United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Mary Bowman (f/k/a Mary Strack), Plaintiff, v.
Jeffrey J. Strack, Defendant
(In re Jeffrey J. Strack, Debtor)
Bankruptcy Case No. 92-13420-7, Adv. Case. No. A94-1089-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

November 8, 1994

Cathy J. Gorst, for the plaintiff.
Joan D. Eloranta, for the defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Although the Bankruptcy Code is intended to provide debtors with a "fresh start," a fundamental concept in bankruptcy law is that not all debts may be discharged. In this regard, 11 U.S.C. § 523(a)(5) provides that a debt is not discharged to the extent that it is

> 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--
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> (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.

At issue in the present case is whether the debtor's obligation to indemnify his former wife from liability on certain debts may be discharged in bankruptcy. Having previously discharged his direct liability to the creditors in question on these debts, the debtor, Jeffrey J. Strack, now seeks to discharge this indemnification obligation as well. His former wife, Mary Bowman, contends that the obligation is one in the nature of support and is not dischargeable in bankruptcy. A trial was held on the matter on October 19, 1994. The debtor was represented by Joan D. Eloranta; the plaintiff was represented by Cathy J. Gorst.

The facts are as follows. The parties were married in September of 1977 and divorced in March of 1992. At the time of the divorce, the plaintiff was 33 years old. The decree contained a finding that she was a disabled housewife. Her gross monthly income was $698.00, consisting solely of the debtor's support payments and food stamps. The debtor at the time of the divorce was 36 years old and employed as a car salesman. His gross monthly income was $3,078.00.

Incident to their divorce, the parties entered into a marital settlement agreement which was approved by the state court and made a part of the divorce decree. The parties agreed that the plaintiff would receive custody of the couple's three minor children. The debtor was obligated to pay approximately $520.00 per month in child support and approximately $170.00 per month in spousal support. Additionally, the debtor was to provide health insurance for the minor children. The settlement agreement divided what little marital property existed between the parties. In a separate section entitled "debts and financial obligations," the agreement also assigned certain debts to each party and required that party to indemnify and hold the other harmless from such debts.

While the settlement agreement is unclear as to the exact amount of the debts assigned to the debtor, the statements of the case submitted for trial indicate that the plaintiff was assigned debts in the amount of $7,921.46, while the debtor was assigned debts in the amount of approximately $32,000.00. Of the debts assigned to the debtor, $6,500.00 was a debt to Antoinette Steckel, the plaintiff's mother, and approximately $4,400.00 was an obligation to the Chiropractic Arts Clinic, the chiropractic clinic at which the plaintiff's present husband is employed. The remaining debts included the mortgage loan on the marital residence, credit card debts, and other similar debts.

The $6,500.00 obligation to the plaintiff's mother apparently comprised one-half of a loan made to the parties for home improvements. The plaintiff was to be responsible for the other one-half of the debt. The chiropractic bills apparently arose in the course of treatment of the plaintiff's disability. At trial, the plaintiff testified that she became disabled as a result of injuries she sustained during an altercation with the debtor. At the time of the divorce, she had initiated a personal injury action against the debtor, which she testified she dismissed because he agreed to assume the medical debts related to her injuries.[(1)]

Several events occurred almost immediately after the entry of the divorce decree. In May of 1992, the three minor children began residing with the debtor, rather than the plaintiff. This arrangement was approved on a temporary basis by the state court until it finally awarded permanent custody of the children to the debtor in September of 1994. Further, the plaintiff remarried in September of 1992. Thus, the debtor's obligation to make both child support and maintenance payments directly to the plaintiff terminated within six months of the divorce.

The debtor testified that after the divorce he attempted to make payment arrangements with his various creditors. He claims that the only creditors who refused his payment proposals were Antoinette Steckel and the Chiropractic Arts Clinic. As a result of his inability to resolve matters with all of his creditors, he filed bankruptcy. However, testimony at trial also indicated that he made few, if any, payments on the assigned debts before filing bankruptcy. Further, prior to filing bankruptcy, and in accordance with the divorce decree, the marital residence and a camper owned by the parties were sold by the secured creditors and the proceeds were applied to the underlying debts. It would appear that these were the only real

"payments" made by the debtor to any of the creditors in question. After the debtor discharged his personal liability on all of these debts, he petitioned to reopen the case so as to discharge his obligation to indemnify his former wife as well.

Disputes about the dischargeability of obligations created by a divorce decree are among the most frequently litigated, and hotly contested, matters in bankruptcy. Under § 523(a)(5), if an obligation is "actually in the nature of" alimony, maintenance or support, it is not dischargeable in bankruptcy; however, an obligation intended as "property division" may be discharged. In re Maitlen, 658 F.2d 466 (7th Cir. 1981). Unfortunately, given that many obligations, such as those before the Court in this matter, do not easily fit within traditional notions of either support or property division, the resulting struggle is often akin to forcing the proverbial square peg into a round hole.

