

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

IN RE

Bryant Bailey,

Case No. 99-11327

Debtor.

Chapter 7

Kimberly Kay Bailey,

Plaintiff,

v.

Adv. Pro. No. 99-5252

Bryant Bailey,

Defendant.

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

The Court conducted a trial in this matter on March 27, 2000. 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. FINDINGS OF FACT

Kimberly Kay Bailey, (hereinafter “Plaintiff”) filed for divorce from Bryant Bailey, (hereinafter “Defendant”), on December 23, 1997. At the time of filing, the couple had been married for ten years and had two children, Nycole Danielle Bailey, born in 1995 and Brandon Tyler Bailey, born in 1997.

Upon a motion filed by the Plaintiff, the Chancery Court of Madison County, Tennessee issued an “Agreed Order of Temporary Support” on May 11, 1998. Such order required the Defendant to “bear responsibility for and [hold] the Plaintiff harmless upon the following indebtednesses:

First mortgage in the approximate amount of \$725.16
Second mortgage in the approximate amount of \$486.00

Regular utilities to be no more than \$200.00
TVA loan of approximately \$86.00
Three separate telephone bills totaling \$125.00 and \$65.00 per month, with nor more than \$25.00 for long distance charges.
Cable bill of approximately \$28.00

The Chancery Court order also required Defendant to “pay, or make arrangements to pay, minimum payments on indebtednesses incurred represented by VISA, Mastercard, J.C. Penney’s and Goldsmith’s until the [marital] house is sold.” Defendant was also ordered to pay the Plaintiff \$100/week in child support.

Upon a motion for a rehearing filed by the Plaintiff, the Chancery Court issued a second order for support on October 5, 1998. This order required the Defendant to place his income tax refund of approximately \$2900.00 in an IOLTA account for use by the Plaintiff for various, enumerated expenses. The Court also ordered the parties to sell a 17 foot Bayliner skiboat and all its accessories with the proceeds to be deposited with the Court for division between the parties. The Court further ordered the parties to sell a large riding lawnmower. Out of the proceeds from this sale, the Plaintiff was to purchase a “good self-propelled push mower” and the remaining proceeds were to be deposited with the Court for further division between the parties. Lastly, the Court ordered that “[t]he former home of the parties located at 5 Alta Vista in Jackson, Madison County, Tennessee, shall be listed with a reputable broker at a price to be mutually agreed upon by the parties based on the recommendation of said broker.” The proceeds from this sale, after paying the mortgages and expenses of the sale, were to be deposited with the Court for division between the parties.

The Baileys’ divorce complaint was heard by the Chancery Court on March 17, 1999. In the “Findings of the Court,” issued on June 7, 1999, Kimberly Bailey was awarded an absolute divorce from the Defendant on the grounds of adultery. Despite the Court’s previous orders, the parties had not put the ski boat, the lawnmower or the house up for sale at the time of the divorce. As a result, the Chancery Court awarded the house and the lawnmower to the Plaintiff.¹ Additionally, Defendant was ordered to pay \$852/month in child support and to bring all delinquent debts up to date, including the house notes and the credit cards. The Defendant was also ordered to pay the costs of the divorce and Plaintiff’s attorney’s fees as alimony *in solido*.

On September 20, 1999, the Chancery Court issued additional findings with regards to the parties’ divorce. The Court ordered the Plaintiff to assume the indebtedness on the house she had been

¹ The Court did not make a determination as to who was entitled to possession of the ski boat in its June 7, 1999, order.

awarded previously and to hold the Defendant harmless thereon. All other divisions made by the Chancery Court in its prior orders were reiterated in the Court's additional findings.

