

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)	Bankr. No. 01-50166
)	
DEBRA ANN LARSON)	Chapter 7
Soc. Sec. No. 454-33-0519)	
Debtor.)	
)	
LAWAYNE LARSON,)	Adv. No. 01-5010
Plaintiff and)	
Counter Defendant,)	
)	
-vs-)	DECISION RE: DISCHARGEABILITY
)	OF A DEBT UNDER § 523(a)(5)
DEBRA A. LARSON,)	AND § 523(a)(15)
Defendant and)	
Counterclaimant.)	

The matter before the Court is the complaint by Plaintiff LaWayne Larson to determine the dischargeability of a certain debt. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Debtor's obligation on the Discover card is not dischargeable under 11 U.S.C. § 523(a)(15).

I.

LaWayne Larson and Debra A. Larson divorced on April 17, 2000. As part of their property settlement, Debra assumed several debts in whole or in part, including the couple's debt to Discover Card, which she assumed wholly. At the time the agreement was drafted, the debt owed on the card was estimated to be \$100. The total debts she assumed in the agreement were about \$1,350. LaWayne also

assumed several debts in whole or in part, which totaled about \$1,284.

For personalty, each took the items then in their possession and each took a car: Debra, a 1996 Chevy Corsica, which had limited, if any, equity in it; and LaWayne, a 1993 Chevy pickup, which had about \$6,000 in equity. Their agreement also provided that they would assume the liability on any other personal property they took. The total amount of each party's assumed debt on personalty was not quantified in the agreement. LaWayne kept the family home, which did not have any equity in it, and he assumed responsibility for the mortgage, insurance, and taxes on it.

Their agreement included a hold harmless clause, and it also provided that:

The parties agree that all debts of whatever kind incurred by either party after the signing of this agreement shall be the sole and separate responsibility of the party incurring said debts.

Another term of the agreement provided:

The parties agree to execute any and all instruments of waiver, renunciation, release, transfer, or conveyance requested by the other party or his or her personal representative which may be necessary and/or appropriate to effect the agreements, covenants and conditions contained in this Agreement.

LaWayne and Debra further stipulated that neither would receive or pay alimony. A separate provision addressed child support. In setting those terms, the parties stipulated that Debra

had a net monthly income of \$1,277.56 and LaWayne had a net monthly income of \$1,775.38.

Between the time the property settlement was drafted and the time the divorce was finalized, the debt on the Discover Card had increased to about \$1,500. The increase was the result of charges made by Debra Larson to meet living expenses after she left the marital home.

Both Debra Larson's and LaWayne Larson's names remained on the Discover Card account. Debra Larson contacted the credit card company by letter on March 15, 2000, about having a new account established in her name only and having the balance from the joint account transferred into the new account. Debra Larson applied for the new account, but her request was denied based on her debt to income ratio. LaWayne Larson did not contact Discover Card to verify that his name had been removed from the account after the divorce. He was unaware that Debra Larson had continued to charge on the Discover Card and that his name was still on the card until he received a statement in the mail, which was near the time that Debra Larson filed a bankruptcy petition.

Debra Larson ("Debtor") filed a Chapter 7 petition in bankruptcy on March 28, 2001. By that time, although she had made some payments on the Discover Card debt, the total then owed on the

credit card had increased to \$8,959.¹ LeWayne Larson was still listed on the account as an obligor.

LaWayne Larson filed a timely complaint seeking a determination that the Discover Card debt was not dischargeable under either § 523(a)(5) or (a)(15).² In her answer, Debtor argued that the Discover Card debt was not a family support debt under § 523(a)(5). She further argued that since she had paid at least \$1,500 on the debt after the divorce, the balance was incurred post-divorce and thus does not fall under § 523(a)(15). Debtor also said that should the debt be deemed a debt of the kind described in § 523(a)(15), it should nonetheless be dischargeable because she did not have the ability to pay it and because discharging the debt would result in a benefit to her that outweighed any detriment to LaWayne Larson.

After the adversary proceeding was commenced, counsel for Plaintiff tried to make an arrangement with Discover Card. That effort was unsuccessful. A trial was thus held January 22, 2002. Appearances included Patricia A. Meyers for Plaintiff LaWayne Larson and Rosemary E. Cotton for Defendant-Debtor. Several joint

¹ Debtor also owed a debt to Discover Financial, which is separate.

² LaWayne Larson included in his complaint some other debts that Debra Larson assumed in the debt. All but the Discover Card debt have been paid in full or otherwise resolved.

exhibits were offered and received. In addition to providing information about the Discover Card account, as set forth above, both parties testified about their financial circumstances at the time of the divorce and at present.

In 2000, Debtor had gross income of \$19,404. In 2001, her gross income had increased to \$24,688.59 and her take-home pay (gross less dental and medical insurance and taxes) was \$18,819.81.³ Debra presently receives \$160 per month in child support. Debtor does not receive any other financial assistance. Her monthly expenses total \$1,862, but that sum does not include any extraordinary or unexpected expenses.

