

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

In the matter of:)

CRAIG ILER)
(Chapter 7 Case 95-42815))

Debtor)

KATHY L. ILER)

Plaintiff)

v.)

CRAIG ILER)

Defendant)

Adversary Proceeding

Number 96-4050

FILED

at 9 O'clock & 25 min A M

Date 9-3-97

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



MEMORANDUM AND ORDER

This action is a complaint to determine the dischargeability of a debt pursuant to Title 11 U.S.C. Sections 523(a)(5) and (15). Defendant/Debtor, Craig Iler, has filed for Chapter 7 relief and claims that his obligation owed to Plaintiff, Kathy Iler, is a

property settlement arising out of a divorce decree and, therefore, should be discharged.

Plaintiff disputes Defendant's contentions and asserts that this debt should be characterized as alimony, excepted from discharge pursuant to either 11 U.S.C. Section 523(a)(5) or (15).

This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a trial on April 17, 1997, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On October 6, 1995 a Complaint for Divorce was filed. On December 29, 1995, Debtor filed for Chapter 7 bankruptcy relief. On November 15, 1996, the parties were divorced. At the time of the divorce, the Debtor earned \$47,500 annually while the Plaintiff earned \$12,000.

As part of the decree, Debtor was required to pay Plaintiff \$910.00 monthly child support for two children, maintain a \$100,000 life insurance policy as well as medical insurance for the benefit of his children, and make regular payments on Plaintiff's Ford Explorer. Debtor does not dispute that the above mentioned obligations are non-dischargeable pursuant to Section 523(a)(5).

As part of the decree, Debtor was also required to pay \$17,283.00 to Plaintiff in twelve equal installments beginning on the first day of January 1997. Beginning on the first day of January 1998, Debtor was required to pay \$250.00 per month to Plaintiff as permanent periodic alimony until remarriage or death. In addition, Debtor was ordered to pay the balance of Plaintiff's attorney's fees and costs in the amount of \$5,343.85. Debtor contends that both the monthly payments and the expense of attorney's fees are dischargeable. Specifically, Debtor cites page four of the divorce decree which states,

. . . the Defendant shall pay, as an award of Defendants retirement benefits to be paid as alimony payments to the Plaintiff, the amount of Tier II Retirement Benefits which this Court finds to be in the sum of . . . (\$17,283.00) to be paid in twelve equal monthly installments beginning on the 1st day of January, 1997 and continuing on a monthly basis on the 1st day thereafter until said sum is paid in full. At the end of twelve months . . . the Defendant shall be required to pay . . . (\$250.00) per month, as permanent, periodic alimony which shall continue each and every month thereafter until the death of either party or the remarriage of the Plaintiff.

Debtor asserts that the alimony debt of \$17,283.00 should not be excepted from discharge under Section 523(a)(5) because although labeled an alimony debt the debt is actually a property settlement. Debtor also asserts that this obligation should not be excepted from discharge pursuant to Section 523(a)(15).

Legal Framework of Domestic Issues in Bankruptcy

11 U.S.C. Sections 523(a)(5) and (15) provide:

(a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b)¹ 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 by 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;

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation,

¹ 11 U.S.C. Section 1328(a)(2) excepts Section 523(a)(5) debts but does not except Section 523(a)(15) debts.

preservation, and operation of such business; or

- (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

Prior to the enactment of subsection (15), the determination of whether a debt was considered support, either in the form of alimony or child support, was dispositive. If the debt was held to be alimony or child support then it was non-dischargeable. If not, then it was not within an exception and was therefore discharged. 11 U.S.C. §§ 727, 523. A bankruptcy court was only to perform a "simple inquiry" to determine if the debt could be legitimately characterized as support at the time of the divorce. See In re Harrell, 754 F.2d 902 (11th Cir. 1985).

The passage of subsection (15) introduces a far different analytical exercise. If a debt fails to qualify under Harrell as being actually in the nature of support, Section (15) provides that there is no *per se* rule discharging the debt. Rather, a bankruptcy court must 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.

