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

In the matter of:)	
)	
KENNETH L. LOWMON, JR.)	Adversary Proceeding
(Chapter 13 Case <u>92-50074</u>))	Number <u>92-5016</u>
)	
<i>Debtor</i>)	
)	
)	
KENNETH L. LOWMON, JR.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
GARY L. BYRD)	
DONNA FAYE LOWMON BYRD)	
)	
<i>Defendants</i>)	

MEMORANDUM AND ORDER

On July 6, 1992, a hearing was held to consider Debtor's Motion for Contempt and Application for Temporary Restraining Order. Upon consideration of the evidence presented at the hearing, the stipulation of fact and briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed his Chapter 13 petition on January 29, 1992. Debtor's ex-wife, Donna Byrd, has custody of the minor child from their marriage. Mrs. Byrd has since remarried, and her husband, Defendant Gary Byrd, seeks to adopt the minor child.

On February 13, 1992, Gary Byrd filed a petition to adopt his stepdaughter. The adoption proceeding was filed after Debtor filed his Chapter 13 petition. No Motion for Relief from Stay was filed. According to the parties' stipulation of facts, the "adoption petition alleges that a surrender or termination of parental rights is not required as a prerequisite to the filing of the petition of adoption, because the Debtor, for a period of one year or longer immediately prior to the filing of the adoption petition, without justifiable cause, had significantly failed to communicate or to make a bona fide attempt to communicate with the child as required by judicial decree." *See* Brief in Opposition to Application of Stay and Temporary Restraining Order, page 2, Stipulation of Fact, filed July 10, 1992.

A claim for the child support pre-petition arrearage, approximately \$9,199.45, has been allowed in Debtor's Chapter 13 case. Debtor's Chapter 13 plan was confirmed on June 26, 1992, with no disbursements made as of the date of the July 6, hearing. The parties were unable to stipulate as to whether or not Debtor was current on his post-petition child support payments which are paid directly by the Debtor and not funded in Debtor's Chapter 13 plan.

Gary Byrd did not file a Motion for Relief from Stay prior to filing the adoption petition in state court. Mr. Byrd now alleges that the adoption proceeding should not be subject to the stay at all, and if the court should decide the stay is applicable to the proceeding, that relief from the stay should be liberally granted with retroactive effect to the date of the filing of the adoption petition. The Byrds further argue that the adoption is not an action against the Debtor as the biological father is only entitled to notice if he does not consent to the adoption.

Debtor argues that the stay should apply rendering the adoption petition null and void as it was filed after the date of the Chapter 13 petition and while the automatic stay was in effect. Debtor's attorney argued at the July 6th hearing that state law allowed adoption on alternative grounds for: (1) failure to communicate with the minor child for a period of one year; or (2) failure to pay child support for a period of one year. Debtor argues that the stay should apply to protect his parental rights.

CONCLUSIONS OF LAW

11 U.S.C. Section 362 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under Section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .

11 U.S.C. §362(a). Section 362 operates as an automatic stay of the commencement of a judicial proceeding against the debtor that could have been commenced before the bankruptcy filing. The purpose of this section is to protect the debtor from his creditors and to provide an orderly administration of the debtor's estate so that one creditor is not unduly favored over other creditors. *See Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992) ("[T]he stay also protects creditors by preventing the premature disbursement of the bankruptcy debtor's estate.")

Section 362(b) provides several exceptions from the automatic stay. Section

362(b)(2), specifically provides an exception from the automatic stay for "the collection of alimony, maintenance, or support from property that is not property of the estate." 11 U.S.C. §362(b)(2). In discussing, Section 362(b)(2), the Eleventh Circuit in Carver, supra, concluded that relief from the stay should be liberally granted in matters of alimony, maintenance, or support. Such family law matters should be left to the state courts instead of the federal courts. Carver, 954 F.2d at 1578.

The Eleventh Circuit further concluded:

[B]ankruptcy and district courts should tread very carefully when asked to impose sanctions for violation of the automatic stay where the actions underlying the violation involve alimony, maintenance, or support. In each case, the court should carefully sift through the facts, keeping in mind the purposes of the automatic stay provision as well as concerns of justice, comity, and judicial economy that support abstention in domestic relations cases. Cf. Kirby v. Mellenger, 830 F.2d 176, 178 (11th Cir. 1987) (diversity exception). Where the purposes of the automatic stay provision would clearly be served by affording a remedy for its violation, and the court would not be required to delve too deeply into family law, the court need not abstain from hearing the claim.