Debtor is purchasing a car on payments of \$200 per month. She still owes about \$3,000 on the car. The value of the car exceeds the debt on it. Debtor does not own a home; she rents a home for herself and her son. Several of her larger household appliances (washer, dryer, television, kitchen appliances, etc.) and some furniture were purchased new when she left the marital home in 2000. She has limited funds in her checking and savings accounts. Debtor does not have a retirement account.

Debtor testified that her present employment situation is unstable. She said her employer, Consec Finance Corporation, has advised her that she will lose her job in the near future due to

³ These figures are difficult to read on Exhibit 6.

the exportation of jobs to India. She will be eligible for unemployment benefits if her job with Conseco ends. Debtor does not expect to be able to find employment at the same pay rate in her locale. She expects her new job will pay \$8.00 to \$8.50 per hour, but she has not yet made a concentrated effort to find new employment.

Debtor has a high school education. She has no special training other than what has been offered by her employers.

LaWayne Larson is employed by Ridco, Inc. In 2000, his annual gross income was \$25,662. His annual gross income is presently \$31,471.62. His take-home pay (gross income less insurance, taxes, and a 401k contribution) is about \$1,235 per month. His bank account balances are small. The balance in his 401k account is approximately \$20,000. There is a loan against it of \$3,500.

LaWayne Larson presently lives with a companion and her three children. LaWayne Larson's monthly expenses are about \$2,050 per month. He pays \$173⁴ in child support and \$65 toward their son's day care costs. With the funds contributed by his companion, he is able to make ends meet. His companion makes about \$9.00 an hour and she receives child support. She pays him \$350 per month toward household expenses, she buys 75% of the household's groceries, and

⁴ The amount of child support he said he pays was slightly more than the amount that Debtor said she received.

she pays for the cable television. They have no formal arrangement for sharing other expenses, though she sometimes helps pay for utilities.

At the conclusion of the receipt of evidence, the Court received briefs on whether that portion of the Discover Card debt that was incurred by Debtor after the divorce could fall under § 523(a)(15). In his brief, LaWayne Larson argued that the debt arose in connection with the parties' divorce decree based on the hold harmless language in the decree and based on a provision that bound each to pay their own post-divorce debts. He cited two cases in support of his position.

In her brief, Debtor stated that after the divorce her payments on the Discover Card debt exceeded the amount that she owed at the time of the divorce, which was about \$1,600. The remaining debt was all incurred after the divorce. She argued that this post-divorce debt does not fall under § 523(a)(15) because it was not incurred during the marriage and that LaWayne Larson is now just a general unsecured creditor. She cited cases regarding hold harmless clauses.

II.

NONDISCHARGEABILITY UNDER § 523(a)(5).

Applicable law. Under 11 U.S.C. § 523(a)(5), a debtor (any chapter) does not receive a discharge of debts owed to a spouse,

former spouse, or child for alimony, maintenance, or support in connection with a separation agreement, divorce decree, or other order of a court of record. Whether a particular debt falls under § 523(a)(5) is a question of federal law. *Scholl v. McLain (In re McLain)*, 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999); *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997). The Court must consider the question in light of all facts and circumstances relevant to the intent of the parties at the time the obligation was created, *not* at the time of the dischargeability trial. *Cummings v. Cummings (In re Cummings)*, 147 B.R. 747, 750 (Bankr. D.S.D. 1992) (citing *William v. Williams (In re Williams)*, 703 F.2d 1055, 1058 (8th Cir. 1983)). The spouse, former spouse, or child, by a preponderance of the evidence, has the burden to show that the debt falls within the limits of § 523(a)(5). *Grogan v. Garner*, 498 U.S. 279, 286-90 (1991).

How the state court or state law characterized the debt is not binding on the Bankruptcy Court. *McLain*, 241 B.R. at 419. Plain language in the support obligation, however, may compel a conclusion that the debt is for support if there is a stated exchange of obligations so that the non debtor spouse or former spouse will have the means necessary to adequately support the family unit. *Id.* Further,

[p]rovisions to pay expenditures for the necessities and ordinary staples of everyday life may reflect a support function. *Id.* (cites therein). Moreover, the assumption of the other spouse's debt can be support for bankruptcy purposes. *Id.*

Cummings, 147 B.R. at 750. Factors that the Court may consider include:

- (1) the relative financial condition of the parties at the time of the divorce or separation;
- (2) the parties' respective employment history and future prospects for financial stability;
- (3) whether one party received more marital property than the other;
- (4) the periodic nature of the payments;
- (5) whether it would be difficult for the spouse, former spouse, or child to meet daily living expenses without the debtor's assumption of the subject debt.