First, it is important to note that a true pre-petition division of property, which

is not subject to challenge as a voidable preference or fraudulent conveyance, is unaffected by bankruptcy. Thus, if title to property is awarded through the course of domestic relations proceedings that award ordinarily will be unaffected. See Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990); see also Matter of Hall, 51 B.R. 1002 (S.D.Ga. 1985) (holding that under Georgia divorce law property delivered to a spouse upon "equitable distribution" becomes the sole and separate property of that spouse). The typical issue, however, is whether an order requiring a debtor to pay a debt that encumbers an award of property made during divorce proceedings is dischargeable.

Because of a strong state interest in domestic relations matters, bankruptcy courts are to grant great deference in deciding cases involving divorce, alimony, child support, child custody, establishment of paternity, etc. See Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992) ("Nor was it the intent of the new Bankruptcy Code to convert the bankruptcy courts into family or domestic relations courts - courts that would in turn willy-nilly, modify divorce decrees of state courts insofar as these courts had previously fixed the amount of alimony and child support obligations of debtors").

I. Burden of Proof

The burden of proof in establishing the Section 523(a)(5) or (15) exception

is on the non-debtor spouse, *see* Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). However, although exceptions from discharge are normally construed strictly against the objecting creditor in order to provide the debtor with a “fresh start,” *see* In re St. Laurent, 991 F.2d 672, 680 (11th Cir. 1993), policy considerations require a bankruptcy court to construe domestic relations exceptions more liberally. *See* In re Kline, 65 F.3d 749, 751 (8th Cir. 1995); In re Miller 55 F.3d 1487, 1489 (10th Cir. 1995).

Because of passage of Section 523(a)(15), all debts arising from a divorce or separation agreement or a decree are *prima facie* non-dischargeable. Matter of Cleveland, 198 B.R. 394, 397 (Bankr.N.D.Ga. 1996). Under Section 523(a)(5), the non-debtor spouse must show that the obligation in issue is actually in the nature of support whereas under Section 523(a)(15), the non-debtor spouse must only show that the debt was incurred during the course of a divorce or separation. *See* In re Stone, 199 B.R. 753, 783 (Bankr.N.D.Ala. 1996). If this burden is met, the burden of going forward shifts to the debtor to either rebut the evidence or offer a *prima facie* case in support of either exception, 11 U.S.C. § 523(a)(15)(A) or (B). *See* Id. at 783; In re Gantz, 192 B.R. 932, 936 (Bankr.N.D. Ill. 1996); In re Anthony, 190 B.R. 429, 432 (Bankr.N.D.Ala. 1995). The ultimate burden remains with the creditor seeking to except the debt from discharge. *See* In re Stone, 199 B.R. at 783. The relevant time for making the Section (a)(5) analysis is the time of the decree, *see* In re Harrell, 754 F.2d at 902,

and the Section (a)(15) analysis is the date of the trial in bankruptcy. See In re Dresser, 194 B.R. 290 (Bankr.D.R.I. 1996); In re Morris, 193 B.R. 949, 952 (Bankr.S.D.Cal. 1996).

II. Section 523(a)(5)

Whether a debt is dischargeable pursuant to Section 523(a)(5) is still a matter of federal law, not state law. See In re Harrell, 754 F.2d at 905. In that regard, the bankruptcy court must independently assess the character of an obligation arising out of a divorce and determine whether it is in the nature of alimony. See Id. at 905; In re Williams, 151 B.R. 605, 607 (Bankr.M.D.Fla. 1993). Section 523(a)(5) requires that the bankruptcy court determine nothing more than whether the payment obligation is in the nature of “alimony, maintenance, or support.” No precise inquiry into the parties’ present financial circumstances is required; only a simple inquiry into the nature of the obligation, liquidating known amounts and leaving any issue of future modifications to the applicable state court. See In re Harrell, 754 F.2d at 907 (11th Cir. 1985); In re Christenson, 201 B.R. 298 (Bankr.M.D.Fla. 1996).

