UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:
WILLIAM H. EDWARDS, JR.,
Debtor.

Case No. 02-39683whb
Chapter 7

CAROLYN C. EDWARDS,
Plaintiff,
v.

Adversary Proceeding No. 02-1118

WILLIAM H. EDWARDS, JR.,
Defendant.

MEMORANDUM OPINION ON COMPLAINT TO DETERMINE DISCHARGEABILITY

A trial was conducted on July 14, 2003 on the complaint filed by Carolyn C. Edwards to determine the dischargeability of debts arising from the prebankruptcy divorce of these parties. After the trial the parties' counsel filed memoranda, and the Court has considered the trial testimony, exhibits and entire record in this proceeding. The opinion contains the Court's findings and conclusions, pursuant to FED. R. BANKR. P. 7052.

SUMMARY OF FACTS

The complaint seeks a determination of whether debts created by the parties' divorce and marital dissolution agreement ("MDA") are dischargeable under 11 U.S.C. § 523(a)(5) or (15). Subsection (a)(5) generally excepts from a discharge debts to a spouse, former spouse or a child of the debtor that are for alimony or support. Subsection (a)(15) has two parts that may permit the discharge of marital debts that do not fall within the (a)(5) exception if

> (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, 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.

11 U.S.C. § 523(a)(15).

These parties were divorced in Shelby County, Tennessee, by a divorce decree dated October 9, 1996. That decree incorporated the parties' consensual MDA that was dated September 16, 1996. At the time of the divorce, custody of two minor children of the marriage was given to Carolyn Edwards, with William Edwards being required to pay child support. The child support amount in the MDA and decree was $4,000 per month; however, subsequent to that decree the state court reduced the child support to $2,733.33 per month based upon a finding that Mr. Edwards had suffered an "involuntary reduction in income." Order Confirming Divorce Referee's Ruling, a part of Exhibit 2. One of the children is now beyond the age of 18, and in the post-trial memorandum filed on behalf of the Debtor, the request for relief included asking for a discharge of the on-going child support and related health-care expenses for the adult child.[1]

In addition to the monthly child support, the MDA and decree required Mr. Edwards to pay other expenses related to the children, such as insurance and medical care. In the state court's reduction of child support, the order dated August 26, 2002 continues to refer to Mr. Edwards's requirement to "maintain health and dental insurance for the parties' two children," without any reference to termination as to the older son.

The principal provision concerning the children that was submitted to this court for consideration was the Debtor's contractual obligation to pay the costs of the children's college or other higher education. As to this obligation, the MDA provided at its paragraph 6 that Mr. Edwards

> agrees to pay the costs of the minor children's college or higher education expenses, including room, board, books, travel and tuition at a public or private college or university to be chosen by the parties and such child, the selection of which shall take into account such child's scholastic abilities, educational interests and desires.

The older child is now enrolled in the Savannah College of Art and Design ("SCAD"), and the younger child, now 16, is expected to be college-bound. SCAD is expensive, with annual fees

---

[1] The Court notes that the language of the MDA and decree leave it uncertain when the Debtor's contractual child support obligations will end. The parties agreed in the MDA that the child support would not terminate upon a child reaching the age of 18. Since another part of the MDA required the Debtor to pay the costs of each child's college or higher education, the Court assumes that the child support obligations were to continue until the children completed their higher education. This court was not asked to make any determination about the termination date under the parties' contract.

of approximately $26,000.

The MDA also imposed a large alimony *in solido* obligation on Mr. Edwards, requiring him to pay $300,000 in monthly installments of $2,500. Apparently, Mr. Edwards is current in this obligation, but he asks this court to find the balance of that on-going obligation to be dischargeable as a property division under § 523(a)(15).

DISCUSSION

CHILD SUPPORT AND COLLEGE EXPENSE OBLIGATIONS

This court had previously issued an opinion concluding that a chapter 7 debtor's monthly child support obligation could be excepted from discharge under § 523(a)(5) notwithstanding the fact that the child reached the age of majority, when that support was contractually agreed to and was in fact in the nature of support. *See Beck v. Beck (In re Beck),* No. 92-22414, Adv. No. 94-0460, 1994 WL 687446 (Bankr. W.D. Tenn. Dec. 6, 1994); *see also Binder v. Prager (In re Prager),* 181 B.R. 917 (Bankr. W.D. Tenn. 1995) (a decision by Chief Judge Kennedy reaching the same conclusion). However, in both *Beck* and *Prager,* the support obligation was a monthly amount that was agreed to by the parties and that would continue after age 18 so long as the child was a full-time student. Neither of these cases involved the contractual obligation for the debtor to pay the college expense in addition to a monthly support amount.