Upon Plaintiff's "Motion for Clarification or Additional Findings of Fact and for Conclusions of Law," the Chancery Court issued yet another order in the parties' divorce action on December 9, 1999. In so doing, the Court divested the defendant of "any and all right, title and interest which he might have in and to. . . (a) A17-foot 1989 Bayliner ski boat, together with all accessories, including, but not being limited to, skis, life jackets, canopy, ski ropes, fire extinguisher and paddles; (b) two brand new Huffy bicycles still in carton; (c) Guns; (d) Rowing machine and weight bench; and (e) Tools having a value of approximately \$5,000." The Court further ordered these items "to be sold by the Plaintiff, with the proceeds of such sale, at the discretion of the Plaintiff, to be utilized by the Plaintiff for whatever purpose deemed necessary for her to provide a home for the children or for the care and maintenance of the Plaintiff and the children, or at the Plaintiff's discretion, if she cannot prevent foreclosure on the home, to be awarded to Plaintiff as *alimony in solido*."

In this order, the Chancery Court also reiterated its earlier directive that the Defendant was "to bring current all delinquent indebtedness, including house notes and credit cards. . ." and that "the assumptions of the indebtedness by Defendant referred to above are necessary for the support and maintenance of the Plaintiff and the minor children of the parties, and should Plaintiff be called upon to make such payments, it would affect her ability to support herself and the minor children of the parties." The Court also awarded the Plaintiff, "in lieu of additional alimony and child support, an amount necessary to reimburse [her] for her expenses," including her attorney's fees.

Since the filing of their divorce petition, both the Plaintiff and the Defendant have filed bankruptcy petitions in the Western District of Tennessee. Bryant Bailey filed chapter 7 on April 29, 1999. Kimberly Bryant filed chapter 13, case number 99-12710, on August 24, 1999, which was converted to a chapter 7 case on March 10, 2000.

Although the Chancery Court ordered them to do so on more than one occasion, the Baileys never sold the marital residence located at 5 Alta Vista in Jackson and it has since been foreclosed upon. According to the Plaintiff's trial testimony, she was initially unable to sell the house because it had suffered severe water damage which was never repaired. The Baileys' insurance company had made out a \$19,000 insurance check to cover the repairs, but the company mistakenly sent it to the Defendant. Unable to agree with the Plaintiff on who should be hired to make the necessary repairs to the house, the Defendant held on to the insurance check. Upon filing bankruptcy, the Defendant turned the check over to his attorney who then submitted the check to the chapter 7 trustee. The money has since been

disbursed to the Defendant's creditors. In addition to the problems with selling the house, the Defendant failed to pay the mortgage delinquencies as the Chancery Court had ordered.

At the time of the trial in this adversary proceeding, the Plaintiff testified that she was unable to work a full-time job commensurate with her training and skills because her youngest child, Brandon, suffers from a behavioral/developmental disorder, as well as hearing loss. She currently works approximately 20 hours a week at a floral/gift shop, at the rate of \$6.50/hour. She is called away from work at least once a week by Brandon's daycare because the staff is not able to manage him. Prior to divorcing the Defendant, the Plaintiff did not work outside the home.

II. CONCLUSIONS OF LAW

A. 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).

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.

In the case at bar, the Chancery Court made three awards to Kimberly Bailey which it designated as “support:”²

- (1) the 1989 Bayliner boat, all the boat accessories, two Huffly bicycles, guns, a rowing machine, a weight bench and tools;
- (2) the assumption of all delinquent debts by the Defendant; and
- (3) the Plaintiff’s expenses and attorneys fees.

With respect to the items listed in paragraph (1) above, the Chancery Court ordered these items to be sold with the proceeds to be used by the Plaintiff to “provide a home for the children or for the care and maintenance of the Plaintiff and the children.” (Chancery Court December 9, 1999, Order). The Chancery Court went on to say that if the Plaintiff were unable to prevent foreclosure on the Alta Vista home, the proceeds were to be awarded to the Plaintiff as “alimony *in solido*.” (Chancery Court December 9, 1999, Order). With respect to the debt assumption listed in paragraph (2) above, the Chancery Court stated that “the assumptions of the indebtedness by Defendant . . . are necessary for the support and maintenance of the Plaintiff and the minor children of the parties, and should Plaintiff be called upon to make such payments, it would affect her ability to support herself and the minor children of the parties.” (Chancery Court December 9, 1999, Order). Finally, in awarding the attorneys fees and expenses listed in paragraph (3) above, the Chancery Court stated that the award was “in lieu of *additional* alimony and child support . . .” (Chancery Court December 9, 1999, Order) (emphasis added).

