

UNITED STATES BANKRUPTCY COURT **Error! Bookmark not defined.**
For the Southern District of Iowa

In the Matter of :
JOHN F. GENESER, : Case No. 90-2531-C H
Debtor. : Chapter 7
- - - - - :
JOSEPHINE M. GENESER, : Adv. No. 90-211
Plaintiff, :
v. :
JOHN F. GENESER, :
Defendant. :

**ORDER--FINDINGS OF FACT AND CONCLUSIONS OF LAW, COMPLAINT
TO DETERMINE DISCHARGEABILITY OF DEBT AND DISCHARGE**

On December 16, 1991, a trial was held on the Complaint to Object to Discharge, which included the Plaintiff's objection to discharge pursuant to Bankruptcy Code § 727 and objection to dischargeability of a debt pursuant to § 523(a)(5). The following attorneys appeared on behalf of their respective clients: Donald F. Neiman, for Debtor/Defendant and Jeffrey A. Baker for Creditor/ Plaintiff. At the conclusion of said trial, the Court ordered both Debtor/Defendant and Creditor/Plaintiff to file proposed findings of fact and conclusions of law in lieu of closing arguments.

Upon review of the pleadings, arguments of counsel, evidence admitted, and briefs submitted, findings and

conclusions of fact and law are now entered pursuant to
Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Debtor filed his Chapter 7 Petition on September 28, 1990. Creditor/Plaintiff filed her Complaint on October 24, 1990.

2. The Complaint contains three counts. Count I alleges that Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(2) because Debtor with intent to hinder, delay, or defraud a creditor transferred two motor vehicles within one year of filing for bankruptcy. Count II alleges that debtor should be denied any discharge pursuant to 11 U.S.C. § 727(a)(2) because Debtor with intent to hinder, delay, or defraud a creditor concealed assets within one year before filing bankruptcy by placing cash in a new account. Count III alleges that the debt owed to the Plaintiff arising out of a decree of dissolution is nondischargeable pursuant to Bankruptcy Code § 523(a)(5) because said debt, as modified by the Iowa Court of Appeals, is actually in the nature of alimony, maintenance, or support.

3. Plaintiff is a creditor of this bankruptcy by virtue of a dissolution decree entered January 8, 1980, as modified by the Iowa Court of Appeals on March 24, 1981.

4. John F. Geneser and Josephine M. Geneser were married in 1947. On January 8, 1980 they were divorced. The decree of dissolution found their net worth to be \$956,336.00.

Most of this net worth was attributable to Geneser Implement

Company (now a Chapter 7 defunct corporation). The trial court awarded Josephine the marital residence (valued at \$57,000), furnishings (valued at \$10,000), the parties' half interest in the 60 acre farm site (that interest valued at \$62,500.00), \$6,255 representing half of the parties' 1978 income tax refunds and a lump sum property settlement in the amount of \$364,702. The net result of the decree was to divide the parties' marital estate in half.

5. On a motion to reconsider, the District Court reduced the cash award to Josephine from \$364,702 to \$303,215.

The case was appealed to the Iowa Court of Appeals, which reduced the property settlement award to Josephine from \$303,215 to \$268,215, payable in monthly installments of \$1,500 with annual interest payments on the unpaid balance to be paid on the anniversary dates of the decree at the rate of 7% per annum. The amount of the annual principal payments also would be increased 5% annually as provided in the original trial court decree.

6. According to Plaintiff's exhibit 3 (Dallas County Clerk payment record), John Geneser made payments on this debt of \$2000/month or more from April 1981 through December 1989.

After January 1990 John Geneser made smaller, more inconsistent payments. Since filing for bankruptcy on September 28, 1990, the Debtor has made no payment under the divorce decree and its modifications and a substantial

arrearage has accumulated.

7. By letter dated November 9, 1988, the Internal Revenue Service proposed to assess a 100% penalty for Debtor's failure to pay Geneser Implement's unpaid corporate payroll tax liability. At that time, the proposed assessment was in the amount of \$32,036.01.

8. By letter dated December 5, 1989, F. H. Becker, counsel for Ms. Geneser, wrote Ronald Sutphin, attorney for the Debtor, John Geneser, requesting proof of compliance with those portions of the decree of dissolution that related to maintaining life insurance, and advising counsel for John Geneser that payments under the decree were substantially in arrears.

9. On January 30, 1990, Debtor, John F. Geneser, executed two assignments of certificate of title to Barbara J. Costello, Debtor's daughter: one for a 1984 Lincoln Town Car and the other for a 1979 Ford pickup. No consideration was paid by Debtor's daughter for transfer of either the Lincoln or the pickup. The address listed on the titles remained the same, i.e., Box 372, Granger, Iowa 50109, which is the address of Debtor. The recited sales price on each of the titles is zero dollars. Debtor paid the fees for the transfer of titles. Debtor continued to insure both vehicles and retained possession and use of the two vehicles.