In determining whether a debtor’s obligation is in the nature of support, the intent of the parties [or the trier of fact] at the time of the settlement agreement or trial is dispositive. See In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996); In re Sampson, 997 F.2d 717, 723 (10th Cir. 1993) (“the critical inquiry is the shared intent of the parties at the time the

obligation arose"). While a label placed upon spousal obligation is not dispositive in determination of dischargeability, it is indicative of the parties' intent. See Matter of Bell, 189 B.R. 543, 547 n.2 (Bankr.N.D.Ga. 1995); In re MacDonald, 194 B.R. 283, 287 (Bankr.N.D.Ga. 1996).

The most critical factors to be considered in interpreting the intent of the provision in issue include: (1) any disparity in parties' earning capacities; (2) parties' relative business or employment opportunities; (3) parties' physical condition; (4) their educational background; (5) their probable future financial needs; (6) benefits that each party would have received if marriage had continued. Matter of Dennis, 25 F.3d 274 (5th Cir. 1994); *see also* In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (holding that a court should also consider whether the obligation terminates upon death or remarriage).

III. Section 523(a)(15)

If the Court finds that an obligation is not actually in the nature of support, the debt is dischargeable under Section (a)(5). It is, nevertheless, excepted from discharge under Section 523(a)(15) unless an exception to the exception is established.

(a) Section 523(a)(15)(A); Ability to Pay

Under Section 523(a)(15)(A), an obligation arising from a division of property may be discharged if a debtor can demonstrate that he does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted a twofold analysis. First, using the disposable income test, a court must determine “whether the debtor’s budgeted expenses are reasonably necessary.” See In re Hill, 184 B.R. 750, 755 (Bankr.N.D.Ill. 1995). Second, Section 523(a)(15)(A) requires a court to consider a debtor’s “ability to pay.” 11 U.S.C. 523(a)(15). In that regard, a court must view the debtor’s general “ability to pay” and not permit the debtor to rely on a “snapshot” of his financial abilities at the time of filing. See In re Smither, 194 B.R. 102, 107 (Bankr.W.D.Ky. 1996) (holding that court must consider prospective earning capacity rather than a snapshot); In re Anthony, 190 B.R. 433 (Bankr.N.D.Ala. 1995). If, after excluding expenses reasonably incurred, a court determines that a debtor does not have the “ability to pay,” the debt is discharged. If the debtor possesses the “ability to pay,” the debtor still may attempt to discharge the debt pursuant to Section 523(a)(15)(B).

(b) 523(a)(15)(B): Balancing Benefit/Detriment

Alternatively, under Section 523(a)(15)(B), a debtor may discharge the obligation if it is demonstrated that the benefit of a discharge outweighs the detrimental consequences to the objecting party. This section essentially requires a court to “balance the

equities” by considering a number of factors, including income and expenses of both parties; whether the non-debtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the non-debtor spouse’s ability to pay. See In re Hill, 184 B.R. at 756.

IV. Partial Discharge

Courts are split when determining whether to permit a partial discharge pursuant to Section 523(a)(15)(A) because a debtor may possess only the “ability to pay” a portion of the indebtedness. Most courts hold that the language of the statute does not provide for a partial discharge and, therefore, discharge pursuant to 523(a)(15) should follow an “all or nothing” approach. See In re Silvers, 187 B.R. 648, 649 (Bankr.W.D.Mo. 1995); In re Taylor, 191 B.R. 760, 767 (Bankr.N.D.Ill. 1996). However, some courts attempt to fashion an equitable remedy by discharging only the portion of the debt that the debtor has no “ability to pay.” See In re Comisky, 183 B.R. 883, 884 (Bankr.N.D.Cal. 1995); Matter of McGinnis, 194 B.R. 917, 921 (Bankr.N.D.Ala. 1996). After considering both lines of authority, I hold that because of the language of the statute, considerations of comity, and the fact that a party may still modify a support decree in State Court after a Section 523 determination, a partial discharge should not be permitted.