In examining these awards, this Court can reach no other conclusion but that they are all “in the nature of alimony, maintenance or support.” The parties were married for ten years and have two children. Plaintiff received custody of the children in the divorce proceedings and has the day-to-day

² The Chancery Court made an additional award of monthly child support to the Plaintiff for the Baileys’ two minor children; however, the parties have agreed that the child support is not at issue in this adversary proceeding.

responsibility of caring for the children. The youngest child, Brandon, suffers from developmental problems which make it impossible for the Plaintiff to have a full-time job. Plaintiff currently makes approximately \$125/week, on which it would be impossible for her and her children to survive. The Defendant, on the other hand, makes approximately \$15.00/hour and is able to work a full-time job without the burden of caring for the couple's impaired son. Without the support the Chancery Court ordered the Defendant to pay, the Plaintiff and her children would be destitute. As it is, Plaintiff has already had to file bankruptcy and has lost the home in which she and her children were residing. Concluding that the awards the Chancery Court made are support and not a property settlement will not result in the Plaintiff receiving a windfall of assets. Instead, it will allow the Plaintiff to barely keep her head above water financially and to keep her children fed and clothed.

As a result of these conclusions, the Court finds that the Plaintiff is entitled to a non-dischargeable judgment against the Defendant in the amount of \$20,000.00. As part of the satisfaction of this judgment, the Court orders the parties to sell the Bayliner boat, its accessories, the bikes, guns, rowing machine and tools. The Court also finds that the Plaintiff is entitled to be reimbursed by the Defendant for her attorney's fees and expenses.

III. ORDER

It is therefore **ORDERED** that the Complaint Objecting to Discharge is **GRANTED**.

It is **FURTHER ORDERED** that the Plaintiff, Kimberly Kay Bailey, is awarded a non-dischargeable judgment against the Defendant, Bryant Bailey, in the amount of \$20,000.00.

It is **FURTHER ORDERED** that the Plaintiff, Kimberly Kay Bailey, is awarded her attorney's fees in this matter. The Attorney for the Plaintiff shall file an application with the Chancery Court of Madison County, Tennessee, to recover said fees.

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: May 8, 2000

ADDITIONAL FINDINGS OF FACT

On May 8, 2000, this Court issued a Memorandum Opinion and Order granting the plaintiff's Complaint Objecting to Discharge. Pursuant to this memorandum, the Court awarded Kimberly Bailey a non-dischargeable judgment against the defendant Bryant Bailey in the amount of \$20,000.00. Bryant Bailey appealed this judgment to the Bankruptcy Appellate Panel for the Sixth Circuit (BAP). On November 27, 2000, the BAP affirmed this Court's finding that the obligations owing to Kimberly Bailey were non-dischargeable; however, the BAP vacated the \$20,000 award, finding that "the record is insufficient to establish the basis on which the Bankruptcy Court determined . . . the amount of the non-dischargeable debt" and remanded the case for additional facts and findings.

This Court conducted a hearing on the BAP's remand of this matter on March 23, 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 additional findings of facts. FED. R. BANKR. P. 7052.

ADDITIONAL FINDINGS OF FACT

In the original trial in this matter, the Court found that the following awards made by the Chancery Court to Kimberly Bailey were non-dischargeable pursuant to § 523(a)(5) of the Bankruptcy Code:

1. The 1989 Bayliner boat, all the boat accessories, two huffy bicycles, guns, a rowing machine, a weight bench and tools;
2. The assumption of all delinquent debts by the Defendants; and
3. The Plaintiff's expenses and attorney's fees.³

Upon reexamination of the record and the exhibits, the Court finds that the amount of the non-dischargeable judgment should be amended to \$29,294.66. The Court will address the value of each of the items Bryant Bailey was to turn over to Kimberly Bailey to sell individually.

