

JUN 26 2006

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	NV-05-1151-MoSMA
)		
TERESA MULLINS,)	Bk. No.	03-17995
)		
Debtor.)	Adv. No.	03-01238
)		
_____)	Ref. No.	05-11
TERESA MULLINS,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
DARYL MULLINS,)		
)		
Appellee.)		
_____)		

Argued and Submitted on May 18, 2006
at Las Vegas, Nevada

Filed - June 26, 2006

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable John L. Peterson, Bankruptcy Judge, Presiding.

Before: Montali, Smith and Marlar, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 In a prior appeal (BAP No. NV-04-1339-PMaR) we reversed the
2 bankruptcy court, which had determined that the debtor's
3 obligation under a marital settlement agreement to repay a credit
4 card debt was nondischargeable spousal support under Section
5 523(a)(5).² On remand the bankruptcy court determined that the
6 debt was nondischargeable under Section 523(a)(15). Because the
7 judgment requires a technical amendment we remand for that limited
8 purpose. In all other respects we AFFIRM.

9 **I. FACTS**

10 Teresa Mullins ("Teresa") and Daryl Mullins ("Daryl") were
11 married in 1989 and divorced in 1998. In connection with their
12 divorce they allocated who would retain which assets and who would
13 pay which debts in a Marital Settlement Agreement ("MSA") which
14 was incorporated into the dissolution judgment. The MSA also
15 included mutual promises (§ 10) not to incur further debt for
16 which the other might be liable, and to defend, indemnify, and
17 hold harmless the other if they did incur such debt.

18 A. Assets

19 Daryl retained the house that he and Teresa had shared in
20 Lemon Grove, California and he took on responsibility for the
21 mortgage on that house. At the time of the MSA, the house had
22 either negative equity (according to Daryl) or minimal equity
23 (according to Teresa). Transcript, April 28, 2004, pp. 22:23,
24 33:16-21, 75:16-17. Daryl alleged at the time of the

25
26 ² Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
28 as enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

1 nondischargeability trial that his current mortgage debt is still
2 about equal to the value of the house. Teresa introduced no
3 contrary evidence.

4 Teresa moved into her parents' house in Las Vegas. After her
5 father died she obtained title to that house and took out a
6 \$40,000 second mortgage on it. Transcript, April 28, 2004,
7 pp. 73:22-74:23.

8 The bankruptcy court later found, in its Memorandum of
9 Decision and Order dated March 30, 2005 (the "Decision"), that
10 there was "no credible evidence" as to the net value of any of the
11 parties' assets. In particular, "the evidence is inconclusive on
12 the equity value of either home[]" as of the date of the
13 nondischargeability trial.

14 B. Debts

15 Daryl assumed responsibility for a smaller share of the
16 credit card debts than Teresa under § 7 of the MSA. Daryl assumed
17 responsibility for a "Chevy Chase Bank VISA Card with a balance of
18 \$14,810.64" and a "Wells Fargo Master Card with a \$1500 balance."
19 Teresa assumed responsibility for obligations to "Bank of America
20 in the amount of \$4,600," "Macy's Visa \$5,200," "MBNA in the
21 amount of \$13,000," "Travelers Bank for couch \$300," and the debt
22 that is central to this appeal, to "Providian Visa [later Chase or
23 Chase Manhattan Platinum MasterCard] in the amount of \$26,524"
24 which Teresa was to pay down at the rate of \$500 per month (the
25 "Providian/Chase" debt).

26 Daryl testified that Teresa assumed responsibility for the
27 Providian/Chase debt because she is the one who incurred all of
28 the charges, during a time when they were separated. Transcript,

1 April 28, 2004, pp. 10:11-11:1. Teresa testified that she assumed
2 responsibility for this and other debts because, although her
3 income was lower, the parties expected her living expenses to be
4 lower as well since she was moving in with her parents. Id.
5 pp. 41:24-42:2. Teresa also testified that Daryl would not agree
6 to a divorce on any other terms. Id. p. 65:14-15.

7 C. Income

8 As Teresa testified, her income has been lower than Daryl's.
9 The bankruptcy court accepted Teresa's evidence that she earned
10 \$30,299 in 2000, \$33,137 in 2001, \$35,925 in 2002, and \$49,752 in
11 2003, although the rise in 2003 was because she took on a second
12 job.³

13 Teresa did not dispute at trial that she was receiving
14 monthly rent payments of \$400 from her mother and \$400 from her
15 son and his family, all of whom resided in the Las Vegas home;
16 but she asserted that these funds should not be taken into account
17 and are more than offset by added expenses. The bankruptcy court
18 doubted Teresa's credibility regarding expenses, as explained
19 further below. It found that her net income at the time of trial

20
21 ³ Teresa's opening brief on this appeal claims that the
22 bankruptcy court erred when it found that "[a]t the time of the
23 divorce [in 1998], Daryl's gross income was \$66,524.00 while
24 Teresa had gross income of \$45,385.00." Teresa claims that this
25 is one of "a number" of factual errors by the bankruptcy court and
26 that "both parties acknowledge" that Daryl earned more than twice
27 as much as Teresa earned at the time of the divorce.

