United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
JOHNSON WILLIAMS and
FRIEDA BILLY WILLIAMS,
Debtors. No. 7-99-10616 S

LOUISE L. CURLEY,
Plaintiff,
v. Adv. No. 99-1107 S

JOHNSON WILLIAMS,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Court for trial on the merits of Plaintiff's complaint to determine dischargeability of debt under 11 U.S.C. § 523(a)(5) and (15). Plaintiff appeared through her attorney Douglas Booth. Defendant appeared through his attorney Robert Finch. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

FACTS

Plaintiff and Defendant were divorced by order of the District Court of the Navajo Nation on September 29, 1981. The divorce decree incorporated a stipulation that included, among other things, the following: 1) there were five children of the marriage who, at the time, ranged from three to twelve years of age, with Jeffrey the youngest born on March 6, 1978, 2) Ms. Curley was awarded custody of the children, 3) Mr. Williams was not required to pay any child support, child support "shall be at

his sole discretion", 4) Mr. Williams was to pay thirteen debts incurred during the marriage that totaled about $35,000, 4) one of the debts listed was to Credit & Financing, Branch of Credit in the amount of $28,000, which was the mortgage on the parties' house (the "property"), 5) the parties agreed to "relinquish their rights, interests and title to their house ... and the title shall transfer to Jeffrey Johnson Williams [the youngest child], upon full settlement of the loan payment or when Jeffrey becomes of age."

Ms. Curley testified that at the time of the divorce she worked as a part time dormitory attendant and earned $5.75 to $5.95 per hour before taxes. Mr. Williams testified that at the time of the divorce Ms. Curley worked full time as a bus driver. He testified that he worked at that time for Arizona Public Service and earned between $5.00 and $6.00 per hour with some overtime, slightly more than Ms. Curley.

Ms. Curley testified that the parties had a verbal agreement for child support at the time of the divorce. This agreement was that Mr. Williams would make the house payments as child support so Ms. Curley and the children would not have to give up the house. She also testified that under Navajo tradition "coming of

age" did not mean 18 years of age; rather, it was a more flexible concept and could mean anything from being 18 to 24 years old.[1]

Mr. Williams also testified to the existence of a verbal agreement. He claims that the agreement did not focus on child support or even use that term, and that the parties never really talked about support. Rather, his recollection was that the entire agreement was only that he would pay the home mortgage until Jeffrey was 18 years old, then deed it to him and stop making payments at that time. He also testified that he had built the house so that the children could live there. He testified that, to him, becoming of age meant being 18 years old, which is usually when a child would get a job.

Plaintiff's exhibit 2 is the loan ledger for the home mortgage on the property. It shows that the note in the amount of $30,000.00 was dated June 2, 1978, called for 360 payments of $190.13 at an interest rate of 7%, and would mature on June 1, 2008.

Julianna Nez, a collection agent at the Navajo Credit agency testified regarding the mortgage loan's history, and regarding regulations relating to transferring properties subject to a mortgage. She stated that regulations prohibited transfer of title until debts were paid. She provided the following

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[1] The Court does not find it necessary to resolve this dispute in order to decide the case.

balances: principal due on May 1, 2000 was $23,256.03; accrued interest as of May 17, 2000 was $4,805.91; had all payments been timely made the balance as of May 1, 2000 would have been $13,522.00; the principal owed as of February, 1996 was $23,256.03; had all payments been timely made the balance as of March, 1996 would have been $18,024.60. Exhibit 2 shows that all payments since July 6, 1994 have gone completely to interest, resulting in a constant principal balance from that date through the present. Between March, 1996 and May, 2000 Mr. Williams paid $3,400.00, all applied to interest.

Plaintiff's Exhibit 3 is Mr. Williams' 1999 W-2, which shows that he earned $84,268.50 for 1999. Exhibit 4 is an Employee Data Sheet for Mr. Williams, showing that he earned $20,389.51 for the period January to March 22, 2000. Mr. Williams did not present evidence of his current expenditures or disposable income. He did not argue or present evidence on a current inability to pay the mortgage. He also did not provide any evidence of the benefit to him of discharging the mortgage obligation or of the consequences, or lack thereof, to Ms. Curley if the obligation is discharged.

Ms. Curley testified that her current income was $2,400 per month, consisting of social security disability payments and some money from a friend. Her current household includes herself, two

of Mr. Williams' children, two children by a different marriage, four grandchildren, and a son-in-law.