As to whether the Debtor can discharge his contractual obligation to pay the expenses to his son's college of choice, SCAD, the court notes that the obligation is strictly contractual. The law in Tennessee does not permit a divorce court to require either parent to support a child past the age of majority. *See Sholes v. Sholes,* 985 F.2d 561 (6th Cir. 1993) (Table Decision) (an unpublished opinion concluding that Mr. Sholes's agreement to pay the college expenses of his children was contractual and that support obligations in Tennessee terminate upon the child reaching the age of 18). This court finds the *Sholes* authority, although unpublished, to be a distinction from the facts in this court's prior *Beck* authority and to be persuasive authority as to the college education expense.

Since Mr. Edwards is contractually obligated to pay $2,733.33 monthly in support for his children and since that obligation apparently continues until one or both children complete higher education, it cannot be said that the separate contractual obligation to pay all higher education expenses is in the nature of necessary support. The monthly support payments are substantial and

there was no proof that the children lack necessary support. The only proof was that the older child desires to attend SCAD and that the expenses for that college are high. As to the Debtor's contractual obligation, the proof was persuasive that he could not afford on his current income to pay those college expenses. The paragraph in the MDA providing for college expenses, paragraph 6, does not refer to the obligation as support. Rather, that paragraph divides between the parents responsibility for education expenses: Carolyn Edwards assumed the expenses for private education before college and William Edwards assumed the expenses for post-secondary education. There is nothing in that paragraph from which the court may conclude that the parties intended these divisions to be support in nature.

Since the Debtor's obligation to pay the college expenses of his children is contractual and separate from his contractual obligation to pay on-going monthly support, this court finds and concludes that the obligation to pay all college expenses is not support under Tennessee law nor under § 523(a)(5); thus, that college-expense obligation is dischargeable.

In contrast, Mr. Edwards's contractual obligation to continue to pay monthly child support, by the terms of the MDA, does not terminate upon a child reaching the age of majority. As such, under the *Beck* and *Prager* authority in this District, the court concludes that the Debtor may not discharge his on-going monthly child support obligation, so long as it may exist under the terms of the MDA and divorce decree. Notwithstanding its contractual basis, it is still support under the terms of those documents. *See Beck,* 1994 WL 687446, at * 4; *Prager*, 181 B.R. at 919-20.

As to the Debtor's further obligations to provide health and dental insurance, paragraph 7 of the MDA required him to do so "for the parties' children as long as they are eligible for coverage pursuant to Husband's health insurance plan." Note that this language refers to "children" not to "minor children." Moreover, the August 2002 order of the state court continues the Debtor's obligation to maintain such insurance. Health and dental insurance is support in nature, and the court concludes that the Debtor may not discharge this obligation under § 523(a)(5), but it is observed that this obligation would appear to end, under its contractual terms, whenever the Debtor's health insurance plan will no longer permit coverage of a child due to that child's age or other circumstance.

As to the Debtor's obligation to pay any health-care costs that are not covered by insurance, paragraph 7 of the MDA, in contrast to its provision concerning health insurance, provides that Mr.

Edwards "shall pay" such expenses "for the minor children." The reference to "minor children" is significant since it differs dramatically from the earlier provisions. Based upon the terms of the MDA, the court concludes that the Debtor's duty to pay non-insured health-care costs for his children is dischargable after each child reaches the age of majority (18).

ALIMONY IN SOLIDO OBLIGATION

The other significant issue presented for determination was whether the debt described by the MDA and decree as alimony *in solido* is dischargeable, either under § 523(a)(5) or (15). In paragraph 5 of the MDA, this obligation is described as an agreement to pay a total of $300,000 in monthly installments of $2,500. The parties agreed in the MDA that the obligation was not modifiable "as a result of any change in circumstances." And, the obligation does not terminate on Carolyn Edwards's death or remarriage, nor upon Mr. Edwards's death unless he had complied with the requirement of having sufficient life insurance to fund any balance due. Finally, the agreement was that the debt was not taxable to the wife nor tax deductible to the husband.

Under case authority in Tennessee, this contractual obligation appears clearly to be a division of property rather than alimony. *See Wilson v. Wilson,* No. W2000-01384-COA-R3-CV, 2002 WL 54385 at * 3 (Tenn. Ct. App. Jan. 10, 2002) (describing alimony *in solido* as property division); *Burlew v. Burlew,* 40 S.W.3d 465, 471 (Tenn. 2001) ("Alimony *in solido* is an award of a definite sum of alimony and 'may be paid in installments provided the payments are ordered over a definite period of time and the sum of the alimony to be paid is ascertainable when awarded.' A typical purpose of such an award would be to adjust the distribution of the parties' marital property.") (quoting *Waddey v. Waddey,* 6 S.W.3d 230, 232 (Tenn. 1999)). The alimony *in solido* described in the MDA at issue fits the Tennessee Supreme Court's definition exactly. Thus, this debt is not alimony under § 523(a)(5), and whether it is a dischargeable property division is an issue to be decided under § 523(a)(15).

