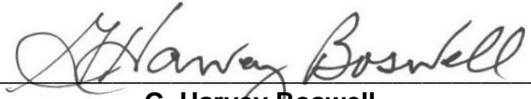




**Dated: February 07, 2005
The following is SO ORDERED.**


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

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

IN RE

Ronald Wayne Pounds,

Case No. 03-13482

Debtor.

Chapter 7

Eugenia Pounds,

Plaintiff,

v.

Adv .Pro. No. 03-5345

Ronald Wayne Pounds,

Defendants.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT OBJECTING TO DISCHARGEABILITY**

The Court conducted a hearing on the debtors' Complaint Objecting to Dischargeability on December 13, 2004. FED. R. BANKR. P. 7001, et seq. 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

The parties in this adversary proceeding were married on July 16, 1976. They had two sons, Clayton who was born on May 2, 1983, and Clark who was born on July 5, 1992. The parties separated on May 1, 1999, and subsequently filed a contested divorce proceeding in Lee County, Mississippi. On October 21, 1999, the Pounds withdrew all fault grounds for their divorce and entered into a Consent to Divorce.

Pursuant to the terms of the October 1999 consent order, Eugenia Pounds was granted exclusive legal and physical custody of the two children. Ronald Pounds was given reasonable rights of visitation. Ronald Pounds agreed to pay Eugenia Pounds twenty percent of his monthly adjusted gross income as child support for the couples' two children. The parties did not set a dollar amount for the child support in the consent order; rather, they left that determination to the Chancery Court of Lee County. Ronald Pounds also agreed to keep and maintain medical insurance on the children and to pay one-half of all medical and dental expenses not covered by insurance.¹

On November 23, 1999, the Chancery Court of Lee County, Mississippi, entered an "Opinion and Judgment of the Court" which granted the parties divorce on the grounds of irreconcilable differences. The Chancery Court reiterated the terms of the parties' October 1999 consent order and set a specific visitation schedule. The court also determined that \$215.00 per month was 20% of Ronald Pounds' monthly income and that Ronald Pounds would be required to pay that amount to Eugenia Pounds on the first day of each month until the children become emancipated. The Chancery Court further incorporated the consent order provision requiring Ronald Pounds to keep and maintain health insurance on the children and to pay one-half of all medical and dental expenses not covered by said insurance. The Chancery Court further stated that Ronald Pounds would be responsible for all medical bills incurred by their son Clark which insurance did not pay based on Clark's pre-existing medical condition. Both Ronald and Eugenia Pounds signed this consent order.

In addition to incorporating the provisions of the parties' consent order, the Chancery Court further awarded exclusive use and possession of the parties marital residence located at 6060 Maynard Drive in Tupelo, Mississippi, to Eugenia Pounds "until such time as the parties [sic] minor children are emancipated." The Chancery Court also ordered Ronald Pounds to pay one-half of the monthly mortgage

¹The provision requiring Ronald Pounds to pay one-half of all medical and dental expenses not covered by insurance contained the following exclusion: "not to include any medical expenses for minor children which are considered 'pre-existing conditions' of such insurance company and therefore not covered by such insurance."

on the residence in the amount of \$250.62 and one-half of the taxes and homeowner's insurance as they became payable. Once both children were emancipated, the court provided that either Eugenia or Ronald Pounds could petition the court to have the residence sold. The proceeds of that sale would be used to pay off any indebtedness on the home with any remaining funds to be "divided equally between the parties." With the exception of one bedframe and table, Eugenia Pounds was awarded exclusive possession and ownership of all furniture, furnishings, fixtures and appliances located in the house "for the use and benefit of the parties [sic] minor children." Lastly, the Chancery Court found that the marital residence was in need of structural repairs "in order for said residence to remain suitable for Eugenia M. Pounds and the parties [sic] minor children to continue to reside there." In furtherance of that need, the court ordered Ronald Pounds to pay for one-half of all necessary structural repairs.

On March 7, 2001, the Chancery Court issued an order increasing the monthly child support from \$215.00 per month to \$375.00 per month. This order stated that the matter was before the court on a "Joint Complaint for Modification." Both Ronald Pounds and Eugenia Pounds signed the order under the heading "approved for entry by."

Although entering into the October 1999 consent order and the March 2001 joint complaint for modification, Ronald Pounds failed to comply with the Chancery Court orders. As a result, Eugenia Pounds filed a "Petition for Citation for Contempt of Court" on June 12, 2001. In this petition, Eugenia Pounds alleged that Ronald Pounds was four months behind on making his half of the monthly mortgage payment on the Tupelo house and four months behind on his child support payments. Eugenia Pounds also alleged that Ronald Pounds had not maintained health insurance on the children nor had he paid one-half of the medical and dental bills incurred by the Pounds' children.