CONCLUSIONS OF LAW

Plaintiff is seeking to have an obligation created in the parties' divorce declared nondischargeable. Debtor's debt to Credit & Financing, Branch of Credit has been discharged. That debt is not at issue. The debt at issue is Debtor's obligation to pay the Branch of Credit debt; this is the obligation that arises from paragraph 5 of the "stipulation in Divorce."

At the outset of the testimony, Mr. Williams raised a parol evidence objection to testimony about the divorce decree stipulation. The Court overruled that objection, in part on the ground that the very wording of Sections 523(a)(5) and (a)(15) contemplates an examination of whether the parties' circumstances and intentions differed from those recited in the parties' written agreement. See Sampson v. Sampson (In re Sampson), 997 F.2d 717, 722 (10th Cir. 1993)("Because the label attached to an obligation does not control, an unambiguous agreement cannot end the inquiry.")

In addition, Ms. Curley submitted a case from the District Court of the Navajo Nation in support of her argument that the parol evidence rule, as construed or enforced by the courts of the Navajo Nation, would not preclude Ms. Curley (or Mr. Johnson for that matter) from offering oral testimony about the divorce

decree stipulation. Hawthorne v. Wener, 2 Nav.R. 62, 66 (Window Rock District Court 1979)("[T]his court rules that the Statute of Frauds does not apply in the Navajo Nation until such time as it is specifically adopted by the Navajo Tribal Council.")[2] The rules of decision in federal cases generally require reference to "state law" on matters of "substantive" law. Since the parol evidence rule or statute of frauds is ordinarily considered a matter of "state law", see Continental Illinois National Bank and Trust Company of Chicago v. Federal Deposit Insurance Corporation (In re Continental Resources Corporation), 799 F.2d 622, 626 (10th Cir. 1986), this Court would ordinarily look to the law of the relevant sovereign, in this instance, the Navajo Nation. However, given the explicit language of the Bankruptcy Code, the Court has not looked to the law of the Navajo Nation, because, as set out above, Congress has mandated the scope of inquiry in Section 523(a)(5) and (a)(15) cases.

Section 523(a)(5)

Section 523(a)(5) excepts from discharge any debt to a former spouse for alimony, maintenance, or support in connection with a divorce decree, but not to the extent that the debt includes a liability designated as alimony, maintenance, or

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[2] This was the only case cited by Ms. Curley. None was cited by Mr. Williams. The Court does not need to research the law further given the disposition the Court makes of this issue.

support, unless the liability is actually in the nature of alimony, maintenance, or support. 11 U.S.C. § 523(a)(5).

The terms "alimony" and "support" are to be given a broad construction to support the Congressional policy that favors enforcement of spousal and child support, thereby overriding the general bankruptcy policy which construes the exceptions to discharge narrowly. Collier ¶ 523.11[2], at page 523-78, citing Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993)(the term "support" as used in § 523(a)(5) is entitled to a broad construction); Dewey v. Dewey (In re Dewey), 223 B.R. 559, 564 (10th Cir. B.A.P. 1998), aff'd 1999 WL 1136744 (10th Cir. 1999) ("Dewey") (the term "support" is to be read broadly and in a realistic manner).

Whether an obligation to a former spouse is in the nature of support is resolved according to federal bankruptcy law, not state domestic relations law. Young v. Young (In re Young), 35 F.3d 499, 500 (10th Cir. 1994) ("Young"); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989)(per curium) ("Sylvester") (citing Goin v. Rives (In re Goin), 808 F.2d. 1391, 1392 (10th Cir. 1987)) ("Goin"). That determination is made as of the time of the divorce, not later, Sampson, 997 F.2d at 725-26, regardless of the ex-spouses' current needs or circumstances. Young, 35 F.3d at 500; Sylvester, 865 F.2d at 1166. Federal

courts should not put themselves in the position of modifying state matrimonial decrees. Sylvester, 865 F.2d at 1166.

In Young the Tenth Circuit Court of Appeals gave clear guidance to the Bankruptcy Courts in making 523(a)(5) determinations through analyzing its earlier Sampson case:

> In re Sampson ... held that a bankruptcy court must conduct a two-part inquiry when resolving the issue of whether payments from one spouse to another incident to divorce settlement are in the nature of support. In re Sampson, 997 F.2d at 722-23. First, the court must divine the spouses' shared intent as to the nature of the payment. Id. at 723. This inquiry is not limited to the words of the settlement agreement, even if ambiguous. Id. at 722. Indeed, the bankruptcy court is required to look behind the words and labels of the agreement in resolving this issue. Id. Second, if the court decides that the payment was intended as support, it must then determine that the substance of the payment was in the nature of support at the time of the divorce – i.e., whether the surrounding facts and circumstances, especially financial, lend support to such a finding. Id. at 725-26.

