

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11289-MWV  
Chapter 7

Daniel J. Morrissette,

Debtor

Rebecca S. Sardone,

Plaintiff

v.

Adv. No. 00-1103-MWV

Daniel J. Morrissette,

Defendant

*Andrew G. Bronson, Esq.  
BRONSON LAW OFFICE  
Attorney for the Plaintiff*

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Attorney for the Defendant*

**MEMORANDUM OPINION**

The Court has before it the complaint of Rebecca C. Sardone, formerly Rebecca Morrissette (“Plaintiff”), against Daniel J. Morrissette (“Debtor” or “Defendant”) seeking a finding by this Court that certain obligations arising out of the parties’ divorce are excepted from discharge pursuant to § 523(a)(15) of the Bankruptcy Code. The original complaint also contained counts pursuant to §§ 727(a)(4) and 523(a)(5) of the Bankruptcy Code, which the Plaintiff waived at the pretrial hearing.

**JURISDICTION**

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## FACTS

The parties were married in October 1983 and divorced effective May 31, 1990. The parties entered into a permanent stipulation, of which Paragraph 12 provided that the Defendant pay the Plaintiff \$13,927.40. This amount represented the Plaintiff's share of the equity in their marital home less certain credits. The obligation was evidenced by a note dated November 5, 1990 and was secured by a mortgage on the parties' homestead. In accordance with the permanent stipulation, Plaintiff conveyed her interest in the premises to the Defendant by quitclaim deed. In early 1992, the first mortgagee foreclosed on the property, wiping out the Plaintiff's mortgage on the property. It appears that the balance now owing is \$10,977.

There are two children of the marriage. Both currently reside with the Plaintiff. The youngest daughter, who is now fourteen, is moderately retarded. Although she attends school, the testimony was that she functions at a third-grade school level, has a social age of seven, and physical problems that require constant supervision from the Plaintiff. Because of this required supervision, the Plaintiff testified that she is unable to work, and her only income currently is \$488 in monthly child support payments from the Defendant. Her current husband has gross monthly income \$2,640, making the total income of the Plaintiff and her husband \$3,128 per month. Their monthly expenses total \$3,106. Thus, they are left with disposable income of \$22 per month or \$264 per year.

The Defendant's gross income for calendar year 2000 was \$33,571.99, leaving a net income after taxes and child support of \$23,007.76. His testimony was that he had expenses from the same time period of \$26,273.76, leaving a deficit of \$3,266. See Plaintiff's Ex. 10. He is remarried, and his current wife has a gross income of \$33,118.35, a net income of \$25,018.99, and expenses of \$16,956.77, leaving a surplus of \$8,062.22. See Plaintiff's Ex. 10. Defendant's expenses include attorney fees of \$5,098.15 and expenses related to two vehicles totaling \$6,413.90.

## DISCUSSION

Section 523(a)(15) of the Bankruptcy Code states as follows:

(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.

This Court, in its memorandum opinion in In re Neveu v. Martin, 2000 BNH 020, fully discussed the burdens of proof and persuasion in a complaint under section 523(a)(15) and adopts the same reasoning here. It is not contested that the obligations in question arose out of a divorce proceeding and are not alimony or support.

The threshold determination in a complaint under section 523(a)(15) is whether the Debtor/Defendant has the ability to pay. When considering the Debtor's ability to pay and the relative harm for purposes of § 523(a)(15) the Court looks at the Debtor's financial circumstances as of the time of trial. See Garrity v. Hadley (In re Hadley), 239 B.R. 433, 436 (Bankr. D.N.H. 1999); Dressler v. Dressler (In re Dressler), 194 B.R. 290, 300 (Bankr. D.R.I. 1996). The Court also applies the disposable income test to determine the Debtor's ability to pay. In re Konick, 236 B.R. 524, 528 (B.A.P. 1<sup>st</sup> Cir. 1999); Hadley, 239

B.R. at 437. For purposes of the 523(a)(15) analysis, the Court considers the income of the debtor's spouse. See Hadley, 239 B.R. at 438.

In the instant case, the Court finds that the Defendant has the ability to pay. Plaintiff's Exhibit 10 shows that the Defendant and his spouse have a combined annual disposable income of \$4,796.22. The Court may look at the current employment status of the Defendant and the possibilities of additional income or a reduction in expenses in the future. See In re Konick, 236 B.R. at 529. As indicated above, the Defendant's expenses include \$5,098.19 for legal fees associated with his bankruptcy and divorce. These fees are not likely to continue. Also, the Defendant pays the expenses related to two vehicles totaling \$6,413.90. Assuming each spouse paid for one-half of the total expenses of the vehicles, Defendant's expenses would be reduced by \$3,206.95. Making these adjustments, the Defendant alone would have annual surplus disposable income of \$5,039.14. Clearly, the Defendant has the ability to pay.

Next, the Court must weigh the benefit of discharge to the Defendant against the detriment to the Plaintiff. Based on the evidence before it, the Court finds that the discharge of the Defendant's obligation to the Plaintiff creates a hardship to the Plaintiff that outweighs the benefits of a discharge to the Defendant. First, it is clear that the Defendant's sole purpose in filing bankruptcy was to discharge this debt to his former spouse. His petition shows that he intends to reaffirm the debts on his vehicles and his residence. He has already reaffirmed the debt to one unsecured creditor listed on his schedules which is not associated with the divorce. The only other two creditors are the Plaintiff and her divorce attorney. Second, the evidence supports a finding that the Plaintiff is in need of the money. Plaintiff's Exhibit 9 shows that Plaintiff and her spouse have virtually no disposable income. Her oldest daughter is about to graduate from high school and hopes to attend college, which will prevent her from assisting in the care of her sister. As indicated above, the youngest daughter's problems are severe and will most likely prohibit the Plaintiff from ever being able to work. Clearly, the detriment to the Plaintiff outweighs the benefit of a discharge to the Defendant. Accordingly, the debt in question is excepted from discharge.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 23rd day of April, 2001, at Manchester, New Hampshire.

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Mark W. Vaughn  
Chief Judge