UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

WALTER RICHARD HUBBARD,

Debtor.

Case No. 90-28551-WHB
Chapter 7

WALTER RICHARD HUBBARD,

Plaintiff,

v.

MARY KATHERINE FORT HUBBARD,

Defendant.

Adversary Proceeding
No. 90-0334

**MEMORANDUM OPINION AND ORDER
ON COMPLAINT TO DETERMINE
DISCHARGEABILITY UNDER §523(a)(5)**

This adversary proceeding presents the issue of whether certain of the plaintiff's obligations under a final decree of divorce are excepted from discharge under 11 U.S.C. §523(a)(5), which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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 -
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> > > (A) such debt is assigned to another entity, voluntarily, by operation of law or otherwise, . . . , 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.

The proceeding is core under 28 U.S.C. §157(b)(2)(I), and the following constitutes findings of fact and conclusions of law pursuant to FRBP 7052.

HISTORY OF PROCEEDING
AND FINDINGS OF FACT

The debtor filed his voluntary Chapter 7 petition case on September 28, 1990, listing among other creditors his former wife, the defendant herein. The case trustee has filed a report of no distribution to creditors. On November 13, 1990, the debtor filed this adversary proceeding against his former wife, seeking a determination of dischargeability of obligations under a marital dissolution agreement and final decree of divorce in the Circuit Court of Sullivan County, Tennessee. (Tr. Ex. 1) The defendant answered, pro se, in the form of a letter to the clerk of this court, and the adversary proceeding was set for trial on May 21, 1991. The defendant appeared at trial pro se, after travelling a substantial distance from Richmond, Virginia, and she expressed a desire to proceed with the trial.

However, counsel for the plaintiff advised the Court that the defendant was now a voluntary Chapter 7 debtor in the United States Bankruptcy Court for the Eastern District of Tennessee, case number 91-30908. (Tr. Ex. 2) A consent order vacating the automatic stay nunc pro tunc as of May 21, 1991, has been entered in Mary Katherine Hubbard's case by Judge Richard Stair, Jr., "to permit [this Court in this adversary proceeding] to determine the dischargeability of certain obligations arising out of" the above referenced divorce decree and marital dissolution agreement. See Judge Stair's order entered as a part of the record of this adversary proceeding.

The final decree of divorce "approved and adopted by reference" the parties' consensual marital dissolution agreement, which was prepared by Mr. Hubbard's attorney and executed by the parties on June 6 and 15, 1990. (Tr. Ex. 1) The dissolution agreement provides at its page two that the parties intend the agreement to "equitably divide the marital property" and "to provide, if appropriate, for the suitable support and maintenance of one spouse by the other in accordance with T.C.A. §36-5-101(a)." (Tr. Ex. 1) Under Section II of the agreement, labeled "alimony" in the Table of Contents, but with that word lined through and

initialled on page three, it is agreed: "The Husband shall pay to the Wife, until November 1, 1990, or until the Wife vacates the marital home at 2112 Pinebrook Drive, Kingsport, Tennessee, whichever is earlier the sum of $1500.00 per month."

As to the home, the husband became the sole owner, but the wife could occupy it as a tenant until it was sold, but she was liable for rent in an amount equal to the first and second mortgages. Any equity belonged solely to the husband, but any actual loss would be borne equally. The husband was to make reasonable efforts to sell the home for a reasonable price.

On page four of the agreement, the husband became the sole owner of a lawn mower and accepted "sole responsibility" for the debt on the mower to Sears. The wife became the sole owner of a computer, but the husband remained responsible for the debt on the computer to Sears.

The wife acquired sole ownership of a lake lot and responsibility for the debt on that lot.

The parties itemized certain credit card and account debts for which they would individually be responsible. (Tr. Ex. 1, pp. 8-9) The agreement purports to bind the parties as to nondischargeability in bankruptcy of each party's "hold harmless" obligation to the other party. And, at page nine, the agreement declares that the parties' debt obligations, in the event of bankruptcy, but not for federal income tax purposes, would be "considered nondischargeable 'alimony in solido' and not as a dischargeable property settlement agreement." (Tr. Ex. 1, p. 9) Mr. Hubbard testified that the word "alimony" on page three was struck because his wife's attorney did not want income to be taxable to her.

Each party was represented by an attorney in the negotiation of the dissolution agreement. (Tr. Ex. 1, p. 10) Both parties work for the Internal Revenue Service.

Of the $1500.00 per month, Mr. Hubbard testified that he paid it to his wife in June, 1990, but in July, 1990, he paid the two home mortgages which totalled more than $1500.00 after his former wife failed to pay the July mortgage payments. He paid a portion of the August mortgage obligations but then ceased all payments. Nevertheless, Ms. Hubbard lived in the home until November, 1990.

