IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	**CHAPTER 7**
	)	
WESLEY LEANDREW BROWN	)	**CASE NO. 04-00291**
	)	
Debtor.	)	

MEMORANDUM DECISION AND ORDER ON MOTION TO REOPEN

The Debtor has filed a Motion to reopen his case for the purpose of adding a creditor not included in his original schedules. The Motion did not set forth any information about the debt in question as to its nature and when it was incurred. Accordingly, the Court set a hearing for November 8, 2010. At that hearing the Debtor appeared, was sworn, and testified in response to the Court's questions. He indicated that the debt in question is a very old one for child support arising out of a divorce case during the 1970s. He claimed that he was unaware of the liability at the time he filed his petition in this Court in 2004. He said that he became aware of it only recently when an effort was apparently made to compel him to pay and that he has no ability to pay it. He stated that he had not given any notice to his former spouse to whom such obligation is apparently owed of his Motion to reopen this case. For the reasons which follow, the Court will deny the Motion without prejudice to the right of either the Debtor or the holder of the obligation to request that his case be reopened for the purpose of determining whether the obligation in question is one which is dischargeable pursuant to the provisions of 11 U.S.C. § 523.

The Debtor filed his petition commencing this case on January 23, 2004. The docket entries in the case indicate that the Trustee filed a "no distribution" report on February 26, 2004. In short, this case is one of those commonly known as a "no asset" chapter 7 case.

The Debtor was issued a discharge on April 20, 2004. On the same day a final decree was entered and the case was closed. The present Motion to Reopen Case was filed on October 25, 2010.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. The Court concludes that a motion to reopen a bankruptcy case for the purpose of scheduling a previously unscheduled creditor is inherently a "core" bankruptcy proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

Although it is common for bankruptcy debtors and their creditors to believe that reopening a closed bankruptcy case and listing a creditor who was omitted from the original schedules means that the debt is now "included" in the bankruptcy case and discharges the debtor from the obligation, the actual legal effect of such an action is somewhat different. In a "no asset" bankruptcy case in which there is never a deadline to file a proof of claim, the debtor's continuing liability to pay the obligation is not affected by whether or not the case is reopened to allow an omitted creditor to be added to the schedules. *See In re Alexander*, 300 B.R. 650, 655 (Bankr. E.D. Va. 2003); *In re Carberry*, 186 B.R. 401, 402–03 (Bankr. E.D. Va. 1995); 4 *Collier on Bankruptcy* ¶ 523.09[5] at p. 523-69 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). While this Court certainly has the discretion to reopen cases to permit the addition of an omitted creditor and frequently does so, to do that in the situation presented here will not affect whether this particular obligation is within or outside the boundaries of his bankruptcy discharge. It chooses not to grant the Motion presented here because of the risk that

Mr. Brown and his former spouse (or other party entitled to enforce the child support obligation) might give unwarranted weight simply to that fact.

Because this case was filed in 2004 it is controlled by the provisions of the Bankruptcy Code which were in effect prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). The pertinent provisions of the Bankruptcy Code in effect in 2004 regarding the dischargeability of child support obligations were §§ 523(a)(5) and 523(a)(15). Those sections then provided 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—
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> . . . .
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> (5) 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)93) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
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> (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;
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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
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>> (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)(5), (15) (2000).

From Mr. Brown's description of his obligation, it appears that it is likely to be an obligation for child support which in any event does not qualify for a discharge in bankruptcy. Because, however, the Court does not have all of the relevant facts before it regarding such obligation and the identity of the party entitled to enforce it, an unequivocal statement to that effect is not warranted. If the obligation is not covered by the language of § 523(a)(5) in effect in 2004, it would appear to be subject to the balancing test set forth in § 523(a)(15).

Because reopening the case for the purpose of adding a creditor will not provide any benefit to the Debtor under the facts in this case, the Court will decline to do so. However, because the effect of the discharge on this obligation is not certain, the denial of the Motion shall be without prejudice to the right of either the Debtor or the creditor to file a motion to reopen the case for the purpose of filing a complaint to initiate an adversary proceeding pursuant to

Bankruptcy Rule 7001 to obtain a determination of the dischargeability of the support obligation. *See Alexander*, 300 B.R. at 656.

Nothing in this decision should be interpreted to have any effect upon the non-bankruptcy issue of whether the support obligation in question remains enforceable as a matter of state law. *See* Va. Code Ann. § 8.01-251(A) ("No execution shall be issued and no action brought on a judgment . . . after 20 years from the date of such judgment or domestication of such judgment, unless the period is extended as provided in this section."); *Adcock v. Dep't of Soc. Servs., Div. of Child Support ex. rel. Houchens*, 56 Va. App. 334, 338, 343, 693 S.E.2d 757, 759, 761 (Va. Ct. App. 2010) (holding that the twenty-year limitations period in § 8.01-251(A) did not apply to an arrearage on a child support obligation imposed by a divorce decree until the "trial court enters an order liquidating the obligation"); *Taylor v. Taylor*, 14 Va. App. 642, 645, 418 S.E.2d 900, 902 (Va. Ct. App. 1992) ("In Virginia, laches may not be interposed as a defense to a support arrearage.").

It is SO ORDERED.

The Clerk is requested to send a copy of this Decision and Order to each of the following: the Debtor, the Trustee and the United States Trustee.

ENTER this 12th day of November, 2010.

UNITED STATES BANKRUPTCY JUDGE