

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	Bankr. No. 99-40588
)	
TERI R. BROST)	Chapter 7
a/k/a Teresa Marie Risch Brost)	
Soc. Sec. No. [REDACTED]-8276)	
Debtor.)	
)	
BRYAN L. BROST)	Adv. No. 99-4020
Plaintiff,)	
)	MEMORANDUM OF DECISION:
-vs-)	DISCHARGEABILITY OF
)	DIVORCE-RELATED CLAIMS
TERI R. BROST)	UNDER 11 U.S.C. § 523(a)(15)(B)
Defendant.)	
)	

The matter before the Court is a non dischargeability complaint under 11 U.S.C. § 523(a)(15)(B) brought by Debtor's former spouse. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the subject debts are dischargeable and are not excepted from discharge pursuant to § 523(a)(15)(B).

I.

Bryan Brost and Teri Brost were married for several years and had two children. Teri also had two older children from a previous marriage. Bryan Brost and Teri Brost were divorced in August 1998. Bryan Brost was awarded physical custody of the couple's two minor children and Teri Brost was given liberal visitation rights. Teri Brost was ordered to pay monthly child support of \$305.88 and to maintain medical insurance for their children's benefit.

Bryan Brost was awarded \$500 in a checking account, a 1989 pickup, a large snow blower, a freezer, and all interest in his air charter and aviation fuel business, Priority Air. Teri Brost received a 1995 Jeep Cherokee (which the divorce court later awarded, with the remaining debt, to Bryan Brost) and household goods. No alimony or attorneys' fees were awarded to either party.

The divorce court ordered Teri Brost to pay the full Jeep loan of \$14,000; \$4,000 for one-half of the remaining home loan; \$504 for one-half of a line of credit with First Premier; \$2,500 for one-half of a loan from the Anza Company; \$211.50 for one-half of the 1994 income taxes due; \$1,460 for one-half of the home study cost; \$8,000 of the couple's \$9,025 in credit card debt (to Norwest MasterCard, Discover, and First USA Visa); \$4,600 on a loan to First Premier for her college-aged daughter's tuition; and \$2,700 to Bryan Brost for the credit card payments he had made in the previous 18 months.

Bryan Brost was ordered to pay the full pickup loan of \$6,015; \$4,000 for one-half of the remaining home loan; \$504 for one-half of a line of credit with First Premier; \$2,500 for one-half of a loan from the Anza Company; \$211.50 for one-half of the 1994 income taxes due; \$1,460 for one-half of the home study cost; \$1,025 of the couple's \$9,025 in credit card debt; and the entire \$379,154 debt against Premier Air.

Page 4 of the divorce decree apparently has some incorrect numbers regarding the home and Jeep debts because the amounts for these debts do not equal the total given. Thus, the amounts herein for these two debts are only estimated.

Teri Brost (Debtor) filed a Chapter 7 petition on June 28, 1999. Claims on her list of liabilities included, among others, \$211.50 to the Internal Revenue Service, \$6,000 to First Premier (Sioux Falls), \$5,104 to First Premier (Watertown), \$2,938 to Discover, \$1,295 to Norwest Card Services, an unstated amount to Anza, an unstated amount to First USA Bank, and an unstated amount to Bryan Brost.

On July 30, 1999, Bryan Brost filed a complaint under 11 U.S.C. § 523(a)(15)(B) seeking a declaration that Debtor is not entitled to a discharge of those debts she was ordered to pay in the divorce because it would work a substantial hardship on him.

A trial was held December 2, 1999. Appearances included James A. Craig for Plaintiff Bryan Brost and John M. Wilka for Defendant-Debtor Teri Brost. The Court received several exhibits and testimony from each party regarding their present income and expenses and Debtor's projected income and expenses. Bryan Brost testified that the debts should not be discharged so that his financial reputation in his business community will not be damaged and so that his ability to pay his own debts is not impaired.

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 spouse holding a marital property settlement claim. Previously, the rights of marital claimants were limited to § 523(a)(5), which provides that alimony and child support payments may not be discharged. 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 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 that the benefit to him in receiving a discharge is greater than the detriment to his former spouse. *In re Crosswhite*, 148 F.3d 879, 884-86 (7th Cir. 1998) (burden shifts to the debtor to demonstrate that debt falls under one of the two exceptions within § 523(a)(15)); *Fureigh v. Haney (In re Haney)*, 238 B.R. 432, 434-35 (Bankr. E.D. Ark. 1999); *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996) (cites therein). 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 they hold a divorce-related claim that is not covered by § 523(a)(5). *Straub v. Straub (In re Straub)*, 192 B.R. 522, 527-28 (Bankr. D.N.D. 1996); *Henson*, 197 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. *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 55-56 (B.A.P. 8th Cir. 1998); *Henson*, 197 B.R. at 303 (citing *Bodily v. Morris (In re Morris)*, 193 B.R. 949 (Bankr. S.D. Cal. 1996)). The debtor must make this showing by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

