

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

IN RE: )  
 )  
HENRY JOSEPH BACHMANN, )  
 )  
Debtor. )  
 )  
MARILYNN DALE BACHMANN, )  
 )  
Plaintiff, )  
 )  
vs. )  
HENRY JOSEPH BACHMANN, )  
 )  
Defendant. )

CASE NO. 89-30054-INH  
ADVERSARY NO. 89-3018-INH  
CHAPTER 12  
MEMORANDUM OF DECISION RE:  
COMPLAINT TO DETERMINE  
DISCHARGEABILITY OF DEBT

The matter before the Court is a complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a) (5) filed by Marilynn D. Bachmann. It is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Marilynn D. Bachmann (Marilynn) and Henry J. Bachmann (Henry or Debtor) were divorced by a decree entered in the Sixth Judicial Circuit of South Dakota<sup>1</sup> on April 21, 1981. The Decree incorporated an agreement between the parties that addressed settlement of property, custody of minor children, and support. The Agreement stated:

The parties hereto agree that they have entered into this agreement with knowledge of the nature and extent of assets which each of them may own, the nature and extent of the earnings of the respective *parties*, and that neither of them has been coerced by threats or duress.

Marilynn was granted custody of their children. Henry agreed to pay Marilynn \$100 per month per child for child support, maintain health insurance on the children, and pay one half of the children's minor

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medical bills. Marilyn was awarded certain household goods and \$6,000 in cash that she already had in her possession plus another \$4,000 that was to be paid by Henry within four days. It was also agreed that Henry would pay Marilyn \$30,000 without interest at the rate of \$2,000 per year beginning on February 15, 1982 until paid in full. Marilyn was given a lien on certain real property being purchased on a contract for deed. Henry was awarded the real property, machinery, and livestock and he assumed all debts incurred during the marriage, including the contract for deed.

Henry filed a petition for Chapter 12 relief on June 16, 1989. His schedules listed Marilyn as an undisputed, unsecured claim holder for \$12,000. A plan of reorganization was filed on September 14, 1989. Marilyn objected inter alia that the plan did not provide for payment of nondischargeable support payments to her and that the plan should commit disposable income to payments under the plan.<sup>2</sup> Marilyn and Debtor, by a stipulation filed October 10, 1989, agreed that the time to file a complaint to determine the dischargeability of a debt would be extended an additional 60 days. The Court approved that stipulation on October 12, 1989.

An amended (captioned "Restated") plan of reorganization was confirmed December 18, 1989. The plan offered a small yearly dividend to unsecured claim holders, presumably including Marilyn. Marilyn

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Apparently, Marilyn's counsel determined that Marilyn did not have a secured interest in the real property by virtue of the Agreement or he did not investigate that possibility since her treatment as a unsecured creditor was not disputed.

did not file any objections to the amended plan but on November 21, 1989 she filed a complaint to determine the dischargeability of a debt. Therein, Marilynn claims that the debts created by the Decree of Divorce and Agreement are in the nature of child support and maintenance and, thus, nondischargeable under 11 U.S.C. § 523(a)(5). A copy of the Decree, but not the Agreement, was attached to the complaint. Debtor denies that any debts under the Agreement were for Marilynn's maintenance and he asserts that the payments to Marilynn (excluding child support) are property division, not support of his ex-wife. A copy of the agreement was attached to the answer.

Thomas M. Maher withdrew as Marilynn's counsel on June 18, 1990. Marilynn did not obtain other counsel. Debtor filed a Pretrial Statement on July 9, 1990. The Court filed a Pre-trial Order on July 13, 1990 that set the trial date and established deadlines for motions, discovery, and briefs. By letter dated July 23, 1990, that was filed with the Court on July 30, 1990, Marilyn acknowledged receipt of the Pre-trial Order. She stated that she has "always had to rely on the property settlement to supplement the children's support" due to rising costs, Debtor's tardiness in making payments, and high medical expenses. Debtor filed a copy of the Decree of Divorce and Agreement prior to the trial.

A trial was held August 14, 1990. Marilynn did not appear. Debtor requested sanctions for travel costs and Debtor's lost wages. The matter was taken under advisement.

## II.

A debt is deemed nondischargeable if it is

to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, ... or property settlement agreement but not to the extent that-

- (A) such debt is assigned to another entity ...; or
- (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support[.]