V. Modification of State Decree Post Discharge

This Court also recognizes that pursuant to the state law of Georgia parties may modify a divorce decree upon a "showing a change in the income and financial status of either former spouse." O.C.G.A. § 19-6-19. Clearly, a discharge of a debtor's divorce obligation changes that spouse's financial status and, therefore, may be relied upon in a state court proceeding to modify a divorce decree without violating the discharge injunction of 11 U.S.C. Section 524. See In re Siragusa, 27 F.3d 406 (9th Cir. 1996) (holding that post-bankruptcy alimony modification does not violate discharge injunction).

CONCLUSIONS OF LAW

I. Dischargeability of obligation to pay \$1,440.25 for twelve months.

Under Section 523(a)(5), an obligation arising from a separation agreement or divorce decree is excepted from discharged if it is "actually in the nature of alimony, maintenance, or support." 11 U.S.C. § 523(a)(5)(B). As mentioned above, the label that the parties attach to the obligation is indicative of the parties' intent which assists in defining whether the debt is in the nature of support. See In re MacDonald, 194 B.R. at 287. In the present case, the Plaintiff, Kathy Iler, was granted "an award of Defendants retirement benefits to be paid 'as alimony.'" Although the award was equal in amount to Defendant's retirement benefits, I hold that they were intended as alimony at the time of the decree and,

therefore, are excepted from discharge.

First and foremost, the order provided that payments were to be paid "as alimony." While that fact alone is only indicative of the parties' intent and not dispositive of the matter, *see In re Appling*, 187 B.R. 27 (N.D.Ga. 1995), I hold that because (1) the award was not a lump sum payment, (2) the payments continued at lower rate until the death of either party or the remarriage, and (3) the Debtor earned a substantially greater income than the Plaintiff at the time of the divorce (\$47,500 vs. \$12,000), the obligation was intended as support. *See In re Bedingfield*, 42 B.R. at 641. Moreover, while it is not difficult to understand why a jury would provide twelve support payments of \$1,440.25 for the first year after the divorce and then reduce that amount to \$250 per month until death or remarriage, it is hard to imagine an award of zero alimony for the first year and then an increase to \$250 per month until death or remarriage. Clearly, the jury was mindful of Defendant's retirement benefits when it awarded the Plaintiff's alimony; however, it is quite plausible that the jury simply used that figure as a method of calculating an amount that the Defendant could provide as support for the Plaintiff. Without additional evidence, I hold that at the time of the parties' divorce the requirement that Defendant make twelve monthly payments of \$1,440.25 was actually in the nature of support and, therefore, non-dischargeable.

II. Attorney's fees.

Although the plain language of Section 523(a)(5) excepts only a debt "to a spouse, former spouse, or child of the debtor," after reviewing the applicable authorities, it appears almost undisputed that an attorney fee obligation arising from a divorce or support decree is non-dischargeable whether payable to a former spouse or directly to a third party. Specifically, courts have held that the nature of the debt determines its dischargeability, not the identity of the payee. See Matter of Hudson, 107 F.3d 355 (5th Cir. 1997) (holding that attorney fee award arising from child support obligation is non-dischargeable, despite being awarded directly to the attorney - similar to an award to pay medical bills directly to a care provider); In re Kline, 65 F.3d 749, 751 (8th Cir. 1995)(direct attorney's fees); In re Miller, 55 F.3d 1487, 1489 (10th Cir. 1995) (fees paid directly to guardian ad litem and psychologist); In re Bedingfield, 42 B.R. 641, 649 (S.D.Ga. 1983) (holding that critical inquiry is that nature of the payment). Pursuant to the above, Debtor's obligation to pay the balance of Plaintiff's attorney's fees and costs in the amount of \$5,343.85 is hereby deemed non-dischargeable.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtor's obligation to pay \$1,440.25 for twelve months to Plaintiff is excepted from discharge and, therefore, non-dischargeable.

IT IS THE FURTHER ORDER OF THIS COURT that the Debtor's obligation to to pay the balance of Plaintiff's attorney's fees and costs in the amount of \$5,343.85 is deemed non-dischargeable.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 2nd day of August, 1997.
September