

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Stephen Bernard McDaniel,

Case No. 00-11659

Debtor.

Chapter 7

Lisa McDaniel,

Plaintiff,

v.

Adv. Pro. No. 00-5274

Stephen Bernard McDaniel,

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT EXCEPTING DEBT FROM DISCHARGE**

The Court conducted a trial in this matter on March 21, 2001. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FACTS

The parties submitted the following "Stipulation of Facts and Exhibits" on March 19, 2001.

1. That Defendant, Stephen Bernard McDaniel, filed for relief under Chapter 7 of the Bankruptcy Code on or about May 10, 2000, bearing Case No. 00-11659-GHB.

2. That Plaintiff, Lisa McDaniel and the Defendant, Stephen Bernard McDaniel were formerly Husband and Wife but were divorced by Order of the Chancery Court of the Twenty-Seventh Judicial District of Obion County, Tennessee, at Union City, dated October 5, 1999, in the matter styled: Lisa L.J. McDaniel vs. Stephen Bernard McDaniel, bearing Docket Number 21,580. A copy of the said Final Decree of Absolute Divorce having been previously marked as Trial Exhibit 1. . . is a true and accurate photocopy of the original and is accordingly entered into evidence.
3. The subject Final Decree heretofore identified as Trial Exhibit 1 incorporated and adopted the Marital Dissolution Agreement executed by the parties on the 23rd day of September, 1999, and made same a part of the Order of the Court for all purposes. The Marital Dissolution Agreement having been previously marked as Trial Exhibit 2 . . . is a true and accurate photocopy of the original and is accordingly entered into evidence.
4. An Amended Order was entered by the afore described State Domestic Relations Court dated March 14, 2000. A copy of the said Amended Order having been previously marked as Trial Exhibit 3 is . . . a true and accurate photocopy of the original and is accordingly entered into evidence.
5. The parties have two (2) minor children, namely Zachary B. McDaniel, now age eight (8) and Amber D. McDaniel, now age two (2).
6. Numerical Paragraph 4 of the Marital Dissolution Agreement of the parties previously

identified herein as Trial Exhibit 2, provides that Defendant shall pay child support in the amount of \$200.00 per week, plus Clerk's commission of \$10.00 for a total weekly payment of \$210.00. The parties acknowledge and stipulate that Defendant's obligation for ongoing child support and any arrearage thereon is non-dischargeable and is accordingly excepted from discharge pursuant to 11 U.S.C. § 523(a)(5).

7. Pursuant to Numerical Paragraph 5 of the afore described Marital Dissolution Agreement, Defendant is to provide medical insurance on behalf of the minor children and further Defendant is to be responsible for all deductibles and any medical, dental, optical and pharmaceutical expenses not covered by insurance. The parties acknowledge and stipulate that Defendant's obligation for the children's non-covered medical bills constitutes an obligation for support and is accordingly excepted from discharge pursuant to 11 U.S.C. § 523(a)(5).

8. Pursuant to the Marital Dissolution Agreement of the parties, previously identified as Trial Exhibit 2, the Defendant was to assume certain marital indebtedness. Included in those debts to be assumed by Defendant and the dischargeability of which are at issue before this Honorable Court include the following (i.e. this is an inclusive list of the debts at issue):

a. Defendant is to pay the 2nd mortgage indebtedness owed on the marital home in the amount of \$311.81 per month. (See Numerical Paragraph 8 of Trial Exhibit 2). Without

stipulating as to the dischargeability of the subject debt, the parties stipulate and agree that the arrearage owing with respect to the 2nd mortgage indebtedness through the month of April 2001 is \$2,556.88.

b. Defendant is to pay VISA Credit Card (Account No. 4356-2100-0362-3425) with a payoff as of March 21, 2001, in the amount of \$3,525.60. (See Numerical Paragraph 11 of Trial Exhibit 2).

c. Defendant is to pay JCPenney account (Account No. 197-305-249-9) with a payoff as of March 21, 2001, in the amount of \$335.21. (See Numerical Paragraph 11 of Trial Exhibit 2).

d. Defendant is to pay the law firm of Conley, Campbell, Moss & Smith the sum of \$1,500.00 for legal expenses incurred by Wife during the divorce. (See Numerical Paragraph 15 of Trial Exhibit 2).

e. Defendant is to pay an additional \$250.00 in attorney fees incurred by Wife. (See Numerical Paragraph 3 of Trial Exhibit 3).

In addition to the facts stipulated to by the parties, the Court makes the following findings of facts:

1. The parties' son, Zachary McDaniel, is currently being treated for ADHD.
2. The plaintiff, Lisa McDaniel, is a full-time student at Dyersburg State Community College. She is seeking an accounting degree. Plaintiff is not employed outside the home at this

time.

