divorce decree, and the contempt findings of fact and order. The Court limited the evidence to Harlan Hoffman's claims under

§§ 727(a) and 523(a)(15) and, based on the findings and conclusions entered on the record, dismissed Harlan Hoffman's claims under §§ 523(a)(4) and 523(a)(6).

Debtor, age 41, testified that she is a dietician who is eligible for licensing but has not completed the necessary paper work. Debtor stated that she filed bankruptcy shortly after learning that her full-time job with the state would be terminated. She worked for the state until November 16, 1996, was unemployed about a month, received one unemployment check, and started a new job on December 20, 1996. She left her state retirement funds with the state. Debtor's new position is with a federal agency, is part-time at two days per week, and is by contract. That means that she does not receive benefits and must pay all the Social Security tax. Her present contract runs through September 1997. Under the contract, Debtor receives \$176.00 gross per day. She intends to seek renewal of the contract. Debtor does not have other employment except to help her two children with a paper route. She stated she has not found suitable supplemental employment that coordinated with her contract job and her desire to spend time with her adolescent children.

Debtor acknowledged that she received an inheritance from her grandmother sometime during the year before or year of her bankruptcy filing. She could not remember the date or amount with any certainty. She estimated that the amount was about \$6,000.00. She also acknowledged that the inheritance was not listed on her schedules. Debtor was uncertain about how she spent the

inheritance except that she said she used some for necessary repairs and improvements to her home in February 1996, she spent some on her children's activities, and that she and the children ate out more and rented movies. At the conclusion of the trial, Debtor and her attorney agreed to provide the particulars about the inheritance to the Court and Harlan Hoffman's counsel.

Debtor also testified that she did not have the present ability to pay Harlan Hoffman the debts she owed him. She conceded that she had paid most all the other debts given to her in the divorce except those debts owed to Harlan Hoffman or his family. Debtor also acknowledged that she did not list on her schedule of personal property the satellite dish that her father purchased for her after the divorce. She could not explain why the value of her personalty was valued at \$3,000.00 in the divorce but at only \$1,200.00 in her bankruptcy schedules. She did state that both appraisals were subjective. Debtor said she had not been able to borrow against the equity in her home to pay her other debts but she provided no evidence of loan applications and denials.

As to a partnership interest she has with family members regarding land in North Dakota, she says she receives about \$300.00 annually in income and that she does not have an active role in the partnership.

Harlan Hoffman, age 37, testified that he works three days a week for a farmer and three days a week at a sale barn for monthly income of approximately \$1,332.50. He said his current wife receives income of \$606.00 per month. His wife's ex-husband is

delinquent on child support of \$866.00 per month for four children that live with Harlan Hoffman and his wife. Harlan Hoffman is current on his child support payments to Debtor.

Harlan Hoffman says he has been able to continue the payments on the contract for deed land that he received in the divorce but that he had to sell the cattle he received in the divorce. He testified that without the \$12,931.00 equalization payment from Debtor he was unable to make his loan payment to the Avon Bank, which had a secured interest in the cattle. He still has the farm equipment he received in the divorce. With his two jobs and his wife's job, he said they are currently "getting by."

Neither party presently carries health insurance on the children. There was no evidence that either party's expenses or income would change in the near future. Neither party testified to any special health problems that currently or in the future would limit their ability to work.

After the trial, Debtor's counsel filed a copy of a final estate report regarding Debtor's grandmother's estate. According to the report, Debtor received an inheritance of \$1,781.85 but the date she received it was not provided. Harlan Hoffman responded that Debtor acted in bad faith in not reporting this inheritance on her schedules. He also again stated that Debtor should use her state retirement fund to pay her debt to him.

II.