10. The Debtor is an experienced businessperson with

over thirty years experience.

11. Josephine M. Geneser, in an effort to satisfy the obligations due under the divorce decree, served a garnishment on Debtor's employer and served a garnishment on Debtor's bank account at Polk City Savings Bank on or about March 14, 1990.

12. On or about April 6, 1990, Debtor opened a new bank account at Bankers Trust and deposited \$2,249.90. When asked why he made the deposit at Bankers Trust, Debtor testified in deposition, "Well, I figured you'd be garnishing my Brenton Bank so better get someplace that you wasn't--you didn't know about." (Plaintiff's exhibit 31, April 2, 1991 deposition of John F. Geneser, at page 9-10). At the time Debtor opened the Bankers Trust account, he was aware of the garnishment efforts being undertaken by Josephine Geneser.

13. On September 24, 1990, Debtor signed Answer to Interrogatory No. 2 in the state court proceeding indicating that he transferred the 1979 Ford pickup truck and the 1984 Lincoln Town Car because he was "concerned about a possible Internal Revenue lien being levied against me for tax liabilities"

14. In his Statement of Financial Affairs signed September 28, 1990 and filed October 1, 1990, Debtor declared that he "[t]ransferred 1979 Ford pickup and 1984 Lincoln town car [sic] to daughter, Barb Costello, in trust in January 1990 primarily to avoid IRS seizure."

15. At the first meeting of creditors on October 23, 1990, Debtor testified regarding his intent stating that the purpose of the transfer of the 1979 Ford pickup and 1984 Lincoln Town Car was to avoid IRS seizure.

16. The certificates of title for both the 1984 Lincoln and the 1979 Ford pickup showing Barbara J. Costello as the titled owner make no reference to the vehicles being held "in trust," nor do they reflect any retained rights, ownership, or interest by Debtor.

17. On or about July 27, 1990, the Plaintiff filed a petition in equity in the Iowa District Court for Dallas County against John F. Geneser and Barbara J. Costello requesting that the court set aside the transfer of the vehicles as a fraudulent conveyance, establish Plaintiff's interest in the two motor vehicles as a lien on the property existing from the time of service of the original notice and petition at law, and that the Court order that the Defendants, John Geneser and Barbara Costello, surrender the 1984 Lincoln Town Car and the 1979 Ford pickup truck on demand, and that said vehicles be sold on execution to go toward satisfaction of Plaintiff's judgment.

18. On the eve of the trial scheduled for October 1, 1990 in the equity action filed in Dallas County, Debtor filed his petition in bankruptcy staying the district court action.

19. Josephine Geneser recalled Debtor coming to her in

the middle 1980s requesting that the two motor vehicles be placed in her name. She did not want the vehicles placed in her name; however, she complied with Debtor's request. For a period of time in the 1980s the 1984 Lincoln Town Car and the 1979 Ford pickup were titled in Josephine Geneser's name. She used the vehicles on occasion. Prior to May 1989 Josephine Geneser told Debtor she wanted the vehicles out of her name at which time she transferred the vehicles back to Debtor for the sum of \$5,000.00.

20. Throughout the Geneser's marriage Josephine M. Geneser never worked outside the family home with the exception of some minor bookkeeping work for the family business. At the time of the divorce decree, Josephine M. Geneser had no regular means of support. She was not employed and at that time had limited skills with no employment history. The divorce decree provided no regular means of support for Josephine M. Geneser with the exception of the monthly payments set forth in paragraph 6 and 7. The District Court for Dallas County ordered temporary support to be paid by Debtor to Josephine Geneser pending the outcome of the divorce. The divorce decree entered by the District Court for Dallas County was appealed. The Supreme Court ordered temporary support in the amount of \$2,000 per month pending the outcome of the divorce decree appeal.

DISCUSSION

Josephine M. Geneser has presented a number of grounds under sections 727 and 523 of the Bankruptcy Code in order to deny Debtor discharge on some or all of his debts. Counts I and II of the complaint, concerning discharge under § 727, will be considered first and Count III, concerning dischargeability under § 523, will be addressed separately.