Tatge, 212 B.R. at 608 (cites therein).

Discussion. Based on several factors, the Court concludes that the Discover Card debt assumed by Debtor in the divorce is not a support-related debt under § 523(a)(5). The language of the parties' divorce agreement clearly did not provide for alimony or other support payments. Instead, marital assets and liabilities were fairly equally divided. Further, at the time of the divorce, the parties had relatively equal financial conditions, they both enjoyed relatively good health, and they both had similar expectations for continued employment and financial stability. Thus, there are no factors that indicate Debtor assumed the

Discover Card debt in lieu of support payments to LaWayne Larson. Accordingly, the Discover Card debt is not excepted from discharge under § 523(a)(5).

III.

NONDISCHARGEABILITY UNDER § 523(a)(15).

Applicable law. Under § 523(a)(15), a marital property settlement 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. *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996) (citing generally *Straub v. Straub (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 527-528; *Henson*, 192 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*, 192 B.R. at 303 (citing *In re Morris*, 193 B.R. 949 (Bankr. S.D. Cal. 1996)). The debtor must make these showings by a 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*, 192 B.R. at 303-04. "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 528.

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*, 192 B.R. at 303. In considering changed

events, and in particular the benefits of a 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. The first issue presented is whether Debtor's debt to Discover Card falls under § 523(a)(15) where most, if not all the debt, was incurred after the divorce and where Debtor paid Discover Card enough funds to satisfy the debt that existed at the time of the divorce. Though only a few courts have touched on the issue, the case law indicates that an increase in the debt after the divorce still qualifies as a debt incurred in connection with the divorce, *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33 (unpublished), 1997 WL 745501 (6th Cir. 1997), *aff'g* 199 B.R. 22 (Bankr. W.D. Ky. 1996); *Crossett v. Windom (In re Windom)*, 207 B.R. 1017, 1019-22 (Bankr. W.D. Tenn. 1997), especially when the divorce agreement or decree includes a hold harmless provision. See *Salerno v. Crawford (In re Crawford)*, 236 B.R. 673, 677 (Bankr. E.D. Ark. 1999) (a hold harmless agreement in a divorce decree imposed liability upon the obligor for all consequences of his failure to pay) (cites therein); *Belcher v. Owens (In re Owens)*, 191 B.R. 669, 673-74 (Bankr. E.D. Ky. 1996); *Stegall v. Stegall (In re Stegall)*, 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995). Accordingly,

the Court concludes that the Discover Card debt, in the amount that existed on the petition date, falls under § 523(a)(15).

The next issue is whether the Discover Card debt is dischargeable under either subsection(a)(15)(A) or (B). The Court concludes that it is not. Under § 523(a)(15), Debtor bore the burden of proving, by a preponderance of the evidence, either that she did not have the ability to pay the Discover Card debt or that her receipt of a discharge of the debt would outweigh any detriment to LaWayne Larson if the debt was discharged and he remained liable for it. Debtor did not meet that burden.

First, under § 523(a)(15)(A), Debtor did not show that she does not have the ability to pay the Discover Card debt over time. Though she has limited disposable income, she did not show that all her expenses are necessary in the amounts she has budgeted. Further, Debtor will have a small cushion that can be applied to the Discover Card debt after her car is paid in full. Though Debtor says she may lose her job, there was no independent evidence to support that testimony. Further, there was no supporting evidence that Debtor had reasonably assessed her employment opportunities should she be let go from Consec.

Second, under subsection (B) the evidence showed that the benefit to Debtor in receiving a discharge is relatively equal to the detriment LaWayne Larson will endure if he has to pay the

Discover Card debt. The parties' financial conditions are fairly equivalent; each makes a living wage with limited disposable income. Each drives a modest vehicle. Their employability is equivalent. They each apparently enjoy good health. In a "jump ball" situation like this, however, the statute dictates that the debt remains nondischargeable since the benefit to Debtor must outweigh the detriment to LaWayne Larson.

An order declaring the Discover Card debt nondischargeable under § 523(a)(15) will be entered.

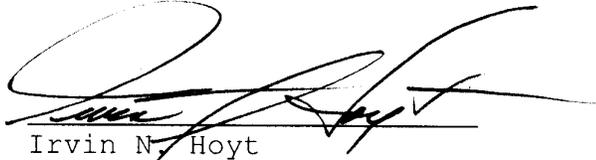
Dated this 15 day of March, 2002.

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

MAR 15 2002

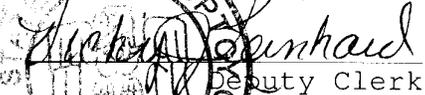
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By _____

BY THE COURT:



Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 
Deputy Clerk



NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
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MAR 15 2002

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

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Rosemary E. Cotton
1719 W. Main
Rapid City, SD 57702

Patricia A. Meyers
PO Box 290
Rapid City, SD 57709

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