UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:

JOHN JACKSON, Debtor. — Case No. 03-24757whb, Chapter 7

JOHN JACKSON, Plaintiff,
v. — Adv. Proc. No. 03-0561

CATHEY JACKSON WISE, Defendant.

MEMORANDUM OPINION AND ORDER
ON COMPLAINT TO DETERMINE DISCHARGEABILITY

The Debtor, John Jackson, filed this complaint seeking to discharge marital obligations under § 523(a)(15), and a trial was conducted on May 13, 2004, after which the Court took the issues under advisement. This opinion contains the Court's findings of fact and conclusions of law.

ISSUES

Although the Debtor's complaint asserts that the obligation at issue is dischargeable under

§ 523(a)(15), the Defendant asserts that those obligations are in the nature of support. Thus, the first issue is whether the debt is in the nature of support, governed by § 523(a)(5), Only if the Court determines that the debt is not of the type described by § 523(a)(5) do the issues of dischargeability under § 523(a)(15) become ripe.

BACKGROUND FACTS

The parties admitted several documents related to their divorce in the Chancery Court for Shelby County, Tennessee. The Marital Dissolution Agreement ("MDA") prepared by the parties' divorce counsel and executed by the parties on July 15, 1999, provided in a "Nondischargeability" paragraph that each party's obligations were nondischageable debts under the Bankruptcy Code, "this obligation being part of the final financial support settlement for both parties." It then provided for the Debtor to pay monthly child support to the custodial parent, the Defendant in this proceeding. It then provided for a separation of debts incurred by each party, with each agreeing to hold the other harmless for the debts assumed. And, as to the issue before this Court, the MDA provided under a "Spousal Support" heading for the Debtor to pay "spousal support" in the lump sum amount of $179,800 to the Defendant, with an initial amount of $25,000, followed by monthly payments of $2,150 beginning September 15, 1999 and continuing for 71 months. Under that "Spousal Support" heading, the following language is found:

> The parties agree that the provisions hereunder are necessary for the support of the Wife. The intent of the parties hereunder is to create a support obligation as such defined under 11 United States Code § 523(a)(5).
>
> Both parties agree that the sums for future payment hereunder are necessary for the Wife to meet her daily needs. The parties agree that the sums paid hereunder are reasonable and necessary and the Husband agrees that he has the present ability to pay all of the obligations contained herein. The calculation of the amount of support hereunder takes into account that the parties are designating the obligations hereunder as nonalimony for income tax purposes and the sums will not be included in the gross income of the Wife.

On the same date as the MDA's execution, the parties executed a Statement to Treat Spousal Support as Nonalimony, a document for IRS purposes, and the MDA specifically contained a paragraph where each party waived alimony claims. The Final Decree of Divorce, which incorporated the MDA, was signed by the Chancellor on July 15, 1999, again the same date as the MDA's execution. That Final Decree contains language finding that the MDA "makes adequate and

sufficient provisions for the custody and maintenance of any child of this marriage and for the equitable settlement of any property rights between the parties...." Thus, except for its incorporation of the MDA, the Final Decree makes no separate finding concerning the nature of the $179,800 obligation.

The parties rather quickly fell into disagreement, resulting in further Chancery Court action. An Order of Special Master was entered on September 14, 2001, wherein the Chancellor approved the findings of a special Master that "[t]he $179,000.00 payment due from Defendant to Plaintiff agreed to in the Marital Dissolution Agreements and ordered in the Final Decree of Divorce is not alimony and is owed from Defendant to Plaintiff regardless of her remarriage," and a judgment was entered for the $169,150 balance due on that obligation. The Debtor filed an Exception to Order of Special Master, wherein he argued that the obligation was rehabilitative alimony, structured by the MDA to prevent the spouse from incurring income tax obligations. And, he argued that his former spouse's remarriage eliminated her further need for this payment to her. The Debtor also filed in the Chancery Court a Motion to Reconsider, on December 6, 2001, which asks that Court to reconsider its ruling concerning this obligation. That Motion specifically states that "[t]he Money allocated to spousal support was *not* a division of property." It goes on to argue that the obligation was intended to allow the former wife "temporary support, allowing Wise to improve her position in the job market." The Motion also argues that the remarriage of Ms. Wise "within a year of her divorce," eliminated her need for support payments.