I. Objection to Discharge

Bankruptcy Code § 727(a) sets out the ten non-exclusive grounds upon which a court can deny a debtor's discharge. An action brought under § 727 is the most serious non-criminal action a creditor can bring against a debtor in bankruptcy. Citizens Fidelity Bank & Trust v. Schermer (In re Schermer), 59 B.R. 924 (Bankr. W.D. Ky. 1986). Discharge under § 727 is the heart of the fresh start provisions of the bankruptcy law. Great Am. Ins. Co. v. Nye (In re Nye), 64 B.R. 759, 762 (Bankr. E.D.N.C. 1986) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 384 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6340). Consequently, objections to discharge are construed liberally in favor of debtors and strictly against the objecting creditor. Fox v. Schmit (In re Schmit), 71 B.R. 587, 589-90 (Bankr. D. Minn. 1987); Chaudbury v. Usoskin (In re Usoskin), 56 B.R. 805, 813 (Bankr. E.D.N.Y. 1985). The burden of proof in objecting to discharge rests with the party

objecting to discharge. Fed.R.Bankr.P. 4005. If the party objecting to discharge does prove a ground for exception to discharge, the burden of going forward with the evidence then shifts to the debtor. Ford v. Poston (In re Ford), 53 B.R. 444, 449 (W.D. Va. 1984), aff'd, 773 F.2d 52 (4th Cir. 1985).

The appropriate standard of proof for an objection to discharge under § 727 is a matter of some dispute. Some courts hold that the grounds for denying a debtor's discharge under § 727 must be established by clear and convincing evidence. Duval v. Portner (In re Portner), 109 B.R. 977, 986 (Bankr. D. Colo. 1989); G & J Investments v. Zell (In re Zell), 108 B.R. 615, 623 (Bankr. S.D. Ohio 1989) (noting split of authority and listing citations). Others have held the preponderance of the evidence standard is applicable. See, e.g., Cobb v. Hadley (In re Hadley), 70 B.R. 51, 53 (Bankr. D. Kan. 1987); Conti-Commodity Servs., Inc. v. Clausen (In re Clausen), 44 B.R. 41, 45 (Bankr. D. Minn. 1984). Grogan v. Garner, 111 S. Ct. 654 (1991) holds the preponderance-of-the-evidence standard applies to all exceptions from dischargeability under § 523(a) and may provide support for either position with regard to § 727. Because, however, the Plaintiff has proven grounds for denial of discharge under § 727 by clear and convincing evidence, the question of which standard of proof applies need not be addressed here.

Section 727(a)(2)(A) provides the court shall grant the

debtor a discharge unless:

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --

(A) property of the debtor, within one year before the date of the filing of the petition; . . .

11 U.S.C. § 727(a)(2)(A). The four elements Plaintiff must prove under § 727(a)(2)(A) are:

1. A transfer of property has occurred;
2. it was property of the debtor;
3. the transfer was within one year of the date of filing the petition; and
4. that at the time of the transfer, the debtor had the intent to hinder, delay, or defraud a creditor.

City Nat'l Bank v. Bateman (In re Bateman), 646 F.2d 1220, 1222 (8th Cir. 1981); Dignam v. McMahon (In re McMahon), 116 B.R. 857, 861 (Bankr. M.D. Fla. 1990); Ford, 53 B.R. at 446. The first three elements are self-explanatory. The fourth element, intent to hinder, delay, or defraud, requires an actual fraudulent intent or actual intent to hinder or delay as opposed to constructive fraudulent intent. Lowell v. Mixon, 719 F.2d 1373, 1376-77 (8th Cir. 1983); First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342-43 (9th Cir.

1986); Ford, 53 B.R. at 449. The courts have recognized the difficulty of proving the specific elements of subjective intent and have therefore declined to adopt a standard requiring a creditor to produce direct evidence that the debtor harbored the proscribed subjective state(s) of mind. Wilder Health Care Ctr. v. Elholm (In re Elholm), 80 B.R. 964, 968 (Bankr. D. Minn. 1987). Intent may be established by circumstantial evidence or by inferences drawn from a course of conduct. House v. Lane (In re Lane), 88-1063-DH, Adv. No. 88-175 (Bankr. S.D. Iowa Oct. 2, 1989) (Judge Hill #109); National City Bank v. McNamara (In re McNamara), 89 B.R. 648, 651 (Bankr. N.D. Ohio 1988). In addition, the court may rely upon circumstances that may indicate the necessary actual intent to defraud including:

1. the lack or inadequacy of consideration;
2. the family, friendship, or close associate relationship between the parties;
3. the retention of possession, benefit, or use of the property in issue;
4. the financial condition of the party sought to be charged both before and after the transaction in issue.
5. the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring debt, onset of financial difficulties, or pendency or threat of suits by creditors; and
6. the general chronology of events and transactions under inquiry.

