UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

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| In re: | ) | Bankr. No. 98-50064 |
| DEAN ROBERT WALTERS, JR.<br>Soc. Sec. No. [redacted]-[redacted]-7627 | ) | Chapter 7 |
| Debtor. | ) | |
| LISA BURTON | ) | Adv. No. 98-5005 |
| Plaintiff, | ) | |
| -vs- | ) | MEMORANDUM OF DECISION |
| DEAN ROBERT WALTERS, JR. | ) | |
| Defendant. | ) | |

The matter before the Court is Plaintiff's non dischargeability complaint under 11 U.S.C. § 523(a)(15). This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendant-Debtor has not met his burden of proof under either exception to § 523(a)(15) and that a non dischargeability judgment must be entered for Plaintiff.

I.

Lisa Burton (Burton) and Dean Walters, Jr., (Walters) were divorced on October 23, 1997. Pursuant to a stipulation dated January 7, 1998 that was incorporated into the divorce decree, the parties resolved matters surrounding custody and care of their children and distribution of their assets and liabilities. Walters

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was directed to pay Burton $1,200.00 to equalize the property distribution, to pay any deficiency on a formerly leased or owned 1996 Ford van, and to pay any debt owed Carmel Finance Corporation for a set of encyclopedia.

On February 11, 1998, Walters filed a Chapter 7 petition in bankruptcy. His schedule of unsecured debts included the property equalization debt to Burton for $1,200.00, the deficiency on the Ford van to Ford Motor Credit for $1,491.15, and the debt to Carmel Finance Corporation for $368.63.

Burton commenced this adversary proceeding under 11 U.S.C. § 523(a)(15) on March 23, 1998 seeking a declaration that the divorce-related debts to her, Ford Motor Credit, and Carmel Finance were non dischargeable, property settlement-related debts. A trial was held August 24, 1998. Appearances included Alan L. Smoot for Burton and Lawrence R. Bihlmeyer for Debtor Walters.

Both Burton and Walters and Walter's new wife testified about their respective household's current and expected income and expenses. In sum, the testimony and exhibits indicated both Burton's and Walters' households run in the red. Neither of them nor any of their dependents have unusual health problems. Neither anticipated any out-of-the-ordinary expenses or losses of income in the future.

Burton testified that she too might have to file bankruptcy if Walters was allowed to discharge the divorce-related debts. Walters stated he could face discharge from the Air Force for

financial irresponsibility if these divorce-related debts were not discharged.

Testimony and the record show that Walters has reaffirmed a debt to Ford Motor Credit for a 1997 Mustang on which he makes monthly payments of about $366.00. There was no evidence on whether the deficiency on the Ford van was included in Walters' new debt with Ford. Walters acknowledged that he would be spending over $4,000.00 in attorneys' fees related to this adversary proceeding. He had budgeted $150.00 per month to pay these fees.

The matter was taken under advisement after the parties were given an opportunity to file post-trial briefs[1] and after Defendant-Debtor Walters' attorney was given an opportunity to respond to the Court's inquiry under 11 U.S.C. § 329(b).

II.

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, former 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

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[1] Burton's post-trial letter from her counsel dated November 2, 1998 and the attached letter from counsel for Ford Motor Credit Company were not received as evidence.

> 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 non dischargeable unless the debtor can demonstrate that he does not have the ability to pay the debt or the benefit to him in receiving a discharge of the debts is greater than the detriment his former spouse will suffer if the debts are discharged. *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. 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*, 192 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 528; *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. *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), 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 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*, 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)).

III.

The parties did not dispute that the $1,200.00 debt Walters owes Burton and the debts to Ford Motor Credit and Carmel Finance that Walters assumed in the divorce are the property settlement type debts governed by § 523(a)(15). Therefore, the burden then fell upon Walters to show that one of the two exceptions under § 523(a)(15) applied. Walters has failed to make the requisite showing.

Under § 523(a)(15)(A), Walters needed to show that he did not have the present and future ability to pay these debts. The evidence does not bear that out. He is gainfully employed, his employer furnishes housing and utilities, and his current spouse is gainfully employed. Their family unit does not have any extraordinary family expenses. While their monthly budget may run in the red, the cause appears to be spending choices, not necessity. Higher food and household expenses were not substantiated. Walters has found the money to repay a family

member, to buy a late model coupe, and to pay an attorney more for this action than the debts covered in the complaint. Therefore, Walters clearly has failed to show that he does not have the ability to pay these debts now or in the foreseeable future.

Under § 523(a)(15)(B), Walters needed to show that the benefits for him in receiving a discharge of the subject debts outweighs the detriment to Burton if the debts are discharged. At best, this issue was a jump ball. Both parties have poor financial health. Both may face unpleasant consequences if the debts are not paid. The evidence presented did not tip the ball in Walters' favor, as needed to happen to have the debts discharged. True, a discharge from the Air Force for financial irresponsibility would be a severe consequence for Walters. Objective evidence to support that contention, however, and to explain how and when it could happen were not presented.

A judgment will be entered for Plaintiff Burton.

Dated this 8 day of December, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT SEAL

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

DEC 08 1998

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

DEC 08 1998

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

Case: 98-05005 Form id: 122 Ntc Date: 12/08/1998 Off: 3 Page : 1
Total notices mailed: 4

Aty Bihlmeyer, Lawrence R. PO Box 8274, Rapid City, SD 57709-8274
Aty Smoot, Alan L. 2902 W Main St, #3, Rapid City, SD 57702-1552
Intereste Walters, Dean Robert, Jr. 6401A George Dr, Ellsworth AFB, SD 57706
Intereste Whetzal, Dennis PO Box 8285, Rapid City, SD 57709