3. Plaintiff's monthly income, excluding money she receives for school expenses, is approximately \$1100.00.

4. Stephen McDaniel's obligation to assume responsibility for the VISA and JCPenney accounts is listed in paragraph 11 of the parties' MDA. This paragraph also contains Stephen McDaniel's obligation to be responsible for all medical bills owed on behalf of the minor children.

5. Numerical Paragraph 14 of the parties' MDA reads as follows: "The parties have reached a fair and equitable division of all remaining personal property . . . [T]he parties will each receive the items listed in the document attached to this Agreement as Exhibit 1."

6. Pursuant to the March 14, 2000, "Amended Order" (Trial Exhibit 3), numerical paragraph 2, Stephen McDaniel is obligated to pay Lisa McDaniel \$311.81 per month in spousal support.

7. The undisputed testimony at trial was that the entire balances on the Visa and the JCPenney credit cards represent funds spent on food, clothes and other expenses for the McDaniel family.

8. As of December 2, 2000, Stephen McDaniel had earned \$31,957.99 in annual income.

9. Defendant, Stephen McDaniel, has been living with Lisa Palmer since January 2000.

As of March 2, 2001, Palmer's income for 2001 was \$8,960.00.

II. CONCLUSIONS OF LAW

11 U.S.C. § 523(a)(5)

Subsection (a)(5) of § 523 provides as follows:

(a) A discharge under section 727 ... 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--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act [42 U.S.C. § 602(a)(26)], or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(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.

11 U.S.C. § 523(a)(5).

Exceptions to discharge are to be narrowly construed. *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991). The party objecting to discharge carries the burden of proving by a preponderance of the evidence that a debt is nondischargeable. *Id.* Nevertheless, "the terms 'alimony' and 'support' are given a broad construction to promote the Congressional policy that favors enforcement of obligations for spousal and child support." 4 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 523.11[2], p. 523.78 (15th ed. Rev. 1997).

"Congressional policy concerning § 523(a)(5) 'has always been to ensure that genuine support obligations would not be dischargeable.'" *Jones v. Jones (In re Jones)*, 9 F.3d 878, 880 (10th Cir.

1993) (quoting *Shine v. Shine*, 802 F.2d 583, 588 (1st Cir. 1986)). “Section 523(a)(5) represents Congress’ resolution of the conflict between the discharge of obligations allowed by the bankruptcy laws and the need to ensure necessary financial support for the divorced spouse and children of the debtor.” *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1106 (6th Cir. 1983). The debtor’s duty to support his or her family takes precedence over the debtor’s right to receive a discharge.

For a debt to be nondischargeable under § 523(a)(5), it must be one that (1) is owed to a spouse, former spouse or child of the debtor; (2) has not been assigned to another entity, except pursuant to section 402 of the Social Security Act; (3) arose in connection with a divorce decree, separation agreement, property settlement agreement, order of a court of record or determination made by a governmental unit with state or territorial law; and (4) is "in the nature of alimony, maintenance or support." *See, Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir.1993); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir.1983). This requirement that payments be “*in the nature of alimony, maintenance or support*” was designed to avoid excepting from discharge debts which are actually property settlements disguised as support obligations. *Calhoun*, 715 F.2d 1103. Agreements which are designated as “alimony, maintenance or support” and which meet some threshold definition of these terms, are generally found to be non-dischargeable under § 523(a)(5). *Fitzgerald*, 9 F.3d 521. In analyzing whether or not the obligation is “in the nature of alimony, maintenance or support,” the Sixth Circuit has

stated that the bankruptcy court may look to traditional factors such as:

The nature of the obligations assumed (provision of daily necessities indicates support); the structure and language of the parties' agreement or other court's decree; whether other lump sum or periodic payments were also provided; length of the marriage; the existence of children from the marriage; relative earning powers of the parties; age, health and work skills of the parties; the adequacy of support absent the debt assumption; and evidence of negotiation or other understandings as to the intended purpose of the assumption.

Calhoun, 715 F.2d at 1108, footnote 7.

Compared to other Marital Dissolution Agreements this Court has seen, the McDaniels' MDA is rather simple and vague. It does not contain separate sections outlining support obligations and property settlements nor does it contain the typical "hold harmless" language found in so many of today's MDAs. It simply sets forth the parties' agreement without regard to labels such as "alimony," "maintenance," or "support."¹ The defendant would have the Court believe that this absence of labels mandates resolution of the case according to § 523(a)(15) rather than § 523(a)(5). The Court, however, finds that the missing labels are inconsequential and that the debts in question are properly analyzed under subsection (a)(5).

