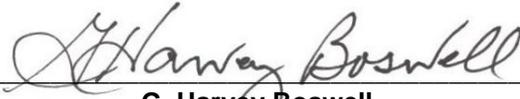


Not intended for publication



Dated: February 17, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

David D. Dean,
Debtor.

Case No. 03-26637

Tina Ann Mosier Dean,
Plaintiff,

Chapter 7

v.

Adv .Pro. No. 03-0728

David D. Dean,
Defendant.

MEMORANDUM OPINION AND ORDER RE COMPLAINT TO
DETERMINE AND DECLARE NONDISCHARGEABILITY OF DEBTOR

The Court conducted a hearing on the Plaintiff's Complaint to Determine and Declare Nondischargeability of debtor on December 2, 2003. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. section 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Tina Ann Mosier Dean and David D. Dean were married in May 2001. The Chancery Court of Tipton County Tennessee issued a Final Decree of Divorce for the Deans on November 22, 2002. The divorce decree

incorporated a marital dissolution agreement entered into by the parties on October 16, 2002. The relevant paragraphs of this agreement are as follows:

8. Debts. Both parties stipulate and agree that, except at [sic] specifically set forth within this Agreement, each party shall be responsible for, and shall pay, their respected debts and indebtedness incurred in their respective name, or for their respective benefit. Additionally, both parties stipulate and agree that Husband shall pay to Wife, within 120 days from the execution of this Agreement, the sum of Six Thousand Three Hundred Fifty-one Dollars and Four Cents (\$6,351.04) for debts and/or payments incurred for the benefit of Husband, or as a result of Husband and Husband's activities, which payment by Husband to Wife is a part of the settlement of the property rights and obligations of the parties and which sum cannot be, and shall not be, discharged, modified, reduced, or amended in any bankruptcy proceeding of Husband or involving Husband or in any other legal proceeding involving Husband.

9. Alimony. Both parties stipulate and agree that neither party shall pay to the other party, nor receive from the other party, any alimony.

19. Costs and Legal Fees Upon Breach of Agreement. The parties agree that if this Agreement shall be breached in any manner by either party, the breaching party shall be responsible for all costs and expenses incurred by the non-breaching party, including reasonable attorney fees.

The MDA also stated that:

1. Tina Dean owned the marital residence prior to the marriage and that all right, title and interest to the residence would re-vest in her;
2. the parties did not have any joint bank accounts and that each party would be the "sole and complete owner" of their respective individual accounts;
3. the parties had divided up their personal property prior to entering into the MDA;
4. the parties would be responsible for their own medical insurance; and
5. the parties would each be the sole and complete owner of their respective vehicle as of the date of the MDA.

MDA, paragraphs 1 - 6. Despite the agreement in paragraph 8 of the MDA, David Dean failed to make the \$6,351.04 payment to Tina Dean.

David Dean filed for chapter 7 relief on April 18, 2003. Tina Dean filed the instant adversary proceeding on July 28, 2003. In her complaint, Tina Dean alleged that the payment David Dean agreed to make to her in paragraph 8 of their MDA should be found non-dischargeable under section 523(a) of the Bankruptcy Code. Tina Dean further alleged that she is entitled to a non-dischargeable judgment against the debtor for her attorney's fees, costs and expenses in bringing this action.

At the hearing in this matter, Tina Dean testified that she lost her job in June 2003 and that she is currently unemployed. She also testified that she has suffered a financial hardship as a result of David Dean's failure to pay the \$6,351.04. Tina Dean did not testify about when she anticipated returning to work.

David Dean also testified at the trial. According to his testimony, David Dean alleged that he is unable to pay the \$6,351.04 to his ex-wife. David Dean currently works for Memphis Motor Sports and grosses \$2,082.00

a month. After taxes, insurance and child support payments in the amount of \$885 are deducted from his check, the debtor nets \$891.00 per month. David Dean pays \$300 per month in rent, \$451.00 per month for his car, and various other living expenses for food, utilities, and the like. No proof was introduced at the trial that David Dean is currently earning less than he did at the time of entering into the MDA or that he is earning less than he is capable of earning. Neither of the parties introduced any proof as to why David Dean owed Tina Dean the \$6,351.04.