Mr. Hubbard attempted to sell the home through a realtor, but the home was foreclosed upon by the mortgage holders, at which point Ms. Hubbard was forced to move.

Mr. Hubbard gave Ms. Hubbard permission to sell the lawn mower when the house was sold, and he never received the $300.00 from that mower sale, nor did he pay the Sears debt on the mower or computer. Ms. Hubbard still has the computer.

Ms. Hubbard testified that she had not been sued by any creditors in her Chapter 7 case and that she had reaffirmed the debt on her car, for which debt she was solely responsible. (Tr. Ex. 1, p. 6) She also reaffirmed the Sears debt for which she was solely responsible. (Tr. Ex. 1, p. 8)

As to the home mortgages, Ms. Hubbard testified that she quit paying them in July when Mr. Hubbard stopped paying her the $1500.00 monthly amount. Ms. Hubbard testified that she had a home of her own and $5,000.00 in savings prior to this marriage, and she came out of the marriage with no cash and no home. She testified that foreclosure could have been prevented had Mr. Hubbard paid her the $1500.00 per month until November 1, 1990. Further, she believed she could have avoided bankruptcy had the payments been made and foreclosure avoided.

CONCLUSIONS OF LAW

The Sixth Circuit has established its four-part test for whether an alleged support obligation is dischargeable under §523(a)(5). In re Calhoun, 715 F. 2d 1103 (6th Cir. 1983); see generally, Brown, "The Impact of Bankruptcy on Alimony, Maintenance and Support Obligations: The Approach in the Sixth Circuit," 56 Tenn. L. Rev. 507 (Spring, 1989). Under that test, as under §523(a)(5) generally, the party seeking to except the debt from discharge, here Ms. Hubbard, has the burden of proof. In re Helm, 48 B.R. 215, 221, n. 21 (Bankr. W.D. Ky. 1985), citing In re Calhoun, 715 F. 2d at 1111, n. 15.

The Calhoun four-part test includes the following analysis:

1. Mutual intent of the parties or of the state court to create a support obligation must be established. 715 F. 2d at 1109. In examining intent, the bankruptcy court is not bound by the labels placed

on the obligation by the parties or the state court. In re Elder, 48 B.R. 414, 417 (Bankr. W.D. Ky. 1985). "Substance must prevail over form." In re Calhoun, 715 F. 2d at 1109. While it is clear in the present agreement that the parties intended for Mr. Hubbard to pay his former wife $1500.00 per month from June to November, 1990, the purpose was to allow her in turn to be able to make the house note of equal amount so that she was in essence paying rent. Although Mr. Hubbard failed to pay the monthly amount, it did not deprive Ms. Hubbard of the ability to live in the house, as agreed, until November.

2. The $1500.00 was not therefore necessary support in the sense of Calhoun's second test. 715 F. 2d at 1109. Ms. Hubbard, who was employed and who had no children of this marriage failed to prove that the $1500.00 was necessary as support in view of the fact that she accomplished her purpose of living in the home until November. Ms. Hubbard appears to complain that the home was lost through foreclosure; however, the parties' agreement made the home Mr. Hubbard's sole property. Had there been a sale of the home and a profit, she would not have benefited from it. It is true that a successful sale might have prevented both parties' bankruptcy; however, there was insufficient proof to show that Mr. Hubbard failed to reasonably attempt to sell the house. The provisions as to the house appear to be more in the nature of a property division than support or alimony.

As to the credit cards bills which were assumed by Mr. Hubbard, there was no proof that his obligations to pay Mastercard or Sears had the effect of providing necessary support to Ms. Hubbard. In re Calhoun, 715 F. 2d at 1109. In fact, Ms. Hubbard received the money from the sale of the lawn mower, and she still has the computer secured by another Sears debt. Again, both parties were employed, and Ms. Hubbard did not meet her burden of showing that Mr. Hubbard's failure to pay Sears and Mastercard deprived her of necessary support.

The parties' language in their agreement that the parties' debts would be nondischargeable alimony is not binding on this Court when the evidence establishes that the parties in actuality divided property and debt rather than establishes a nondischargeable support obligation for Mr. Hubbard.

CONCLUSION

Because of the failure of the proof to meet the first two requirements of Calhoun, the Court need not explore the last two parts of the Calhoun test. See, 715 F. 2d at 1110. The Court concludes that these parties divided their property and debts, that Ms. Hubbard had the benefit of housing for the time agreed upon, and that the short term $1500.00 monthly payments and credit card debts assumed by Mr. Hubbard were not established by the proof to be essential support or alimony to Ms. Hubbard. The obligations of Mr. Hubbard under the parties' dissolution agreement are dischargeable as not actually being in the nature of alimony, maintenance or support. 11 U.S.C. §523(a)(5)(B).

SO ORDERED THIS 6th day of August, 1991.

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WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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