The 1989 Bayliner Boat

According to the proposed findings of facts submitted by both parties to this action, the value of the boat is \$4,000.00. Because no separate proof was submitted regarding the value of the accessories, the Court finds that the \$4,000.00 value includes the accessories.

Two Huffy Bicycles

Kimberly Bailey testified at the original trial in this matter and at the hearing on the BAP's remand that the value of the brand new bicycles was \$100.00 each. Bryant Bailey introduced proof at the remand hearing that he sold the bicycles to Wayne Isbell on September 29, 2001, at a yard sale for \$25.00 each. Despite this sales price, the Court finds that the bicycles were worth \$100.00 each. At the time of selling the bicycles, Bryant Bailey was under numerous court orders to turn the bikes over to Kimberly Bailey so that they may be sold. He did not have authority to sell them himself. Additionally, his decision to sell the bicycles for \$25.00 apiece does not establish what the bikes were worth, rather it establishes what he sold them for. Bryant Bailey did not submit any proof of the bikes' value.

³ On appeal, the Bankruptcy Appellate Panel for the Sixth Circuit affirmed this conclusion: "Accordingly, the bankruptcy court correctly found that the awards in favor of Kimberly Bailey in the divorce proceedings are in the nature of support and thus nondischargeable pursuant to 11 U.S.C. § 523(a)(5)." *Bailey v. Bailey (In re Bailey)*, 254 B.R. 901, 906 (B.A.P. 6th Cir.2000).

Guns

The only proof submitted to the Court regarding guns was a pawn shop estimate for a model 950 Beretta of \$75.00. No other proof was submitted regarding the existence or value of any other guns. As a result, the Court finds that the value of the guns Bryant Bailey was ordered to turn over to Kimberly Bailey by the Chancery Court was \$75.00.

Rowing Machine

No proof was presented at either the original trial in this matter or at the remand hearing that the parties ever owned a rowing machine. Consequently, the value of this award is \$0.00

Weight Bench

Bryant Bailey testified that he was in possession of the weight bench, but that Kimberly Bailey had the weights. His estimation of the value of the weight bench without the weights was \$50.00. No proof was submitted by Kimberly Bailey to refute this valuation.

Tools

In all the relevant Chancery Court orders, the value of the tools Bryant Bailey was to turn over to Kimberly Bailey was \$5,000.00. Both Kimberly Bailey and Bryant Bailey stated in their proposed findings of fact that they agreed with this value. The Court therefore finds that the value of this award is \$5,000.00.

Delinquent Debts

Bryant Bailey was not divested of title to the parties' marital residence until September 20, 1999. On December 15, 1999, the Chancery Court reiterated this divestiture and ordered Kimberly Bailey to assume the indebtedness as of the date of entry of that order, which was December 15, 1999. In this same order, the Chancery Court ruled as follows:

For repetition, the Defendant is, by specific orders of the court, to bring current **all delinquent indebtedness, including house notes and credit cards, . . .**

As a result, the debtor was required to pay all delinquencies as of December 15, 1999.

As of December 15, 1999, the first mortgage on the parties' marital residence was delinquent for the months of February 1999 through December 1999. At the time of this delinquency, the monthly payment on the first mortgage was \$846.70. The Court finds the value of the eleven month default on the first mortgage to be \$9,313.37.

As of December 15, 1999, the second mortgage on the parties' marital residence was delinquent for the months of February 1999 through December 1999. At the time of this delinquency, the monthly payment on the second mortgage was \$648.00. The Court finds the value of the eleven month default on the second mortgage to be \$7,128.00.

The utility bill for the parties' marital residence was delinquent in the amount of \$1,528.29 as of December 15, 1999. Pursuant to the Chancery Court order, Bryant Bailey was obligated to pay this default.

Attorney's Fees

The plaintiff has incurred attorneys fees in trying to enforce the chancery court orders and in bringing this action. The Court finds that the plaintiff is entitled to an award of \$2,000.00 for attorney's fees.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: May 9, 2001