

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

In the matter of:)
)
OJARS JURJANS)
(Chapter 13 Case Number 01-41142))
)
Debtor)

Adversary Proceeding

Number 01-4121

FILED

at 2 O'clock & 00 min P M
Date 4-24-02

JOYCE C. JURJANS)
)
Plaintiff)

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia *RB*

v.)
)
OJARS JURJANS)
)
Defendant)

MEMORANDUM AND ORDER

The former wife ("Plaintiff") of Debtor Ojars Jurjans ("Debtor") brings this Adversary Proceeding seeking to have a debt arising out of their domestic relations decree declared non-dischargeable under 11 U.S.C. § 523(a)(5) and (a)(15). Having considered evidence presented at trial on February 14, 2002, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff and Debtor were married in 1977 and separated in August 1999,

shortly after they had refinanced the first and second mortgages on their home and paid off a number of other outstanding debts. Debtor initially made voluntary payments of \$1,750.00 per month, and later \$1,500.00 per month, in lieu of any court-ordered temporary alimony or support. After their divorce and alimony case had been pending for several months, they arrived at a settlement whereby Plaintiff would receive title to the parties' residence and Debtor would pay her \$1,350.00 per month for an indefinite term. Half of that amount, or \$675.00, was denominated in the decree as alimony, and half was denominated as a division of property.

At the time of the parties' divorce, Debtor's total monthly income was \$3,499.00 and his net monthly income was \$3,092.32. Pl.'s Ex. 4. Plaintiff's income at that time was \$3,341.77, which included the total amount due to her under the decree of \$1,350.00. Pl.'s Ex. 5. Following the date of the divorce, Debtor made payments of \$1,350.00 to Plaintiff for two months. After he filed bankruptcy, he reduced the payment amount by half, contending that \$675.00 was dischargeable.

As a result, beginning in May of 2001, Plaintiff's income was reduced to \$2,666.77, against which she had monthly expenses of \$2,767.83. Pl.'s Ex. 5. The relevant terms of the divorce decree are in Paragraph Two:

The Defendant shall pay to the Plaintiff the sum of One Thousand Three Hundred Fifty and 00/100 (\$1,350.00) Dollars per month, \$675.00 a week of which shall be by way of equitable distribution, and \$675.00 of which shall

be alimony. This payment shall be made on or before the 10th day of each month, commencing with the month of February, 2001.

Pl.'s Ex. 2. In Paragraph One of that decree, the title to the property was granted to Plaintiff, and she was made solely responsible for the mortgage payments, taxes, insurance, and maintenance on that property. Id.

Because of certain changes since the effective date of the decree, Debtor's income has changed in the following respects: His earned income has increased by approximately \$220.00 per month as a result of the fact that he is now working full-time. His Social Security benefit has increased slightly by approximately \$26.00 per month, apparently due to cost of living increases. His military retirement, which was \$1,709.00, according to the financial affidavit given in the divorce, has now been split into two checks, one in the amount of \$1002.00 from military retirement and the other a non-taxable VA disability of \$309.00. After taking into account the tax-free nature of that check, it appears that his total military retirement and VA disability is approximately the same as it was at the time of the decree. As a net result, his income is now slightly higher than it was at the time of the parties' divorce.

Plaintiff petitions the Court to declare non-dischargeable Debtor's entire monthly obligation to Plaintiff. Debtor contends that only the \$675.00 amount denominated in the decree as alimony should survive his anticipated Chapter 13 discharge.

Determination of this issue rests upon whether, and to what extent, the \$1,350.00 awarded Plaintiff in the divorce decree was intended at the time of the divorce to be in the nature of support. Plaintiff contends that the entire \$1,350.00 due to her under the divorce decree was in the nature of support. Debtor contends, to the contrary, that only half of that amount is in the nature of support and that the remaining \$675.00 is in the nature of a property settlement.

CONCLUSIONS OF LAW

11 U.S.C. § 523, which provides that a debt liability designated as alimony, maintenance, or support may not be discharged if “such liability is actually in the nature of alimony, maintenance, or support,” § 523(a)(5)(B), requires a bankruptcy court to determine whether the “support” label accurately characterizes the nature of the obligation. Harrell v. Sharp (In re Harrell), 754 F.2d 902, 906-07 (11th Cir. 1985) (finding ongoing assessment of present need in changing circumstances irrelevant and noting that inquiry’s usual form is deciding whether nature is “support” as opposed to “property settlement”).