II. CONCLUSIONS OF LAW

11 U.S.C. section 523(a)(5)

Subsection (a)(5) of section 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 408(a)(3) of the Social Security Act, 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. section 523(a)(5). “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 [section] 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). 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.*

In the case of *Hayes v. Hayes (In re Hayes)*, 235 B.R. 885 (Bankr. W.D.Tenn. 1999), Judge Latta set forth an excellent and concise discussion of the Sixth Circuit’s law regarding section 523(a)(5):

In *Calhoun* the Sixth Circuit set forth a framework for determining when an agreement to assume joint debts creates a nondischargeable obligation to provide support. The court set forth the following factors to be considered in making that determination:

- (1) whether there was an intent to create a support obligation;
- (2) whether the obligation has the effect of providing necessary support;
- (3) if the first two steps are satisfied, whether the amount of the support represented by the obligation is not excessive; and if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purpose of federal bankruptcy law.

Id. at 1109-10.; see also *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993).

Following its decision in *Calhoun*, the Sixth Circuit returned to the issue of the dischargeability of marital debts in the case of *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993). The court acknowledged the confusion that had arisen concerning the application of its “present needs” test to support obligations other than assumptions of debt. *Id.* at 520. The court stated that “*Calhoun* was not intended to intrude into the states’ traditional authority over domestic relations and [sic] the risk of injustice to the non-debtor spouse or children.” *Id.* at 521. In *Fitzgerald* the question before the court was “whether something denominated as alimony [was] really alimony and not, for example, a property settlement in disguise.” *Id.*

Most recently, the Sixth Circuit has considered the dischargeability of marital debts in *In re Sorah*, 163 F.3d 397 (6th Cir. 1998). The court reiterated the deference to be given to a state court’s award of alimony that is labeled and structured as such. The court directs that,

In determining whether an award is actually support, the bankruptcy court should first consider whether it ‘quacks’ like a duck. Specifically, the court should look to the traditional state law indicia that are consistent with a support obligation. These include, but are not necessarily limited to, (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits.

An award that is designated as support by the state court and that has the above indicia of a support obligation (along with others that the state support statute considers) should be conclusively presumed to be support. A non-debtor spouse who demonstrates that these indicia are present has satisfied his or her burden of proving that the obligation constitutes support within the meaning of [section] 523, and is thus nondischargeable. . . . The burden then shifts to the debtor spouse to demonstrate that although the obligation is of the type that may not be discharged in bankruptcy, its amount is unreasonable in light of the debtor spouse’s financial circumstances.

Sorah, 163 F.3d at 401.

In re Hayes, 235 B.R. 885, 891-892 (Bankr. W.D.Tenn.,1999).

In the case at bar, the \$6,351.04 obligation at issue was not labeled as “alimony” or “support.” Instead, the MDA states that the \$6,351.04 “payment by Husband to Wife is a part of the *settlement of the property rights* and obligations of the parties” (emphasis added). Although courts have held that “a court may presume that a so-called property settlement is intended for support when the circumstances of the case indicate that the

recipient spouse needs support,”¹ this Court concludes that Tina Dean has not proven, by a preponderance of the evidence, that the \$6,351.04 payment is “in the nature of alimony, maintenance, or support.” The MDA designates the payment as a “settlement of the property rights” “for debts and/or payments incurred for the benefit of Husband.” Tina Dean did not testify as to what these “debts and/or payments” she incurred on David Dean’s behalf were. As a result, the Court can only look to the MDA as a whole to determine whether or not the payment was intended as support. Paragraph 9 of the MDA specifically states that neither party shall pay or receive alimony. Paragraphs 1 through 6 of the agreement indicate that Tina Dean and David Dean were financially independent of one another at the time of their divorce. Presumably, if Tina Dean owned her own automobile, had her own medical insurance, and maintained her own bank account, she did not need financial support from David Dean.

