

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

In the matter of:	)	
	)	Adversary Proceeding
BENNY E. TYRE	)	
(Chapter 7 Case <u>93-20320</u> )	)	Number <u>93-2034</u>
	)	
<i>Debtor</i>	)	
	)	
	)	
MARTHA DOMINEY	)	
	)	
<i>Plaintiff</i>	)	
	)	
	)	
v.	)	
	)	
BENNY E. TYRE	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM AND ORDER**

Plaintiff initiated this proceeding on August 23, 1993, seeking to have a debt declared nondischargeable in Defendant's underlying Chapter 7 case under 11 U.S.C. Section 523(a)(5). Defendant timely filed his Answer on September 17, 1993, admitting the existence of the debt but denying that it is non-dischargeable. The matter was tried on December 7, 1993. Based on the evidence introduced at the hearing and the record in the file, I make the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

Plaintiff and Defendant were married for approximately ten years before receiving a divorce on July 24, 1992. The parties had one minor child, who was 17 years of age at the time of the divorce. The divorce decree, entered by the Superior Court of Glynn County after a contested proceeding, sets forth the following terms for the parties' divorce:

- 1) Plaintiff was awarded permanent custody of the minor child.
- 2) Defendant was ordered to pay \$100.00 per week to Plaintiff as permanent child support for the maintenance of the minor child, with said payments ceasing when the child reached eighteen years of age.
- 3) Plaintiff was awarded the sum of \$19,500.00 to be paid by Defendant in 390 consecutive weekly installments of \$50.00 to begin immediately after the child support obligation ceased. The award is characterized as a "property settlement" for debts paid by Plaintiff on behalf of Defendant.

During most of the parties' marriage, Defendant owned and operated a shrimp boat. At the time of the divorce, however, Defendant was employed as a fishing boat captain by Sun State Marine, where he earned an annual gross income of approximately

\$27,500.00.<sup>1</sup> Plaintiff was employed by the Glynn County Board of Commissioners, earning an annual gross income of approximately \$32,000.00 plus benefits.

Plaintiff testified that she had, during the course of her marriage to Defendant, borrowed substantial sums of money in an effort to support Defendant in the operation of his boat. Specifically Plaintiff testified that she entered into the following obligations for the exclusive benefit of Defendant and the operation of his boat:

- 1) Plaintiff signed a \$14,000.00 promissory note with Sears Consumer Finance to allow Defendant to make a down payment upon and make repairs to render seaworthy a shrimp boat for his business. As additional security for this obligation, Plaintiff granted the lender a second mortgage on the family home, which Plaintiff owned exclusively. The Defendant did not sign and is in no way legally liable on this note. The check written by the lender, however, was made out to Defendant, and the money from this loan was allegedly used exclusively on matters related to Debtor's ownership of his shrimping boat. Defendant has never made any payments on this note.
- 2) Plaintiff borrowed \$5,000.00 from her credit union to enable Defendant to buy his

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<sup>1</sup> There is some confusion as to what Defendant's current take-home pay is. Defendant's schedules, filed with his Chapter 7 petition, indicate that his average monthly net income is \$1,240.00, while his total gross income over the two years preceding his bankruptcy was \$55,000.00. Defendant testified, however, that he had a weekly net income of approximately \$699, which averages out to a monthly net income of approximately \$2,019.00. Additionally, it was revealed that there is a very large difference between Defendant's current gross and net income. Defendant's explanation for these discrepancies is that he only works approximately 46 weeks out of the year, working two weeks straight and then having one week off. Consequently, he has a net income of \$699.00 per week for the two weeks that he works and then no income for the week that he does not work. Defendant also indicated that his weekly income can vary substantially depending upon the number of hours he is required to work.

shrimp boat out of foreclosure. The money was used to extinguish the first lienholder's interest, which allowed Defendant to retain ownership of his boat. The credit union is apparently still deducting the payments on this note from Plaintiff's pay check.

- 3) Plaintiff co-signed several other notes made by Defendant with Barnett Bank and First Georgia Bank during the course of their marriage.
- 4) Plaintiff and Defendant filed joint tax returns for the years of 1985 and 1986, which Plaintiff was forced to pay when Defendant did not.

On cross examination, Plaintiff admitted that she did not have written evidence for all of these obligations.

Plaintiff testified that Defendant's shrimping business never generated any appreciable income for the household, and in fact, the business was consistently a liability upon the family finances after the first or second year of operation. Plaintiff further testified that Defendant did not operate his boat consistently even when he had the opportunity.

Thus, Plaintiff alleges that she was personally liable on approximately \$19,500.00 of the above-described debt at the time of the divorce. As of the date of the hearing on this matter, Plaintiff's reduced liability on these obligations was estimated to be approximately \$15,000.00, due to the fact that Plaintiff has been paying the debts from her

personal income since the time of the divorce. Plaintiff has struggled to pay these obligations and meet her current living expenses, requiring her, at times, to work two or three jobs to cover all of her expenses. Plaintiff is not, however, currently behind in payment on any of her bills, including the obligations at issue in this case.

Finally, Plaintiff admitted that she was represented by counsel in her divorce proceeding, and that she did not pray for alimony or spousal support in her complaint for divorce. Plaintiff testified that the reason she did not seek any sort of spousal support from the Defendant is because he was, at the time of the divorce, in a psychiatric ward.