A. Second Mortgage Indebtedness of \$311.81 per month

As mentioned above, Stephen McDaniel's obligation to assume responsibility for the 2nd mortgage on the parties' marital residence is not labeled as either a support obligation or a

¹The Court notes that the only obligation which is labeled in the McDaniels' MDA is "child support." This obligation is not in dispute in this proceeding.

property settlement in the MDA. In some instances, this failure to label the obligation might give some support to Stephen McDaniel's argument that it is indeed not an award for support or alimony; however, the Court finds that there is other proof in the record which conclusively establishes that the assumption of the 2nd mortgage by Stephen McDaniel is indeed "support" as contemplated by § 523(a)(5).

In the "Stipulation of Facts" entered with the Court on March 19, 2001, the parties stipulated that "Defendant is to pay the 2nd mortgage indebtedness owed on the marital home in the amount of \$311.81 per month." In the March 14, 2000, "Amended Order" modifying the parties' MDA, numerical paragraph 1 reads "[t]he Husband has failed to make the monthly spousal support payments of \$311.81" Numerical paragraph 2 of the Amended Order reads ". . . the Husband's obligation to pay spousal support payment of \$311.81 per month shall be added to the Husband's wage assignment in which he is presently paying child support." The Amended Order was stipulated to by both parties in this matter and was entered into evidence as "Trial Exhibit 3" with the Court. From looking at the MDA as modified by the March 14, 2000, "Amended Order," it is clear that the Chancery Court of Obion County concluded that the \$311.81 monthly payment on the 2nd mortgage by Stephen McDaniel was a "spousal support" payment.

The conclusion by the Obion County Chancery Court that the 2nd mortgage assumption by Stephen McDaniel was for "spousal support" persuades this Court that the debtor's obligation on

the 2nd mortgage is non-dischargeable pursuant to § 523(a)(5). As further support for a determination of nondischargeability, this Court finds the following factors to be persuasive:

1. The payment of the 2nd mortgage by Stephen McDaniel aids in providing his children the daily necessity of having someplace to live.

2. At the time the parties were divorced, Lisa McDaniel did not have the skills to obtain employment which would allow her to be able to make both the 1st and 2nd mortgage payments.

3. Stephen McDaniel continues to have a better earning capacity than Lisa McDaniel.

As a result of these facts and the clear intention of the Chancery Court, the Court holds that Stephen McDaniel's obligation for the 2nd mortgage on the McDaniels' marital residence is nondischargeable pursuant to 11 U.S.C. § 523(a)(5).

B. VISA and JCPenney Accounts

The Court next turns its attention to the charge accounts assumed by Stephen McDaniel in the divorce. Applying the *Calhoun* factors to the credit cards, the Court finds that the amounts owed on the VISA and JCPenney accounts represent amounts spent on providing daily necessities for the McDaniel family. The undisputed testimony at trial was that the balances represented funds spent on food, clothing and other daily expenses for the family. Stephen McDaniel did not offer any proof which contradicted this testimony. Although the Chancery Court did not place labels in the parties' MDA, the Court notes that Stephen McDaniel's obligation to assume the VISA and JCPenney accounts was listed in the same paragraph of the

MDA as his obligation on the children's medical bills—an obligation which Stephen McDaniel stipulated was nondischargeable under § 523(a)(5).

The Court also finds support for excepting Stephen McDaniel's obligation on the VISA and JCPenney accounts based on the relative earning capacity of the parties and the existence of the McDaniels' children. At the time of the divorce, Lisa McDaniel did not have the necessary skills to go out into the workplace and obtain employment commensurate with Stephen McDaniel's. Additionally, Lisa McDaniel testified that the fact that the McDaniels' son, Zach, has ADHD makes it difficult for her to work.

As a result of these conclusions, the Court finds that Stephen McDaniel's obligation for the VISA and JCPenney accounts is nondischargeable under 11 U.S.C. § 523(a)(5).

C. Attorney Fees

Bankruptcy Courts are almost unanimous in holding that attorney's fees incurred in connection with efforts to collect alimony, maintenance or child support are non-dischargeable pursuant to § 523(a)(5). *Macy v. Macy*, 114 F.3d 1, 3 (5th Cir. 1997); *In re Platter*, 140 F.3d 676, 682 (7th Cir. 1998); *In re Williams*, 703 F.2d 1055, 1057 (8th Cir. 1983). As a result, this Court finds that any and all attorney's fees incurred by Lisa McDaniel in attempting to collect any of the debts for support mentioned in this opinion are nondischargeable in Stephen McDaniel's bankruptcy case pursuant to 11 U.S.C. § 523(a)(5).

III. ORDER

It is therefore **ORDERED** that the Complaint Excepting Debt From Discharge is
GRANTED.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: April 9, 2001