28 Teresa cites the Statement of W-2 Earnings attached to Daryl
and Teresa's joint 1998 federal tax return, but although it shows
different wages for purposes of Social Security it shows exactly
the same "gross income" for each of them as recited by the
bankruptcy court. Teresa also cites Daryl's testimony in which he
initially agreed that Teresa earned "about \$30,000," but then he
testified, "Actually I think she made more than that"
Transcript, April 28, 2004, p. 28:17. Teresa has shown no factual
error.

1 was "about \$3,200 per month from her employment and rent."

2 Daryl's tax returns show adjusted gross income of \$67,748 in
3 1999, \$76,015 in 2000, \$81,317 in 2001, \$86,886 in 2002, and
4 \$103,527 in 2003. Daryl, a police officer, testified that though
5 he had earned substantial overtime pay in 2003 due to a heightened
6 security alert level and inadequate staffing, as of the time of
7 trial there was no opportunity for overtime. Teresa questioned
8 whether Daryl really could not earn overtime pay any more and she
9 relied on wage statements issued shortly before trial, but the
10 bankruptcy court believed Daryl's testimony about exceptional
11 circumstances in the past and lack of overtime opportunities at
12 present. The Decision states that "by the time of trial that
13 overtime pay had decreased to virtually zero." The bankruptcy
14 court found that as of the time of trial Daryl was paid about
15 "\$6,092 gross per month," which is \$73,104 per year. Daryl
16 introduced evidence that after payroll deductions, including
17 approximately \$1,400 per month paid into a deferred
18 compensation/retirement plan, his average net monthly pay was
19 \$4,280.51.

20 D. Expenses

21 Daryl's expenses as of the time of trial amounted to about
22 \$4,300 per month. The parties have no minor dependents but both
23 have expenses for assisting elderly mothers, according to Daryl's
24 budget accepted in evidence in the nondischargeability trial and
25 Teresa's testimony. Transcript, April 28, 2004, p. 29:21-24.

26 Teresa alleged that her current expenses are about equal to
27 her income, but Daryl pointed to evidence suggesting that her
28 expenses are overstated or not reasonably necessary. Among other

1 things he pointed out that Teresa claimed rental income of \$1,000
2 from her mother in her original bankruptcy schedules but later
3 claimed that the current amount is \$400 (Transcript, April 28,
4 2004, pp. 49:3-50:11); at trial she claimed expenses related to a
5 timeshare of approximately \$484 per year, but she did not list
6 either the timeshare or the associated expenses in her original
7 bankruptcy schedules; and at trial she claimed expenses that are
8 much higher than those in either her original or her amended
9 bankruptcy Schedule J, increasing her food expense from \$250 per
10 month to \$600, her cable television bill from \$40 per month to
11 \$150, and her power bill from \$125 per month to \$275. Daryl
12 pointed out that Teresa previously was able to pay at least \$500
13 per month on the Providian/Chase debt for several years. Id.
14 pp. 44:25-45:1. Teresa also admitted that she gambled and that
15 her losses exceeded her winnings by at least the amounts reflected
16 on her tax returns: \$19,600 in 2002 and \$17,635 in 2003. Id.
17 pp. 57:21, 59:6. She testified that she stopped gambling around
18 the time that she filed her voluntary Chapter 7 petition (id.
19 pp. 57:22-58:2) so this no longer consumes large amounts of her
20 income. Daryl also challenged Teresa's credibility by pointing
21 out that she did not include income from her second job in her
22 bankruptcy Schedule I, although she had started that job about a
23 month prior to filing her bankruptcy petition. Id. p. 37:21-22.

24 Teresa responded that she signed her bankruptcy papers before
25 she had her second job (and, implicitly, she forgot to amend them
26 before filing her voluntary Chapter 7 petition). She acknowledged
27 that her living expenses have gone up but alleged that this was
28 because "[t]here's more people living with me" now that her son

1 and his family have moved in. Transcript, April 28, 2004,
2 p. 294:9. As for rent received from her mother, she testified "I
3 don't really know" where the \$1,000 number came from but "[i]t was
4 just an approximate amount" that she gave when preparing her
5 bankruptcy papers and "there [are] times [when her mother] buys
6 food or she helps with my dog." Id. pp. 49:24-50:6.

7 The bankruptcy court rejected Teresa's allegation that she
8 had no net income:

9 [A]lthough she states her expenses are about equal
10 to her income[*], she made the admission at trial
11 that since the divorce she was able to pay \$40,000
12 to \$50,000 on the Providian account. (Tr. 64). It
13 is disturbing, however, that during the period just
14 prior to filing the Chapter 7 petition she
15 sustained gambling losses in the year 2002 of
16 \$19,600 and \$17,635 in the year 2003. She claims
17 she has now stopped her gambling activity (Tr. 57,
18 59).

19 [*] Teresa amended her bankruptcy petition
20 . . . on August 8, 2003, to report on
21 Schedule J -- Current Expenditures -- monthly
22 expenses of \$2,963.00. She gave no
23 explanation why her expenses increased.
24 [Footnote in original.]

