

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

In the matter of:

CHARLES KENNETH ALLARD
(Chapter 7 Case 92-20479)

Debtor

CHARLES KENNETH ALLARD

Plaintiff

v.

CHARLOTTE ALLARD

Defendant

Adversary Proceeding

Number 92-2069

MEMORANDUM AND ORDER

On October 23, 1992, a hearing was held upon a complaint to determine dischargeability of divorce related debts pursuant to 11 U.S.C. Section 523(a)(5). Upon consideration of the evidence adduced at trial, 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 June 19, 1992, after a contested proceeding. Debtor filed his Chapter 7 petition on July 6, 1992. The Final Divorce Judgment and Decree entered June 19, 1992, *nunc pro tunc* June 18, 1992, appears to have been amended post-petition on July 17, 1992, *nunc pro tunc* June 18, 1992. At the October hearing this court concluded that only the original unamended decree would be considered for purposes of determining dischargeability.

The parties had been married for approximately five years and had no children from the marriage. The parties did have children from prior marriages. Debtor became disabled during the marriage and unable to work full-time. Debtor was disabled at the time of the divorce.

At the time of the divorce, Defendant was the Administrative Director of the local chapter of the United Way and earned approximately \$2,100.00 per month.

The divorce decree provides that Debtor is to pay the following obligations:

- 1) Monthly payments of \$346.14 to Trust Company Bank on a mobile home;
- 2) Monthly payments of \$166.13 to Trust Company Bank on a consolidation loan;
- 3) The sum of \$5,000.00 payable to Defendant for reimbursement of insurance premiums; and
- 4) The sum of \$600.00 in attorney's fees for Defendant's attorney in the divorce proceeding.

See Final Divorce Judgment and Decree. The divorce decree provided that the parties' mobile home would be retained by the Debtor, who would be responsible for the monthly payments. Title to the mobile home is in the name of Defendant and Debtor's mother. Debtor lived in the home to be near his mother.

The decree also provided that Debtor was to be responsible for the consolidation loan. This debt represents an obligation owed by Debtor prior to the marriage.

Debtor was also responsible for a \$5,000.00 sum owed to Defendant for reimbursement of insurance premiums. Defendant testified that she provided, through her employer, medical insurance coverage for Plaintiff and his children from the prior marriage. Debtor was to repay this \$5,000.00 obligation after the two Trust

Company Bank debts were paid.

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 . . .

But the exception does not apply unless [523(a)(5)(B)] "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, 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. *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. The bankruptcy court may consider state law labels and designations although bankruptcy laws control. 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 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 Helms, 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).

At the October hearing, the evidence showed that the monthly payment to Trust Company Bank on the mobile home was in the nature of support. Title to the home was in the name of Defendant and Debtor's mother, and Debtor was living in the home to be near his mother. The payment of this debt was necessary for Defendant's support as she needed her separate income, free of this debt, to provide another home for herself after the divorce. This debt is non-dischargeable. *See In re Harrell*, 754 F.2d 902 (11th Cir. 1985).

The consolidation loan payments were also in the nature of support.

This debt represents an obligation owed by the Plaintiff prior to the marriage. I find that Plaintiff's obligation to repay this debt for which Defendant was not originally responsible, if discharged, would deprive Defendant of funds necessary to her support. As such, the provision was actually in the nature of support for Defendant.

This court has held that attorney's fees incurred during a divorce proceeding are non-dischargeable if they are actually in the nature of support. Matter of Suarez, Chapter 11 Case No. 91-20276, Adversary Proceeding No. 92-2013 (Bankr. S.D.Ga. December 23, 1992). *See also* In re Henry, 110 B.R. 608 (Bankr. N.D.Ga. 1990). As the attorney's fees in Defendant's divorce proceeding were necessary to provide support, such fees are non-dischargeable.

The final debt to be considered is the \$5,000.00 sum owed for reimbursement of insurance premiums. Defendant testified that she provided, through her employer, medical insurance coverage for Debtor and his children from a prior marriage. Defendant provided many necessities during the later part of the marriage after Debtor became disabled and unable to work fulltime. This sum was ordered to be repaid by Debtor because Defendant had no legal obligation to provide insurance for his children. Nevertheless, she made that contribution, freely, during the time of the marriage. At the time of the divorce, her income exceeded his. While shifting his

future monthly debt payments to her would deprive her of necessary resources from which to support herself, the discharge of this debt does not have the effect of encroaching on her monthly income. As to this balance Defendant has shown nothing other than that a general unsecured debt exists. The repayment of that debt was not intended to provide necessary support to her. *See generally In re Hart*, 130 B.R. 817, 836-37 (Bankr. N.D.Ind. 1991). Defendant's arguments that the obligation should be characterized as alimony awarded to compensate the Defendant for contributions to the marriage are unpersuasive considering the facts of this case.

In light of the foregoing, I conclude that Debtor's obligations of \$346.14 per month secured by the mobile home and \$166.13 per month for the consolidation loan are non-dischargeable. Also, Defendant's attorney's fees, of \$600.00, in the divorce case are non-dischargeable. However, the debt for reimbursement of \$5,000.00 for insurance coverage is dischargeable. Further, Defendant's Motion for Relief is granted to enforce the above non-dischargeable obligations.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS THE ORDER OF THIS COURT that Debtor's obligation to Trust Company Bank in the amount of \$346.14 per month and the obligation to Trust Company Bank for \$166.13 per month are non-dischargeable. Also, Debtor's obligation to pay Defendant's attorney's fees in the amount of \$600.00 from the divorce proceeding is non-dischargeable. Defendant's Motion for Relief from Stay is granted to enforce the above non-dischargeable obligations.

FURTHER ORDERED that Plaintiff's obligation to Defendant in the amount of \$5,000.00 for reimbursement of insurance coverage is dischargeable.

**Lamar W. Davis, Jr.
United States Bankruptcy Judge**

Dated at Savannah, Georgia

This ____ day of February, 1993.