

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
TOMMY LESTER GRICE)	
(Chapter 7 Case Number <u>02-42982</u>))	Number <u>02-4141</u>
)	
<i>Debtor</i>)	
)	
)	
SARAH E. GRICE)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
TOMMY LESTER GRICE)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

Debtor filed his case seeking relief on September 16, 2002. In his bankruptcy petition, Debtor has requested that his debt to the Bank of Lumber City (“Lumber City”) be discharged. Debtor’s former wife, Sarah E. Grice (“Sarah”), filed an adversary complaint on November 1, 2002 objecting to the discharge of the Lumber City debt. The

trial was conducted on March 13, 2003.

This Court has jurisdiction pursuant to 28 U.S.C. §157 (a) and (b)(1) over this core proceeding. Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor and Sarah were divorced in the Superior Court of Jeff Davis County by virtue of a Final Judgement and Decree (“decree”) dated May 6, 2002. Pl.’s Ex. 1. The decree incorporated a written agreement that the parties had entered into on March 19, 2002. Id. The only provision in the documents that is contested is Debtor’s obligation arising under §XII of the agreement which provided in part, “that the HUSBAND shall be responsible for... one half of the loan payment to the BANK OF LUMBER CITY.” In §XIII, Sarah was made liable for the remaining part of the Lumber City debt.

A note of approximately \$15,000 was taken out from Lumber City by the parties during the term of their marriage to refinance certain credit card debt that had been primarily incurred by Debtor. The note required monthly payments of approximately \$350.00. Sarah’s parents pledged their 1995 Ford Windstar Van and 15 foot aluminum boat to assist the parties in obtaining this note. While the van is owned by Sarah’s parents, Sarah

has possession of it and it is her only means of transportation.

Debtor has failed to make any payments on the Lumber City debt since he filed his bankruptcy petition. Thus, Lumber City filed a Motion to Modify the Automatic Stay in order to take possession of the van and boat that secured the debt. Lumber City argued that there was insufficient equity in the collateral. On his petition, Debtor listed the value of the collateral as \$3,000 and the outstanding debt as \$13,766. On November 1, 2002, I granted Lumber City's motion.

Pursuant to the settlement agreement, Sarah was given sole physical and legal custody of the parties' minor child. In addition, both Debtor and Sarah waived any further claim and right each had to alimony, maintenance or support of any nature from the other or his or her estate. Pl.'s Ex. 1, Agreement §XV. The agreement further stipulated that Debtor's gross income was \$1,893.72 per month while Sarah had gross monthly income of approximately \$700.00. Id. at §VI.

The Superior Court found that the support guidelines under Georgia law for one child ranged from 17 to 23 percent of the noncustodial parent's gross income. Accordingly, the Court ordered Debtor to pay monthly child support in the amount of \$321.93, which amounted to 17% of his income. Further, it set forth the statutory 18 "special

circumstances” that are to be considered under Georgia law in determining the appropriate level of child support. Of the 18, the only circumstance checked by the Court as applicable was item 16, “[t]he cost of accident, sickness or life insurance coverage and expenses for dependent child.” In particular, items 9¹ and 11² relating to other support and debt were not checked. The provision for child support as enumerated by the Court followed the agreement between the parties in all material respects. As a result of Debtor’s sporadic work history,³ he has failed to provide child support and health insurance⁴ for his child for much of the period since the date of the divorce.

Sarah contends that Debtor entered the divorce settlement fraudulently and in bad faith because he then had the intention to file bankruptcy and avoid payment of the obligation to Lumber City in violation of 11 U.S.C. §523(a)(2)(A). Likewise, she asserts that the debt to Lumber City should be excepted from discharge because it was for willful and malicious injury by the debtor under §523(a)(6).⁵ Finally, she argues that Debtor’s debt to

¹Item 9 stated: “Other support a party is providing or will be providing, such as school tuition.”

²Item 11 stated in part: “Extreme economic circumstances: a) Unusually high debt structure . . . ”

³Debtor’s testimony revealed that he has been employed at four different jobs since 2001; however, he has been unable to find work since December 2002.

⁴Sarah testified that she has since arranged for their child to be insured by Peach Care, a state program that provides health insurance for uninsured children. Further, she stated that she has received some reimbursement from Debtor for health insurance after a court proceeding in December 2002.

⁵The evidence introduced at trial was insufficient to support Sarah’s contention that the Lumber City debt should be excepted from discharge pursuant to either §523(a)(2)(A) or §523(a)(6).

Lumber City is non-dischargeable pursuant to §523(a)(5) as it is in the nature of alimony, maintenance or child support . Sarah contends that she agreed to the lower support level only because of Debtor’s agreement to pay one-half of the loan payment to the Bank of Lumber City; however, she was aware that the agreement did not list the assumption of debt as a special circumstance resulting in a lower child support payment. She said she signed the agreement only because she believed it to be the best agreement possible under the circumstances.

Debtor denies that the assumption of the debt to Lumber City was a factor in determining child support and asserts that the only reason for the reduction of such support was his agreement to pay medical insurance for the child which “costs” him approximately \$130.00 per month. Thus, Debtor is seeking the discharge of his debt to Lumber City.

CONCLUSIONS OF LAW

Section 523(a)(5) provides that a Chapter 7 discharge does not discharge an individual from any debt-

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 government unit, or property settlement agreement, but not

to the extent that—

...

(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; . . .

In Smith v. Smith (In re Gene Kyle Smith), Adv. Nos. 96-2054 & 96-2085, Ch. 7 Case No. 95-20524 (Bankr. S.D. Ga. Dec. 30, 1997), this Court articulated the following legal framework for an (a)(5) determination:

The burden of proof in establishing the § 523(a)(5) exception is on the non-debtor spouse. However, although exceptions from discharge are normally construed strictly against the objecting creditor in order to provide the debtor with a “fresh start,” policy considerations require a bankruptcy court to construe domestic relations exceptions more liberally.