25 All matters considered, I find Teresa has the
26 ability to pay the Providian debt over time,
27 particularly in light of her substantial present
28 income and release of her debts by the Chapter 7
discharge.

29 E. Debt incurred by Teresa after executing MSA

30 Teresa testified that at one point she had paid down the
31 Providian/Chase debt to "fourteen thousand and something"
32 (Transcript, April 28, 2004, pp. 44:25-45:1) but that she later
33 incurred more debt on the Providian/Chase account. Section 10.c.
34 of the MSA provides:

35 c. Wife warrants to Husband that she has not
36 incurred, and she covenants that she shall not
37 incur, any liability or obligation for which

1 Husband is or may be liable, with the exceptions of
2 any obligations identified in this agreement. Wife
3 covenants, except, as may be expressly provided
4 otherwise in this agreement, that if any claim,
5 action or proceeding shall hereafter be brought
6 seeking to hold husband liable for any of Wife's
7 debts, liabilities, acts or omissions, she shall,
8 at her sole expense, defend him against any such
9 claim or demand (whether or not well founded) and
10 that Wife shall indemnify him and hold Husband free
11 and harmless from all costs, expenses and
12 liabilities in connection therewith, including
13 attorneys fees and costs incurred by, Husband in
14 defending or responding to any collection agency.
15 [Emphasis added.]

16 Among other things Teresa obtained a cash advance of \$9,500
17 that she loaned to her then boyfriend for his business. Teresa
18 testified,

19 It was never a question that I couldn't use it [the
20 Providian/Chase credit card]. [Daryl] didn't care
21 if I used the credit card forever as long as I paid
22 the credit card and which I did do. If he didn't
23 want me to use the credit card he would have
24 stopped it the day that I left where I couldn't
25 charge on it anymore but he did not. We talked
26 about this bill, I talked to Daryl on a monthly
27 basis for a lot of years. . . . [¶] We were
28 friends, I was allowed to use this credit card. I
didn't use the credit card for about two or three
years and I had paid it down. At different times
after that I did use the credit card.

Transcript, April 28, 2004, p. 43:12-24.

Daryl testified that he "had no knowledge that it [the debt
to Providian/Chase] had been run up to this amount" until he tried
to get a second mortgage on his home and he "contacted Providian
and asked them to take my name off the card." Transcript, April
28, 2004, p. 13:1-22. At that time, he testified, "Providian told
me that due to the amount on the card they could not close the
account" without payment in full. Id.

Although Teresa has obtained her discharge (Case No. BK-S-03-
17995-VJ) Daryl has not filed a bankruptcy petition and the debt

1 to Providian/Chase has not been discharged as to him. The
2 bankruptcy court found that as of the time of the
3 nondischargeability trial the debt had grown to about \$33,000.

4 F. Procedural background

5 Teresa filed her voluntary Chapter 7 petition on June 26,
6 2003. She received her discharge on October 14, 2003. Meanwhile,
7 Daryl filed a nondischargeability complaint under Section 523 that
8 came on for trial on April 28, 2004.

9 After trial the bankruptcy court initially ruled that the
10 debt was nondischargeable under Section 523(a)(5). We reversed
11 and remanded (BAP No. NV-04-1339-PMaR), stating:

12 The parties discuss at length in their
13 appellate briefs whether the debt is
14 nondischargeable under § 523(a)(15). We do not
15 address these arguments, because the bankruptcy
16 court did not make any of the factual findings
17 necessary to a determination of dischargeability
18 under § 523(a)(15). We therefore remand for the
19 bankruptcy court to make the necessary factual
20 findings.

21 On remand the bankruptcy court issued the following order:

22 . . . the Court is advised by the Court's law
23 clerk that counsel for the parties agree to submit
24 the issue on the present record and with briefs
25 filed in the appeal to the BAP. The Court concurs.
26 The Court, however, is desirous of having the
27 record supplemented by each party's affidavit on
28 the following issue:

- 29 1. Has Providian VISA/Chase Platinum
30 MasterCard made any demand on either party for
31 payment since the filing of the Debtor's
32 bankruptcy petition, and if so attach any
33 correspondence or written document which
34 verifies such contact.

35 Each affidavit shall be filed with the Clerk of
36 this Court on or before March 2, 2005.

37 The parties have not included any affidavits in the excerpts
38 of record. We have accessed the bankruptcy court's docket

1 electronically and it does not reflect any affidavit from Teresa
2 but it does list one from Daryl, which we have obtained. Daryl's
3 affidavit and attached documents show that Providian/Chase has
4 made demands for payment but had not brought any legal action
5 against Daryl as of that time. Daryl's counsel confirmed this at
6 oral argument before us.

7 On April 1, 2005, the bankruptcy court entered its Decision
8 concluding that a judgment should be entered in Daryl's favor and
9 against Teresa. On the same day the bankruptcy court entered a
10 separate Judgment, which also is not in the excerpts of record but
11 which we obtained electronically. That Judgment recites that it
12 "is entered against [Teresa]" and that "the debt owed by [Teresa]
13 to [Providian/Chase] is excepted from her discharge" under Section
14 523(a)(15). Teresa filed a timely notice of appeal.