The court follows the authority in this Circuit that the Debtor has the burden of proof on whether one of the (a)(15) exceptions permits a discharge, and the court concludes that the Debtor has not carried his burden under either subpart (A) or (B). *See Hart v. Molino (In re Molino),* 225 B.R. 904, 907 (BAP 6th Cir. 1998).

In analyzing the proof, the court is not persuaded by the Plaintiff's argument that Mr. Edwards voluntarily or artificially reduced his ability to pay his marital obligations. First, such a

finding would be inconsistent with the state court's finding that Mr. Edwards's income had been "involuntarily reduced." Moreover, while there was some proof that Mr. Edwards had spent substantial sums of money on travel, purchases and a business start-up subsequent to his divorce, there is no proof that he did this with any motive to eliminate ability to pay his marital debts. Rather, Mr. Edwards was earning a substantially higher income at the time of his divorce and for some period of time afterwards. The industry in which he is employed has suffered substantial set-backs, according to his credible testimony, and he can no longer expect to earn the salary that he previously earned in the home health care industry. His current income of $11,250.00 monthly is still substantial but is completely consumed by his personal expenses (which the court does not find to be excessive) and by his on-going marital and support debt payments.

Although Mr. Edwards's income has been involuntarily reduced and his monthly budget is tight, there was not sufficient proof that he is unable to pay the on-going alimony *in solido* of $2,500.00 along with the on-going child support. The Debtor's monthly deficit of $247.00 shown on Exhibit 9 is not so insurmountable as to justify a finding of inability to pay the alimony *in solido* under § 523(a)(15)(A). There was proof that he may receive an annual bonus, although that is not certain; thus, there is the real potential for him to overcome any monthly short-fall by further reduction in his expenses and by additional income.

As to § 523(a)(15)(B), a balancing test is required, and the Debtor must demonstrate by the proof that the benefit of the Debtor's possible discharge outweighs any hardship to the former spouse. *In re Molino,* 225 B.R. at 908-909 (citing *Patterson v. Patterson (In re Patterson),* No. 96-6374, 1997 WL 745501 (6th Cir. Nov. 24, 1997) (unpublished) for its approval of non-exclusive factors to aid the bankruptcy court's consideration of § 523(a)(15)(B)). This court has considered all of the proof in this case in light of the *Patterson* factors. While it is clear that Carolyn Edwards is underemployed and that she has some assets held for retirement purposes, and it is obvious that William Edwards is spending as much as he earns without any current substantial unnecessary spending, it is not clear from the evidence that Mr. Edwards's possible discharge of the remaining alimony *in solido* obligation outweighs the detrimental effect that such a discharge would have on Carolyn Edwards. Moreover, since the court has concluded that Mr. Edwards may discharge his college-expense obligation and some of his health care costs for his older son, it will be necessary for Carolyn Edwards to assist her sons in these expenses. She has already done that for current

expenses at SCAD. Thus, a discharge of the alimony *in solido* obligation would have a detrimental effect not only on Carolyn Edwards but on the children of this marriage as well.

The court is not persuaded by the evidence that a balancing of the proof favors a discharge outweighing any detriment to Carolyn Edwards, and the court concludes that the Debtor may not discharge his alimony *in solido* obligation. The Debtor must simply await payment of that obligation in a few years and reduction/elimination of his remaining child support obligations in order to see relief from the substantial financial burden that his contractual obligations created.

CONCLUSION

The Debtor's contractual obligation to pay the college expenses of his children is dischargeable under 11 U.S.C. § 523(a)(5).

The Debtor's obligation to continue child support beyond the age of majority is not dischargeable under 11 U.S.C. § 523(a)(5), nor is his obligation to pay for health and dental insurance so long as his health insurance permits coverage of the children. His obligation, however, to pay any health-care costs for the children that are not covered by insurance shall terminate and be dischargeable upon each child reaching the age of majority.

The Debtor's contractual obligation to pay alimony *in solido* is not dischargeable under 11 U.S.C. § 523(a)(15)(A) or (B).

A separate order will be entered consistent with this opinion.

Dated: August 21, 2002.

_____
William Houston Brown
United States Bankruptcy Judge

Russell W. Savory
Gotten, Wilson, Savory & Beard, PLLC
Attorney for Plaintiff
200 Jefferson Avenue, Suite 900
Memphis, TN 38103

Jack F. Marlow

Wyatt, Tarrant & Combs, L.L.P.
Attorney for Defendant/Debtor
1715 Aaron Brenner Drive, Suite 800
Memphis, TN 38120-4367