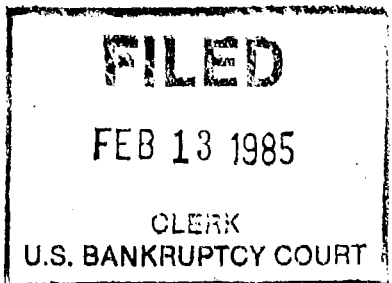


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

JEROME T. ANDERSON, a/k/a
JERRY ANDERSON, f/d/b/a
JEROME T. ANDERSON APPRAISAL,
INC.,

EF7-84-01213

Debtor.

KATHRYN ANDERSON,

Plaintiff,

Adversary Number:

v.

84-0226-7

JEROME T. ANDERSON,

Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW
AND
ORDER DETERMINING PORTION OF
MORTGAGE RESPONSIBILITY NON-DISCHARGEABLE

Kathryn E. Anderson, by Guelzow, Senteney, Carson, White & Hertel, Ltd., having filed a complaint to determine the dischargeability of a debt; and Debtor Jerome T. Anderson, by Herrick, Hart, Duchemin, Danielson & Guettinger, S.C., having filed an Answer; and a pre-trial hearing having been held; and the Complainant appearing by Attorney Cindra R. Carson; and the Debtor appearing by Attorney Terrence R. Spaeth; and the matter being submitted on briefs; the Court, being fully advised in the premises, FINDS THAT:

1. On August 6, 1979, the Eau Claire County, Wisconsin, Circuit Court granted a divorce to Kathryn E. Anderson and Jerome T. Anderson.

2. The Circuit Court found that Ms. Anderson was a student and housewife with a monthly income of \$1,200 in maintenance and child support, see Paragraphs 3 & 4 infra (\$700 awarded as maintenance, \$500 awarded as child support), that Mr. Anderson was a farmer and appraiser with a monthly net income of \$1,700, and that the couple had two minor children: Sara (born May 5, 1971) and David (born March 5, 1973).

3. Ms. Anderson was awarded custody of the children and \$500 a month as child support.

4. In a paragraph labelled "Maintenance--Limited Time" Ms. Anderson was awarded \$700 a month for six months and a lump sum payment of \$8,400 thereafter "as and for maintenance payments".

5. In the following paragraph Ms. Anderson was awarded a 1977 Buick automobile, a vendor's interest in a \$12,000 land contract,

all right, title and interest in a home located at 2431 Trillium Drive, Eau Claire, Wisconsin, currently subject to a mortgage owing to First Federal. [Mr. Anderson] shall be responsible for the payment of each and every mortgage payment on said homestead as the same becomes due and payable; and he shall hold the petitioner harmless from the payment thereon,

household furnishings and appliances, \$30,000, and two snowmobiles as a "property settlement". (In separate paragraphs Ms. Anderson was awarded a riding lawn mower and a central air conditioning unit for her homestead and Mr. Anderson was ordered

to maintain insurance on his life and medical insurance for the children.)

6. Ms. Anderson was granted a judgment lien against certain real property awarded to Mr. Anderson as security for the obligations denominated as maintenance and property awards.

7. Mr. Anderson was awarded two farms and was declared responsible for all debts incurred by the parties prior to the commencement of the divorce proceedings.

8. On June 19, 1984, Mr. Anderson filed for relief under Chapter 7 of the Bankruptcy Code.

9. On September 13, 1984, Ms. Anderson filed a complaint to have, inter alia, Mr. Anderson's obligation to pay the mortgage on the Trillium Drive home declared non-dischargeable.

Discussion

10. Under 11 U.S.C. sec. 523(a)(5), a debt for alimony, maintenance or support of a spouse or child is not dischargeable in bankruptcy. In re Maitlen, 658 F.2d 466, 467, 8 B.C.D. 48, 50 (7th Cir.1981).

11.

In reviewing cases construing and applying 11 U.S.C. § 523(a)(5) some general principles have emerged. First, the burden of proof on the issue of whether an award is dischargeable is on the party objecting to discharge. . . .

Second, what constitutes alimony, maintenance or support for purposes of determining dischargeability is a federal, not a state law question. . . .

Finally, the labels and recitations found in the divorce decree are not determinative of the nature of the awards. . . .

In determining whether an award is alimony, maintenance or support, courts have considered two types of evidence. First, they have looked at the form of the award. Is the award to be paid in installments, does it terminate on the death of either spouse or on the remarriage of the recipient spouse, is it labelled support by the divorce court? These factors are given some weight as evidence of the parties' intentions, but will not defeat an award which is clearly intended to be for a spouse's support. As Judge Mabey explained in the Warner case, "If a debt is imposed to discharge the state law duty of support, no matter what the form of the obligation, it is not dischargeable. The award need not have the traditional characteristics of support." . . .

Second, courts consider the circumstances of the parties to determine whether a need for support exists. It should be emphasized that even should a need for support exist, an award may not have been granted to alleviate this need and would therefore be dischargeable. In determining whether a need exists courts have considered the relative health, education and employment history of the spouses.

In re Bailey, 20 B.R. 906, 909-910 (Bankr.W.D.Wis. 1982) (footnotes omitted), In re Vande Zande, 22 B.R. 328 (Bankr.W.D.Wis. 1982), In re Chambers, 36 B.R. 42 (Bankr.W.D.Wis. 1984). Only that part of the debt which is for alimony, maintenance or support is non-dischargeable. In re Yeates, 44 B.R. 575, 580 (D.Utah 1984).

12. An analysis of the form of the Anderson award is far from conclusive: Maintenance and support is indicated by the requirement of periodic payments, by the award of the family home (and an air conditioning unit) to the spouse with custody of the

children¹ and by an award of the family's income producing property to Mr. Anderson (who, in turn, is to pay the mortgage obligation). Property settlement is indicated by the lack of a provision for the termination of Mr. Anderson's obligation in the event of, e.g., Ms. Anderson's remarriage, and separate maintenance and support provisions.² (The evidence before the Court is not sufficient to permit a finding regarding equality of the "property settlement". Cf. In re Vande Zande, Paragraph 11 supra, at 330 (equal division gives rise to presumption that support not an element of award).)

13. An analysis of the circumstances of the parties is more definitive: Ms. Anderson was unemployed (even when her studies ended she would, the Court presumes, only qualify for an entry-level position--if any were available) and responsible for two young children. See In re Rodriguez, 22 B.R. 309, 310 (Bankr. W.D.Wis. 1982) ("In the present case, a need for support clearly existed. Cheryl is not employed outside the home and is the mother of a fourteen-year-old son.").

¹ Ms. Anderson's interest in the home is captive to custodial obligations--Mr. Anderson's support payments would not increase if Ms. Anderson sold her rent-free accommodations.

² On the other hand, the provision for mortgage payments on the "homestead" suggest that the mortgage payments are in the nature of housing for Ms. Anderson and the children, see Footnote 1 supra, and that the separate maintenance and support awards did not include that item of maintenance and support.

14. However, Ms. Anderson's need for support will not continue forever. And only Mr. Anderson's alimony, maintenance and support obligations are non-dischargeable.

CONCLUSION OF LAW

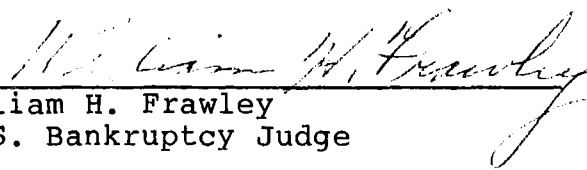
Mr. Anderson's obligation to pay the mortgage on the Trillium Drive House is non-dischargeable to the extent that it continues until the Anderson's youngest child reaches the age of majority. See In re Ploski, 44 B.R. 911, 914 (Bankr.D.N.H. 1984) (obligation to make payments on family home is non-dischargeable for the same period as debtor's support obligation).

ORDER

IT IS ORDERED THAT Debtor Jerome T. Anderson's responsibility for mortgage payments which become due and payable before March 5, 1991, on the home located at 2431 Trillium Drive, Eau Claire, Wisconsin, is non-dischargeable.

Dated: February 13, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc? Attorney Cindra R. Carson (Guelzow, Senteney, Carson, White & Hertel, Ltd.)
Attorney Terrence R. Spaeth (Herrick, Hart, Duchemin, Danielson & Guettinger, SC)