On September 14, 2001, the Chancery Court issued an order in the Pounds case. It stated that the Pounds had reached an agreement as to the past-due amounts Ronald Pounds owed Eugenia Pounds. According to the terms of the order, Ronald Pounds agreed to pay Eugenia Pounds "all sums owed to her for past due payments toward the marital home and past due child support payments by September 30, 2001." The order further provided that Ronald Pounds "agrees to also pay the current amounts owing toward said marital home and child support during the months of July, 2001, August, 2001, and September, 2001." Ronald Pounds also agreed to pay \$500.00 in attorney fees for Eugenia Pounds by September 31, 2001.

The Chancery Court issued another order on February 24, 2002, in which it found Ronald Pounds in willful contempt of court. In this order, the Chancery Court ordered Ronald Pounds to pay past due mortgage payments in the amount of \$2,255.58, child support of \$2,090.58, medical bills in the

amount of \$421.00, orthodontic bills in the amount of \$2,068.00, attorney fees in the amount of \$750.00 and filing fees in the amount of \$80.00. When Ronald Pounds failed to comply with that order, Eugenia Pounds filed a "Petition for Citation for Contempt of Court." The Chancery Court issued an order on Eugenia Pounds' petition on May 21, 2002, wherein it ordered Ronald Pounds to pay the past due child support, the attorney's fees and the filing fee by Friday, June 14, 2002. The Court also stated that Ronald Pounds was to be given credit for \$200.00 he paid to Eugenia Pounds on May 17, 2002. The order did not mention the past due mortgage payments or the medical and orthodontic bills.

Ronald Pounds did not comply with the May 21, 2002, order. As a result, the Chancery Court issued an "Order for Citation of Contempt of Court" on June 17, 2002. In that order, the court found Ronald Pounds "in willful and contumacious contempt for his refusal to abide" by the May 21, 2002, order. The order directed the Lee County Sheriff's Department to arrest Ronald Pounds and incarcerate him in the Lee County jail until he paid the \$2,920.58 plus an additional \$400.00 in attorney fees. According to Eugenia Pounds' testimony in the case at bar, Ronald Pounds was arrested and incarcerated for this contempt. Ronald Pounds' father paid the \$3,320.58 to Eugenia Pounds and Ronald Pounds was released from jail.

Although no proof was presented to the Court regarding any other petitions for contempt Eugenia Pounds has filed against Ronald Pounds, Eugenia Pounds testified that she has filed petitions since June 2002. Eugenia Pounds also testified that it is her understanding that there is an outstanding warrant for Ronald Pounds' arrest in Lee County, Mississippi, as a result of his contempt. Ronald Pounds testified that he does not know for certain that there is an arrest warrant, but that he suspects that there is.

Ronald Pounds filed a petition for chapter 7 bankruptcy relief on July 22, 2003. He did not list any secured or unsecured priority creditors. He did list a \$51,000.00 debt owing to City Mortgage Company as a general unsecured creditor. Ronald Pounds listed a monthly expense of \$275.00 for "alimony, maintenance and support" on his schedule J. Ronald Pounds did not list Eugenia Pounds on his petition or matrix nor did he indicate any outstanding indebtedness or arrearage.

Citifinancial filed a motion for relief from stay on August 28, 2003. In its motion, Citifinancial alleged that it had a deed of trust on 106 Maynard Drive, Tupelo, Mississippi, with a balance of \$51,556.23. The Pounds had allegedly defaulted on the mortgage. Citifinancial's motion was granted on October 1, 2003, and an order lifting the stay was entered on October 3, 2003. As of the trial date in this adversary proceeding, Eugenia Pounds was still residing at 106 Maynard Drive. The parties did not mention the order lifting the stay. The Court presumes some type of arrangements have been made with Citifinancial since Eugenia Pounds and her sons are still residing at the house.

At some point after Ronald Pounds filed his chapter 7 case, Eugenia Pounds became aware of the pending bankruptcy proceeding and on November 12, 2004, she filed a complaint objecting to discharge of the child support, mortgage payments, repair bills and medical bills. Despite the fact that this adversary proceeding had been filed, the Court issued an order of discharge in Ronald Pounds' case on November 14, 2003. The discharge was set aside as to Eugenia Pounds on November 25, 2003. An order vacating the discharge in whole was entered on April 2, 2004.

