

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

IRVIN N HOYT

CHIEF BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560

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June 4, 1997

Mr. Brian Seefeldt
Plaintiff, pro se
100 Brady Street, #174
Davenport, Iowa 52803

Thomas A. Blake, Esq.
David J. King, Esq.
Counsel for Defendant-Debtor
505 West 9th Street, #202
Sioux Falls, South Dakota 57104

Subject: **Brian Seefeldt v. Carrie J. Seefeldt**
(In re Carrie J. Seefeldt),
Adversary No. 96-1017;
Chapter 7; Bankr. No. 96-10182

Dear Gentlemen:

The matter before the Court is the dischargeability complaint filed by Brian Seefeldt. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter 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 certain marital debts, which Debtor Carrie Seefeldt was ordered to pay under a divorce decree, are non dischargeable under 11 U.S.C. § 523(a)(15).

SUMMARY OF FACTS. Brian Seefeldt and Carrie Seefeldt were divorced on October 13, 1995. The Decree of Dissolution of Marriage provided that certain debts incurred during the marriage would be paid by Brian Seefeldt, some would be paid by Carrie Seefeldt, and others would be split equally. Carrie Seefeldt was ordered to pay one-half of the \$7,288.15 owed to Norwest, all of the \$634.22 owed to Sportsman's Edition Visa, one-half of the \$5,816.40 owed to Brown County Welfare, and all of the \$575.00 owed to Dr. McDougall. Carrie Seefeldt was also ordered to pay Brian Seefeldt \$100.00 to equalize the credit card debts each was paying. Carrie Seefeldt paid Brian Seefeldt the \$100.00 she owed him directly but she failed to pay all her share of the Norwest and Brown County debts and she failed to pay Dr. McDougall and the Sportsman's Edition Visa bills.

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On August 14, 1996, Carrie Seefeldt filed a Chapter 7 petition. According to her schedules, her unsecured creditors included Brown County, Norwest, and several other credit card issuers. Her only secured creditor was GMAC, who held a secured interest in a 1994 Hyundai that she received in the divorce.

On November 18, 1996, Brian Seefeldt commenced an adversary proceeding against Carrie Seefeldt seeking a declaration that the debts Carrie Seefeldt was ordered to pay in the divorce were non dischargeable under 11 U.S.C. § 523(a)(15). Carrie Seefeldt answered with a general denial. A trial was held May 21, 1997. Plaintiff Brian Seefeldt appeared *pro se*. Defendant-Debtor Carrie Seefeldt appeared through David J. King. (Thomas A. Blake represented Debtor before trial.)

Exhibits and the testimony of the two parties established that Brian Seefeldt is expected to soon graduate from chiropractic school and that he will take the appropriate exams this summer to be licensed. If he graduates this spring and passes the licensing exams this summer, he will seek employment in one of several states. His income will depend on the job he receives but in time his income will be comfortable and higher than Carrie Seefeldt's present or future income. He and his live-in companion have her children with them three days per week. His companion is also a soon-to-graduate chiropractic student.

Carrie Seefeldt is presently employed in Tennessee where she lives with her son, a child from her marriage to Brian Seefeldt, and her fiancé. She intends to keep the same job, which pays more than the legal secretary positions for which she is trained. Carrie Seefeldt is expecting a second child later this year. Her monthly income is about \$2,000.00. The living expenses for her and her son have equaled or exceeded her income of late because her fiancé, a student, has been unable to pay one-half of the rent. He recently obtained a full time job and will resume paying his share of the rent.

DISCUSSION. 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). 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--

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(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 nondischargeable unless the debtor can demonstrate that she does not have the ability to pay the debt or the benefit of discharge to her is greater than the detriment to her former spouse. *Henson v. Johnston (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 non-debtor spouse's threshold burden is to show that he had a divorce-related claim not covered by § 523(a)(5). *Straub*, 192 B.R. at 528; *Henson*, 197 B.R. at 302-03. The burden then shifts to the debtor to show either that she does not have the ability to pay the debt or that discharging the debt would result in a benefit to her that outweighs the detrimental consequences to the former spouse. *Henson*, 197 B.R. at 303 (citing *In re Morris*, 193 B.R. 949 (Bankr. S.D. Cal. 1996)). The debtor must make these showings by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

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Under subsection (A), the Court must look at the debtor's ability to pay the debt -- now and in the future. *Henson*, 197 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*, 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)).