15 II. ISSUES

16 A. Was the debt "incurred by the debtor in the course of a
17 divorce or separation" or otherwise within Section 523(a)(15)?

18 B. Did the bankruptcy court err in finding that the debt is
19 nondischargeable under section 523(a)(15)(A) and (B)?⁴

20
21 ⁴ Teresa raises another issue but it was disposed of in
22 her prior appeal (BAP No. NV-04-1339-PMaR). She objects that the
23 gravamen of Daryl's Complaint was Section 523(a)(5) and that he
24 did not sufficiently raise Section 523(a)(15) even though the
25 Complaint quotes that section in its entirety, the bankruptcy
26 court rejected this argument at the start of the
27 nondischargeability trial because the parties had briefed the
28 issue (Transcript, April 28, 2004, p. 5:23-24), and we noted in
her prior appeal that she "does not argue that the bankruptcy
court erred in allowing evidence to be presented on this claim
[under Section 523(a)(15)]." Memorandum (BAP No. NV-04-1339-PMaR)
at pp. 15:15-16:1. Moreover, we specifically remanded for the
bankruptcy court to make the necessary factual findings under that
section. It is the law of the case that the issues under Section
523(a)(15) were properly before the bankruptcy court. See In re
Fraschilla, 235 B.R. 449, 454, 457-458 (9th Cir. BAP 1999) (on

(continued...)

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III. STANDARDS OF REVIEW

We review the bankruptcy court's legal conclusions de novo and its factual findings for clear error. In re Myrvang, 232 F.3d 1116, 1120 (9th Cir. 2000). See also In re Smith, 242 B.R. 694, 699 (9th Cir. BAP 1999) (former "gross abuse of discretion" standard is same as reviewing the findings of fact for clear error and reviewing conclusions of law de novo). The "balance of the equities" test under Section 523(a)(15)(B) is reviewed for abuse of discretion. Id. at 1121.

Our review of factual findings is deferential to the trial court.

Review under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed. Thus, an appellate court must accept the [trial] court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Smith, 242 B.R. at 69-700 (citations and internal quotation marks omitted).

IV. DISCUSSION

Under Section 523(a)(15), "debts incurred in the course of a divorce proceeding are not dischargeable unless the debtor can establish that (1) the debtor does not have the ability to pay

⁴(...continued)
remand a court must follow decision of appellate court, absent intervening change in governing authority), aff'd, 242 F.3d 381 (9th Cir. 2000).

1 [the 'ability to pay' prong], or (2) the benefit of the discharge
2 to the debtor outweighs the detriment of discharge to the former
3 spouse [the 'benefit/detriment' prong]." Myrvang, 232 F.3d at
4 1119 n. 2. More fully, Section 523(a)(15) provides:

5 (a) The discharge under section 727 . . . of this
6 title does not discharge an individual debtor from
any debt --

7 * * *

8 (15) not of the kind described in
9 paragraph (5) [i.e. not for alimony,
10 maintenance, or support] that is incurred by
11 the debtor in the course of a divorce or
12 separation or in connection with a separation
agreement, divorce decree or other order of a
court of record, [or] a determination made in
accordance with State or territorial law by a
governmental unit unless

13 (A) the debtor does not have the ability
14 to pay such debt from income or property
of the debtor not reasonably necessary to
15 be expended for the maintenance or
support of the debtor or a dependent of
16 the debtor and, if the debtor is engaged
in a business, for the payment of
17 expenditures necessary for the
continuation, preservation, and operation
of such business; or

18 (B) discharging such debt would result in
19 a benefit to the debtor that outweighs
the detrimental consequences to a spouse,
20 former spouse, or child of the debtor[.]

21 11 U.S.C. § 523(a)(15) (prior to BAPCPA amendments; see n. 2
22 above).

23 Both the ability to pay prong and the benefit/detriment prong
24 are applied as of the time of trial, not at the time the
25 bankruptcy petition was filed. Jodoin, 209 B.R. at 142.
26 Objections to discharge are construed narrowly, but "once the
27 Plaintiff demonstrates that the Debtor incurred the debt in
28 connection with divorce, the burden shifts to the Debtor to prove

1 subsections (A) and (B),” meaning that the debtor has “both the
2 burden of going forward with the evidence and the burden of
3 persuasion.” Jodoin, 209 B.R. at 139-40 (citation and internal
4 quotation marks omitted).

5 In assessing the “ability to pay” requirement of
6 Section 523(a) (15) (A), the Ninth Circuit has not decided whether
7 the “disposable income test of 11 U.S.C. § 1325(b) (2) is the
8 exclusive method that a bankruptcy court must employ” (Myrvang,
9 232 F.3d at 1120 n. 3) but it cited our decision that this
10 “provides an excellent starting point.” Id. (quoting Jodoin, 209
11 B.R. at 142). Section 1325(b) (2) defines “disposable income” as
12 “income which is received by the debtor and which is not
13 reasonably necessary to be expended -- (A) for the maintenance or
14 support of the debtor or a dependent of the debtor [including
15 certain charitable contributions]; and (B) if the debtor is
16 engaged in business, for the payment of expenditures necessary for
17 the continuation, preservation, and operation of such business.”
18 11 U.S.C. § 1325(b) (2) (prior to BAPCPA amendments; see n. 2
19 above).