Nonetheless, the issue of what constitutes a nondischargeable debt for alimony, support, or maintenance under 11 U.S.C. § 523(a)(5) is one of federal law, not state law. In re Hoivik, 79 B.R. 401 (Bankr. W.D. Wis. 1987). The burden of proof is on the party objecting to the discharge of the obligation, and the standard of proof is by a preponderance of the evidence. In re Messnick, 104 B.R. 89 (Bankr. E.D. Wis. 1989). Further, the exceptions to discharge contained in § 523 must be strictly construed in favor of the debtor. Id. at 92. The fact that the parties or the state court may have labelled the obligation as "support" is not determinative of the issue of dischargeability, although state laws regarding the divorce and the parties' marital obligations may be of assistance. Messnick. 104 B.R. at 92. The essential goal of the bankruptcy court's inquiry is to determine whether the obligation was intended as property division or support and whether the obligation actually achieved the intended result. Id.

Where the nature of the obligation is unclear, the court must determine whether the obligation is intended to balance the income of the parties or preserve equity in property. Hoivik, 79 B.R. at 404. If necessary, the bankruptcy court may look beyond the documents and focus upon the circumstances of the parties at the time of the divorce. Messnick, 104 B.R. at 92; Hoivik, 79 B.R. at 402. The factors which have been identified as important in determining whether an obligation is in the nature of support or property division are as follows:

a. whether a maintenance award is also made for a spouse;

b. whether there was a need for support at the time of divorce and whether support would be inadequate absent the obligation in question;

c. whether the court intended to provide for support by the obligation in question;

d. whether the debtor's obligation terminated upon the death or remarriage of the recipient spouse;

e. whether the amount or duration of payments may be altered upon a change in circumstances;

f. the age, health, educational level, work skills, earning capacity and other financial resources of the parties independent of the obligation in question;

g. whether payments are extended over time or are in a lump sum;

h. whether the debt is characterized as property division or support under state law;

i. whether the obligation balances the disparate incomes of the parties;

j. the tax treatment of the payments;

k. whether one party relinquished a right to support under state law in exchange for the obligation in question;

Messnick, 104 B.R. at 92-93.

The present needs of the recipient spouse are usually irrelevant to the dischargeability determination. Messnick, 104 B.R. at 92. However, the debtor in this case argues that because he now has custody of the children, the plaintiff has remarried, and it would be a financial burden upon both him and the children to pay these debts, the obligation to indemnify his wife should be dischargeable. In support of this contention, the debtor cites the cases of In re Calhoun, 715 F.2d 1103 (6th Cir. 1983) and In re White, 55 B.R. 878 (Bankr. E.D. Tenn. 1985).

In Calhoun, the Sixth Circuit held that determining that the parties and the state court intended the assumption of a debt as a support obligation is only the beginning of the inquiry. According to the court,

> [The] finding of intent does not, however, control the ultimate issue of whether the assumption of joint debts was actually in the nature of support for purposes of federal bankruptcy. If the bankruptcy court finds, as a threshold matter, that assumption of debts was intended as support it must next inquire whether such assumption has the effect of providing the support necessary to ensure that the daily needs of the former spouse and any children of the marriage are satisfied. 715 F.2d at 1109. [Emphasis in original].

If, without the debt assumption the spouse could not obtain daily necessities, such as food, housing and transportation, the effect of debt assumption may be found "in the nature of support" for bankruptcy purposes. Id. Even if the assumption does provide necessary support, however, under Calhoun the bankruptcy court must still determine if the amount of support represented by the assumption is so excessive as to be "manifestly unreasonable" under traditional concepts of support; if unreasonable, the bankruptcy court is to set a reasonable limit upon the nondischargeability of the obligation for purposes of bankruptcy. Id. at 1110. This analysis was adopted by the court in In re White, the other case cited by the debtor.

As is correctly stated by the plaintiff, however, the Calhoun decision has come under considerable criticism in the years since its rendition. Every Court of Appeals to address the issue has rejected the Calhoun court's three-part test and held that the bankruptcy court is to look only at the circumstances of the parties at the time of the divorce, not their present needs. See, e.g., In re Harrell, 754 F.2d 902 (11th Cir. 1985); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); In re Gianakas, 917 F.2d 759 (3rd Cir. 1990).

This overwhelming rejection of Calhoun is based upon several factors. First, the language of § 523(a)(5) would appear to require courts to determine nothing more than whether the obligation at issue is "actually in the nature of alimony, maintenance, or support." See 11 U.S.C. § 523(a)(5)(B). According to the court in Harrell, supra, the statutory language suggests a "simple inquiry" as to whether the obligation can legitimately be characterized as support; the language does not justify an ongoing assessment of the parties' financial needs as circumstances change.

Harrell, 754 F.2d at 906.[(2)]

Another consideration is that of comity. An inquiry into the present conditions of the parties would arguably put federal courts into the position of modifying the matrimonial decrees of state courts, thus interfering with "delicate state systems for dealing with the dissolution of marriages and the difficult and complex results that flow therefrom." Forsdick, 812 F.2d at 803-04. In the absence of a clear mandate from Congress, it would appear that there is no basis for overturning or modifying the award previously found appropriate by the state court. Id. at 804; Harrell, 754 F.2d at 907; Sylvester, 865 F.2d at 1166. Further, where appropriate and authorized by state law, a debtor may resort to state court to request modifications in a divorce settlement on the basis of changed circumstances. Thus, the inquiry for the bankruptcy courts should be limited to the nature of the obligation at the time it was undertaken. Gianakas, 917 F.2d at 763.