Under [§] 523(a)(5), the non-debtor spouse must show that the obligation in issue is actually in the nature of support. If this burden is met, the burden of going forward shifts to the debtor to rebut the evidence that the provision is actually in the nature of support under [§] 523(a)(5). The ultimate burden remains with the creditor seeking to except the debt from discharge. . . .

. . . . [T]he bankruptcy court must independently assess the character of an obligation arising out of a divorce and determine whether it is in the nature of alimony. Section 523(a)(5) requires that the bankruptcy court determine nothing more than whether the payment obligation is in the nature of “alimony, maintenance, or

support.” No precise inquiry into the parties’ present financial circumstances is required; only a simple inquiry into the nature of the obligation, liquidating known amounts and leaving any issue of future modifications to the applicable state court.

In determining whether a debtor’s obligations is in the nature of support, the intent of the parties [or the trier of fact] at the time of the settlement agreement or trial is dispositive. While a label placed upon spousal obligation is not dispositive in determination of dischargeability, it is indicative of the parties’ intent.

Id. slip op. at 10-12 (internal citations omitted). The relevant time for making the § (a)(5) analysis is the time of the decree. Id. at 11.

Often, agreements that are negotiated in dissolution proceedings do not result in obligations that are easily categorized as either nondischargeable support payments or dischargeable property settlements. Thus, factors to determine the intent of the parties have been established. They include any comparative disparities in earning capacities, potential business or employment opportunities, physical conditions, educational backgrounds, probable future financial needs, and the benefits the parties would have received had their marriage not ended. Id. at 12 (citing Dennis v. Dennis (In re Dennis), 25 F.3d 274 (5th Cir. 1994)). Also, “[a]n obligation that serves to maintain daily necessities such as food, housing and transportation is indicative of a debt intended to be in the nature of support.” In re Gianakas, 917 F.2d 759, 763 (3rd Cir. 1990). *See also* In re Sanders,

2000 WL 33950018, *3 (Bankr. S.D. Ga. 2000) (Davis, J.) (noting that bankruptcy code is not to be used to "deprive dependants . . . of the necessities of life" (quoting Carver v. Carver, 954 F.2d 1573,1579 (11th Cir. 1992))).

Courts have generally acknowledged that a divorce-related automobile loan assumption constitutes support under 11 U.S.C. 523(a)(5). *See* Wellner v. Clark (In re Clark), 207 B.R. 651, 654 (Bankr. E.D. Mo. 1997) (holding that economic disparity between Plaintiff and Debtor supports finding that Debtor's obligation pursuant to divorce to make car payments and to hold Plaintiff harmless on the car was in the nature of support); Lane v. Lane (In re Lane), 147 B.R. 784, 787 (Bankr. N.D. Okla. 1992) (holding that car provides a necessity of life in the form of transportation and therefore does contribute to support and is nondischargeable); Ferebee v. Ferebee (In re Ferebee), 129 B.R. 71, 74 (Bankr. E.D. Va. 1991) (holding that agreement to pay car lease is nondischargeable where alimony, maintenance, or support was bargained away in favor of obligation of spouses to hold each other harmless on various debts); Harrod v. Harrod (In re Harrod), 16 B.R. 711, 714 (Bankr. W.D. Ky. 1982) (holding automobile payments not dischargeable even though payable to third party); Holland v. Holland (In re Holland), 48 B.R. 874, 877 (Bankr. N.D. Tex. 1984) (holding husband's obligation under marriage separation agreement to pay off indebtedness on an automobile awarded to wife nondischargeable support where child support was such that it was necessary that wife maintain gainful employment and

automobile had been encumbered to make community expenditures). *But see* Snipes v. Snipes (In re Snipes), 190 B.R. 450, 452 (Bankr. M.D. Fla. 1995) (holding that obligation to make car payments on vehicle awarded to ex-wife dischargeable where obligation not contingent on death or remarriage and not designed to balance income of parties); Jones v. Jones (In re Jones), 28 B.R. 147, 151 (Bankr.W.D. Tenn.1983) (holding debtor's obligation to repay an automobile loan on his former wife's car, arising from divorce decree, which obligation had been reduced to a \$3,700 judgment after the car had been repossessed, was dischargeable).

Sarah testified that the van securing the debt to Lumber City was the only means of transportation for her and her child. Since Debtor filed his petition, I have granted Lumber City's Motion to Modify the Stay such that it can now maintain an action to repossess the van. Due to Debtor's failure to make payments as mandated by the separation agreement, Sarah is in jeopardy of losing the van. Substantively, there is little difference between this situation and the cases holding that a debtor cannot discharge a debt to make car payments in favor of a non-debtor spouse. In both cases, the non-debtor spouse risks losing the use of a vehicle that is necessary to her livelihood.

Other traditional factors support a finding that this payment is actually in the nature of support. At the time of the divorce, Debtor's income greatly exceeded Sarah's.

Thus, the assumption of debt by Debtor served to balance their respective income. Although the Lumber City debt was not designated as alimony, maintenance or support in the decree or settlement agreement, payment of the debt is required to maintain an asset, the van, that is necessary for Debtor's ex-spouse and his child. Since the divorce, Debtor has failed to satisfy his obligations to Sarah and their child. Taking these facts into consideration, I find that the Debtor's agreement to pay the debt to Lumber City is in the nature of support. If this Court allows Debtor to discharge the Lumber City debt, both Sarah and his child will suffer material harm.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's obligation to Lumber City is excepted from discharge.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of April, 2003.

