

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

In the matter of:)	
)	
CADMUS MADISON WILCOX)	Adversary Proceeding
JESSIE M. WILCOX))	Number <u>92-2006</u>
(Chapter 7 Case <u>92-20042</u>))	
)	
<i>Debtors</i>)	
)	
)	
CADMUS MADISON WILCOX)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
MARILYN WILCOX))	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

On July 9, 1992, a hearing was held upon a Complaint to Determine Dischargeability of a divorce related debt pursuant to 11 U.S.C. Section 523(a)(5). Upon consideration of the evidence adduced at trial, the briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor/Plaintiff and his former wife, Defendant, were divorced on August 13, 1990, after an uncontested proceeding. The parties had been married for 32 years and had two children from the marriage. Defendant worked little during the marriage and had little education; she focused her attentions on raising the two children, who are now adults. Defendant went back to work after the children were grown.

The parties entered into a "Contract and Agreement" which was incorporated into the Final Decree of Divorce. The Debtor owned real estate in Coffee County, Georgia, which included the marital residence and a mobile home park. Currently, the two adjoining pieces of real estate are subject to two outstanding mortgages. One mortgage is held by Bluebonnet Savings Bank, assignee of Douglas Federal Savings and Loan Association, in the amount of \$1,454.00, and one to Southeastern Bank, Assignee of First Georgia Savings Bank, in the amount of \$11,739.71. The property was appraised at \$55,000.00. The payment for the two mortgages combined is \$305.00 per month.

The Defendant/Ex-wife was awarded the real estate in the divorce proceedings. The divorce decree provides as follows:

Second party [Defendant] shall have the use and possession of the former home of the parties, located at Route #1, Box 71A, Nicholls, Georgia, and first party will pay and be responsible for the indebtedness on the same in favor of Fulton Federal, Douglas, Georgia, in the approximate amount of Three Thousand Dollars (\$3,000.00) payable at the rate of Eighty-Five Dollars (\$85.00) per month, holding the second party harmless on same. First party agrees to deed his interest, in and to said former home, to second party. First party also agrees to pay and be responsible for any other indebtedness on same and hold second party harmless. If legal action is brought against then first party or the second party to recover any of the above listed debt, the first party agrees to indemnify or hold second party harmless, and in addition to pay all attorney's fees and costs of collection which she may incur as a result of such liability.

See Defendant's Exhibit 1, Divorce Decree.

The obligation to make the mortgage payments was contained in a paragraph subsequent in the agreement to the paragraph which divided the marital property between the parties. The obligation was not specifically labelled property division or alimony. Plaintiff testified at the hearing that he did not intend to pay "alimony" to his ex-wife, but intended to settle the property issues.

At the time of the divorce, Defendant was receiving \$200.00 per week, or approximately \$800.00 per month, in alimony or support from her husband. Additionally, her husband was paying the \$305.00 per month mortgage payment. Defendant also had income of \$600.00 per month from her job at a retail clothing store and \$175.00 per month rental income from the mobile home park. Defendant testified that she depended on her husband for support and needed him to pay the \$305.00 per month mortgage payment in order to meet her expenses. Defendant has had to make the monthly mortgage payment since August, 1991, in order to prevent foreclosure. Defendant testified that she paid \$2,491.95 on the mortgages until she refinanced the debt.

Defendant testified that she went back to college to study accounting. According to Defendant, Plaintiff paid for two quarters of her schooling and she financed the rest through grants, work-study, and her income. Plaintiff and Defendant had been married for 32 years. However, they had been separated several years before the divorce became final. Prior to the time of the divorce, Plaintiff had been doing electrical work and earning approximately \$41,000.00 per year. Plaintiff testified that he was involved in four separate accidents prior to 1990 and that he received settlements in those cases totalling over \$4,000.00. Plaintiff used the settlement money to pay his living expenses. Plaintiff failed to produce his tax return for 1989, the year prior to the

divorce. Plaintiff did produce his 1990 tax return which reflected an income of \$14,550.00. Plaintiff testified that he sustained a severe back injury and was sick and in the hospital during much of 1990. Plaintiff had surgery in February of 1990 and was out of work for approximately one year. Plaintiff testified that he had disability insurance to cover the mortgages during part of the time he was sick. Plaintiff is currently able to work although he is now unemployed and receiving unemployment benefits.

Plaintiff testified that he obtained the second mortgage to pay off his hospital bills. Plaintiff also claimed that Defendant benefitted from part of the mortgage funds, which allegedly were used to pay for her education and her automobile. Defendant denied these assertions. Defendant testified that she did not know about the second mortgage for several weeks and that she did not receive any of the funds from the mortgage.

CONCLUSIONS OF LAW

Section 523(a)(5) of the Bankruptcy Code creates an exception to discharge of any debt

. . . 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 . . . designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. §523(a)(5). The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law." In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985) (quoting H.R.Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U.S.Code Cong. & Admin. News 5787, 6319). To be declared non-dischargeable, the debt

must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904.