If the Chancery Court acted upon the Debtor's reconsideration motion, nothing was presented to this Court to show that. However, there is another order submitted to this Court, the Chancery Court's Order on Criminal Contempt, Scire Facias and Wage Assignment, wherein the Chancellor found the Debtor in contempt of that Court's prior order, directing a future monthly payment schedule on the disputed obligation, which that Order called "spousal support." This Court has no knowledge of whether the Debtor has pursued or exhausted his appellate remedies in the Tennessee courts. The Debtor filed for chapter 7 relief in this Court on March 21, 2003. The Debtor filed this adversary proceeding on June 11, 2003.

FINDINGS AND CONCLUSIONS

Essentially, the Debtor's proof in this proceeding was that he started making payments on his MDA obligation but was prevented by a down-turn in his landscape architectural business from

continuing to make those payments. He attributed the down-turn in large part to the death of his former partner who had been a civil engineer. With the loss of those services, the business lacked a land surveyor and did not have the potential for as much income. The Debtor is now the only principal in the corporate business, Jackson Person & Associates, Inc. He stated that when he agreed to pay the $179,000 in the MDA he considered it to be a property division, but this conflicts with the statement in his Motion to Reconsider which was filed in the Chancery Court, wherein it is specifically alleged that the obligation "was *not* a division of property." Moreover, his testimony in this trial that his former partner died in 1994 (resulting adversely on the potential income of the business) conflicts with the sworn statement in the July 1999 MDA that he had the present financial ability to pay all MDA obligations. The Debtor introduced some proof about his modest annual salary from the corporation, declining from $100,000 in 1999 to $21,000 in 2002. Based on the financial condition of that corporation, which owes substantial taxes, the Debtor testified that he did not expect to be able to pay the spousal obligation. At the conclusion of the Debtor's proof, the Defendant moved for judgment.

The first problem for the Debtor is the inconsistent positions taken about the nature of the disputed obligation. In the Chancery Court, he stated that the obligation was not a property division, and the judicial estoppel doctrine should prevent him from taking an inconsistent position in this Court. However, the Debtor's attorney also argued in this Court that it was rehabilitative alimony, subject to partial discharge in the bankruptcy under 11 U.S.C. § 523(a)(5) or (15).

If the obligation is in fact some type of alimony or support, it can not be dischargeable under § 523(a)(15), which is specifically directed to debts "not of the kind described in paragraph (5)." In other words, § (a)(15) permits the bankruptcy court to examine discharge in whole or part of debts that are not alimony or support in nature, for example, property division debts.

Whether the MDA created rehabilitative alimony or another type of support, the language of the MDA calls this obligation spousal support. In a post-divorce order, the Chancellor called the obligation spousal support. And, the MDA states that the parties were intending to create an obligation of the type described in § 523(a)(5). Although pre-bankruptcy agreements to waive a bankruptcy discharge are questionable and may not be enforceable per se, such language in an MDA may be probative of the parties' intent as to the nature of the obligation. Therefore, this Court concludes that the MDA's provision that the obligation is not dischargeable is not in itself

determinative, but the language that the parties intended to create a § 523(a)(5) obligation is evidence that the obligation was support in nature.

In fact, in pleadings before the Chancery Court, as well as in argument to this Court, the Debtor admits that the obligation is support in nature but he contends that it is no longer needed as support due to the former wife's remarriage. From the evidence before this Court, it can only be concluded that the obligation was support in nature; therefore, § 523(a)(15) is not applicable.[1]

In analyzing the facts of this case under § 523(a)(5), there is authority in this Circuit that the "'present needs' of the non-debtor spouse should not be considered when the obligation was intended as support." *Sorah v. Sorah (In re Sorah),* 163 F.3d 397, 400 (6th Cir. 1998) (quoting *Fitzgerald v. Fitzgerald (In re Fitzgerald),* 9 F.3d 517, 520 (6th Cir. 1993)). The *Sorah* opinion cautions that bankruptcy courts must give deference to a state court's award of alimony "when labeled and structured as such." *In re Sorah,* 163 F.3d at 401. That caution would apply to any obligation that is support in nature, that is, covered by § 523(a)(5).

If support in nature, as this Court concludes this obligation is, the *Sorah* opinion tells us that the debtor spouse may not "introduce evidence regarding the resources, earning potential, and daily needs of the non-debtor spouse, either at the time the obligation arose or at the time of the bankruptcy proceeding." *Id.* at 402. Thus, although the Debtor introduced nothing but argument that the non-debtor spouse no longer needed the payments from him, such proof and argument is not permissible under the *Sorah* authority.

The Debtor's attorney correctly asserted that, under *Sorah*, the Debtor could still attempt to discharge the support debt to the extent that he could "demonstrate that the obligation is unreasonable in light of the debtor's financial circumstances." *Id.* "This is the third prong of the *Calhoun* test." *Id.* (citing *Calhoun v. Calhoun (In re Calhoun*)*,* 715 F.2d 1103, 1110 (6th Cir.

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[1]The Court notes that if a § 523(a)(15) analysis were being made, the Debtor's proof would not support an outcome favorable to him. That section requires a balancing between the abilities of the debtor and needs of the recipient or a benefit/consequence balancing of the effects of discharge. Here, the Debtor's only proof was that he lacked the present ability to pay the debt. This falls short of the other side of the balance–the needs of or adverse effects on the recipient. Moreover, this Court would question why the Debtor would continue to work in a corporation that was paying him so little; in other words, there was no proof that he lacked the ability to improve his income by seeking other employment.

1983)). This is not an examination or determination that is without limits. *Sorah* tells us that

> the bankruptcy court does not sit as a super-divorce court to determine the *most* reasonable level of support. Rather, it may consider evidence that the obligation is unreasonable and discharge it *to the extent* that it exceeds what the debtor can reasonably be expected to pay. Section 523 obviously places no limitation upon a state court's ability to award alimony, maintenance, or support (*see Fitzgerald ,* 9 F.3d at 521), and the bankruptcy court should not second-guess the state court support award absent evidence that the burden on the debtor spouse is excessive.

In re Sorah, 163 F.3d at 402 (emphasis in original).

As observed in footnote 1 to this opinion, the Debtor's proof was merely that his corporate business was not producing enough income for him to expect to pay this support obligation. That limited proof is far short of what would be needed for this Court to say that the remaining obligation is an unreasonable one. Moreover, the Debtor has presented this argument to the Chancery Court after his divorce, apparently without success. The Chancery Court has concurrent jurisdiction with the bankruptcy court to determine discharge of § 523(a)(5) obligations. Compare the exclusive jurisdiction of the bankruptcy court over § 523(a)(15) determinations. 11 U.S.C. § 523(c). It may be that the Debtor's pleadings before the Chancery Court, coupled with the statements in the MDA about discharge, have already placed the § 523(a)(5) determination before that Court; if so, this Court has even more reason to avoid infringement on the Chancery Court's jurisdiction.[2]

CONCLUSION AND ORDER

The Court having concluded that the parties' Marital Dissolution Agreement created a support obligation and that the proof before this Court does not justify a finding that the remaining obligation is an unreasonable one, this Court must deny the relief sought by the Debtor. This Court's Order is without prejudice to the parties presenting whatever proof or pleadings they may have a right to present to the Chancery Court, and that Court, which enjoys concurrent jurisdiction over § 523(a)(5) discharge determinations, may enter such orders, including an order concerning dischargeability of this support debt, as it deems appropriate.

The Clerk shall enter a judgment on this final order and serve this upon the following:

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[2]This Court declines to decide if res judicata bars a determination of discharge under § 523(a)(5), as it is unnecessary to so decide. The proof in this proceeding does not permit this Court to discharge any of the support obligation.

Debtor
Curtis D. Johnson, Jr., Debtor's attorney
Ellen E. Fite, Defendant's attorney
Linda L. Homes, Defendant's attorney