Carver, 954 F.2d at 1579-80. Although the issue before me does not involve precisely alimony, maintenance, or support, the Eleventh Circuit's guidance in the area of family law is helpful. Adoption is surely an area of family law which is beyond the province of this federal court. In Matter of Palmer, 78 B.R. 402 (Bankr. E.D.N.Y. 1987), the bankruptcy court concluded:

[T]o the extent that the state matrimonial court adjudicates personal rights, custodial relationships, and property entitlements, not only is there no overriding compelling federal question, but except for the extent specifically enumerated in 28 U.S.C. §157, the bankruptcy court clearly has no jurisdiction to adjudicate such matters. 28 U.S.C. §157.

Palmer, 78 B.R. at 405. The court concluded it would not interfere with the state court proceedings to determine equitable division of property and would allow relief from the stay as the state court's decisions regarding the obligations of the parties would not affect property of the estate. Id. The court did state that the automatic stay would be in effect with regard to enforcement of any decree of the state court to the extent the court awarded any property of the estate to someone besides the debtor. Id. at 407.

The bankruptcy court in In re Shock, 37 B.R. 399 (Bankr. D.N.D. 1984), went a step further than the court in Palmer to hold that a divorce petition does not come within the meaning of Section 362 and that such a divorce petition would not be subject to the stay at all. The court concluded "it would be nonsensical for this court to modify the stay to permit a divorce proceeding to continue." Shock, 37 B.R. at 400.

Similarly, the bankruptcy court in In re Rook, 102 B.R. 490 (Bankr. E.D.Va. 1989), aff'd 929 F.2d 694 (4th Cir. 1991) (Table),¹ concluded that the automatic stay did not apply "to an act or proceeding that does not affect property of the debtor's estate." Id. at 492. According to the court:

In the realm of domestic relations litigation, matters which do not bear on a debtor's economic status, such as the dissolution of the marital relationship, are not stayed by a bankruptcy court.

Id. (citations omitted).

¹ The table of decisions without published opinions shows the citation appealed from if reported. The table at 929 F.2d 694 shows the appeal from 102 B.R. 490, in Rook, but does not cite the district court decision. Apparently, the district court's decision was not a published or reported decision.

Following the guidance of the above cases, I conclude that the adoption proceeding is not subject to the automatic stay. The rights affected are personal rights of the debtor separate from any rights in property of the estate. The effect of the adoption petition if granted, would not adversely affect the orderly administration of the debtor's bankruptcy estate; instead, the effect would be to eliminate the claim for future post-petition child support. The Defendants are making no claim against property of the Debtor's bankruptcy estate and as such is the case the automatic stay does not apply.

An underlying issue between the parties is that Debtor's plan proposes payment of a past due child support obligation which is a basis for the adoption action. The applicable state statute, O.C.G.A. Section 19-8-10, provides that parental rights do not have to be surrendered voluntarily by a parent:

[I]f that parent, for a period of one year or longer immediately prior to the filing of the petition for adoption, without justifiable cause, has significantly failed:

- (1) To communicate or to make a bona fide attempt to communicate with that child; or
- (2) To provide for the care and support of that child as required by law or judicial decree,

and the court is of the opinion that the adoption is for the best interests of that child.

O.C.G.A. §19-8-10. The child support arrearage is being funded in Debtor's Chapter 13 plan, and it appears that Mrs. Byrd and her daughter will soon be receiving payments.

The Eleventh Circuit in Carver concluded that children should not have to wait on a Chapter 13 confirmation to enforce their state law support rights; the Eleventh Circuit cited

Caswell v. Lang, 757 F.2d 608, 610 (4th Cir. 1985) with approval for this proposition. Caswell v. Lang, supra, held that child support arrearages may not be included in a Chapter 13 plan. However, in this case, no objection to repayment of this obligation in Debtor's plan was filed. In the absence of objection there is no reason to refuse to permit Debtor to make such payments. However, the state statute provides for adoption where there has been no communication or no payment for a year. The purpose of the statute is to allow adoption when the natural father has made no attempt to provide support. I cannot agree that the pendency of the Chapter 13 case should provide Debtor an outlet for avoiding the state law consequences of his previous actions, notwithstanding his current proposal to retire that debt. As the Eleventh Circuit in Carver stated, the Bankruptcy Court should not "be used as a weapon in an on-going battle between former spouses . . ." Carver, 954 F.2d at 1579.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's Motion for Contempt and Application for Temporary Restraining Order are overruled. The adoption petition filed by Mr. and Mrs. Byrd is not subject to the automatic stay and may proceed in State Court.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of August, 1992.