

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF SOUTH DAKOTA**  
ROOM 211  
FEDERAL BUILDING AND U.S. POST OFFICE  
225 SOUTH PIERRE STREET  
**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**  
BANKRUPTCY JUDGE

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May 23, 2002

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Subject: *Cynthia L. Keller v. Marvin E.W. Parkinson*  
(*In re Parkinson*), Adversary No. 01-4035;  
Chapter 7; Bankr. No. 01-40938

Dear Counsel:

The matter before the Court is Plaintiff Cynthia L. Keller's complaint seeking a determination of the dischargeability under 11 U.S.C. § 523(a)(15) of a judgment she holds against Defendant-Debtor Marvin E.W. Parkinson. This is a core proceeding under 28 U.S.C. § 157(b)(2). As set forth below, a judgment will be entered for Plaintiff.

**SUMMARY OF FACTS.** Marvin E.W. Parkinson ("Debtor") filed a Chapter 7 petition on August 21, 2001. In his schedules and statement of financial affairs, he reported that he did not own any real property. His scheduled personal property included various items valued at only \$2,365.50. He declared all his personalty exempt. Debtor stated he did not have any secured creditors. Priority, unsecured creditors included the Internal Revenue Service. Debtor estimated the government's claim was for \$40,000. Debtor scheduled several general, unsecured creditors whose claims totaled \$39,233.70. These creditors included his former wife, Cynthia Parkinson, whom he said held a judgment for \$16,900.

Cynthia Parkinson, now known as Cynthia L. Keller ("Plaintiff"), timely filed a nondischargeability complaint against Debtor. She sought a declaration that her claim against Debtor for \$16,328, which arose from two divorce-related orders, plus accruing interest, was nondischargeable under 11 U.S.C. §§ 523(a)(5), (a)(6), or (a)(15).

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In his answer, Defendant-Debtor said Plaintiff had only a general unsecured claim, that the claim was not for alimony or support and thus was not excepted from discharge under § 523(a)(5), and that he did not have the ability to pay her claim so that it is dischargeable under § 523(a)(15).

A trial was held in December 2001. The parties agreed that the subject debts did not fall under § 523(a)(5), but did fall under § 523(a)(15). Thus, the burden fell to Debtor to show either that he did not have the ability to pay the debt or that the benefit of his receiving a discharge outweighed any detriment to Plaintiff.

Four exhibits offered by Plaintiff were received: the state court divorce judgment and decree, the subsequent compliance motion by Plaintiff, and the findings and conclusions and the judgment entered by the state court in response to Plaintiff's post-divorce motion. These documents indicated that Plaintiff and Debtor were divorced in early January 1996. The divorce court ordered a marital farmstead in rural Trent, South Dakota, to be sold and the proceeds be to be divided several ways, with Plaintiff slated to receive a significant portion. The remaining personalty was divided by agreement of the parties. Debtor received all the business property and associated debt. Plaintiff received a mobile home the couple had. Neither party was awarded alimony.

In early 1996 Plaintiff and Debtor signed an agreement that resolved a dispute regarding some personal property. It also provided that Plaintiff would quit claim to Debtor her interest in the farmstead and that he did not have to sell it until after some repairs were made.

Debtor failed to comply with the divorce decree, though he eventually sold the farmstead and realized about \$25,000 to \$30,000 in equity from it. Plaintiff filed a motion with the divorce court. In November 1998, the state divorce court, aware of both its original divorce decree and the parties' agreed modification in early 1996, gave Plaintiff a judgment against Debtor for \$13,328, plus \$1,500 for related attorney fees and costs, for a total of \$16,328. The court did not order specific security for this judgment.

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Debtor testified that he is currently employed as a diesel mechanic. He has been with this employer a bit over one year after starting there on a work release program while he was incarcerated. He works 40 hours per week with limited overtime. This employer has experienced some layoffs recently, though not in Debtor's department. From this job, Debtor has net or "take home" pay of \$423.47 every two weeks. Some weeks he may earn about \$70 more for overtime. Debtor also works about 8 hours per week for a commercial cleaning service, especially during the winter months. He takes home approximately \$78 every two weeks from this job.

With the two jobs combined, Debtor's net income is about \$1,087 per month. Debtor's expenses at the time of trial totaled \$1,082.67 per month. Debtors says he lives pay check to pay check in an efficiency apartment and enjoys no luxuries except an occasional day of fishing. His lone vehicle has high mileage and poor back tires and it runs poorly. He is presently receiving treatment for stress-related anxiety. The medication cost for this ailment will be paid, in full or in part, by insurance.

Debtor testified that he has not accumulated any retirement funds on his own and that he is unfamiliar with any retirement benefits or retirement savings programs offered by his current employer. He hopes his income increases over the years, but he says he is not assured that it will.

Debtor is currently on active supervised parole and will be until September 2004. He pays a parole supervision fee of \$10 per month, which is included in his total expenses noted above. Debtor must pay the fee and remain employed to avoid violating his parole. His ability to travel is presently restricted unless permission is obtained from his parole officer.

Debtor is about 37 years old. He has a General Equivalency Degree; he does not have any specialized training. Debtor testified that in his opinion he is presently earning as much income as he can. He said he has applied for better jobs, but he feels that his criminal record has hindered his success in landing one. He also said the industrial job market in his home area of Yankton, South Dakota, is slow. Debtor stated that he is now unable to perform more difficult physical labor. He said he has a fused bone in one wrist and his ankles, knees, and one hip are in poor condition.