Nature of the debt. As the Court ruled at the commencement of the trial, the debts to be paid by Debtor pursuant to the Seefeldts' divorce decree are of the type covered by § 523(a)(15). Contrary to Debtor's assertion, the lack of a specific "hold harmless clause" in the divorce decree does not remove these debts from § 523(a)(15). To require such word-specific indemnity language in the property settlement would ignore the powers state divorce courts have by statute or common law to insure that the parties comply with their orders. Iowa Code §§ 598.15, 598.21, and 626.1; *In re Marriage of Lenger and Lenger*, 336 N.W.2d 191 (Iowa 1983); *Carlisle v. Carlisle (In re Carlisle)*, 205 B.R. 812, 818 (Bankr. W.D. La. 1997); and *Schmitt v. Eubanks (In re Schmitt)*, 197 B.R. 312, (Bankr. W.D. Ark. 1996); *contra Stegall v. Stegall (In re Stegall)*, 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995); compare *Belcher v. Owens (In re Owens)*, 191 B.R. 669, 673-674 (Bankr. E.D. Ky. 1996) ("hold harmless" or other language in property settlement agreement may create obligation governed by § 523(a)(15)), and *Barstow v. Finaly (In re Finaly)*, 190 B.R. 312, 314-16 (Bankr. D. Ohio 1995) (debts to third parties cannot be rendered nondischargeable under § 523(a)(15); evidentiary hearing set on debt with hold harmless language regarding former spouse). While

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rendering debts such as these dischargeable under § 523(a)(15) will not protect the non debtor spouse from the joint creditors, it does insure that the non debtor spouse can continue to look to the courts to enforce the obligation imposed by the divorce order on the debtor. *Wellner v. Clark (In re Clark)*, 207 B.R. 651, 657 (Bankr. E.D. Mo. 1997); *Dressler* 194 B.R. at 304. Only the debt between the creditors and the debtor is discharged; the former spouse retains the protections afforded by the property settlement. *Id.* *Dressler* 194 B.R. at 304.

Debtor's ability to pay. As noted above, divorce-related debts will not be discharged under § 523(a)(15)(A) unless Debtor can show that she has no present or future ability to pay the claims. Here, Debtor is healthy and gainfully employed. See *Straub*, 192 B.R. at 529. While recently all her income has been needed for living expenses, her fiancé's new job means he can resume paying his half of the rent and other shared living expenses. Accordingly, Debtor now has those funds available to start repaying the divorce-related claims. While these available funds per month are not large, they do allow her -- over time -- to fulfill her obligation under the Decree of Dissolution of Marriage.

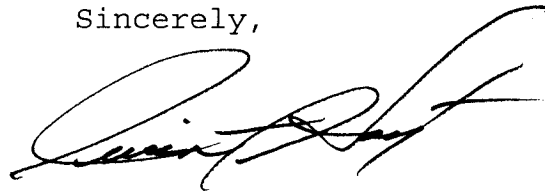
The Court recognizes that Debtor's expenses will increase when another child is added to the family. However, those expenses too must be shared with the child's father. Her available funds to pay her divorce-related debts may decrease but there is no evidence that they will disappear.

Weighing the benefit and detriments. When the several factors discussed above are considered, Debtor has not shown that the benefits of a discharge to her outweigh the detriment Brian Seefeldt will suffer if the debts are discharged. At this time, Brian Seefeldt's financial picture would be brightened if these debts did not appear on his credit report. While he will have the ability to pay these joint debts once he is employed as a chiropractor, Debtor currently has the ability to pay them and will continue to have the ability to do so. Brian Seefeldt's financial status will soon be altered by student loan repayments and his child support obligation will increase when he becomes a chiropractor. Therefore, the additional financial burden of the joint debts would be a detriment to him that are counterbalanced, but not outweighed by, Debtor's need for a fresh financial start. Moreover, it does not appear that Debtor or her children's standard of living will be lowered if the divorce related debts are declared nondischargeable. In sum, both Brian Seefeldt and Debtor have the present and future ability to fulfill the obligations each were given under the divorce decree and they should do so.

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A judgment rendering Debtor's obligations listed in the Decree of Dissolution of Marriage nondischargeable under § 523(a)(15) as to Plaintiff Brian Seefeldt shall be entered.

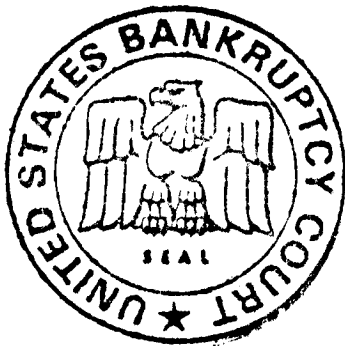
Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: adversary file (docket original and copies
to parties in interest)



NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUN 04 1997

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

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

By: Charles L. Nail, Jr.
Date: June 4, 1997

Case: 96-01017 Form id: 122 Ntc Date: 06/04/97 Off: 3 Page : 1
Total notices mailed: 4

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