20 With respect to the benefit/detriment requirement of Section
21 523(a) (15) (B), the Decision uses a “totality of the circumstances”
22 test and lists the following “non-exclusive criteria”:

- 23 1. The relative economic conditions of both parties,
including income and expenses of both parties;
- 24 2. The health, job skills, training, age and education
of the parties;
- 25 3. The amount and nature of the debt;
- 26 4. The debtor’s ability to pay the debt;
- 26 5. The parties['] relative life style;
- 27 6. The conduct of the parties;
- 27 7. The number of the parties['] dependents;
- 28 8. Whether there is joint liability on the debt;
- 28 9. The ability to pay of the new spouse;
10. The assets of the parties.

1 See In re Haines, 210 B.R. 586, 594 (Bankr. S.D. Cal. 1997); In re
2 Morris, 193 B.R. 949, 954 n. 8 (Bankr. S.D. Cal. 1996).

3 No party has challenged the bankruptcy court's use of these
4 factors, and the Ninth Circuit has implicitly approved the
5 totality of the circumstances test as one of several alternative
6 approaches. See In re Short, 232 F.3d 1018, 1024 (9th Cir. 2000)
7 (quoting In re Crosswhite, 148 F.3d 879, 889 (7th Cir. 1998))
8 ("[T]he bankruptcy court set the correct course when it adopted a
9 'totality of the circumstances' approach to its inquiry [regarding
10 dischargeability].").

11 A. Teresa's obligations to Daryl under the MSA are debts
12 incurred "in the course of a divorce or separation" or
13 otherwise within Section 523(a)(15)

14 Teresa argues that the debt purportedly made nondischargeable
15 by the bankruptcy court is not a debt owed to Daryl but is instead
16 a debt owed to a third party, Providian/Chase, and therefore does
17 not come within the provisions of Section 523(a)(15). Though
18 there is some disagreement in the reported decisions about who has
19 standing under Section 523(a)(15) and whether the debt can be owed
20 to a third party rather than the former spouse, we need not
21 address those issues here. We interpret Daryl's Complaint to
22 assert claims under the hold harmless provisions of the MSA and as
23 Teresa concedes there is no question that such hold harmless debts
24 come within Section 523(a)(15).⁵ See In re Finaly, 190 B.R. 312,
25 315-16 (Bankr. S.D. Ohio, 1995) (although third party creditors
26 lack standing under Section 523(a)(15), former spouse has standing

27
28 ⁵ We use the term "hold harmless" to include Teresa's obligations under the MSA to defend, indemnify, and hold Daryl harmless.

1 when division of marital debts includes hold harmless provision);
2 In re Smith, 205 B.R. 612, 615-17 (Bankr. E.D. Cal. 1997) (same).
3 Compare In re Stegall, 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995)
4 (debt is not "incurred" in divorce settlement if no hold harmless
5 agreement between former spouses). Contra In re Soderlund, 197
6 B.R. 742, 747-48 (Bankr. D. Mass. 1996) (disagreeing with Finally
7 that third party creditors lack standing). Cf. In re Montgomery,
8 310 B.R. 169, 175-180 (Bankr. C.D. Cal. 2004) (debt to former
9 spouse would be nondischargeable even without hold harmless
10 provision), and In re Dollaga, 260 B.R. 493 (9th Cir. BAP 2001)
11 (2-1 decision) (divorce attorney lacked standing; declining to
12 decide whether all third party creditors lack standing under
13 Section 523(a)(15)).

14 Teresa has obligations under the MSA to defend, indemnify,
15 and hold Daryl harmless from any cost, expense, or liability in
16 connection with the original obligation to Providian/Chase. See
17 MSA §§ 7 and 10.c. She was also obligated not to incur additional
18 indebtedness. See MSA § 10.c. Lastly, she is obligated to
19 reimburse Daryl for all reasonably necessary costs and expenses,
20 including attorneys' fees and court costs, resulting from the fact
21 that she did not carry out the MSA agreement. See MSA §§ 10.c.
22 and 17.j.1. All such debts are "incurred in the course of a
23 divorce or separation or in connection with a separation
24 agreement, divorce decree or other order of a court of record"
25 within the meaning of Section 523(a)(15). See Short, 232 F.3d at
26 1023 (rejecting contention that pre-marital debt from the wife to
27 the husband, included in stipulated divorce judgment, was not
28 "incurred in the course of" divorce or separation).

