

**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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December 19, 2003

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Subject: *Patricia J. Warkenthien v. Brett E. Warkenthien*  
(*In re Brett E. Warkenthien*), Adv. No. 03-3004;  
Chapter 7; Bankr. No. 03-30055

Dear Counsel:

The matters before the Court are the Motion to Vacate Order and Motion for Protective Order filed by Plaintiff on October 30, 2003, and the Motion to Dismiss filed by Defendant-Debtor on November 4, 2003. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Plaintiff's Motion to Vacate and her Motion for Protective Order will be granted in part. Defendant-Debtor's Motion to Dismiss will be held in abeyance to insure that Plaintiff timely fulfills Defendant-Debtor's discovery request in the manner directed by the Court.

*Summary.* On May 28, 2003, Plaintiff Patricia J. Warkenthien commenced an adversary proceeding against her former husband, Defendant-Debtor Brett E. Warkenthien. Plaintiff sought a determination that certain divorce-related debts that Debtor had been ordered to pay were nondischargeable under 11 U.S.C. § 523(a)(15). Debtor answered the complaint saying he did not have the ability to pay the debts and that the benefit to him if the debts were discharged outweighed any consequences to Plaintiff. The Court set deadlines for completion of discovery and for filing any dispositive motions.

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Through a series of pleadings from both parties, Plaintiff eventually was permitted by the Court to amend her complaint to seek an alternative declaration of nondischargeability under 11 U.S.C. § 523(a)(5). In his answer to the amended complaint, Debtor denied that the subject debts were support debts that fell under § 523(a)(5). The discovery deadline was extended once at the request of both parties.

On October 10, 2003, Debtor sought an order compelling Plaintiff to furnish her present husband's income tax returns for 2001 and 2002, to provide wage information for 2003, and "bank statements." The Order was granted.

On October 30, 2003, Plaintiff asked the Court to vacate the October 10, 2003, discovery order and to limit the discovery regarding her husband's income. She said she and her husband were not married until May 2003 and she challenged the necessity for them to provide his income records for a period during which they were not married. Plaintiff also stated that her husband was not willing to provide information for a lawsuit to which he was not a party. If the Court found that Plaintiff's husband's income was relevant to this adversary proceeding, she asked that it be limited to those times since they were married.

On November 4, 2003, Debtor responded to Plaintiff's motion by filing a motion seeking dismissal of the adversary proceeding. He stated Plaintiff's husband's financial information was relevant under § 523(a)(15). He further stated that he had been advised that Plaintiff would prefer that the adversary proceeding be dismissed in lieu of her providing the financial information requested. Plaintiff timely resisted that motion.

*Discussion.* 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 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.

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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, 291 (1991).

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)).

If Plaintiff meets her burden of showing that the subject debts fall under § 523(a)(15), then, as noted above, the burden will fall on Debtor to show that the debts are nonetheless dischargeable because either subsection (A) or (B) applies. To meet his burden under subsection (B), Debtor will, of course, need to know Plaintiff's present financial situation so that it can be compared to his. Since Plaintiff is now married and apparently maintaining a household with her spouse, Plaintiff's husband's income is relevant in determining Plaintiff's household's income and expenses. Accordingly, Plaintiff must provide that information to Debtor.

At this time, Debtor has not demonstrated a need to assess Plaintiff's husband's income and expenses for a period earlier than when the couple married. That information, however, may be relevant if Plaintiff's husband's income and expenses vary significantly from year to year, as is often true for farmers,



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