DENIAL DISCHARGE. Harlan Hoffman essentially based his discharge complaint under 11 U.S.C. § 727(a)(4)(A). Under that section, a debtor will be denied a discharge if the debtor "knowingly and fraudulently . . . made a false oath, or account . . ." in connection with his bankruptcy case. The standard of proof is by a preponderance of evidence. *United States v. Hartman (In re Hartman)*, 181 B.R. 410, 412 (Bankr. W.D. Mo. 1995). The debtor's fraudulent intent may be shown by a combination of circumstances from which the court can draw an inference. *First State Bank of Newport v. Beshears (In re Beshears)*, 196 B.R. 468, 475 (Bankr. E.D. Ark. 1996). If fraudulent intent is shown, the second inquiry is whether the intent is sufficiently abusive to merit denial of a discharge. *Palatine National Bank v. Olson (In re Olson)*, 916 F.2d 481, 484 (8th Cir. 1990); *Beshears*, 196 B.R. at 475. A false oath is material, and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property. *Id.* at 484 (citing *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984)). In essence, the falsity must be connected to the debtor's financial situation. *Id.*

At trial, Harlan Hoffman also argued that Debtor has failed to show why the debts to him have not been paid when she has managed

to pay most of her other debts. Those grounds fall under § 727(a)(5). Under that section, the party seeking denial of a discharge must show that the debtor had substantial and identifiable assets. *Beshears*, 196 B.R. at 472-73. The debtor must then go forward and explain the loss of those assets. *Id.*; *Hartman*, 181 B.R. at 413. The court should not be made to speculate what happened or be left to speculate as to the veracity of the explanations; i.e., "unsubstantiated, uncorroborated[,] and undocumented" testimony from the debtor is not likely sufficient. *Beshears*, 196 B.R. at 473.

[T]he intention of the debtor is irrelevant, as is the credibility of the debtor, if the explanation is unsupported by sufficient documentation.

Hartman, 181 B.R. at 413 (citing *Miami National Bank v. Hacker (In re Hacker)*, 90 B.R. 994, 996 (Bankr. W.D. Mo. 1987)).

DISCUSSION. The evidence at trial indicated that Debtor accurately scheduled her interest in a family land partnership. In contrast, Debtor did not schedule some personal property, including two ladders and a satellite dish. However, from the evidence presented, the Court cannot infer that she fraudulently intended to do so. Accordingly, Debtor will not be denied a discharge under § 523(a)(4)(A). The ladders were of limited value and the satellite dish had been purchased by her father. Other changes in her personalty since the divorce were explained. Debtor must promptly amend her schedules, though, including her schedule of

exemptions, if appropriate, to include any omitted property, including the satellite dish she received. Any additional personalty not declared exempt can then be liquidated and distributed by the trustee. *Superior National Bank v. Schroff (In re Schroff)*, 156 B.R. 250, 256 (Bankr. W.D. Mo. 1993) (a debtor must list all assets and debts, not just those the debtor thinks are important).

As to the inheritance, the burden rested on Harlan Hoffman to show that the asset still existed on the petition date and that it was substantial. The present record indicates only that Debtor received a small inheritance and that she spent all of it pre-petition. Accordingly, the Court cannot find that Debtor failed to schedule the inheritance.

Similarly, the Court cannot find that Debtor has not accounted for the inheritance so as to deny discharge under § 727(a)(5). The inheritance was small and apparently was just spent in various ways, including meals out and movie rentals. While the spending may have been frivolous, Debtor sufficiently accounted for the funds.

The Court is not oblivious to the fact that Debtor testified to receiving a much larger inheritance and that her testimony about how she spent it was not entirely consistent. Without some indicia of fraud, though, the Court cannot deny her discharge. The harsh penalties imposed for bankruptcy fraud are available if something fraudulent surfaces later.

III.

NONDISCHARGEABILITY OF DEBT TO HARLAN HOFFMAN. In 1994 Congress amended the Bankruptcy Code to add a new non dischargeability provision. Section 523(a)(15) was added to enhance the rights of a non-debtor spouse holding a marital property settlement claim. Previously, the rights of marital claimants were limited to § 523(a)(5). The new section provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(15) not of the kind described in paragraph (5) 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. § 523(a)(15). Under this provision, a marital debt is presumptively nondischargeable unless the debtor can demonstrate that she does not have the ability to pay the debt or the benefit to her is greater than the detriment to her former spouse. *Henson*

v. *Johnston (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996) (citing generally *In re Straub*, 192 B.R. 522 (Bankr. D.N.D. 1996) (discussing placement of the burdens of proof upon the debtor and nature of 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*, 197 B.R. at 303.