The debtor does not dispute that the child support payments are non-dischargeable. What he does allege, however, is that his half of the house payment, the repair bills for the house, the medical and dental bills on the children as well as his obligation to keep the children insured should be discharged because he does not have the ability to pay those debts.

Since 2002 when Ronald Pounds' father paid the \$3,320.58 so that his son could get released from jail, Ronald Pounds has only made sporadic payments to Eugenia Pounds for the child support, mortgage payments, medical and dental bills and the repair bills. Ronald Pounds has not kept the children insured nor has he visited his children. Eugenia Pounds has made structural repairs to the house during this time with the financial help of her church. Although she did not have a precise figure with her at the trial, Eugenia Pounds estimated that her church has lent her between \$11,000.00 and \$15,000.00 to make the necessary repairs and pay other bills. The church expects her to pay this money back, but only when she is able. Eugenia Pounds has not made any payments toward this debt as of the trial.

Although the parties did not present any document to the Court showing that March 7, 2001, Chancery Court order increasing the child support from \$215.00 to \$375.00 has been modified, Eugenia Pounds testified that the Chancery Court reduced the \$375.00 back down to the original \$215.00 figure at some point in time. Ronald Pounds testified that he reduced the monthly figure to \$158.00 after calling the Chancery Court to ask what the Mississippi statutory rate for one child was. Ronald Pounds did not file a motion asking the Chancery Court to reduce the child support nor did the Chancery Court issue an order so reducing the amount. Ronald Pounds has only paid this \$158.00 to Eugenia Pounds sporadically. Despite this fact and the fact that he testified under oath that he reduced the child support to \$158.00 per month on his own, Ronald Pounds listed \$275.00 as his monthly expense for child support on his bankruptcy schedules.

Ronald Pounds did not ever comply with the Chancery Court order requiring him to obtain health insurance on this two sons. Eugenia Pounds was able to enroll both boys in a Mississippi state program for insurance; however, because their oldest son is now 21, he is no longer eligible for the program. The

couples' youngest son is covered by the Mississippi program, but Eugenia Pounds has incurred large medical bills for him due to his poor health. Eugenia Pounds has also incurred orthodontic bills in the approximate amount of \$2,000.00 for her children. Ronald Pounds has not paid any money towards these bills.

Eugenia Pounds testified that the taxes on the house in Tupelo are approximately \$675.00 per year and that the homeowners insurance is approximately \$511.00 per year. Ronald Pounds has not paid half of these amounts. Eugenia Pounds has made some of the necessary repairs to the house. Ronald Pounds has not paid his half of these repairs.²Eugenia Pounds makes approximately \$24,000.00 per year at her job with the Lee County circuit court. According to her financial disclosure form, her monthly expenses exceed her income by approximately \$1,300.00. Eugenia Pounds testified that she is able to cover this shortfall through the generosity of her church and by using her tax refund throughout the year. She does not have any significant unsecured debt.

Ronald Pounds works at Langley Wire and makes \$7.85 per hour. He previously worked at Aqua Glass making more money, but his wages were being garnished for the current and back child support. Ronald Pounds testified that after the money was taken out for the child support, he did not have enough money to meet his own expenses. As a result, he made the decision to quit Aqua Glass and find other employment where his wages would not be garnished. He testified that he does not have any skills that would allow him to make more money than he does currently.

When asked why he agreed to pay the other expenses in addition to the child support when he signed the consent order in October 1999, Ronald Pounds testified that he was living with his parents in Mississippi at the time and did not have any monthly expenses. At some point he transferred to Tennessee with his job and had to get his own place to live. According to his testimony, once he did that, he was unable to pay his monthly expenses plus all the money he agreed to pay in the divorce. Although he testified that he thought there might be a warrant for his arrest in Lee County, Ronald Pounds stated that he has not returned to the Chancery Court to seek a modification of the divorce decree because he does not own a car and has no way to get to the court.

Ronald Pounds does not dispute that he owes Eugenia Pounds for the house payment, the house repairs, the taxes and insurance, or the medical bills. He admitted at the trial in this matter that he understood these payments were for the support of the children. Why he is asking the Court to discharge

²Eugenia Pounds testified that prior to their divorce, Ronald Pounds refinanced their house and took \$11,000.00 in equity to make the necessary repairs to the house. Ronald Pounds kept this money; however, and did not use it to make the necessary repairs.

these obligations is because he claims he will not be able to exist if made to pay this money to Eugenia Pounds. Ronald Pounds did not testify about the possibility of obtaining additional employment in order to supplement his income nor did he testify about whether or not it is possible for him to work additional hours at his job.

