

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

EDWARD L. GROSS AND NELLIE  
DUANE ROBERTS

Debtors.

Bky Case No. 02-94367

Chapter 7

Adversary Proceeding No. 03-3114

Michael S. Dietz, Trustee of the Bankruptcy  
Estate of Edward L. Gross and Nellie Daune  
Roberts,

**TRUSTEE'S TRIAL BRIEF**

Plaintiff,

vs.

Edward L. Gross and Nellie Daune  
Roberts,

Defendants.

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**INTRODUCTION**

The trustee submits this Trial Brief pursuant to this Court's Scheduling Order for Trial dated June 9, 2004. This is an adversary proceeding by which the bankruptcy estate has objected to the Debtors' discharge based upon their concealment of assets prior to filing bankruptcy; their failure to properly disclose and schedule their assets; their false testimony; and, their inability to account for numerous large cash withdrawals and to otherwise account for their assets. The Debtors have not taken their duty of candid disclosure in their bankruptcy proceeding very seriously. Instead have consistently filtered their obligations through their own unilateral determination of what the trustee and their creditors needed to know. The evidence will demonstrate numerous instances of concealed assets and an extensive pattern of large cash transactions that are impossible to trace. At the time of the numerous cash transactions, the Debtors were being pursued by Great West Insurance Company for collection

on a large judgment. They admit they began conducting their financial affairs with untraceable cash for the express purpose of concealing their assets from their creditors.

The facts, as set forth below, fall roughly into four groups: Concealment of the Debtors' property prior to filing bankruptcy; concealment of property of the estate after the date of the bankruptcy filing; the Debtors' false oaths; and, the Debtors' inability to account for their assets. Many of the facts set forth below constitute a basis for the denial of discharge under more than one of the preceding legal theories.

### FACTS

The plaintiff expects the evidence at trial will demonstrate the following facts:

- In July of 2002, Defendants sold their house in Canada and received \$354,401.75 in partial payment from the closing. The closing statement indicates the proceeds were taken in the form of a check payable to Daune Roberts. Ms. Roberts will testify that she took the \$354,401.75 check to a bank, cashed it, and turned it into currency. Consistent with her deposition testimony she will testify at trial that she does not know what became of the currency. Although both Lyle Gross and Nellie Duane Roberts owned the home that was sold, Lyle Gross does not appear as a payee on the check for the sales proceeds.
- On several occasions during the six months prior to filing their bankruptcy petition, the Debtors took significant withdrawals from their bank accounts in the form of cash currency. The withdrawals include the following:

Bank Account	Date	Amount

First Federal	\$ 5,350.00	October 20, 2002
CIBC Bank	\$52,830.72	November 5, 2002
First Federal	\$ 4,000.00	November 13, 2002
First Federal	\$40,000.00	November 20, 2002

In addition, shortly after September 27, 2002, the Debtors received a federal income tax refund in the amount of \$10,191.00. At approximately the same time they also received a Minnesota Income Tax Refund in the amount of \$1,739.00. They cashed these checks.

- At trial, Daune Roberts will testify that the Debtors' motivation in conducting their cash transactions was to conceal the funds from creditors. Plaintiff expects Ms.

Roberts' trial testimony to be consistent with the following testimony from her March 20, 2003, deposition:

**I did a major mistake 'cuz I've never been through a bankruptcy before. And I started taking our cash out to pay all our bills in cash, which now I realize I should have left in there and paid everything by check or debit cards, so there'd be a paper trail.**

**But I just don't know how things work in the States; and I thought there could be a lien, like I thought there could be a hold on our account so that we wouldn't have access this money, and I wouldn't be able to pay our bills.**

**So I started taking out these amounts and paying everything in cash, and I paid everything in cash; and now, of course, it's a big mistake.**

\* \* \*

**If I would have known this, I would have kept a journal, but I didn't. Is there any way to reconstruct it? I think it would be difficult. I think I could possibly reconstruct some of it, but it was a – it was stupid.**

**I mean, what I did was just – I just had no idea what was going to happen, and I just – I was afraid, and I took the money out so we could keep paying bills; and that's all I can say.**

- About one year before filing their bankruptcy, the Debtors contacted State Farm insurance agent Richard Thompson to apply for home owners insurance. Duane Roberts gave the agency information as to the nature and value of the Debtors' assets, including a ring worth, in her estimation, in excess of \$10,000.00. This information was included on an application which was executed by Ms. Roberts. She recalls discussing the information on the application with her insurance agent. The application indicates that the Debtors owned the following property, with the following values:

Description	Value
Jewelry and Furs	\$25,000.00
Ring	\$10,000.00 +
Book Collection	\$20,000.00
Fire Arm	\$ 500.00
Television, Stereo, Tapes, Records/CD's	\$50,000.00
Fine Arts, Antiques and Rugs	\$20,000.00
Musical Instruments, Cameras and Sports Equipment	\$10,000.00
Computers	\$20,000.00

Nellie Daune Roberts will testify, in addition to the written information on the insurance application, she independently is able to identify a number of items not included on the bankruptcy schedules. These include a gold and platinum wedding ring, a Tourmaline ring, a fire arm, various “family” antiques and computers. None of the foregoing assets are disclosed on the Debtors’ bankruptcy schedules. Nor does the Debtors’ Statement of Financial Affairs disclose any transfer of the above property during the one year before filing their bankruptcy.

- On the date of their bankruptcy filing the Debtors owned a very large hot tub, prominently located in their back yard. The Debtors did not disclose the hot tub until

the trustee identified it in the background of an unrelated photograph provided to the trustee by the Debtors.

- On the date of filing, the Debtors had an undisclosed life insurance policy with a cash value of \$170.
- The Debtors testified at their 341 examination, under oath, that they had not received any money from a lawsuit filed in Canada against Great West Life Assurance Company. In fact, on June 26, 2000, they received \$190,000.00.
- The Debtors also testified at their Section 341 hearing that they did not have a total of over \$500.00 of cash currency in their possession at any one time during the two years prior to their bankruptcy petition. The Debtors' subsequent testimony regarding the various large cash transactions demonstrates that this was false testimony.
- The Debtors testified at their Section 341 hearing that they had no property of any sort that they did not disclose on their bankruptcy papers or testify about at the hearing. In fact, the Debtors owned substantial additional undisclosed property.
- The Debtors testified at their 341 hearing that they had transferred a lien on their 1987 Jaguar automobile to Rod Gobelle prior to their bankruptcy petition. In fact, they did not transfer the lien until January 4, 2003, more than two weeks after filing their bankruptcy petition.
- At the 2004 Examination of Edward Lyle Gross, taking on March 6, 2003, he testified that he did not own any of the property identified in connection with the insurance application as of the date of his bankruptcy filing. Likewise, Defendant, Nellie Daune Roberts, specifically testified at her deposition on March 20, 2003, that she did not own any undisclosed property.

- At the time they filed their bankruptcy petition the Debtors had an open bank account at Canada Trust Bank. They did not include this account on their schedules.
- During the year before filing their bankruptcy the Debtors closed an account at Canada Trust Bank in the name of Edward Lyle Gross. They did not disclose this closed account on their Statement of Financial Affairs.
- The trustee has made repeated requests that the Defendants deliver bank records related to a Canada Trust bank account in the name of Nellie Daune Roberts. The Debtors have not delivered any of the requested information.
- In July of 2003, six months after filing their bankruptcy, the Debtors purchased a new home for \$338,000.00. They paid \$138,000.00 down on a contract for deed to purchase the home, with a balloon payment due on the balance in 2006.

### **DISCUSSION**

The Debtors' discharge should be withheld pursuant to Sections 727(a)(2)(A), (B); 727(4)(A), (D); and 727(A)(5). These sections provide as follows:

(a) The court shall grant the debtor a discharge, unless –

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(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

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(4) the debtor knowingly and fraudulently, in or in connection with the case

(A) made a false oath or account;

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(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial or discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

#### **UNDISCLOSED ASSETS/FALSE OATH**

Misrepresentation in a debtor's bankruptcy schedules as to the identity or value of assets is a false oath under Section 727. *In re Mathern*, 137 B.R. 311, 320 (Bankr. D. Minn. 1992). It furthers the statutory goal of fair dealing to require a debtor to furnish a satisfactory accounting for their financial condition and the nature of their assets in order to obtain a discharge. *See Id.* at 317. To this end, the bankruptcy petition, including the schedules and statements, must be accurate and reliable and must not require the parties in interest to conduct an independent examination to get the true facts. *In re Sears*, 246 B.R. 341, 347 (8th Cir. BAP 2000)(citing *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992).

In this case the Debtors disclosed a variety of property in connection with their application for insurance made in close proximity to their bankruptcy filing. This included a ring with a value of something in excess of \$10,000.00. The Debtors refused to make any kind of meaningful response to the trustee's requests for a detailed copy of their insurance documents. Finally, the trustee subpoenaed the documents directly from the Debtors' insurance agent and discovered the concealed property. Before the Debtors realized the trustee had the insurance application, they specifically denied that they owned any of the property itemized on the application. Upon seeing the signed application, they admitted to owning some of the smaller items, e.g. a firearm, a gold and platinum wedding ring, and a Tourmaline ring for which they paid \$1,000.00. The property they have admitted to owning,

by itself and without anything more, justifies denying their discharge for failure to include it on their bankruptcy schedules.

