

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	Bankr. No. 00-40098
)	
ABDUL T. WARD)	Chapter 7
Soc. Sec. No. 449-39-9248)	
Debtor.)	
)	
PAIGE HOFER-WARD)	Adv. No. 00-4011
Plaintiff,)	
)	
-vs-)	INTERIM DECISION
)	
ABDUL T. WARD)	
Defendant.)	

The matter before the Court is the complaint to determine the dischargeability of certain marital debts. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Interim Decision and accompanying Order shall not constitute the Court's final findings and conclusions. As discussed below, the Court concludes that this matter shall be held in abeyance pending entry of a decree of divorce by the state court.

I.

Abdul T. Ward ("Debtor") filed a Chapter 7 petition. Debtor separated from his wife, Paige Hofer-Ward, prior to filing. They continue to live apart. Divorce proceedings are pending. The couple shares custody of their minor son. An interim child support order has been entered. The divorce court has not yet made a division of property.

Hofer-Ward moved for dismissal of the case under 11 U.S.C. § 707(a). She also filed a complaint under 11 U.S.C. § 523(a)(15). An evidentiary hearing on the dismissal motion and a trial on the

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§ 523(a)(15) complaint were held jointly. At the trial, the parties stipulated that the subject debts fell under § 523(a)(15). On the witness stand, Debtor reviewed his income and expenses, his present living arrangement, and the reasons he filed bankruptcy. Debtor stated that he did not foresee any appreciable increase in his income or a decrease in his expenses. His expenses will likely increase due to the recent birth of a daughter to his present companion. He claims an inability to pay the marital debt as governed by § 523(a)(15)(A).

Hofer-Ward testified that she thought their jointly-owed debts could be paid over time if both she and Debtor worked second jobs. She disputed Debtor's expenses for traveling to exchange custody of their son and the amount of taxes owed to the I.R.S.

At trial, the parties estimated what debts were jointly owed, but there was no definitive agreement regarding who would assume payment of the couple's particular debts.

By separate Decision and Order, Hofer-Ward's motion to dismiss Debtor's case has been denied.

III.

In 1994, Congress amended the Bankruptcy Code to add a new nondischargeability provision. Section 523(a)(15) was added to enhance the rights of a non-debtor spouse holding a marital property settlement claim. Under the new provision, a marital 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. *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 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. *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 (1991).

Under subsection (A), the only subsection on which Debtor relies to claim the subject marital debts nondischargeable, the Court must look at 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 528.

III.

As the Court discussed briefly with counsel in Chambers, § 523(a)(15) presumes that a court order has been entered or, at the least, that a formal separation agreement has been reached, regarding the division of marital debts. Since that formal division has not yet occurred between Debtor and Hofer-Ward and because the state court has not finalized the matter, this Court is reluctant to make a dispositive ruling on Hofer-Ward's § 523(a)(15) complaint. The better course is to send the parties back to state court for a resolution of the distribution of assets and liabilities and entry of a divorce decree. The parties can then return to this Court for a final disposition of the § 523(a)(15) complaint.

A continued evidentiary hearing will be necessary only if Debtor's present or projected financial circumstances change appreciably in the interim [§ 523(a)(15)(A) does not encompass a review of Hofer-Ward's financial circumstances]. The parties can submit the divorce decree to this Court and request a continued evidentiary hearing, if needed.

An order holding this matter in abeyance will be entered in

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Total notices mailed: 6

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