The non-debtor spouse's threshold burden is to merely show that he had a divorce-related claim not covered by § 523(a)(5). *Straub*, 192 B.R. at 527-28; *Henson*, 197 B.R. at 302-03. The burden then shifts to the debtor to show *either* that she does not have the ability to pay the debt *or* that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. *Henson*, 197 B.R. at 303 (citing *In re Morris*, 193 B.R. 949 (Bankr. S.D. Cal. 1996)). The debtor must make these showings by the preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Under subsection (A) of § 523(a)(15), the Court must look at the debtor's ability to pay the debt -- now and in the future. *Henson*, 197 B.R. at 304. "As with student loans, the inquiry begins with an analysis of the debtor's current financial circumstances, 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. Section 523(a)(15)(A) does not restrict the court's inquiry to a "present" ability to pay the debt. *Id.* at 529.

Under subsection (B) of § 523(a)(15), the debtor must demonstrate that "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." The point in time to weigh these benefits and detriments to each party is at the time of the dischargeability trial, not when the divorce order was entered; this allows the Court to fully examine the benefits of the "fresh start" to the debtor, any change in circumstances in employment, and other good or bad fortune which may have befallen the parties. *Henson*, 197 B.R. at 303. In considering changed events, and particularly the benefits of discharge given one party, the current and future financial circumstances of the parties are better analyzed. *Id.* (citing *In re Dressler*, 194 B.R. 290 (Bankr. D.R.I. 1996), and *In re Taylor*, 191 B.R. 760 (Bankr. N.D. Ill. 1996)).

DISCUSSION. It is clear that the debt Debtor owes to Harlan Hoffman is a property-type debt governed by § 523(a)(15). Therefore, the burden falls on her to show by a preponderance of the evidence either that she does not have the present and future ability to pay the debt or that the benefits to her of discharging this debt outweighs the detriments to Harlan Hoffman if the debt is discharged. Debtor has not met this burden.

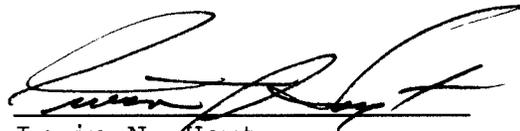
First, Debtor has not shown she does not have the ability to pay the debt. She used some inherited funds frivolously that she could have used to decrease her debt to Harlan Hoffman. She works only part-time and has the time and ability to have a supplemental job. She presented only self-serving testimony that she cannot find a suitable full-time job in her field or employment out side of her field that pays as well or better than her present part-time job. She has equity in her home and has provided no evidence other than self-serving testimony that she is unable to borrow against that equity to pay her debt to Harlan Hoffman. She has a good education and no known health problems that would preclude her from continuing to work in the future. While she may not have the ability to pay the debt in full at once, she certainly had and still has the ability to pay it over time.

Second, the party's financial situations are similar. Therefore, the Court cannot find that she needs to be discharged from her debt to Harlan Hoffman any more than he needs her to pay that debt. In fact, Harlan Hoffman already has suffered financially when he lost his cattle, in part due to Debtor's failure to pay him the \$12,931.00 plus interest that he is due. Debtor appears only to have not paid her obligation to him by choice, not inability. Accordingly, the debt will be deemed non dischargeable under § 523(a)(15).

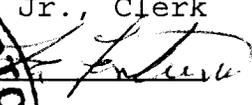
An appropriate order will be entered. Counsel for Harlan Hoffman may prepare a judgment, also.

Dated this 21st day of July, 1997.

BY THE COURT:



Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST
Charles L. Nail, Jr., Clerk
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DEPUTY CLERK
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UNITED STATES BANKRUPTCY COURT

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
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JUL 21 1997

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U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: 
Date: 7-21-97

Case: 96-04046 Form id: 122 Ntc Date: 07/21/97 Off: 4 Page : 1
Total notices mailed: 5

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