Moreover, in addition to the smaller items for which the Debtors admit ownership, the evidence also justifies a finding that they owned the larger items identified on the insurance application at the time they filed their bankruptcy petition. Duane Roberts gave the information on the application to the insurance agency. She signed the application after it was completed. She recalls discussing the application with her insurance agent and she recalls that she was asked to estimate the values of the various items. Given her admissions, her signature on the application, the fact that the insurance agent will testify that all of the information for the completion of the application was supplied by the Debtors; and, the fact that the insurance agent has no reason or motivation whatsoever to fabricate imaginary assets to include on the application, it is clear that the insurance application represents a rare candid recitation of the Debtors' personal property assets.

The trustee anticipates that at trial the Debtors will attempt to isolate the various omitted assets and characterize them as *de minimus*. For example, the Plaintiff expects the Debtors will testify that the large hot tub in their back yard was in need of repair, so they unilaterally determined it had little value and did not include it on their bankruptcy schedules. Likewise, Plaintiff anticipates the Debtors will argue that a post-petition appraisal of the Debtors' household goods and furnishings yielded a total value that was largely exemptable. Thus, the Debtors will argue, "no harm, no foul." Even if the appraisal were an accurate measure of the property the Debtors actually possessed at the time of filing (evidence will demonstrate that the Debtors did not show the appraiser all of their property), this "no harm,

no foul" approach to completing the Debtors' schedules is not consistent with the law concerning their obligation of disclosure.

Omission of even a relatively modest asset from the debtor's schedules merits denial of their discharge based upon their false oaths, if done with knowledge and fraudulent intent. *Mertz* at 598 (denying discharge for knowing omission of \$1,358.00 tax refund). The materiality of a debtor's false oath, in fraudulently failing to list certain assets on bankruptcy schedules, does not turn on the value of the omitted assets. *Mathern*, 141 B.R. at 320. An omission is material if there is a relationship between the subject matter of the omission and the concerns of the bankruptcy process. *Sears*, 246 B.R. at 347. The United States Court of Appeals for the Eighth Circuit has adopted the following definition of materiality in the context of an objection to discharge:

The subject matter of a false oath is 'material' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence or disposition of his property.

*In re Olson*, 916 F.2d 481, 483 (8th Cir. 1990)( *quoting In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984). Here, the failure of the Debtors to include the insurance application assets, or disclose cash, obviously relate to the "discovery of assets" or the "existence of property." However, the pattern of asset concealment is so pervasive here that the omission of even the smallest, least valuable, asset is relevant to the "estate" because it relates to the integrity of the bankruptcy process as a whole.

## **INTENT**

Fraudulent intent is rarely amenable to proof by direct evidence, thus it may be inferred from circumstantial evidence. *McCormick v. Security State Bank*, 822 F.2d 806, 808 (8th Cir. 1987). Specifically, a trial court may infer fraudulent intent under Section 727(a)(4) from the facts and circumstances in a case, given the difficulty in relying only on a debtor's testimony on state of mind. *Sears*, 246 B.R. at 350. In addition, in the context of an objection to discharge, fraudulent intent may be shown by either actual intent to deceive or by a reckless indifference to the truth. *In re Sholdra*, 249 F.3d 380, 382 (5th Cir. 2001).

In this case the circumstances of the Debtors' pattern of concealment, their pursuit by a judgment creditor, and their method of conducting their affairs in cash for some time prior to their bankruptcy filing, establish the requisite intention to hinder, delay or defraud their creditors. However, it is not necessary for the court to rely solely upon circumstantial evidence to make the finding regarding intent. In this case there is direct evidence of mental state and intent. Duane Roberts will testify, consistent with her deposition testimony, that the Debtors undertook the pattern of using cash, rather than a checking account, because they were afraid their creditors would find it and freeze it or take a lien on it and the Debtors thought they could thwart this if they withdrew the funds in cash. This is a direct admission that the Debtors moved to an untraceable cash system to hinder, delay and defraud their creditors.