Under subsection (B) of § 523(a)(15), the only subsection plead in this adversary proceeding, 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. *Haney*, 238 B.R. at 435; *Henson*, 197 B.R. at 303. This allows the Court to fully examine the benefits of the "fresh start" to the debtor and any change in circumstances in employment or other good or bad fortune which may have befallen, or predicably will befall, the parties. *Haney*, 238 B.R. at 435; *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 to be analyzed. *Henson*, 197 B.R. at 303 (citing *Dressler v. Dressler (In re Dressler)*, 194 B.R. 290 (Bankr. D.R.I. 1996), and *Taylor v. Taylor (In re Taylor)*, 191 B.R. 760 (Bankr. N.D. Ill. 1996)). Net worth alone is not determinative; the totality of the circumstances must be considered. *Gamble v. Gamble (In re Gamble)*, 143 F.3d 223, 226 (5th Cir. 1998). Factors to consider include: the amount of debt involved and available repayment terms; the current income of the debtor and former spouse and their respective current spouses; the current assets and liabilities of the debtor and the former spouse and their respective current spouses; the health, job skills, training, age, and education of the debtor and the former spouse and their respective current spouses; the dependents of the debtor and the former spouse and their respective current spouses and any special needs which they may have; changes in financial circumstances for the debtor or former spouse since the divorce; the amount of debt that may be discharged by the debtor; and the good faith of the parties. See *Hart v. Molino (In re Molino)*, 225 B.R. 904, 909 (B.A.P. 6th Cir. 1998).

III.

Debtor has met her burden of proving that the benefits that she will receive if these divorce-related debts are discharged outweigh any detriment to Bryan Brost if the debts are discharged

and he assumes sole responsibility for them. *Gamble*, 143 F.3d at 226; *In re Leonard*, 231 B.R. 884, 888-89 (Bankr. E.D. Pa. 1999). The evidence established that Debtor's annual take-home income as a nurse, about \$19,000 annually, is not likely to increase substantially, that she has some employment limitations due to back problems, that some of her expenses are unnecessary or excessive, and that her necessary expenses (rent and utilities, transportation, food, clothing, and medical care, etc.) take most of her income and are not likely to decrease. Her lifestyle is limited. Debtor does not own her own home, she rarely vacations, and she has relied on family members to keep financially afloat.

The evidence also showed that Bryan Brost and his present wife's combined incomes of \$90,500 from their air charter business exceed their necessary expenses, that he owns his own home (a small acreage), that he maintains an above-average style of living that includes travel and the support of horse hobby for their daughter, that he has and will maintain a greater earning capacity than Debtor, that he has been able to make minimal payments on the credit card debts that Debtor was ordered to pay in the divorce, and that he can pay these debts in full over time from disposable income without appreciable consequences for himself, his family, or his business.

Both parties have incurred unnecessary expenses because they have been unwilling to allow the children to travel between their homes with appropriate clothing.

* At the beginning of the trial, the parties stipulated that the subject debts fell under § 523(a)(15).

From this evidence, it is clear that Debtor needs relief from the divorce-related debts. She is trying to make the most of her bankruptcy discharge and is learning to apply better spending habits. A discharge of these divorce-related debts is necessary for her effort to be successful. In contrast, Bryan Brost and his present spouse enjoy a much higher standard of living. His assumption of these debts will not work a hardship on him or his dependents. Therefore, the equities in this adversary proceeding favor Debtor's "fresh start" and the divorce-related debts must be discharged under § 523(a)(15)(B). Compare *Taylor v. Taylor*, 199 B.R. 37, 41-42 (N.D. Ill. 1996) (debt discharged under § 523(a)(15)(B) where more affluent former spouse would suffer only minimal economic and psychological injury from discharge); *Shea v. Shea (In re Shea)*, 221 B.R. 491, 500-01 (Bankr. D. Minn. 1998) (debt not discharged under § 523(a)(15)(B) where the debtor maintained a much higher standard of living than former spouse); *Williams v. Williams (In re Williams)*, 210 B.R. 344, 347-48 (Bankr. D. Neb. 1997) (debt not discharged under § 523(a)(15)(B) where equities were equal).

Court files indicate that a debtor in this District has never before been successful in a § 523(a)(15) action. In the previous actions, both parties' ability -- or inability -- to pay the divorce-related debts has been the same and the impact of granting or denying a discharge of the debts has been equal. The distinguishing factor in this case is Bryan Brost's much higher standard of living and his ability to pay the debts over time

without a significant hardship to himself, his family, or his business.

Included in those debts that will be declared discharged under § 523(a)(15)(B) are those non priority, unsecured claims that Debtor was ordered to pay in the divorce. Excluded are Debtor's share of the home study costs, which is more in the nature of child support and which is non dischargeable under § 523(a)(5) and the priority claim to the Internal Revenue Service for 1994, which is non dischargeable by § 523(a)(1). Any secured creditors may still look to their collateral.

The Court reaches no conclusion on whether Debtor has the ability to pay these debts over time. Section 523(a)(15)(A) was not plead. Moreover, Debtor needed only to prove one of the two exceptions under § 523(a)(15) for the divorce-related debts to be discharged.

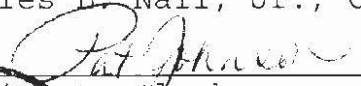
An appropriate order and judgment shall be entered.

Dated this 3rd day of January, 2000.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 


Clerk

(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

JAN 04 2000

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

JAN 04 2000

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

Case: 99-04020 Form id: 122 Ntc Date: 01/04/2000 Off: 4 Page : 1
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