11 U.S.C. section 523(a)(15)

Because the Court has found that the debt at issue in this case is not “in the nature of alimony, maintenance or support,” the Court must now analyze the facts under section 523(a)(15). Subsection (a)(15) excepts from discharge any debt:

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--

(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. section 523(a)(15). This court has exclusive jurisdiction to determine if the debt in question is nondischargeable. 11 U.S.C. section 523(c)(1); *see In re Smither*, 194 B.R. 102, 106 (Bankr.W.D.Ky.1996) (noting that section 523(c)(1) grants federal courts exclusive jurisdiction over section 523(a)(15) matters while granting concurrent jurisdiction with state courts over section 523(a)(5) matters).

In section 523(a)(15) proceedings, the plaintiff creditor only has the burden of proving that (a) the debt is not a debt which is nondischargeable under section 523(a)(5), and (b) the debt was incurred "in the course of divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with state or territorial law by a governmental unit ..." in order for it to be nondischargeable under section 523(a)(15). *In re Molino*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998). If the

¹*Linthicum-Sandoval v. Sandoval (In re Sandoval)*, 161 B.R. 796, 799 (Bankr. N.D. Ohio 1992).

plaintiff meets this burden of proof, then the burden shifts to the debtor who must either prove an inability to pay the debt under section 523(a)(15)(A) or that a discharge of the debt would result in a benefit to the debtor that outweighs the detrimental consequences of a discharge to the spouse, former spouse, or children of the debtor under section 523(a)(15)(B) regarding the consequences of the discharge on the respective parties. *Id.*; *In re Stoodt*, 302 B.R. 549, 555 (Bankr. N.D. Ohio 2003).

In determining whether or not a debtor has the ability to pay under section 523(a)(15)(A), this Court has previously adopted the “disposable income” test of section 1325(b)(2) of the Bankruptcy Code as the appropriate standard by which to determine the debtor’s ability. Other courts in the 6th circuit have also adopted this approach. *Miller v. Miller (In re Miller)*, 247 B.R. 412, 414 (Bankr. N.D. Ohio 2000); *Spiezio v. Vitek (In re Vitek)*, 271 B.R. 551, 560 (Bankr. S.D. Ohio 2001). Under this test, a debtor has the ability to pay an obligation if the debtor has sufficient disposable income to pay all or a material part of a debt within a reasonable amount of time. Courts have enumerated several factors to consider when determining the debtor's ability to pay:

1. The debtor's "disposable income" as measured at the time of trial;
2. The presence of more lucrative employment opportunities which might enable the debtor fully to satisfy his divorce-related obligation;
3. The extent to which the debtor's burden of debt will be lessened in the near term;
4. The extent to which the debtor previously has made a good faith effort toward satisfying the debt in question;
5. The amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and condition of those debts;
6. The value and nature of any property the debtor retained after his bankruptcy filing;
7. The amount of reasonable and necessary expenses which the debtor must incur for the support of the debtor, the debtor's dependents and the continuation, preservation and operation of the debtor's business, if any;
8. The income of debtor's new spouse as such income should be included in the calculation of the debtor's disposable income;
9. Any evidence of probable changes in the debtor's expenses.

Smither, 194 B.R. at 108-09; *Cleveland*, 198 B.R. at 398.

In the case at bar, the debtor has a monthly gross income of \$2,082.00. After taxes and child support payments in the amount of \$885 are deducted, he takes home \$891.00 per month. David Dean pays a modest rent of \$300 per month which leaves him with \$591.00 for all other living expenses. Even if all of David Dean’s debts are discharged, this \$591.00 figure will not increase. David Dean has to pay for utilities, food, and transportation out of this \$591.00. Even if the debtor were to live frugally, the Court does not see how he could have any disposable income with which to pay even the smallest percentage of the \$6,351.04 to Tina Dean. Additionally, no proof was introduced that David Dean is earning less than he’s capable of or that he has the potential to earn more in the near future. Given these facts, the Court finds that the \$6,351.04 the debtor owes to Tina Dean is dischargeable under section 523(a)(15)(A) of the Bankruptcy Code.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Complaint to Determine and Declare Nondischargeability of Debtor is **DENIED**. It is **FURTHER ORDERED** that the debt owing to Tina Dean in the amount of \$6,351.04 is **DISCHARGED**.

Mailing Information:

Debtor

Debtor's Attorney

W. Clark Washington, 2773 Summer Oaks Drive, Memphis, TN 38134, Attorney for Plaintiff