In re Young, 35 F.3d at 500.

The Court finds that the shared intent of the parties was to provide support. First, the Court finds that there was an oral agreement to pay support at the time of the divorce. Although the parties may not have discussed payment of the mortgage specifically as an element of support, the Court finds that the intent of that agreement was to provide support for Ms. Curley and the children in the form of a place to live. Second, the

agreement actually functioned as intended, providing the home for Ms. Curley and the children. See Martinez v. Martinez (In re Martinez), 230 B.R. 314, 318-19 (Bankr. W.D. Tx. 1999)(Although divorce decree labeled it a property settlement, Bankruptcy Court finds that award of house to one spouse with other assuming mortgage payment is support arrangement, with ultimate goal being to give the house to parties' children.) Finally, the financial circumstances at the time of the divorce indicate that Mr. Williams' contributions were support: Ms. Curley had custody of the five children, was earning less than Mr. Curley, and under the divorce decree he had no other obligations for support except paying the bills.

The stipulation anticipates payment of the mortgage in full. The list of debts to be paid by Mr. Williams, paragraph 5, included the full amount of the mortgage, $28,000, as of the divorce date. The Court also finds that the intent was that the full amount of $28,000 be "support"; it is no less "support" because Mr. Williams was to pay it out over the term of the mortgage, or more particularly because some was due to be paid after Jeffrey turned 18. In fact, an installment treatment suggests that an obligation is support rather than a property division. Id. at 318 (citing Carlile v. Fox (In re Fox), 5 B.R. 317, 321 (Bankr. N.D. Tx. 1980)).

Paragraph 6, the agreement to convey the parties' interests in the house, does not reduce or modify the requirement of paragraph 5 that the full debt be paid, or change the Court's view that it is a support arrangement. Conveyance of a mortgaged house normally does not relieve the mortgagor from liability on the mortgage. Paragraph 6 only fixes the time at which the house was to be conveyed: when the mortgage was paid or when Jeffrey became of age. It did not fix a date upon which Mr. Williams and Ms. Curley would no longer be responsible for making payments on the debt.

The Court finds that the agreement to pay the mortgage constitutes a debt "to a spouse, former spouse, or child of the debtor, for ... maintenance for, or support of such spouse or child, in connection with a ... divorce decree", and is therefore nondischargeable under 11 U.S.C. § 523(a)(5). The parties argued over whether the initial intent was to pay the mortgage until Jeffrey turned 18, or until it was paid off. Debtor argues that if in fact the award was support, his obligation terminated when Jeffrey turned 18; that the balance due at that time was $23,256.03 and if all payments had been made it would have been $18,024.60; and that, therefore, his maximum liability is the $5,231.43 difference which should be reduced by the $3,400 he paid after Jeffrey turned 18. The Court finds that it need not decide this, however, because the Court finds below that to the

extent any of the liability was not "support" under § 523(a)(5), it is also not discharged under section 523(a)(15).

Section 523(a)(15)

The Bankruptcy Reform Act of 1994 added section 523(a)(15) as an exception to supplement the exception of section 523(a)(5). Collier ¶ 523.21, at page 523-104. Subsection (5) establishes that alimony, maintenance and support are nondischargeable obligations; subsection (15) then establishes that any marital debt other than alimony, maintenance or support that is incurred in connection with a divorce is nondischargeable. Appeal of Ginter (In re Crosswhite), 148 F.3d 879, 883 (7th Cir. 1998).

Subsection (15) offers two exceptions to nondischarge-ability: (A) if the debtor does not have the ability to pay the debt from disposable income, or (B) the benefit to the debtor in discharging the debt outweighs the detrimental consequences to the former spouse or child. Crosswhite, 148 F.3d at 883.

Most courts that have applied this subsection put the burden on the creditor to show that a debt falls within subsection (15), and then shift the burden to the debtor to show that he or she meets the exceptions in subpart (A) or (B).

> [T]here is a clear shift in the burden of proof under §523(a)(15). The burden of proving initially that she holds a subsection (15) claim against the debtor should be borne by the creditor (nondebtor/former spouse). To make that showing, the creditor must establish that the debt is within the purview of subsection (15) by demonstrating that it does not fall under § 523(a)(5)

> and that it nevertheless was incurred by the debtor in the course of the divorce or in connection with a divorce decree or similar agreement. Once that showing has been established, the burden of proving that he falls within either of the two exceptions to nondischargeability rests with the debtor. In short, once the creditor's initial proof is made, the debt is excepted from discharge and the debtor is responsible for the debt unless either of the two exceptions, subpart (A), the "ability to pay" test, or (B), the "detriment" test, can be proven by the debtor.