1 That said, Teresa is correct that the Judgment erroneously
2 refers to the "debt obligation owed by Teresa Mullins to Providian
3 Visa/Chase Manhattan." The bankruptcy court's discussion in its
4 Decision shows that this was simply a technical error. On remand
5 the bankruptcy court should fashion a form of Judgment in Daryl's
6 favor, declaring that Teresa's debts to Daryl under the MSA that
7 relate to the Providian/Chase debt, whatever those debts may be,
8 are excepted from her discharge under 11 U.S.C. § 523(a)(15).⁶

9 We note that there is no evidence in the excerpts of record
10 that Providian/Chase has brought any collection action against
11 Daryl. In the past it sent him dunning letters but for all we
12 know it may have decided not to pursue Daryl for this debt or he
13 may have some defense to it. In response to our questions at oral
14 argument Teresa's counsel agreed that Daryl might have a complete
15 defense as to any liability incurred by Teresa after Daryl
16 attempted to have his name removed from the account, under the
17 Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et. seq., or
18 other applicable law. Daryl may have other defenses. Neither
19 Teresa's nor Daryl's counsel could tell us whether the statute of
20 limitations has run on any collection action by Providian/Chase
21 against Daryl. For these or other reasons it is possible that
22 Providian/Chase no longer has any claim against Daryl, or
23 alternatively Providian/Chase might have decided to abandon

24
25 ⁶ Daryl complained in his post-remand affidavit filed with
26 the bankruptcy court that since filing his Complaint he has
27 discovered at least one other debt that Teresa did not pay in
28 violation of the MSA, but the Judgment only included the
Providian/Chase debt and as the bankruptcy court noted it "has the
discretion to order a partial discharge of a separate debt arising
out of the terms of a divorce decree." Myrvang, 232 F.3d at 1124.
Daryl has not cross-appealed from the Judgment.

1 whatever claim it did have. Therefore, we questioned Daryl's
2 attorney at oral argument whether this appeal could be moot and if
3 we are being asked to render an advisory opinion. See In re
4 Omoto, 85 B.R. 98, 99-100 (9th Cir. BAP 1988) ("The panel can only
5 address actual cases and controversies and, therefore, has a duty
6 to raise the issue of mootness sua sponte when the parties fail to
7 do so.").

8 Daryl's attorney responded that at a minimum Daryl has
9 already incurred attorneys' fees and other costs arising from
10 Teresa's breach of the MSA, and Teresa is obligated to reimburse
11 him for these legal expenses. See MSA §§ 10.c. and 17.j.⁷ In
12 addition, he argued that on the present state of the record Daryl
13 has at least contingent debts to Providian/Chase and therefore
14 Teresa has at least a contingent hold harmless debt to Daryl.
15 Contingent claims can be nondischargeable. See In re Murrell, 257
16 B.R. 386, 389-90 (Bankr. D. Conn. 2001) (former spouse's
17 contingent debts under hold harmless obligation were
18 nondischargeable); In re Kruse, 114 B.R. 582, 594-95 (Bankr. N.D.
19 Ind. 1988) ("a debt that is contingent may be nondischargeable").
20 Therefore, we are satisfied that this is not an advisory opinion.

21
22 ⁷ Section 10.c. requires Teresa to hold Daryl harmless
23 against "all costs, expenses and liabilities in connection [with
24 the debt to Providian/Chase], including attorneys fees and costs
25 incurred by, [Daryl] in defending or responding to any collection
26 agency." Section 17.j. of the MSA provides in relevant part,
27 "Each of the parties agrees on request of the other, to execute
28 and deliver any instrument, furnish any information and perform
any other acts reasonably necessary to carry out the provisions of
this Agreement without undue delay or expense. A party who fails
to comply with this subsection shall reimburse the other party for
all costs and expenses, including attorneys' fees and court costs,
that as a result of such failure become reasonably necessary to
carry out this Agreement."

1 Nor does the possibility that Daryl's debt to Providian/Chase
2 could be reduced or eliminated change our analysis of the
3 dischargeability of Teresa's debts to Daryl, whatever they
4 ultimately may be. Accord Myrvang, 232 F.3d at 1119 n. 1
5 (husband's contention that collection action by creditor was "less
6 likely" in view of post-trial developments "could not have
7 significantly changed the judge's calculus of
8 nondischargeability"). Therefore, we turn to the bankruptcy
9 court's analysis of dischargeability.

10 B. Teresa has not established that the debt is
11 dischargeable

12 1. The ability to pay prong: Section 523(a)(15)(A)

13 The bankruptcy court concluded that Teresa has the ability to
14 pay the debt:

15 All matters considered, I find Teresa has the
16 ability to pay the Providian debt over time,
17 particularly in light of her substantial present
income and release of her debts by the Chapter 7
discharge.