Lane, op. at 15; McNamara, 89 B.R. at 651 (citing In re Kaiser, 722 F.2d 1574, 1582 (2d Cir. 1983)).

With respect to the transfer of the two automobiles, the first of the three elements are not challenged. Debtor contends, however, that he transferred the two vehicles to his daughter to be held "in trust." The certificates of title do not reflect any "trust" relationship or notation indicating Debtor retained any interest in either vehicle. Iowa Code § 321.45(2) sets forth the law regarding interest, rights, or ownership of a vehicle. Section 321.45(2) provides:

No person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to the person for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to the person for such vehicle; . . .

Iowa Code § 321.45(2) (1991).

Debtor argues that a parole trust was created. The notion that a parole trust can be created by transferring property "in trust" within one year of bankruptcy has been rejected. Tibbs v. Caterinacci, 191 F.2d 957, 958 (4th Cir. 1951). It is, however, unnecessary for the court to address the scant evidence on and the tenuous arguments for whether a trust relationship existed. Nor would it be wise to encourage debtors to concoct such relationships in the midst of

financial troubles or on the eve of bankruptcy. In the instant case, there is no written document creating a trust and there is no indication on the certificates of title of any retained ownership, rights, or interest by Debtor in either vehicle. This Court finds that no "trust" relationship existed. Therefore, Josephine Geneser has proven the first three elements of § 727(a)(2)(A).

With regard to the fourth element, the Court finds the Debtor had the requisite intent to hinder, delay, or defraud a creditor and will therefore deny Debtor's discharge. The circumstances surrounding the Debtor's transfers of assets strongly suggest Debtor intended to hinder, delay, or defraud his creditors, specifically the IRS and Josephine Geneser. It is undisputed that Debtor transferred the Lincoln and pickup truck to his daughter for no consideration. Such a transfer raises a presumption of fraudulent intent. Bateman, 646 F.2d at 1222; EFA Acceptance Corp. v. Cadarette (In re Cadrette), 601 F.2d 648, 651 (2d Cir. 1979). Debtor retained the possession, benefit, and use of the vehicles and continued to insure them. At the time Debtor transferred the vehicles, the IRS was proposing to assess a 100% penalty for over \$30,000 against Debtor. During the same time period his creditor-former spouse had advised his attorney that payments and other obligations to her were in arrears. Moreover, she initiated a garnishment action to satisfy her claim.

Debtor's transfer of the vehicles was part of a pattern and series of transactions Debtor undertook during his financial difficulties, from which the Court can infer fraudulent intent. Shortly after Josephine Geneser garnished Debtor's bank account at Polk City Savings Bank, Debtor opened a new account at Bankers Trust. His testimony revealed that the purpose for opening the new account was to avoid further garnishment. As Debtor put it he wanted to put his funds someplace "you [creditor] didn't know about."

Likewise, Debtor's reasons for transferring the vehicles to his daughter all indicate his intent to conceal them from the IRS. Put most innocuously, he described the transfer as a measure taken because he was "concerned" the IRS may move against them and that the transfer would somehow help him "settle" with the IRS. Debtor's counsel states that Geneser at all times, as reflected on the schedules, acknowledged the ownership of the vehicles. While it is prudent for a debtor to fully disclose assets on bankruptcy schedules, the focus here is on whether at the time of the transfer, the Debtor had the intent to hinder, delay, or defraud a creditor. Based especially on Debtor's statements that the transfer was made to avoid IRS seizure, this Court finds Debtor did have that intent.

Based upon the undisputed and admitted purpose on the part of the Debtor to avoid IRS seizure of the vehicles and

upon the circumstances surrounding the transfer (discussed above), the requisite intent to hinder, delay, or defraud a creditor has been proven. Josephine Geneser has proven all four elements required under § 727(a)(2)(A) and Debtor will therefore be denied a discharge.

II. Section 523(a)(5)

Josephine Geneser also contends that Debtor is not entitled to discharge of the debt stemming from the divorce decree because said debt is actually in the nature of alimony, maintenance, or support for purposes of exemption under § 523(a)(5) of the Bankruptcy Code. Debtor contends that because the divorce decree labels the decretal award as a "property settlement" that the debt is therefore dischargeable in bankruptcy. In light of this Court's conclusion that the Debtor should be denied a discharge altogether, the Court need not address this issue.

CONCLUSION AND ORDER

WHEREFORE, Plaintiff has met her burden of proof in objecting to Debtor's discharge under Section 727(a)(2)(A) as discussed above:

IT IS ACCORDINGLY ORDERED that Debtor, John F. Geneser, is denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A); and the issue raised as to § 523(a)(5) is accordingly moot.

Dated this 6th day of October, 1992.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE