

§523(a)(5) - *merge/shelter*

Case fully litigated in state court - House payments non-dischargeable as "in the nature of support"

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

In the matter of:

DAVID LIVINGSTON HERR
(Chapter 7 90-20679)

Debtor

DAVID LIVINGSTON HERR

Plaintiff

v.

FRANCES M. HERR

Defendant

Adversary Proceeding

Number 90-2084

U.S. COURT
SAVING BANK GEORGIA
APR 2 10 23 AM '91

FILED

MEMORANDUM AND ORDER

This case comes before the Court upon a Motion to Determine Dischargeability of a divorce related debt pursuant to 11 U.S.C. § 523(a)(5). Upon consideration of the evidence adduced at the January 9, 1991 hearing, the briefs and underlying court documentation submitted by the parties, and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The parties were divorced on June 22, 1989, following a jury verdict entered on May 11, 1989. The Debtor was disabled at the time of the divorce, remains disabled, and currently receives approximately \$170.00 per week in workers compensation. At the time of the divorce, the wife worked part time at a convenience store but has since had neck surgery and has been unable to work since 1989. The parties were married 31 years and have no minor children.

Following a full trial on the merits, the Jury awarded a verdict as follows:

We the jury award alimony to the Plaintiff as follows: We find that Mr. Herr shall pay monthly alimony of \$730.00 until both mortgages are paid in full. It is our intent that as a mortgage is paid off the alimony of \$730.00 will be reduced accordingly to cover the monthly payments of the remaining mortgage.

The June 22nd Order provides for an equitable division of property and alimony as follows:

As an equitable division of marital property, plaintiff is awarded:

(a) The former marital residence of the parties located at Route 6, Box 331, Fancy Bluff Circle, Brunswick, Glynn County, Georgia (Lots 38 and 39 Fancy Bluff Circle Subdivision, Brunswick, Glynn County, Georgia), and all household goods and furnishings located therein;

(b) The 1975 Mercedes Benz 450 SE automobile. As alimony, the plaintiff is

awarded the sum of \$730.00 per month beginning on the due date of the next mortgage payment on the former marital residence to either the first mortgagee, Southland Mortgage Corporation, or the second mortgagee, Hanover Mortgage Corporation, whichever comes due first; and every month thereafter until the said first mortgage in favor of Southland Mortgage Corporation is paid in full at which time such alimony shall be reduced to the sum of \$545.00 per month and shall continue to be paid monthly in such amount until such time as the said mortgage in favor of Hanover Mortgage Corporation is satisfied at which time said alimony payments shall cease.

The Debtor filed his petition under Chapter 7 of the Bankruptcy Code with this Court on October 19, 1990. On October 24, 1990, the Debtor brought an action to terminate periodic alimony under the Georgia "live in lover" statute, O.C.G.A. § 19-6-19. Judge A. Blenn Taylor, Jr., of the Superior Court of Glenn County, determined that the alimony was not subject to termination pursuant to O.C.G.A. § 19-6-19 inasmuch as it was a "lump sum" alimony award rather than periodic alimony.

CONCLUSIONS OF LAW

11 U. S. C. Section 523(a)(5)¹ creates an exception from 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 . . . ", but only if the debt is "actually in the nature of alimony, maintenance, or support". There is ample controlling authority in the Eleventh Circuit and the Southern District of Georgia in interpreting and applying 11 U.S.C. Section 523(a)(5).²

¹ 11 U.S.C. Section 523(a)(5) provides that:

(a) A discharge . . . 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 by a governmental unit, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or

(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;

² In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S. D. Ga. 1984) (Bowen, J.); In re Bedingfield, 42 B.R. 641 (S. D. Ga. 1983) (Edenfield, J.).

The Eleventh Circuit has made it clear that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law". Harrell, 754 F.2d at 905 (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 held non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904. A determination is made by examining 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 906.³; 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); In re Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983), aff'd on other grounds, 723 F.2d 737 (9th Cir. 1984). Contra, Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). 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

³ In rejecting the analysis in In re Warner, 5 B.R. 434 (Bankr. D. Utah, 1980), Harrell overrules Bedingfield 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 fact that the circumstances of the parties may have changed from the time the obligation was created is not relevant to the inquiry which the bankruptcy court must undertake in a §523(a)(5) action. Harrell, 754 F.2d at 907. In all other respects, Bedingfield remains controlling authority in this jurisdiction.

F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, 715 F.2d at 1109 Pauley v. Spong, 661 F.2d 6, 9 (2nd Cir. 1981). The Harrell court stated:

The language used by Congress in §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. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change. 754 F.2d at 906 (emphasis original).

In analyzing this portion of the Harrell opinion, it is clear that only "a simple inquiry as to whether the obligation can legitimately be characterized as support" is needed. While the court did find that bankruptcy laws, not state law is controlling, it did not explicitly fashion guidelines or otherwise set forth factors to be used in resolving the required "simple inquiry". Rather, the Court stated:

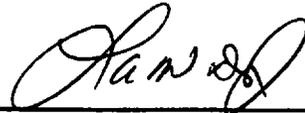
This inquiry will usually take the form of deciding whether the obligation was in the nature of support as opposed to being in the nature of a property settlement. Thus, there will be no necessity for a precise investigation of the spouse's circumstances

to determine the appropriate level of support. It will not be relevant that the circumstances of the parties may have changed, e.g., the spouse's need may have been reduced at the time the Chapter VII petition is filed. Thus, limited to its proper role, the bankruptcy court will not duplicate the functions of state domestic relations courts, and its rulings will impinge on state domestic relations issues in the most limited manner possible. Harrell, 754 F.2d at 707.

In following the mandate that my simple inquiry "impinge on state domestic relations issues in the most limited manner possible", I find that the house payments ordered by the Superior Court of Glynn County are in the nature of support and thus are non-dischargeable in bankruptcy. It is axiomatic that shelter is a basic necessity of human life and thus its provision is most certainly in the nature of support. I also place great weight on the fact that this matter was fully and fairly tried in the Glynn County Superior Court on two occasions, first before a Jury and second before the Judge in an attempt to terminate periodic alimony. In light of the foregoing, I find through simple inquiry that the debt due for the support of the Defendant is non-dischargeable.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that alimony in the sum of \$730.00 per month due the Defendant is non-dischargeable in bankruptcy. The Defendant shall have Relief from Stay in order to pursue collection of these sums in State Court.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 1st day of ~~March~~ April 1991.