UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

LAWRENCE MICHAEL ROBBINS, Case No. 96-36328-K

Debtor. Chapter 7

LAWRENCE MICHAEL ROBBINS,

Plaintiff,

vs. Adv. Proc. No. 97-0090

BEVERLY MARGARET BRECKENRIDGE fka BEVERLY MARGARET BRECKENRIDGE ROBBINS,

Defendant.

BEVERLY MARGARET BRECKENRIDGE fka BEVERLY MARGARET BRECKENRIDGE ROBBINS,

Plaintiff,

vs. Adv. Proc. No. 97-0113

LAWRENCE MICHAEL ROBBINS,

Defendant.

MEMORANDUM AND ORDER

Introduction

This Memorandum arises out of the above-referenced consolidated adversary proceedings commenced under 11 U.S.C. §§ 523(a)(5) and 523(a)(15)(A)-(B) which, inter alia, illustrate the sensitive interplay between federal bankruptcy and state domestic relations (or family) laws.

In Adv. Proc. No. 97-0090, the plaintiff, Lawrence Michael Robbins, the above-named chapter 7 debtor ("Mr. Robbins"), seeks a judicial determination that certain hereinafter discussed obligations and hold harmless agreements arising out of a marital dissolution agreement ("MDA") with his former spouse are dischargeable under 11 U.S.C. §§ 523(a)(5) and 523(a)(15)(A)-(B). In original and amended Adv. Proc. No. 97-0113, the plaintiff, Beverly Margaret Breckenridge fka Beverly Margaret Breckenridge Robbins, the former spouse of Mr. Robbins, ("Ms. Breckenridge"), seeks an order determining that the identical MDA obligations and agreements referred to in Adv. Proc. No. 97-0090 are nondischargeable under 11 U.S.C. § 523(a)(5) or alternatively under 11 U.S.C. § 523(a)(15).

By virtue of 28 U.S.C. § 157(b)(2)(I) these consolidated dischargeability actions brought under 11 U.S.C. §§ 523(a)(5) and 523(a)(15)(A)-(B) are core proceedings.

Based on the sworn testimony of Mr. Robbins and Ms. Breckenridge, the trial exhibits, statements of counsel, and consideration of the entire case record as a whole, the following shall constitute the court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

Background Facts

The relevant background facts may be briefly summarized as follows: Mr. Robbins and Ms. Breckenridge were married on July 14, 1979. Using a $22,000 inheritance from Ms. Breckenridge's father for a down payment, in 1980 the parties bought their marital residence located at 3315 Prince George Street, Memphis, Tennessee. Unfortunately, both Mr. Robbins and Ms. Breckenridge experienced a series of health problems which persisted throughout most of the 15 year marriage.

After encountering domestic problems, the parties separated in February 1994. They had no children. On August 18, 1994, Ms. Breckenridge filed a complaint for divorce against Mr. Robbins in the Shelby County, Tennessee Chancery Court, being No. D24509-3. On

December 7, 1994, they entered into the aforesaid MDA. See Collective Exhibit 1. At the time of the execution of the MDA, Ms. Breckenridge was totally disabled. During the divorce action Ms. Breckenridge was represented by an attorney while Mr. Robbins acted pro se. On December 15, 1994, an uncontested final decree of divorce was entered, which judicially approved and incorporated the MDA. See Collective Exhibit 1. The MDA was consensually amended on January 13, 1995, with court approval; and on January 18, 1995, the final decree of divorce was amended accordingly.

Due to Mr. Robbins nonpayment of the obligations and agreements under the MDA Ms. Breckenridge's home subsequently was sold at a forced sale and her automobile was repossessed. Mr. Robbins also failed to pay Ms. Breckenridge the sum of $477 per month required under the MDA and earmarked for her additional living expenses.