18 We cannot say that the bankruptcy court made a clear factual
19 error. It did not believe Teresa's evidence that she lacked
20 sufficient net income to make monthly payments to reduce the
21 Providian/Chase debt (or whatever portion of it must be paid by
22 Daryl, and is thus owed by Teresa to him under the hold harmless
23 provisions of the MSA). The Decision makes reference to several
24 factors that support its conclusion: its finding that Teresa's
25 income has "risen sharply" since the divorce, her past ability to
26 pay at least \$500 per month on the Providian/Chase debt for
27 several years (while she was working only one job), her
28 unexplained increase in expenses listed on her amended bankruptcy

1 Schedule J, her past ability to fund her former boyfriend's
2 business and large gambling losses, and the additional net income
3 she can expect to have in the future because her other debts have
4 been discharged and because she testified that she has stopped
5 gambling. Although the bankruptcy court could have drawn
6 different conclusions from the evidence, we cannot say that it
7 misapplied the law or clearly erred in its factual conclusions.
8 See Jodoin, 209 B.R. at 143 (affirming nondischargeability, based
9 in part on finding that debtor had demonstrated "the capacity to
10 purchase" expensive assets and services). "When there are two
11 permissible views of the evidence, the trial judge's choice
12 between them cannot be clearly erroneous." In re Baldwin
13 Builders, 232 B.R. 406, 410 (9th Cir. BAP 1999) (citations
14 omitted).

15 Teresa argues that by taking into account the \$800 in monthly
16 rent that she receives from family members the bankruptcy court
17 improperly took into account the finances of others living in her
18 household, without meeting the "economic interdependence" test set
19 forth in Short, 232 F.3d at 1023-24 (applying that test to a live-
20 in romantic companion). Teresa claims that "technically" she did
21 not even have to include the rent she receives from her family
22 members in her income. This is wrong. The rent she receives is
23 cash income. It is not deemed income that is attributed, as
24 authorized by Short, from another individual's separate earnings
25 because that individual is "economically interdependent" with the
26 debtor. To the contrary, if there had been more evidence of the
27 family's economic interdependence it might have cut the other way.
28 There was evidence, for example, that although Teresa's son has

1 been working it has been Teresa who payed for all utilities, payed
2 a cable bill approximately three times what Daryl pays, and payed
3 for substantially all the household's food, although she testified
4 that "once in a while" the other occupants of the house "do go buy
5 food or if they need something." Transcript, April 28, 2004,
6 pp. 52:1-18, 71:4-17. Meanwhile, Teresa's son has been paying
7 over \$1100 per month for two vehicles. Id. p. 71:16-18. Teresa
8 originally stated in her bankruptcy schedules that she received
9 \$1000 from her mother each month for rent, at a time when her son
10 did not live in the house, but at trial she claimed that the
11 current figure is \$400. She explained that her mother "used to
12 try to help a little bit more when I needed more help because my
13 son wasn't living there." Id. p. 70:14-15. Teresa has also been
14 paying for a timeshare property. From all of these things the
15 bankruptcy court could conclude that Teresa did not adequately
16 support her allegation that her necessary expenses use up all of
17 her income or offset the \$800 in cash that she acknowledged
18 receiving every month from her family for rent.

19 Teresa, who is older than Daryl, argues in her opening brief
20 on this appeal that it takes 25 years to pay back a credit card
21 when making minimum payments and that she would be 76 years old by
22 that time. The short answer is that there is no evidence in the
23 excerpts of record to support this calculation and it assumes that
24 Teresa can only pay the minimum amount, whatever that might be.

25 In sum, given the conflicting and sometimes missing evidence,
26 we cannot say that the bankruptcy court erred in finding that
27 Teresa did not meet her burden of proof on the ability to pay
28 prong of Section 523(a)(15)(A). We must conclude that Teresa has

1 the ability to pay the debt.

2 2. The benefit/detriment prong: Section 523(a)(15)(B)

3 The bankruptcy court found that Daryl has "substantially more
4 net income than Teresa, but her expenses are lower on a monthly
5 basis, and well within her income from all sources." The
6 bankruptcy court also found that Daryl "assumed substantially more
7 marital debt that Teresa, due to the home mortgage assumption" in
8 the MSA. It found that most other factors are neutral: both
9 parties are healthy, neither has any minor dependents, both own
10 family homes, and "the evidence is inconclusive on the equity
11 value of either home[] although Daryl testified [that] his
12 mortgage payment, transferred to him under the MSA, is about equal
13 to the value of the home." The overriding factor in the
14 bankruptcy court's analysis, besides Teresa's ability to pay the
15 debt, was the genesis of the debt:

16 The Providian debt is about \$33,000.00. Yet,
17 it is clear [that] a significant portion of that
18 obligation was due to the cash withdrawal on the
19 account post-divorce by Teresa. Her discharge of
20 the debt and thus her breach of promise to pay the
obligation not only violates the MSA and the hold
harmless clause, but does so under circumstances
where she substantially benefitted from the cash
withdrawal of \$9,500.00.

21 Therefore, as to the benefit/detriment test, I
22 find the equities tip in favor of Daryl. To hold
23 otherwise would reward Teresa at the expense of
24 Daryl, when Teresa voluntarily and willingly
25 undertook under the divorce decree to pay the debt.
26 Thus, discharging the debt would result in a
significant benefit to Teresa that far outweighs
the detrimental consequences to Daryl to have to
pay a debt assumed by Teresa by her solemn promise
to pay Provident.

