

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

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In the Matter of:

No. 95-01312-C J
Chapter 7

GAIL ANN JORDAN,

Debtor.

- - - - -
CONRAD P. CARTER,

Plaintiff,

vs.

Adv. No. 95-95108

GAIL ANN JORDAN,

RULING

Defendant.

- - - - - x

U.S. Courthouse Annex
110 Court Avenue
Des Moines, Iowa
Wednesday, April 17, 1996
1:30 p.m.

BEFORE: THE HONORABLE LEE M. JACKWIG, Judge

APPEARANCES:

For the Plaintiff:

JOHN J. SCIESZINSKI, ESQ.
Law Office, Suite A
637 41st Street
Des Moines, IA 50312

For the Defendant:

MICHAEL P. BRICE, ESQ.
PO Box 1143
Oskaloosa, IA 52577

1 THE COURT: Be seated, please. The Court
2 has jurisdiction of this matter under 28 U.S.C.
3 Section 1334. This is a core proceeding pursuant
4 to 28 U.S.C. Sections 157(b)(2), paragraph I.

5 The plaintiff asks that the Court find
6 the debt in issue to be nondischargeable pursuant
7 to 11 U.S.C. Section 523(a)(5) or (a)(15).

8 The Court will focus first on paragraph
9 (a)(5). And that states in relevant part: "A
10 discharge under Section 727 of this Title does not
11 discharge an individual debtor from any debt to a
12 spouse, former spouse or child of the debtor for
13 alimony to, maintenance for or support of such
14 spouse or child in connection with a separation
15 agreement, divorce decree or other order of a
16 court of record, determination made in accordance
17 with state or territorial law by a governmental
18 unit or property settlement but not to the extent
19 that" --

20 Paragraph (a) of this section refers to
21 debts being assigned to another entity. I will
22 skip over that and focus on (b).

23 "Such debt includes a liability
24 designated as alimony, maintenance or support
25 unless such liability is actually in the nature of

1 alimony, maintenance or support."

2 Now, what all that fine code language
3 boils down to is that under 523(a)(5), alimony,
4 maintenance and support obligations are not
5 dischargeable. Property settlements are
6 dischargeable.

7 The plaintiff spouse, ex-spouse, child or
8 even a third-party creditor may commence this type
9 of action really anytime after the bankruptcy is
10 filed and can even commence an action like this in
11 state court. Bankruptcy courts and the state
12 courts share jurisdiction over these types of
13 matters, but the action has been brought here.

14 The plaintiff, the nondebtor spouse, bears
15 the burden of proof with respect to paragraph (5).
16 The preponderance of the evidence is the
17 evidentiary standard. The Court must look to
18 federal law, not state law, in analyzing whether
19 or not the obligation in issue falls under
20 alimony, maintenance and support or under a
21 property settlement.

22 As I indicated, sometimes debts to third
23 parties can be in the nature of alimony,
24 maintenance or support, or they might just be a
25 property settlement. The Court also, for purposes

1 of paragraph (5), must focus on the facts at the
2 time of the dissolution or divorce.

3 Now, what I have done over the years in
4 looking at a 523(a)(5) action is to go through a
5 number of elements set forth in the In Re Coffman
6 decision. That is found at 52 D.R. 667. It's a
7 1985 bankruptcy decision from the District of
8 Maryland. It has been cited by a number of other
9 courts also as having a good laundry list of
10 factors to review.

11 First of all, I must consider whether
12 there was an alimony award entered by the state
13 court. From looking at Exhibit 1, the answer to
14 that appears to be no.

15 Second, the question is whether there was
16 a need for support at the time of the decree and
17 whether the support award would have been adequate
18 absent the obligation in question. From the
19 evidence that was presented, it did not appear to
20 me that the plaintiff would have been in need of
21 any alimony as such. Child support is another
22 matter, so I think basically the answer to
23 question number 2 or factor number 2 is no.

24 Three: Was there an intention by the
25 Court to provide support? Really, the record is

1 not clear on that point. It appears that the
2 judge in Tennessee simply looked at the document
3 that had been prepared by counsel for the two
4 parties in that proceeding and signed off on it.

5 Four: I should look to see if the
6 debtor's obligation terminates upon death or
7 remarriage of spouse -- this would be the
8 plaintiff here -- or a certain age of the children
9 or any other contingencies such as a change in
10 circumstances. The answer to that based on the
11 record is no.

12 Five: I should compare the age, health,
13 work skills and educational levels of the
14 parties. I have a little bit of evidence on this,
15 but not a whole lot. I gather that both pursued
16 some higher education from the fact that there
17 were student loans in issue for both sides. We
18 heard about the age of the debtor but not the ex-
19 spouse. There's really nothing about health. So
20 there's not a whole lot I can conclude on that.
21 It would appear you're about even on this factor,
22 but the record could be better.

23 Six: Whether the payments are made
24 periodically over an extended period or in a lump
25 sum. From Exhibit 1, it simply looks as though

1 these debts were identified. I would assume that
2 they could be treated, as many debts like this
3 are, and paid out over a reasonable amount of
4 time, whatever is acceptable to the particular
5 creditor who holds that claim.

6 Seven: The existence of a legal or moral
7 obligation to pay alimony or support. I think
8 with respect to the child support provisions, that
9 is there. That's not what's in dispute. The
10 debtor has agreed that she is not trying to
11 discharge her obligation with regard to the
12 children including any medical payments that must
13 be made.

14 Eight: The express terms of the debt
15 characterization under state law. From Exhibit 1
16 it doesn't appear that these debts to third
17 parties have any label. They don't appear to fall
18 under, obviously, alimony, maintenance or
19 support. They're not identified as a true
20 property settlement. They're just included in one
21 of a few paragraphs.

22 Nine: Whether the obligation is
23 enforceable by contempt. I don't recall seeing
24 anything specifically to that effect in the decree
25 itself; however, it sounded from some of the

1 testimony as though Tennessee state law might say
2 there was a way to enforce it by contempt.

3 Ten: The duration of the marriage. I
4 don't know. No one put any evidence on that.

5 Eleven: The financial resources of each
6 spouse including income from employment or
7 elsewhere. And on that point it seemed as though
8 the debtor could be expected to earn somewhere in
9 the range of 17 to 20,000 and the plaintiff
10 ex-spouse seems to be earning in the neighborhood
11 of the low thirties. She appears to have
12 resources available from her family to assist her
13 with some bills. He seems to be getting a bit of
14 a break with respect to his bills related to his
15 residence via his stepfather. So that's close.

16 Twelve: Whether the payment, the
17 obligations to third parties was fashioned in
18 order to balance disparate incomes of the
19 parties. I have to say no, based on what I've
20 reviewed so far in my ruling and what I reviewed
21 of the record during the recess.

22 Thirteen: Whether the creditor spouse
23 relinquished rights of support for payment of the
24 obligation in question. This seems to be the
25 plaintiff's main theme in this case. He is saying

1 to me, "Yes, I did relinquish higher support, gave
2 her a break, but I wanted these other bills
3 paid." She is saying, "No. That wasn't my
4 understanding-" It appears that both parties got
5 their information from their respective attorneys;
6 and while they may both feel the arrangement is as
7 they believe it to be, it's not clear to the Court
8 that, in fact, the plaintiff did relinquish rights
9 of support in exchange for the obligation in
10 issue.

11 Fourteen: Whether there were minor
12 children in the care of the creditor/spouse.

13 Yes.

14 Fifteen: The standard of living of the
15 parties during their marriage. The record is not
16 clear.

17 Sixteen: The circumstances contributing
18 to the estrangement of the parties. There was a
19 very brief passing comment about possible abuse.
20 It was not elaborated on in the record.

21 Certainly, the timing with respect to leaving
22 Tennessee, remarrying might raise some other
23 concerns. I don't think I can draw any
24 conclusions from a passing comment or even from
25 the timing with respect to leaving Tennessee.

1 Seventeen: Whether the debt is for a
2 past or a future obligation, any property division
3 or any allocation of debt between the parties.
4 Again, it seems from Exhibit 1 that they were
5 dividing up debts owed to third parties between
6 them.

7 Eighteen: Doesn't seem to apply here at
8 all. It's tax treatment of payment by the debtor
9 spouse. That does not come into play given what
10 I've heard today.

11 So on balance, I would have to find that
12 the plaintiff did not prevail under the Coffman
13 standards in bringing these debts to third parties
14 under the umbrella of alimony, maintenance or
15 support, meaning that under paragraph (5), at
16 least, the debts in issue would be dischargeable.

17 Now, prior to October 22 of 1994, that
18 would be the end of the case. However, many
19 individuals and many organizations complained at
20 length to Congress about the number of times
21 debtors who did not like the arrangement in the
22 state court dissolution proceeding would come to
23 bankruptcy, file a petition and try to get rid of
24 the obligations that they had agreed to in the
25 state court.

1 Accordingly, Congress added paragraph
2 (15) to section 523(a); and that reads, in
3 relevant part: "A discharge under Section 727 of
4 this Title does not discharge an individual debtor
5 from any debt not of the kind described in
6 paragraph (5) that is incurred by the debtor in
7 the course of a divorce or separation or in
8 connection with a separation agreement, divorce
9 decree or other order of a court of record, a
10 determination made in accordance with state or
11 territorial law by a governmental unit unless --
12 (A) the debtor does not have the ability to pay
13 such debt from income or property of the debtor
14 not reasonably necessary to be expended for the
15 maintenance or support of the debtor or a
16 dependent of the debtor and, if the debtor is
17 engaged in a business, for the payment of
18 expenditures necessary for the continuation,
19 preservation, and operation of such business; or
20 (B) discharging such debt would result in a
21 benefit to the debtor that outweighs the
22 detrimental consequences to a spouse, former
23 spouse, or child of the debtor."
24 To me, it's easier to understand that new
25 code section if one reads "does not" in the

1 introductory paragraph as "does" and changes the
2 "unless" appearing before paragraph (a) to "if.,,
3 In other words, property settlements and debts to
4 third parties are still dischargeable if the
5 debtor does not have the ability to pay. If the
6 debtor does have the ability to pay, the
7 obligations are still dischargeable if the
8 detrimental consequence to the debtor's fresh
9 start from not discharging the obligation outweighs
10 the detrimental consequences to the spouse, former
11 spouse or child of the debtor from discharging the
12 obligation.

13 Since this case was filed after the
14 effective date of the provisions enacted by the
15 Bankruptcy Reform Act of 1994, I must proceed to
16 analyze the facts under paragraph (15). Unlike
17 paragraph (5), the action must be brought in the
18 bankruptcy court, not the state court, and within
19 60 days of the first date set for the meeting of
20 creditors; and that is as is required by Section
21 523(c) and Federal Rule of Bankruptcy Procedure
22 4007 (c) .

23 Now, right now we have no Supreme Court
24 nor Eighth Circuit Court of Appeals decision
25 analyzing this new law. A number of bankruptcy

1 courts are writing decisions on this. Some are
2 qualifying their decisions as they go.

3 I've had one opportunity to hear a rather
4 long case entailing paragraph (15); and like
5 today, I ruled from the bench. From my review of
6 the cases that are out there and from my one
7 experience, I feel the guidelines for paragraph (15)
8 are as follows: The plaintiff, as I indicated at
9 the outset, bears the burden of establishing a
10 claim under paragraph (15). Then the burden of
11 going forward shifts to the debtor. And that is
12 extremely important.

13 In this case, the plaintiff has
14 established a claim; indeed, in most cases that
15 is should be a given. So the burden shifts to the
16 debtor to prove up paragraphs (a) and (b) of
17 paragraph (15).

18 The preponderance of the evidence is the
19 same as for paragraph (5) -- the same standard as
20 in paragraph (5). once again, I think the courts
21 have to look to federal law, not any state law.
22 Unlike paragraph (5), I think we have to focus on
23 the facts at the time of the order for relief to a
24 certain extent. And I will explain that by
25 pointing out that the language in paragraph 15(a)

1 seems to be very similar to that set forth in 11
2 U.S.C. Section 1325(b). That is the disposable
3 income test that we utilize in Chapter 13 cases
4 when either the Chapter 13 trustee or an unsecured
5 creditor objects to the terms of the plan.

6 I must stress, paragraph (a) is not a
7 test to see if the income of the creditor spouse
8 is greater than the income of the debtor. I must
9 look at the income and the expenses of the debtor
10 around the time of the order for relief, realizing
11 that the focus is not limited simply to what were
12 the earnings and expenses on that date, but what
13 was the potential, what was the likelihood to be
14 able to pay out some amount over time.

15 Now, unfortunately, as I looked over my
16 notes and the exhibits that were offered, I really
17 don't have much of a record on that point. We
18 learned that the income varied between 17 and
19 20,000 preceding and immediately after the time of
20 the dissolution; and there was some period of not
21 working prior to filing relief here on May 5th,
22 1995; and that for a while when the debtor had her
23 children with her, she was receiving some aid.