Id. at 884-85. See also, e.g., Johnson v. Johnson (In re Johnson), 212 B.R. 662, 666 (Bankr. D. Ks. 1997)("The majority of courts have held that the debtor has the burden of proof as to subsections (A) and (B).") and Schottler v. Schottler (In re Schottler), 251 B.R. 441, 1999 WL 766100 at 3 (10th Cir. B.A.P. 1999)(unpublished opinion)(Noting that how section 523(a)(15) should be applied in the Tenth Circuit is undecided, but recognizing "majority rule" is that burden is on debtor to prove 523(a)(15)(A) or (B).)

This majority rule has been adopted by the various bankruptcy courts within the Tenth Circuit. See Slover v. Slover (In re Slover), 191 B.R. 886, 891 (Bankr. E.D. Ok. 1996); Simons v. Simons (In re Simons), 193 B.R. 48, 50 (Bankr. W.D. Ok. 1996); Johnson, 212 B.R. at 666; Dennison v. Hammond (In re Hammond), 236 B.R. 751, 766-67 (Bankr. D. Ut. 1998).

Ms. Curley made, in the alternative to her 523(a)(5) case, a prima facie case that the mortgage debt was "incurred by the debtor in the course of a divorce ... agreement, divorce decree

or other order of a court of record." 11 U.S.C. § 523(a)(15). This prima facie case establishes a rebuttable presumption that the debt is nondischargeable. See Slover, 191 B.R. at 892.

Mr. Williams did not meet his burden of proof to show that either of the exceptions of 523(a)(15)(A) or (B) were met. He did not present a current budget that would show an inability to pay[3]. See Johnson, 212 B.R. at 666 (Court uses "disposable income test" to determine ability to pay.) Nor did Mr. Williams show that discharging the debt would result in a benefit that outweighs the detriment to Ms. Curley.[4]

Therefore, the Court finds that, to the extent any of the mortgage debt was not support, it should not be discharged under 11 U.S.C. § 523(a)(15). Judgment will enter declaring that Mr. Williams obligation to hold Ms. Curley harmless from the home mortgage debt is not discharged in his chapter 7 proceeding.

ATTORNEY FEES

A court can award attorney fees in a domestic relations case if there is economic disparity between the parties. Sheets v. Sheets, 106 N.M. 451, 456, 744 P.2d 924, 929 (Ct. App. 1987). "Where a party lacks sufficient funds to pay attorney fees for

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[3]The only evidence relative to his budget was Ms. Curley's showing that debtor earned over $80,000 per year.

[4]Again, the only evidence of relative benefit/hardship was Ms. Curley's showing that debtor had an $80,000 gross income, while her income was $2,400 monthly for a family of ten persons.

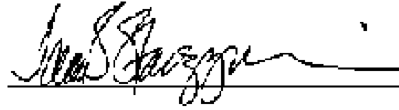
representation incident to dissolution of marriage or rights incident thereto, and the financial situation of the parties is disparate, it is error to deny an award of reasonable attorney's fees." Id.

Mr. Booth, attorney for Ms. Curley filed a request for fees in the amount of $4,167.03 and costs of $324.65. Defendant filed no objection to these fees. The Court has independently reviewed the request, and finds it reasonable. Therefore, the judgment in this case will also call for the payment of $4,167.03 in fees and $324.65 in costs.

CONCLUSION

The Court will enter judgment against Mr. Williams declaring that the mortgage debt listed in the Divorce Decree to Credit & Financing, Branch of Credit, is not discharged in this bankruptcy proceeding. Judgment will also enter against Mr. Williams for $4,167.03 in attorney fees and $324.65 in costs, for a total money judgment of $4,491.68. Interest on the total will accrue at the rate of 10% per annum. Ms. Curley, through counsel, also asked the Court to order Mr. Williams to cure the arrearages and resort to his pension plan to do so. Counsel for Mr. Williams, in closing, asked that Ms. Curley be ordered to deed her interest in the house to Jeffrey Williams. The Court will not consider these issues; rather, the parties should return to the Navajo Courts for specific enforcement action. The Bankruptcy Court

will only declare the debt nondischargeable, and award attorney fees to Ms. Curley in connection with this action.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and parties.

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