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At the time Debtor and Plaintiff were married, Debtor was self-employed in farming and commercial and residential construction. The construction enterprise was a business that he developed and ran by age 32, following his first drug-related felony conviction in 1990. Debtor estimated that he earned about \$35,000 a year from the construction business and employed, on average, three other people. The business folded after Plaintiff's and Debtor's divorce. Debtor was incarcerated on a second felony drug and gun-related conviction beginning in 1999 to June 2001. Debtor said all the assets of his business were stolen while he was in jail. Plaintiff, who kept the books for the construction business, testified that Debtor earned net income from the construction business of \$50,000 to \$60,000 in 1995 to 1996.

Plaintiff, age 33, sold for \$500 the mobile home she acquired in the divorce. She presently lives in her own home in Sioux Falls with a boyfriend. Plaintiff purchased the Sioux Falls home in 1995 from her father for \$12,000. She has made some necessary improvements to the home. Plaintiff drives a 1990 Ford Escort worth \$1,700. She is not currently working due to a back injury suffered at home in June 2001, but she is not under any doctor's directive not to work. Plaintiff is receiving therapy for her injury.

Plaintiff primarily meets her living expenses with \$800 per month payments she receives for back child support. These payments will continue for about another year. Her total income in the past year (January to December 11, 2001) was about \$11,000, including the child support. After working with some creditors to resolve problems with old debts, Plaintiff is now able to receive credit.

Plaintiff makes the \$360 per month mortgage payment on her house, which includes home insurance and taxes. Her other monthly expenses include: electricity, \$50; water, \$40; garbage, \$45; cable television, \$35; telephone, \$35; groceries, \$200; car insurance, \$57; and credit cards, \$100. Her boyfriend pays his own insurance and car expenses. They share the cost of groceries and the utilities. Thus, her total expenses, after her boyfriend pays his share, are about \$700. Debtor sometimes uses her \$100 in disposable income to help her sons with their expenses.

Plaintiff has taken some college classes, but she does not have a degree. Her past employment includes working at a convenience store, tending bar, cleaning, and bookkeeping. In the

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past she has earned up to \$8.00 an hour.

By the December 11, 2001, trial, the I.R.S.'s claim against Debtor had not been finalized. The adversary proceeding was continued to allow Debtor to obtain that information. Debtor advised the Court in April 2002 that he had no outstanding federal income tax obligation. After Plaintiff's time to respond to this information passed, Plaintiff's § 523(a)(15) complaint was taken under advisement.

APPLICABLE LAW. Under 11 U.S.C. § 523(a)(15), a marital property settlement debt is presumptively nondischargeable unless the debtor can demonstrate that he does not have the ability to pay the debt or that the benefit to him is greater than the detriment to his 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 she had a divorce-related claim not covered by § 523(a)(5). *Straub*, 192 B.R. at 527-28; *Henson*, 192 B.R. at 302-03. The burden then shifts to the debtor to show either that he 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. *Fellner v. Fellner (In re Fellner)*, 256 B.R. 898, 902-03 (B.A.P. 8th Cir. 2001); *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 55-56 (B.A.P. 8th Cir. 1998); *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 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*, 192 B.R. at 303-04. "[T]he 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"

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ability to pay the debt. *Id.* at 528. Further, the reasonableness of a debtor's expenses can be considered. *Fellner*, 256 B.R. at 902-04. The debtor bears the burden to show that they are. *Id.*, at 903-04.

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 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. Debtor has not met his burden of proof that he is unable now or in the future to pay the debt owed to Plaintiff, as required to receive a discharge of the marital debt under subsection 523(a)(15)(A). While Debtor's present employment does not afford him any measurable disposable income, Debtor has job skills that he is not utilizing to maximize his income. While Debtor said he is unable to return to more physically challenging work, such as construction, he provided only self-serving testimony on his health. He also failed to present any independent evidence of the job market and his ability to secure better employment. Further, all of Debtor's other unsecured debts have been discharged, he does not have any priority claims -- taxes or child support -- to pay, and he does not have any secured debts that he is paying over time. Thus, any disposable income he earns now or in the future can be applied to the repayment of Plaintiff's judgment claim.

Second, Debtor has not shown that he will benefit more from a discharge than Plaintiff will suffer as a consequence if her claim is discharged. While Plaintiff's present meager income is largely of her own choice, she does not have sufficient income producing-skills that will allow her to overcome the financial loss she will suffer if her judgment against Debtor is discharged. Debtor, on

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the other hand, has already received a discharge of several debts and does have job skills that will allow him to earn a higher wage. With little other evidence on this issue presented, the scales are balanced or even tipped slightly in Plaintiff's favor. Thus, Debtor has not met his burden of proof under subsection 523(a)(15)(B), and Plaintiff's claim cannot be discharged under subsection 523(a)(15)(B).

An appropriate order and judgment for Plaintiff will be entered.

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; copies to parties in interest)

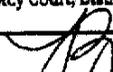


I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

MAY 24 2002

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

By \_\_\_\_\_



NOTICE OF ENTRY  
Under F.R. Bankr.P. 9022(a)  
Entered

MAY 24 2002

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
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