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). The exceptions to discharge in Section 523 must be proved by a preponderance of the evidence. Grogan v. Garner, __ U.S. __, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.¹ *Accord* Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986) It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46. *Accord* Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983). According to the Eleventh Circuit in Harrell:

The language used by Congress in Section 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is 'actually in the nature of alimony, maintenance, or support.' The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell court determined that only a "simple inquiry" was needed, the Court did not set forth the guidelines or factors to be considered.

¹ Harrell overrules *In re Bedingfield*, 42 B.R. 641 (S.D.Ga. 1983), only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding." Bedingfield, 42 B.R. at 646. The Eleventh Circuit in Harrell concluded that only the facts and circumstances at the time the decree was entered are to be considered. Harrell, 754 F.2d at 906-07.

The Bankruptcy Court may consider state law labels and designations although bankruptcy law controls. *See In re Holt*, 40 B.R. 1009, 1011 ("There is no federal bankruptcy law of alimony and support. Such obligations and the rights of the parties must be devined [sic] by reference to the reasoning of the well established law of the states.")

The Bankruptcy Court must determine if the obligation at issue was intended to provide support. *Calhoun*, 715 F.2d at 1109. In making its determination, the Court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." *Id.* If a divorce decree incorporates a settlement agreement, the Court should consider the intent of the parties in entering the agreement; if a divorce decree is rendered following actual litigation, the Court should focus upon the intent of the trier of fact. *In re West*, 95 B.R. 395 (Bankr. E.D.Va. 1989). *See generally In re Mall*, 40 B.R. 204 (Bankr. M.D. Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); *In re Helm*, 48 B.R. 215 (Bankr. W.D.Ky. 1985) ("It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super divorce courts.' It is only those cases . . . in which former spouses settle their support differences by agreement albeit with resulting state court approval, that bankruptcy courts may later reopen and re-examine.")

In order to determine if an obligation is actually in the nature of support, the following factors must be examined:

- 1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called

"property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.

2) "The presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. (citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977)).

3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into consideration all of the provisions of the decree. See In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987).

As applied to the facts of this case, I conclude that the Defendant/Spouse has proved by a preponderance of the evidence that the obligation at issue is actually in the nature of support.

The circumstances at the time the settlement agreement was entered into indicate that Defendant needed some support from her husband. Defendant was receiving \$200.00 per week, \$800.00 per month, from her husband, in addition to the \$305.00 per month mortgage payment.

This \$800.00 per month appears to have been intended as temporary alimony. The parties did not fully explain why the payments were terminated. The divorce decree required Plaintiff to continue paying the mortgages. No other provision provided for Defendant's support. Although this provision requiring the mortgage payment is not designated as either alimony or support, the provision appears to be in the nature of support.

Defendant proved a disparity of income between herself and her former spouse. Plaintiff had been earning \$41,000.00 per year and had been able to afford the \$800.00 per month "temporary alimony" and the \$305.00 per month mortgage payment up until the time of the divorce. Plaintiff had been supporting Defendant during their lengthy 32 year marriage and while their children were growing up. Defendant had income of \$600.00 per month from her job and \$175.00 per month rental income, which is much less than Plaintiff was earning from his electrical work.

The mortgage obligation does not terminate on Defendant's death or remarriage, and thus this factor suggests that the payment is not to be considered alimony.

The fourth factor is whether or not the payment provision is unreasonable. The \$305.00 per month payment is small for a mortgage and considerably less than rent for most apartments. The payment provision is reasonable in light of Plaintiff's income at the time of the divorce and considering Defendant's support needs.

The final matter to be addressed is Plaintiff's income at the time of the divorce. Plaintiff testified that he was in and out of the hospital during 1990, immediately before the divorce became final. However, Defendant testified that she was receiving the \$800.00 per month payments until the divorce became final. Indeed, Defendant proved that Plaintiff continued to pay the mortgage until August, 1991, after the divorce. Defendant sufficiently showed that Plaintiff had

significantly more income than she did at least up to the time of the divorce. It was at or close to the time of the divorce that Plaintiff began to have his medical and financial difficulties.

According to Harrell, this Court may not consider a spouse's current income and situation in deciding if a payment provision was intended as support or reasonable. Harrell, 754 F.2d at 906-07. The Court should consider the ability to pay and intent of the parties prior to and as of the time the divorce became final. If there has been a significant change in circumstances since the divorce, the state court has the authority to permanently or temporarily adjust a support provision; this Court does not have such authority.

I can certainly understand Debtor's inability to pay his support obligations during a period of sickness or unemployment. However, the duty of this Court is to determine if the support obligation was actually in the nature of support. Despite Plaintiff's testimony that he did not intend to give his wife "alimony," I conclude after balancing all the relevant factors that the \$305.00 per month mortgage payment was actually in the nature of support.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Cadmus Madison Wilcox to Marilyn Wilcox for payment of the mortgage debt upon her home and mobile home park is non-dischargeable in this proceeding.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1992.