Here, the Court must look at the parties’ financial situation at the time of the divorce and assess their intent in entering into the settlement agreement. On this point, the parties’ testimony was remarkably similar. Debtor, Plaintiff, and Plaintiff’s domestic relations attorney all testified that the figure of \$1,350.00 was a compromise figure, but that it represented what they believed at the time was the least amount Plaintiff would need

in order to meet her ongoing monthly expenses after taking into account her other sources of income. Debtor had acknowledged at an earlier time that he agreed in writing to pay Plaintiff the sum of \$1,750.00 for expenses, Pl.'s Ex. 1, but he testified credibly that immediately after the separation he was under some duress to sign that agreement.

The document Debtor signed is ambiguous as to whether the \$1,750.00 figure was ever intended to be binding on either party as to the actual amount of Plaintiff's ongoing expenses. The better evidence comes from the testimony of the parties during and after the pendency of the divorce and from the domestic relations counsel that: (1) \$1,350.00 was the bare minimum that Plaintiff needed in order to make ends meet; and (2) that figure reflected a reduction from the higher amount in order to bring about a compromise which otherwise might have been difficult or impossible to obtain.

Only after that sum was agreed upon did the parties' attorneys discuss allocating half of it to alimony and half of it to equitable division and, in doing so, they took into the account the prospective tax consequences of making that allocation. According to Plaintiff's domestic relations counsel, the attorneys and the parties simply agreed that they would split the burden fifty-fifty and allocate half of his ongoing payments to alimony and half to non-alimony.

In light of this testimony, I conclude that the entire debt is non-dischargeable under 11 U.S.C. § 523(a)(5). It is clear that the parties contemplated that the

amount Debtor agreed to pay was the minimal amount necessary for Plaintiff to be able to afford the mortgage payment and meet her other expenses.¹ As such, notwithstanding the label placed upon it by the parties, the payment of \$1,350.00 is actually in the nature of support as contemplated in Harrell, *supra*.

Debtor argues credibly that he has found it difficult, if not impossible, to continue making the \$1,350.00 payments in light of his current obligations, which include post-divorce credit card bills and expenses arising out of his remarriage. For that reason, had this Court found that the \$675.00 payment in issue was not actually in the nature of support, it would have been necessary to balance the equities between the parties under subsection (a)(15) in order to determine dischargeability, *see Smith v. Smith (In re Smith)*, 218 B.R. 254, 257 (Bankr. S.D. Ga. 1997) (Davis, J.) (“If a debt fails to qualify under Harrell as being actually in the nature of support, [subsection (a)(15)] provides that there is no *per se* rule discharging the debt. A bankruptcy court must instead engage in a two-part test (1) to determine debtor’s current ability to pay, and (2) to balance the relative benefit and detriment of a discharge.”). In light of my earlier conclusion, however, that issue is not reached in this case.

Debtor additionally contends that Plaintiff should be estopped from claiming that the \$675.00 payment is non-dischargeable alimony because of the way she

¹ At the time of the divorce, Debtor was earning more than Plaintiff. He was approximately sixty-four years of age and was thus able to continue to working, whereas Plaintiff was approximately seventy-seven, and due to her age, was unable to do so.

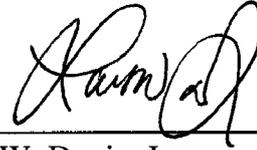
has treated it, or intends to treat it, for purposes of income tax reporting. In other words, Debtor asserts that Plaintiff is estopped because she does not intend to report the \$675.00 payment as income or to pay taxes on it. Clearly, the parties' attorneys contemplated that she might be in a position to do so at the time the decree was entered into and the allocation of payments was made as between equitable division and alimony.

There is, however, no estoppel issue before the Court at this time. There is no evidence that Plaintiff has actually filed a tax return omitting the \$675.00 as taxable income. Thus, despite the attorneys' prospective analysis as to her available tax choices, she has taken no position with respect to her income tax liabilities to the United States that is adverse to the position which she now takes before this Court. More important, the evidence is clear that the allocation which permits her this tax treatment was negotiated by the parties as part of the give and take necessary to settle their dispute. She has gained no advantage over Debtor in this case as a result of any contrary position taken in a previous proceeding.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's ongoing obligation to pay the additional \$675.00 denominated as equitable division of property is non-dischargeable. Debtor is ORDERED to make said payments to the Plaintiff.

Debtor is FURTHER ORDERED to file a modified plan consistent with the conclusions reached herein within thirty (30) days from the date of this Order.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of April, 2002.

cc: Debtor
Debtor's Atty.
Creditor
Creditor's Atty. Bar
Trustee
~~U. S. Trustee~~ 4/24/02
RB