Even if there were not direct evidence of intent, or overwhelming circumstantial evidence of fraudulent intent, it is at least abundantly clear that the Debtors failed to include their assets out of a reckless indifference to the truth. Here, from the outset, the debtors have shown a disdain for the bankruptcy process as a whole. Their demeanor gives the impression that they can't be bothered with nosey questions about what they deem to be immaterial

amounts of money. For example, Duane Robert's will testify, consistent with her deposition testimony, that she was justified excluding her Tourmaline ring from her schedules because she had only paid a thousand dollars for it. Lyle Gross will testify that he did not include a cash value life insurance policy worth \$170 on his schedules because it was insignificant. At an absolute minimum the Debtors' conduct in failing to include all of their assets on their bankruptcy schedules is a reckless indifference to the truth.

The Debtors disregard for the truth extends beyond their failure to include all of their assets on their bankruptcy schedules. The evidence will demonstrate that they gave knowingly false answers to questions at their 341 examination and their respective depositions relating to their past financial dealings, as well as the nature and extent of their assets. In the case of Duane Roberts, the evidence will demonstrate that, within the same examination, she all but admits that she was not truthful during an earlier portion of the examination. The evidence will demonstrate that this was not the result of a spontaneous desire to tell the truth, but rather as a result of a misstep in keeping her story straight.

#### **FAILURE TO ACCOUNT/BURDEN OF PROOF**

In an adversary proceeding to deny a discharge, the plaintiff must present evidence to support a finding of fact on the required elements. Once plaintiff does this, the burden of production shifts over to the debtor. *Sears*, 246 B.R. at 350. In adversary proceeding to deny a debtor's discharge based upon his failure to satisfactorily explain loss or diminution of assets, once the plaintiff demonstrates a deficiency of assets, the burden shifts to the debtors to explain this loss by providing reasons which are definite enough to convince court that no assets are missing. If a debtor's explanation is too vague, indefinite or unsatisfactory, the debtor is not entitled to discharge. *In re Sendeky*, 283 B.R. 760, 766 (8th Cir. BAP 2002). Thus, a plaintiff

need not establish that debtor acted knowingly or fraudulently in dissipating assets in order to obtain denial of a debtor's discharge. All the Plaintiff must do is to identify missing assets, whereupon the debtor must provide a satisfactory explanation for what happened to these assets. *In re Ryan*, 285 B.R. 624, 632 (Bankr. W.D. Pa. 2000). This explanation must leave the trier of fact with no cause whatsoever to wonder where the assets went. *Id.*

In this case the cash that passed through the Debtors hands pre-petition and the assets included on the insurance application have not been explained by the debtors. The Plaintiff expects the Debtors will attempt to back into an explanation by providing a summary income and expense schedule to indicate that they must have used the cash to pay bills because the bills somehow were paid. It appears they will attempt to do this by using a demonstrative display consisting of a spread sheet with thousands of cells, none of which will have any evidentiary foundation. Further, the spreadsheet is premised upon the circular reasoning that the Debtors have disclosed all of their income and assets and that since they bills apparently were paid, the debtors must have used the cash they took to pay the bills. This reasoning is circular because the starting premise for the Debtors' attempt to account for their assets is that they have, in fact, disclosed all of their assets. This attempt to "back into" an inference as to what became of the cash is insufficient to explain the disposition of assets.

The bare explanation that a debtor used the missing funds to "pay bills" is insufficient to avoid a denial of discharge. *In re Gray*, 295 B.R. 338, 346 (Bankr. W.D. Mo. 2003). Likewise, to obtain a bankruptcy discharge it is insufficient for a debtor to respond to questions about their financial affairs with "I don't know" or "I didn't keep records." *See In re Morris*, 2003 WL 23018193 (Bankr. N.D. Okla. 2003). A debtor's explanation for a loss of assets must be buttressed by substantial documentation. *In re Costello*, 2003 WL 22324880 (Bankr. N.D. Ill.

2003). Accordingly, their account of the disposition of their assets must be corroborated by sources other than their own testimony. See *In re Tran*, 297 B.R. 817, 836 (Bankr. N.D. Fla. 2003); *In re McNamara*, 310 B.R. 664, 667 (Bankr. D. Conn. 2004).

Finally, Lyle Gross will testify, consistent with his testimony at his 2004 examination, that Duane was in charge of administering the bank accounts of behalf of their family. Duane will testify, consistent with her deposition testimony, that she doesn't know anything about the bank accounts and that, in reality, Lyle is the one who knows. These are highly educated, sophisticated debtors with access to professional help with their financial affairs. Their consistent disavowal of knowledge of their financial affairs is not the result of an inability to understand the operation of a checking account. It is a deliberate, intentional attempt to conceal their financial affairs.

#### CONCLUSION

Accordingly, for the reasons stated, the trustee respectfully requests the court enter its order for judgment denying the Debtors the entry of a discharge.

Dated: August 11, 2004

DUNLAP & SEEGER, P.A.

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