11 U.S.C. § 523(a)(5) (in pertinent part). This Court has extensively reviewed this Code section and held that a determination of whether a divorce award is in the nature of alimony, maintenance, or support is a question of fact to be determined under the Bankruptcy Code, not state law; the state court's characterization of the award is not determinative. Elton v. Krage (In re Krage), Bankr. No. 186-00144, Adversary No. 87-1014, slip op. at 6-7 (Bankr. D.S.D. March 23, 1988) (citing re Neely, 59 B.R. 189 (Bankr. D.S.D. 1986)). A finding of nondischargeability must be based on circum that existed at the time of the dissolution, not the parties' present situation. *Id.* at 7. Eighteen related factors should also be considered.<sup>3</sup>

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<sup>3</sup> The eighteen factors are:

1. Whether there was an alimony award entered by the state court.
2. Whether there was a need for support at the time of the of the decree; whether the support award would have been inadequate absent the obligation in question.
3. The intention of the court to provide support.
4. Whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances.
5. The age, health, work skills, and educational levels of the parties.
6. Whether the payments are made periodically over an extended period or in a lump sum.
7. The existence of a legal or moral "obligation" to pay

III.

Marilynn bears the burden of establishing the nondischargeability of a debt, see Krage, slip op. at 10. Therefore, she had the burden of showing the Court that several of the applicable Neeley factors weigh in her favor. However, Marilynn presented insufficient evidence for the Court to adequately assess the Neeley factors and conclude that all debts created by the Decree of Divorce and related Agreement are support debts that are non dischargeable under § 523(a) (5).

Debtor recognized in his Answer that the support obligations for his children are not dischargeable and an order will be entered recognizing that admission. The Court, however, cannot conclude that the \$6,000, \$4,000, and \$30,000 cash payments awarded to Marilynn via the parties' Agreement at the time of their divorce are support payments. The Agreement specifically recognized the parties'

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alimony or support.

8. The express terms of the debt characterization under state law.

9. Whether the obligation is enforceable by contempt.

10. The duration of the marriage.

11. The financial resources of each spouse, including income from employment or elsewhere.

12. Whether the payment was fashioned in order to balance disparate incomes of the parties.

13. Whether the creditor spouse relinquished rights of support in payment of the obligation in question.

14. Whether there were minor children in the care of the creditor spouse.

15. The standard of living of the parties during the marriage.

16. The circumstances contributing to the estrangement of the parties.

17. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties.

18. Tax treatment of the payment by the debtor spouse.

respective earning powers and Marilyn's position as the custodial parent. Debtor's support obligations for his children were separately addressed. Most important, the Agreement clearly stated that the \$30,000 to be paid by Debtor to Marilyn "is considered by the parties to be property division and not wife support." Marilyn apparently recognized this fact since she stated in her July 23, 1990 letter to the Court that the property settlement has been used to supplement the child support.

An order will be entered that declares the debt to Marilyn, created by the Decree of Divorce and the Property Settlement, Custody and Support Agreement is non dischargeable under 11 U.S.C. § 523(a)(5) to the extent, if any, that the debt is for child support, including Debtor's share of the children's minor medical expenses. A separate order will be entered that addresses Debtor's request for costs associated with the hearing on August 14, 1990.

Dated this 11th day of December, 1990.

BY THE COURT:

Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

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HENRY JOSEPH BACHMANN,	)	ADVERSARY NO. 89-3018-INH
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Debtor.	)	CHAPTER 12
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MARILYNN DALE BACHMANN,	)	ORDER RE:
	)	COMPLAINT TO DETERMINE
Plaintiff,	)	DISCHARGEABILITY OF DEBT
	)	PURSUANT TO 11 U.S.C.
vs.	)	§ 523(a)(5)
	)	
HENRY JOSEPH BACHMANN,	)	
	)	
Defendant.	)	

In recognition of and in compliance with the Memorandum of Decision Re: Complaint to Determine Dischargeability of Debt entered this day,

IT IS HEREBY ORDERED that the debt of Henry J. Bachmann to Marilynn D. Bachmann created by the Decree of Divorce and the Property Settlement, Custody and Support Agreement appended thereto entered on April 21, 1981 by the Court of the Sixth Judicial Circuit of the State of South Dakota is non dischargeable under 11 U.S.C. § 523(a) (5) to the extent, if any, that the debt is for child support, including Henry J. Bachmann's share of the children's minor medical expenses.

So ordered this 11th day of December, 1990.

BY THE COURT:

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Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: \_\_\_\_\_

Deputy Clerk

(SEAL)