On December 6, 1996, Mr. Robbins filed an original petition under chapter 7 of the Bankruptcy Code, being No. 96-36238, the above-captioned case. Mr. Robbins' summary of schedule of liabilities reflects that he owes $10,000 to secured creditors; $17,000 to unsecured priority creditors; and approximately $24,500 to unsecured non-priority creditors. It is noted that Mr. Robbins additionally has filed prior petitions under the Bankruptcy Code as follows:

Case No.	Date Filed	Chapter	Date Dismissed
92-32172	11/6/92	13	6/9/94
94-25136	5/25/94	13	3/20/95
95-23506	4/5/95	13	5/30/95
95-25913	6/12/95	13	4/2/96

These two adversary proceedings ensued and were later consolidated for trial purposes.

Contentions of Mr. Robbins

Mr. Robbins essentially contends that the marital obligations and hold harmless agreements arising out of the MDA are dischargeable under section 523(a)(5) and section

523(a)(15)(A)-(B); that he does not have the ability to pay such obligations and agreements from income not reasonably necessary to be expended for his maintenance and support and payment of expenditures necessary for his employment; and that discharging such obligations and agreements would result in a benefit to him that outweighs the detrimental consequences to Ms. Breckenridge.

Contentions of Ms. Breckenridge

Ms. Breckenridge's contentions are contrawise. She contends that the marital obligations and hold harmless agreements arising out of the MDA are nondischargeable alimony, maintenance, or support obligations as contemplated under section 523(a)(5). Actually, she states that the "whole MDA is about support." Alternatively, she asserts that such obligations and agreements, in full or in part, are nondischargeable under section 523(a)(15).

Discussion

The Congressional policy of giving the unfortunate but honest individual debtor a fresh financial start in bankruptcy is subordinate to the more compelling interests of providing financial protection to the debtor's family members (e.g., former spouses and children). See, among others, *In re Sternberg*, 85 F.3d 1400 (9th Cir. 1996). The United States Congress has been somewhat active in the development of the relationship between federal bankruptcy laws and state domestic relations matters. See, for example, 11 U.S.C. §§ 523(a)(5) and (15)(A)-(B), 1141(d)(2), 1228(a)(2); and 1328(a)(2).

Whether an obligation or agreement is actually in the nature of alimony, maintenance, or support is determined by federal law, not state law. H. Rep. No. 595, 95th Cong., 1st Sess. 363 (1977); U. S. Code Cong. & Admin. News 1978, p. 5787. Since there is no federal domestic relations law, the bankruptcy court has to consider state law in determining the appropriate federal standard. *In re Calhoun*, 715 F.2d 1103, 1107 (6th Cir. 1983); *In re Hawkins*, 25 B.R. 430, 434 (Bankr. E.D. Tenn. 1992). It is clear, however, that the definition of alimony, maintenance, or support under state law is not determinative of how it may be defined under federal

law by 11 U.S.C. § 523(a)(5). The Bankruptcy Code provides that the mere labeling of an obligation or agreement by the parties (or the state court) as one for alimony, maintenance, or support will not, in and of itself or ipso facto, render it nondischargeable. *In re Calhoun*, 715 F.2d at p. 1111.

Prior to the enactment of H.R. 5116, cited as "The Bankruptcy Reform Act of 1994," Pub. L. No. 103-394, 108 Stat. 4106 ("H.R. 5116"), effective with regard to cases filed on or after October 22, 1994,[1] the dischargeability of a domestic relation debt depended on whether the debt was actually in the nature of alimony, maintenance, or support or whether the debt arose out of a property settlement and hold harmless agreement. If the former (i.e., a support debt), then the debt was nondischargeable under 11 U.S.C. § 523(a)(5), and if the latter (i.e., a property settlement or hold harmless obligation), the debt was dischargeable. Understandably perhaps, this led to litigation concerning the sometimes very fine distinction between nondischargeable alimony, maintenance, or support obligations on the one hand and dischargeable property settlement and hold harmless obligations on the other hand. See, for example, *In re Calhoun*, supra; *In re Fitzgerald*, 9 F.3d 517 (6th Cir. 1993) (discussed more fully hereinafter); and *Goggins v. Osborn*, 237 F.2d 186 (9th Cir. 1956).