Indeed, even the Sixth Circuit has narrowed the scope of Calhoun. In In re Fitzgerald, 9 F.3d 517 (6th Cir. 1993), the Sixth Circuit recognized the widespread criticism of Calhoun, including the criticism that it required undue federal involvement in state domestic authority and penalized the non-debtor spouse for becoming self-sufficient. Id. at 520-21. The Fitzgerald court, in an opinion written by the author of Calhoun, stated that Calhoun was not intended to intrude into the state's traditional authority or punish the non-debtor spouse or children. Although it did not clearly overturn Calhoun, the court expressly limited its holding to those cases where the obligation was clearly not designated as alimony or maintenance. Id. at 521.

Nonetheless, given the considerations outlined above, this Court declines to follow Calhoun even where the obligation is not clearly designated as alimony or maintenance. Without a directive from Congress, an examination of the present needs of the parties is an inappropriate invasion of state authority.[(3)] The condition and intention of the parties at the time of the divorce are the relevant issues, and subsequent changes in those conditions or intentions cannot alter the determination. Messnick, 104 B.R. at 92.

Applying the Messnick factors to this case, it is clear that at least some of the debts were intended as support. While it is true that the decree contained separate provisions for maintenance of both the plaintiff and the minor children, there was clearly a need for additional support. The plaintiff was disabled and received no income beyond support payments and food stamps. At least in part, the obligation to assume various marital debts balanced the disparate incomes of the parties, thus constituting an obligation in the "nature" of support. Hoivik, 79 B.R. at 404. Further, although the exact amount of any waiver of support was disputed, it appears that the plaintiff at least believed she was surrendering the right to a portion of the support specified by law so as to permit the debtor to make the payments in question. Finally, the debtor himself testified that he assumed the debts because, among other things, the plaintiff had no money to pay them.

However, given that there is no indication that the assumption of all of the debts was intended as support, it is possible that some of the debts were assumed for different reasons. Accordingly, the Court must examine each debt assumed by the debtor to determine whether it was assumed to support the plaintiff or the children. At the time of the divorce, the plaintiff had sued the debtor for an intentional tort. As part of the divorce settlement, the plaintiff agreed to dismiss this action if the debtor would assume the medical bills associated with her injury. The debtor agreed to assume the medical bills to the Chiropractic Arts Clinic to avoid the expense and aggravation of

this lawsuit, not because the parties intended it as support. As the assumption was not intended as support, the obligation to indemnify the plaintiff as to this debt is dischargeable.

Additionally, the debt to Antoinette Steckel was not intended as support. The parties were jointly liable on the mortgage debt on their residence. The debtor was already assuming sole responsibility for the deficiency in the mortgage debt. The loan in question was for home improvements and the assumption by the debtor of this debt was intended to balance the equities associated with the disposition of the marital residence rather than support the plaintiff or balance their respective incomes. Thus, the obligation to indemnify plaintiff as to this debt may be discharged as well.

Accordingly, the debtor is discharged from his obligations to indemnify and hold the plaintiff harmless from any and all debts to Chiropractic Arts Clinic or Antoinette Steckel. The remaining debts referenced in the marital settlement agreement are marital debts and the assumption of these debts was clearly intended as support; the obligation to indemnify plaintiff and hold her harmless as to these debts is accordingly not dischargeable in the debtor's bankruptcy.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. On several occasions, the plaintiff has mentioned that if she had prevailed on the lawsuit, the resulting judgment would have been nondischargeable. This statement not only presumes numerous facts not in evidence regarding her injuries, but also is irrelevant as to whether the debts were assumed by the debtor as a support obligation.

2. Further support for this position is found in the fact that there is no language in § 523(a)(5) which directs the court to consider the present status of the parties. Arguably, had Congress wished the bankruptcy courts to consider the current impact of its decision on the parties in determining whether an alimony or support debt is dischargeable, it could have easily done so. It is clear that Congress was aware of such considerations, as it provided that student loans are excepted from discharge unless exception from discharge imposes an "undue hardship" upon the debtor or the dependents of the debtor. See 11 U.S.C. § 538(a)(8). This indicates that the exception in § 523(a)(5) can only be interpreted as an absolute exception to discharge. Forsdick, 812 F.2d at 804.

3. It would appear that Congress may have at least partially addressed the issue in the recently passed Bankruptcy Reform Act of 1994. Section 304 of that act amends 11 U.S.C. § 523 to create an additional exception to discharge for debts (other than those described in § 523(a)(5)) incurred in connection with a divorce. This new exception contains language which would seem to permit such debts to be discharged where the debtor has insufficient assets for support of the debtor and any dependents.