Defendant's testimony varied significantly from that of Plaintiff's. Specifically, Defendant testified that he had only borrowed money from Plaintiff on one occasion, and that was the \$5,000.00 that he used to get his boat out of foreclosure. Defendant testified that the fishing industry is very unpredictable, and he would have particularly good years followed by particularly bad years. In the years where he had income, however, Defendant stated that he did contribute to the household. Defendant also admitted that some money from the household went into his shrimp boat business, but that he could not put a figure on the amount. Defendant further testified that he was earning a net income of approximately \$625.00 per week at his position with Sun State Marine when the divorce took place in July of 1992. Prior to that time, however, he had been unemployed for almost one year.

Finally, Defendant testified that he cannot afford to pay Plaintiff the \$50.00 per week called for in the decree and needs the debt discharged as part of his Chapter 7 liquidation.

Based upon this evidence, Plaintiff argues that, looking at the true nature of the award and not the nomenclature associated with it in the divorce decree, it is clear that the \$19,500.00 was intended as support for Plaintiff. Defendant counters that it is the intent of the trier of fact that controls, and that there is no credible evidence that the Superior Court intended the award to be anything other than a property settlement between two parties who basically were on equal financial footing.

Preliminarily, I find as fact that Defendant owes Plaintiff \$19,500.00, which debt arose because Plaintiff borrowed this amount for Defendant's exclusive benefit during the parties' marriage. Defendant admits, in his Answer to Plaintiff's complaint, that the divorce decree imposes upon him an obligation to pay Plaintiff \$19,500.00 in installments of \$50.00 per week. The divorce decree itself unambiguously awards the \$19,500.00 to Plaintiff as compensation for "debts paid by the Plaintiff on behalf of the Defendant . . .", and Plaintiff's testimony was completely consistent with the language in the decree. As a result, I find Defendant's testimony to the contrary unpersuasive.

#### CONCLUSIONS OF LAW

11 U.S.C. Section 523(a)(5), in relevant part, provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor 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, a governmental 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.

The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state laws." In re Harrell, 754 F.2d 902 (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 (or spouse asserting an exception to dischargeability) has the burden of proving that the debt is within the exception to discharge. In re 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, 498 U.S. 279, 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.<sup>2</sup> *Accord*

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<sup>2</sup> Harrell overrules In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (Edenfield, J.), 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. 641 (S.D.Ga. 1983). The Eleventh Circuit in Harrell concluded that only the facts and circumstances existing at the time the decree or agreement was entered are to be considered. Harrell, 754 F.2d at 906-07.

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); Long v. Calhoun, *supra*. 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. Other courts have held that, while bankruptcy law controls, a court may consider state law labels and designations in making its inquiry. *See e.g.*, Matter of Holt, 40 B.R. 1009, 1011 (S.D.Ga. 1984) (Bowen, J.)

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 determining whether an obligation is actually in the nature of support, the following factors may be considered:

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 Matter of 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 rather than 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 the provisions of the decree. See In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

Applying these factors to the instant case, I conclude that the award of \$19,500.00, payable in weekly installments of \$50.00, is in the nature of a property settlement. There was no imbalance between Plaintiff's and Defendant's annual gross income at the time of the parties' divorce. If anything, Plaintiff's income exceeded Debtor's and is more stable. Plaintiff was awarded custody of the parties' one minor child and, accordingly, was awarded child support from Defendant until the child reached the age of majority. This child has since reached the age of majority, and there is no evidence that Plaintiff has been or will be unable to provide herself with the "basic necessities"

considering her current income and obligations.

Moreover, the terms of the award itself make it clear that the Superior Court did not intend for the \$19,500.00 award to be considered alimony, support or maintenance. Plaintiff's complaint for divorce did not include a prayer for alimony or other spousal support, and the divorce decree, entered after a contested proceeding, states unambiguously that the \$19,500.00 was awarded as "a property settlement in regards to debts paid by the Plaintiff on behalf of the Defendant . . ." Thus, if the Superior Court awarded the \$19,500.00 as alimony or support, it did so without Plaintiff asking for it and while calling it a "property settlement".

In sum, there is no basis for finding that the award is anything other than what it is called under the divorce decree; a "property settlement". While the Superior Court terminology is not binding, none of the traditional bases for finding an obligation to be "actually in the nature of support" are present. Plaintiff/wife earned more than Debtor and her income was stable. Thus there is no imbalance suggesting that the "recipient spouse needs support". The minor child was provided for with a specific support agreement which has been complied with. And the obligation to repay which stretched 390 weeks or 7½ years does not terminate on the death or remarriage of Plaintiff. In short, there is no federal basis for considering this obligation to be anything other than what the decree labelled it. While Defendant's conduct in inducing Plaintiff to become solely liable for these debts is most unsavory, it is not a proper ground for concluding that the substance of the award is actually in the nature of support. Accordingly, Defendant's debt to Plaintiff in the amount of

\$19,500.00, payable under the terms set forth in the parties' divorce decree, is dischargeable in his Chapter 7 proceeding.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Debtor/Defendant, Benny E. Tyre, to pay to Plaintiff, Martha Dominey, \$19,500.00, under the terms set forth in the Final Judgment and Decree by the Superior Court of Glynn County, Georgia in Civil Action No. 89-02317, is dischargeable in Debtor's Chapter 7 proceeding.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of March, 1994.