In *Goggins v. Osborn*, 237 F.2d 186, 189-189 (9th Cir. 1956), the court discussed the distinction between alimony and a property settlement:

[1]Section 523(a)(15), infra, was enacted pursuant to section 304 of the Bankruptcy Reform Act of 1994. It creates an additional statutory ground for excepting from discharge debts incurred in connection with divorce or separation cases filed *after the effect*ive date of the 1994 amendments. Pub. Law 103-394, 108 Stat. 4150, section 702 (effective October 22, 1994). See also *In re Christie*s, 201 B.R. 298 (Bankr. M.D. Fla. 1996); *In re Tremaine*, 188 B.R. 380, 382-83, n.3 (Bankr. S.D. Ohio 1995). Compare section 305 of the Bankruptcy Reform Act of 1994 styled “Interest on interest” and its effective date set forth in section 702(b)(2)(D) (“The amendments made by section 305 shall apply only to agreements entered into after the date of enactment of this Act”). It is emphasized that section 304(e) of the Bankruptcy Reform Act of 1994 (i.e., section 523(a)(15)) does not have an effective date similar to section 305, notwithstanding the assertion of Mr. Robbins.

> Alimony is an allowance which a husband is required to pay his wife for her maintenance following or pending her divorce of legal separation from him. It may also include an award made for the support of minor children. Although parties may contract as between themselves concerning the amount of alimony the allowance of alimony is incidental to the divorce procedure and requires the court's intervention to give it validity.
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> A decree providing for alimony, whether or not based upon a contract, may be modified or terminated upon the death of the husband, the remarriage of the wife or a change in the financial condition of the parties. Bankruptcy will not relieve a husband of his obligation to make alimony payments. For the willful refusal of the husband to pay alimony, contempt proceedings will lie....
>
> A property settlement agreement deals with the division of property belonging to a husband and wife. A wife is free to settle her claims against her husband's property by private agreement. For a consideration, she may waive all claims for support. A decree incorporating a property settlement agreement gives rise to legal consequences which are different from those involving alimony.
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> The provisions of a property settlement agreement are governed by the law of contracts. When approved by the court, they may not be modified without the consent of the parties unless there was fraud or collusion. The rights and obligations they create survive the parties and are not affected by changing conditions such as the remarriage of the wife or inability of the husband to pay. They may be discharged by bankruptcy. The payments cannot be enforced by contempt proceedings.

An entire section of H.R. 5116, the Bankruptcy Reform Act of 1994, namely section 304, was devoted exclusively by the Congress to marital and child support matters. More specifically, subsection (e) of section 304 of H.R. 5116, infra, adds a new exception to discharge (i.e., section 523(a)(15) of the Bankruptcy Code) and creates a new general rule: certain property settlement and hold harmless obligations arising out of a divorce decree or separation agreement that are otherwise dischargeable under section 523(a)(5) as not being in the nature of alimony, maintenance, or support are nondischargeable with two exceptions (referred to more fully, infra).

Section 523(a)(5) of the Bankruptcy Code represents a departure from the general policy of giving a debtor a "fresh financial start" following his or her bankruptcy and instead "enforces an overriding public policy favoring the enforcement of family obligations." *Shaver v. Shaver*, 736 F.2d 1314, 1315-6 (9th Cir. 1984). That is, the policy of giving the unfortunate but honest individual debtor a new opportunity in life unhampered by pre-existing debts is subordinate to the more compelling interest of the debtor's family members in continuing to receive financial support. Compare *Lines v. Frederick*, 400 U.S. 18, 19 (1970); *Local Loan Co. v. Hunt*, 292 U.S.

234, 244 (1934).

Specifically, section 523(a)(5) provides that a discharge does not discharge an individual debtor from any debt -

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse of child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance wit 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 USCS § 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.