27 Teresa asserts numerous grounds for a different outcome on
28 the benefit/detriment prong. She claims that Daryl's California

1 house has appreciated in value, but she introduced no evidence of
2 that at trial. She argues that the bankruptcy court should have
3 taken into account the earnings of Daryl's live-in girlfriend, who
4 is an administrative assistant in a construction office. Daryl
5 testified that she was a student until two months before trial and
6 that he did not know her earnings. Transcript, April 28, 2004,
7 p. 35:11-20. Teresa responds that this "strains credibility" and
8 that even at minimum wage the girlfriend's earnings would provide
9 Daryl with an extra \$600 per month. Teresa presented no evidence
10 to support this conjecture and the bankruptcy court was free to
11 believe Daryl's evidence or discount any potential income from a
12 girlfriend because, unlike a spouse, she presumably could leave at
13 any time with no financial obligation.

14 Teresa argues that she barely breaks even but, as discussed
15 above, the bankruptcy court found that she does more than break
16 even, her expenses are well within her income, and she can afford
17 to pay the Providian/Chase debt (or hold Daryl harmless against
18 any debt he must pay to Providian/Chase). She argues that her
19 income is 40% of what Daryl earns, but using the bankruptcy
20 court's findings the calculation is far higher (\$49,752/\$73,104
21 per year = 68%). She argues that Daryl's own figures show that he
22 was earning more than minimal overtime pay before the trial, but
23 the bankruptcy court believed Daryl's testimony that he no longer
24 had the opportunity to earn any substantial overtime pay. She
25 argues that she takes care of her 80-year-old mother with
26 Alzheimer's disease, provides some support to one son who lives
27 with her with his wife and two children, and has two other
28 children while, allegedly, Daryl has no dependents. Neither

1 Teresa's nor Daryl's tax returns list any dependents, both have
2 elderly mothers whom they support and, as noted above, the
3 evidence was inconclusive about what is contributed by or given to
4 Teresa's family members who live with her, except that she admits
5 that they pay her \$800 per month in rent.

6 Teresa's most persuasive arguments are that she works 80
7 hours per week at two jobs,⁸ that Daryl could if necessary use the
8 \$1400 per month that he pays into savings and retirement accounts
9 to pay the Providian/Chase debt, and that according to one case
10 "if the debtor's standard of living will fall materially below the
11 creditor's standard of living if the debt is not discharged, then
12 the debt should be discharged." In re Smither, 194 B.R. 102, 111
13 (Bankr. W.D. Ky. 1996). Under the totality of the circumstances
14 test, however, we cannot say that the bankruptcy court erred in
15 finding that Teresa did not meet her burden to satisfy the
16 benefit/detriment prong.

17 It is an uncontested fact that Teresa chose to incur new
18 debts instead of paying down her old debt to Providian/Chase as
19 she was obligated to do under the MSA. Meanwhile interest, late
20 fees, and other charges have undoubtedly accrued. If Daryl is
21 able to raise legal defenses to the debt asserted by
22 Providian/Chase then that will also reduce some of Teresa's
23 nondischargeable hold harmless obligations to Daryl under the MSA.

24
25 ⁸ On cross examination she admitted that she works
26 somewhat fewer than 80 hours per week, although we do not question
27 that holding down two jobs is very difficult and may not be
28 sustainable. Transcript, April 28, 2004, pp. 55:21-56:1. On the
other hand, she testified that the second job added only \$900 per
month in additional income and as noted above there is evidence in
the excerpts of record to suggest that even without this second
job she may be able to pay the debt at issue. The burden was on
Teresa to prove otherwise, and the bankruptcy court doubted her
credibility. We cannot say that this was clear error.

1 If, on the other hand, Daryl must pay Providian/Chase or incur
2 legal fees and other costs in defending against that creditor then
3 he would be harmed all the more by discharging Teresa's
4 obligations to him. In either event, the bankruptcy court had
5 sufficient evidence to determine that Teresa has not met her
6 burden to show that the benefit to her outweighs the harm to
7 Daryl.

8 **V. CONCLUSION**

9 In this unfortunate case neither spouse has a lavish
10 lifestyle but both were left with the consequences of debts
11 incurred during the marriage and Teresa's post-divorce \$9,500 cash
12 advance and gambling debts. Daryl may be legally obligated to
13 Providian/Chase for some portion of the credit card balance, and
14 Teresa has the legal obligation under the MSA to defend,
15 indemnify, and hold him harmless from this debt. Although Teresa
16 earns less than Daryl the bankruptcy court also found that she has
17 not proven her alleged expenses and did not meet her burden to
18 show that she is unable to pay the debt at issue or that the
19 benefit to her of discharging the debt would outweigh the harm to
20 Daryl. The bankruptcy court's findings of fact and application of
21 its discretion are entitled to great deference. We cannot say
22 that it erred in these conclusions.

23 We remand for a limited purpose. The bankruptcy court should
24 fashion a form of Judgment in Daryl's favor, declaring that
25 Teresa's debts to Daryl under the MSA that relate to the
26 Providian/Chase debt, whatever those debts may be, are excepted
27 from her discharge under 11 U.S.C. § 523(a)(15). In all other
28 respects, the Judgment is AFFIRMED.