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) which the Court hereby adopts:

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, Ronald Pounds does not dispute that the money he owes to Eugenia Pounds is support for his children. The only decision for the Court to make then is whether or not Ronald Pounds has met his burden of demonstrating that the amount of money he is required to pay to his ex wife is unreasonable in light of his financial circumstances.

Ronald Pounds does not dispute that the \$215.00 monthly child support is non-dischargeable. He claims to be unable to pay his half of the monthly mortgage payment which is \$250.62. He also claims to be unable to pay his half of the homeowners insurance and property taxes which would be approximately \$25.00 per month each. He also claims to be unable to pay for one-half of the structural repairs to the house. And, lastly, he claims to be unable to afford to insure his children or to pay his half of the medical and dental bills. Despite his claims of an inability to pay these amounts, Ronald Pounds has never petitioned the Chancery Court to modify the divorce decree in the five-and-a-half years since the parties were divorced. He has, however, taken it upon himself to reduce the monthly child support amount on his own.

The Court understands that it is difficult to make ends meet when you are earning only \$7.85 per hour; however, the Court also understands that Ronald Pounds voluntarily agreed to make these additional payments to Eugenia Pounds for the support of his children. Ronald Pounds did testify that he was living with his parents at the time of the divorce and was therefore able to make the payments and it was only after he transferred with his job to Tennessee that he became unable to pay; however, Ronald Pounds did not testify as to why he transferred to Tennessee instead of remaining at his parents' house and finding a new job. Nor did he testify as to why he did not petition the Chancery Court at the time of his move to reduce the amount of his payments.

The Court is also troubled by many facts in this case. Ronald Pounds chose to quit a higher-paying job in order to avoid a garnishment order rather than seeking relief in the Chancery Court for modification of the support amount. He also took it upon himself to reduce the child support himself instead of going through the proper channels. Even after he reduced the amount, he only made the payments sporadically. Lastly, despite his self-imposed reduction, Ronald Pounds listed \$275.00 as his

monthly child support payment on schedule J of his petition. It is clear he has not been paying that amount, or the self-imposed reduced amount of \$158.00, on any regular basis. It could be said that these acts indicate some bad faith on the part of the debtor.

In light of these facts and the debtor's behavior with regard to his support obligations, the Court is hesitant to find that the debtor has met his burden as to an inability to pay; however, the Court is aware that Ronald Pounds must have some money to exist on after he pays his obligations for his children. As a result, the Court finds that from February 7, 2005, the monthly payment to Eugenia Pounds for the mortgage payment and house repairs should be reduced to \$200.00. This Court finds this amount to be non-dischargeable. The Court also finds any past-due amounts due and owing to Eugenia Pounds as of February 7, 2005, for the house payments, repairs, insurance, taxes and medical bills are non-dischargeable. These amounts shall be figured in accordance with the parties' divorce decree. The Court also finds that Ronald Pounds shall comply with all other provisions of the divorce decree entered by the Chancery Court on November 23, 1999. Eugenia Pounds will receive a lien against Ronald Pounds' share of equity in the house in Tupelo for any amount of the ongoing or past-due payments Ronald Pounds fails to make.

III. ORDER

It is therefore **ORDERED** that:

1. The child support payments in the amount of \$215.00 per month are hereby declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(5);
2. Any child support arrearage, owed by Ronald Pounds to Eugenia Pounds is hereby declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(5);
3. Any monies owed to Eugenia Pounds by Ronald Pounds as of February 7, 2005, for his portion of the structural repairs to the marital residence, outstanding medical or dental bills, monthly mortgage payments, property taxes, homeowners insurance and attorney fees and costs are hereby declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). Eugenia Pounds is hereby awarded a lien in an amount equal to the total amount of money owed to her by Ronald Pounds against his interest in the house at 106 Maynard Drive in Tupelo, Mississippi;
4. Ronald Pounds shall continue to pay \$215.00 per month in child support to Eugenia Pounds until such time as he has that amount modified by the Chancery Court of Lee County, Mississippi;

5. In addition to the monthly child support payments, Ronald Pounds shall pay \$200.00 per month to Eugenia Pounds for the ongoing mortgage payments and structural repairs. This amount is hereby declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(5); and

6. Ronald Pounds shall comply with all other provisions of the Chancery Court orders entered in connection with his divorce from Eugenia Pounds. Those requirements are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5).

mailing information

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