In *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983), the Sixth Circuit Court of Appeals provided an analytical framework for determining when obligations are "actually in the nature of alimony, maintenance, or support," and thus nondischargeable, when they are not designated as such. *Calhoun* involved a continuing obligation by a debtor to assume marital debts and hold harmless his former spouse. The *Calhoun* obligation was incurred as part of a divorce settlement. The Sixth Circuit first found that a hold harmless obligation could constitute nondischargeable support although not paid directly to the former spouse. Next, the Sixth Circuit in *Calhoun* announced a four-step analysis for determining whether an obligation, which was not designated alimony or maintenance, was nonetheless actually in the nature of support and nondischargeable. First, the obligation constitutes support only if the state court or parties intended to create a support obligation. Second, the obligation must have the actual effect of providing necessary support. Third, if the first two conditions are satisfied, the court must determine if the obligation is so excessive as to be unreasonable under traditional concepts of support. Fourth, if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of

federal bankruptcy law. *Calhoun,* 715 F.2d at 1109-10. The burden of demonstrating that an obligation is in the nature of alimony, maintenance, or support under section 523(a)(5) is on the non-debtor (Ms. Breckenridge). *Id*.

Newly enacted section 523(a)(15) of the Bankruptcy Code contrastedly provides as follows:

> 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 -
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> * * *
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> 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-
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> (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....

The House Judiciary Committee's "section-by-section" analysis underlying section 304(e) (i.e., 523(a)(15)), H.Rep. No. 835, 103d Cong., 2d Sess. 54, reprinted in 1994 U.S. Code Cong. & Admin. News 3363, provides in relevant part as follows:

> This section [section 304] is intended to provide great protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy. The Committee believes that a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations.
>
> * * *
>
> Subsection (e) adds a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or support. In some instances, divorcing spouses have agreed to make payments of marital debts, holding the

> other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts. In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents. The Committee believes that payment of support needs must take precedence over property settlement debts. The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.
>
> The new exception to discharge, like the exceptions under Bankruptcy Code section 523(a)(2), (4), and (6) must be raised in an adversary proceeding during the bankruptcy case within the time permitted by the Federal Rules of Bankruptcy Procedure. Otherwise the debt in question is discharged. The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse and can be asserted only by the other party to the divorce or separation. If the debtor agreed to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former spouse -- an obligation to hold the spouse or former spouse harmless -- which is within the scope of this section. See *In re MacDonald*, 69 259, 278 (Bankr. D.N.J. 1986).

The non-debtor has the initial burden of demonstrating that an obligation is excepted from the general discharge under the first paragraph of section 523(a)(15) as being incurred in a divorce-related separation agreement and not within the scope of section 523(a)(5). See, for example, *In re Campbell*, 198 B.R. 467, 472 (Bankr. D. S.C. 1996); *In re Armstrong*, 205 B.R. 386 (Bankr. W.D. Tenn. 1996). The burden of proof in the affirmative defenses of section 523(a)(15)(A), and section 523(a)(15)(B), however, rests upon the debtor - that is, the burden of the two section 523(a)(15)(A)-(B) exceptions to the discharge exception shifts to the bankruptcy debtor. *In re Campbell*, 198 B.R. at 472-473. Compare *In re Hesson*, 190 B.R. 229, 239 (Bankr. D. Md. 1995).

As noted earlier, by virtue of this new exception to discharge under section 523(a)(15), property division or hold harmless obligations otherwise subject to discharge under section 523(a)(5) may now be nondischargeable. This new exception to discharge under section

523(a)(15) is specially meant to address property settlements and hold harmless obligations arising out of a divorce decree or separation agreement that are otherwise dischargeable under section 523(a)(5) as not being actually in the nature of alimony, maintenance or support.

Accordingly, the distinction between nondischargeable "alimony, support or maintenance" and dischargeable property settlement and hold harmless obligations under section 523(a)(5) is rendered less significant by newly enacted section 523(a)(15) in two instances. Section 523(a)(15)(A)-(B) provides two exceptions to the new general rule of nondischargeability as follows:

> * that the debtor does not have the ability to pay the debt from income or property not reasonably necessary to be expended for the maintenance or support of the debtor, and if the debtor is engaged in business, for the payment of business expenses necessary to operate such business; or
>
> * that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the non-filing creditor-spouse or child.

Conclusions

In accordance with the MDA, Mr. Robbins agreed to pay either directly to Ms. Breckenridge or on her behalf certain obligations and to indemnify and hold her harmless. See, for example, paragraphs 8 and 9, p. 12, of the MDA as follows:

> The Husband further agrees to indemnify and hold the Wife harmless on all tax return filings and for all taxes for the past years wherein they have filed jointly, which may be determined by the IRS, the State of Tennessee, or any other municipality, or a court of competent jurisdiction to be due and owing, delinquent or otherwise in arrears, or owed to the IRS or State of Tennessee, or municipality.
>
> The Husband further agrees to indemnify and hold the Wife harmless on any and all jointly incurred (sic) debts, wherein the Husband has agreed to make certain payments, either to the Wife, or on her behalf, and for her benefit, in the event any such creditor or holder/issuer or any asset mentioned or referred to in his Agreement, calls upon or otherwise makes demand upon the Wife, for payment or possession of any asset, or in the event of any notice to the Wife of any payment in default, whether or not she shall have paid such demand, together with all reasonable attorney fees and expenses incurred by her.

Paragraph 12, p. 13, of the MDA provides:

> It is understood and agreed by the parties hereto that in addition to the foregoing provisions of this Agreement, that the amounts, whether monthly or otherwise designated to be paid by the Husband to the Wife or

> on the Wife's behalf, although not to be considered as alimony for taxation purposes by the Internal Revenue Service, that the Court may look to the same from the standpoint of State law, as alimony, for the purposes of enforcing its decree of divorce and enforcement of the Marital Dissolution Agreement regarding appropriate and timely payments and in consideration of any defaults or any other remedies that either party may be entitled concerning alimony as expressed herein and as the same is considered for State law purposes.

The December 15, 1994 "Final Decree of Divorce" provides as follows:

> The Marital Dissolution Agreement filed in this case be and is hereby approved, and the same is incorporated herein by reference without the necessity of copying same verbatim. That the Marital Dissolution Agreement providing for payments of monies either to the Plaintiff by the Defendant or on behalf of the Plaintiff by the Defendant are hereby reinforced and that all of the same are held by this Court for State Court purposes to be termed alimony, but it is further understood and agreed and so ordered that for purposes of Internal Revenue Services and Federal tax purposes, that same is not alimony as the same is stated within the Marital Dissolution Agreement. The Court hereby retains jurisdiction over all of such matters as set forth in the Marital Dissolution Agreement and incorporated herein by reference. The quoting or reference to or incorporation of specific language from the Marital Dissolution Agreement into this Final Decree of Divorce shall in no way alter the rights and power of that document or in any way dilute it by either the reference thereto or non-reference thereto. (emphasis added.)

In *Fitzgerald v. Fitzgerald*, 9 F.3d 517 (6th Cir. 1993), the Sixth Circuit revisited *In re Calhoun* and the question of how to determine when an obligation or agreement is "actually in the nature of alimony, maintenance, or support" in dischargeability litigation under section 523(a)(5). Stating that its previous effort in *In re Calhoun* "has been the source of some confusion in the lower courts...," the Sixth Circuit substantially retreated from the "present needs" analysis required by *Calhoun*. Judge Cornelia Kennedy in *Fitzgerald* lamented that her earlier *Calhoun* opinion had "been applied more broadly than intended." *Fitzgerald* seems to say that when an obligation is denominated as alimony, maintenance or support by the parties or the divorce court, it is not necessary to analyze in a subsequent action under 11 U.S.C. § 523(a)(5) whether payments are actually necessary to provide support.

Unlike *Calhoun*, where it was necessary to determine whether something *not* denominated as support in the divorce decree was really support, under the *Fitzgerald* approach it appears that the only question is whether something denominated as alimony is really alimony, maintenance or support and not a property settlement in disguise. The alimony obligations and

agreements in *Fitzgerald* were to permit the plaintiff-spouse (i.e., the non-debtor) to achieve a standard of living compatible with what she might expect were the marriage to continue. This is a long-standing standard for alimony, maintenance, or support where a spouse's assets or earning capacity justifies such an award. Federal bankruptcy laws do not place a restriction on the state courts' ability to award alimony, maintenance, or support. As the Sixth Circuit stated in *Calhoun*, "[d]ivorce, alimony, support and maintenance are issues within the exclusive domain of the state courts." *Calhoun*, 715 F.2d at 1107 (citing *Boddie v. Connecticut*, 401 U.S. 371, 389 (1971) (Black, J., dissenting)). Other terms of the *Fitzgerald* agreement provided for the division of property and the payment of debts.

When the Sixth Circuit stated in *Calhoun* that the "loan assumption should be treated, to the extent possible, the same as ordinary direct child support or alimony payment," the Sixth Circuit was not suggesting that alimony or support payments be reduced to necessary support. Rather, the Sixth Circuit was applying to loan assumptions a minimum standard ordinarily applied by state courts, holding that, to the extent loan assumptions exceed what a court would have awarded for alimony, maintenance or support, they are dischargeable.

As noted by the House Judiciary Committee's section-by-section analysis of section 304(e) of the Bankruptcy Reform Act of 1994, section 523(a)(15), Congress intended to provide even greater protection for alimony, maintenance or support obligations and agreements owing to a spouse, former spouse, or child of a debtor in bankruptcy, and a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital (or child support) obligations. and agreements. The greater protection under section 523(a)(15) applies prospectively to bankruptcy cases filed on or after October 22, 1994. See footnote 1, supra.

In some instances, divorcing spouses agree regarding payments of joint marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony, maintenance, or support payments. In other instances, divorcing spouses agree to lower alimony,

maintenance, or support based on a larger property settlement. In accordance with the MDA, Mr. Robbins agreed, inter alia, for a period of 4 ½ years to supportably pay the $915 monthly house note for Ms. Breckenridge and the $418 monthly note to Ford Motor Credit regarding Ms. Breckenridge's automobile. He failed to do so resulting in (1) a subsequent forced sale of the home by Ms. Breckenridge to avoid a pending foreclosure and (2) repossession of her automobile. See, for example, *Poolman v. Poolman*, 299 F.2d 332 (8th Cir. 1961) (a home case); *In re Owens*, 191 B.R. 669 (Bankr. E.D. Ky. 1996) (an automobile case).

Mr. Robbins and Ms. Breckenridge initially contemplated that the marital residence would be sold after 4 ½ years for an amount that would allow for Ms. Breckenridge to be reimbursed the $22,000 inheritance from her Father that was used for the down payment of the home; this specific MDA supportive provision was to enable her to purchase another home. At the time of the forced sale of the home, which infelicitously did not result in monies in excess of the existing purchase money mortgage, Mr. Robbins was in arrears on the house payments in the approximate amount of $23,000! Mr. Robbins also agreed to pay the Internal Revenue Service for past tax debts and he has failed to do.

The term "support" as used in the discharge exception under section 523(a)(5) for alimony, maintenance, or support is entitled to broad application. See, for example, *In re Clegg*, 189 B.R. 818 (Bankr. N.D. Okla. 1995). The critical *Fitzgerald* inquiry is the shared intent of the parties at the time the MDA obligations arose. Under the *Fitzgerald* inquiry, the bankruptcy court must ascertain the intention of the parties at the time they entered into the MDA. Several factors should be considered in determining how the parties intended to characterize the obligation. Foremost, the bankruptcy court should consider whether the recipient spouse actually needed spousal support at the time of the divorce. There can be no serious doubt here that Ms. Breckenridge needed such spousal support. Although the labels given to the payments by Mr. Robbins and Ms. Breckenridge are not conclusive, they may be looked at as evidence of their

intent. See *In re Sampson*, 997 F.2d 717, 723 (10th Cir. 1993); *In re Combs*, 101 B.R. 609, 616 (BAP. 9th Cir. 1989).

Considering the particular facts and circumstances and applicable law, the court determines in the instant case that the subject obligations and agreements, among all the others referred to in the MDA, constitute alimony, maintenance, or spousal support in favor of Ms. Breckenridge as contemplated under section 523(a)(5) of the Bankruptcy Code. This determination also is consistent with applicable Tennessee law.

At all times relevant here, Ms. Breckenridge was totally disabled. After having to vacate her home, she moved into an apartment in June 1997. Although Ms. Breckenridge is currently unemployed, interestingly, she is looking for a part-time teaching position. It is the sense of the court that it is not likely under the circumstances that she will be successful. It is observed that her monthly social security income has ceased. She is in dire need of support or maintenance and is unable to provide for herself. Congress has directed and the Sixth Circuit has instructed that such support obligations, as exists here, be nondischargeable. The Sixth Circuit in *Fitzgerald* directed that obligations designated as alimony, maintenance, or support and intended as such by the parties or the state divorce court be nondischargeable under section 523(a)(5). In the instant case the court finds shared intent under a totality of the particular facts and surrounding circumstances based on, inter alia, the parties' intent when they entered into the MDA on December 7, 1994, the concomitant needs of Ms. Breckenridge, and careful consideration and interpretation of the specific language of the MDA and the final decree of divorce.

In the event an appellate court later determines that all or part of the subject MDA instead is governed by section 523(a)(15) and not section 523(a)(5), as believed by this court, the court alternatively determines that such martial obligations and hold harmless agreements are nondischargeable as contemplated under section 523(a)(15). This additional determination under section 523(a)(15)(A)-(B) perhaps will eliminate the costs and delays of a remand. The benefits of

Mr. Robbins' discharge of such obligations and agreements are greatly outweighed by the substantial and detrimental consequences and harm to Ms. Breckenridge, who under the circumstances should not be saddled with the financial responsibility of these marital debts and lack of maintenance or support, as previously observed. On the date of the MDA and at this time, Ms. Breckenridge is unemployed and has no source of income. Mr. Robbins has by far the greater ability to pay and reimburse prior payments of such debts (and otherwise perform under the MDA). Mr. Robbins is gainfully employed as a highly experienced commissioned insurance agent for Massachusetts Mutual Insurance Company. Mr. Robbins has a BA degree from the University of Memphis and a CLU designation in life insurance.

In summary and based on all the foregoing and the entire case record as a whole, the court concludes that Ms. Breckenridge has carried the burden of proof and that the marital obligations and hold harmless agreements set forth in the December 7, 1994 MDA are nondischargeable under section 523(a)(5) of the Bankruptcy Code. Assuming arguendo the applicability of section 523(a)(15), in full or in part, alternatively, the court finds that the obligations and agreements under the MDA are nondischargeable and further that Mr. Robbins has failed to prove entitlement to the two affirmative defenses under section 523(a)(15)(A)-(B).

Having found that all the MDA obligations and agreements are nondischargeable in bankruptcy under either section 523(a)(5) or section 523(a)(15), Ms. Breckenridge may now proceed in the Honorable Shelby County, Tennessee Chancery Court to determine the remaining issues including, for example, monetary judgments against Mr. Robbins, enforcement issues, etc. Likewise, Mr. Robbins also may proceed in the State Court to seek to modify the support obligations and agreements under the MDA based on asserted changed circumstances, if he deems it proper and appropriate to do so. These remaining issues historically are reserved to the domain of the State court. There is "no federal law of domestic relations." *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956). Except where unavoidable, the federal bankruptcy court generally

should not intrude into the States' traditional authority over domestic relations. Accordingly, in the interest of the doctrine of comity with the State Court and high respect for State law, this bankruptcy court, sua sponte, abstains regarding such remaining issues to allow the Honorable Shelby County Chancery Court to invoke and exercise its authority and expertise under applicable State law and the concurrent jurisdictional provisions of 28 U.S.C. § 1334(b). 28 U.S.C. § 1334(c)(1); *Bellotti v. Baird*, 428 U.S. 132, 143, n.10 (1976); *In re Southmark Storage Assoc., Ltd. Partnership*, 132 B.R. 231, 233 (Bankr. D. Conn. 1991); *Scherer v. Carroll*, 150 B.R. 549, 552 (D. Vt. 1993).

The Bankruptcy Court Clerk is directed to send a copy of this Memorandum and Order to the persons listed below.

In accordance and consistent with the foregoing, **IT IS SO ORDERED.**

BY THE COURT

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DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATE: August 13, 1997

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