24 But then I learned that she was living
25 with her parents until she married. I have no

1 idea of knowing what the true expenses were during
2 that time frame to compare it with the alleged
3 amount of potential income. I certainly have a
4 poor record with regard to what the current income
5 and expenses are for that family unit; and,
6 indeed, going back to this comparison with Section
7 1325(b), I do look at what can be expected in the
8 way of income and expenses for purposes of a
9 Chapter 13 plan confirmation. I think that that
10 is an acceptable approach in trying to analyze
11 this particular paragraph.

12 So based on the record I've got, I do not
13 believe I can make a finding that the debtor does
14 not have the ability to pay the debts over a
15 reasonable amount of time.

16 I might add another point here: The
17 dissolution decree -- or I guess it's called
18 decree of divorce in Tennessee -- simply identifies
19 the third-party debts by name. It does not show
20 amounts. Neither party presented that type of
21 evidence. I would suggest that in future cases,
22 you might want to do that. I appreciate counsel
23 on both sides had a difficult task here, because
24 again, there isn't much case law out there on this
25 new law.

1 So that means now I must look at
2 paragraph (b), which is comparing the fresh start
3 versus the detriment to the nondebtor spouse. In
4 the legislative history that follows the section
5 of the Bankruptcy Reform Act that put into effect
6 paragraph (15), it states in part: "The debt will
7 also be discharged if the benefit to the debtor of
8 discharging it outweighs the harm to the obligee.
9 For example, if a nondebtor spouse would suffer
10 little detriment from the debtor's nonpayment of
11 an obligation required to be paid under a hold
12 harmless agreement (perhaps because it could not
13 be collected from the nondebtor spouse or because
14 the nondebtor spouse could easily pay it) the
15 obligation would be discharged. The benefits of
16 the debtor's discharge should be sacrificed only
17 if there would be substantial detriment to the
18 non-debtor spouse that outweighs the debtor's need
19 for a fresh start."

20 Now, as I thought over this new language
21 in light of the other case I heard and this one,
22 it seemed as though factors one might want to look
23 at would include how much of the total debt listed
24 in the debtor's schedule is attributable to the
25 obligation that the plaintiff ex-spouse wishes to

1 have held nondischargeable. Unless I went beyond
2 the record that the parties gave me, I can't
3 really get into that in my ruling because that
4 wasn't presented.

5 I think I should look at whether the
6 discharged debt can be collected from the
7 plaintiff ex-spouse. And that was clarified on
8 the record, at least with respect to the named
9 obligations, again, not with respect to the dollar
10 amounts. And I might add, that was done by
11 plaintiff's counsel even though that technically
12 isn't plaintiff's burden.

13 And then is the plaintiff ex-spouse in a
14 better position to pay this debt than the debtor
15 is? Well, what I learned was that there were a
16 number of debts that were divided up in the state
17 court decree; that some of those debts, at least a
18 portion of the consolidated student loan, is a
19 debt of the debtor but one that the plaintiff ex-
20 spouse has stated in open court on the record he
21 is willing to continue to pay.

22 I have his breakdown of expenses, some
23 information about his income and, on balance, it
24 does look like a relatively tight budget to me.
25 On the other hand, once again, I really don't know

1 how to answer those questions with respect to the
2 debtor's ability. I can obviously answer that the
3 debts they've identified are ones for which they
4 would both be responsible, at least from a
5 creditors' perspective. But as far as being in a
6 better position to pay the debt, I don't know.
7 But since it's the debtor's burden to go forward
8 on this, that factor is not in the debtor's favor
9 in this case.

10 I think for paragraph (b), I should also
11 be considering, which parent has custody of the
12 children and whether or not that parent is
13 incurring most of the related expenses of
14 day-to-day living. And here I have the plaintiff
15 spouse having custody of the children and
16 incurring most of the day-to-day expenses.

17 So on balance I cannot find, especially
18 with the plaintiff picking up the debt that would
19 otherwise be nondischargeable, I can't say that
20 the debtor's fresh start is going to be
21 jeopardized to such an extent, if much of an
22 extent, more than the plaintiff would incur a
23 detriment -- that being having to pay this
24 additional amount on what is already a tight
25 budget.

1 So based on my review of the record that
2 was presented, I cannot find that the debtor has
3 met the preponderance of the evidence standard
4 with respect to paragraph (15); and accordingly,
5 under this new law, I find that the debts in issue
6 are nondischargeable.

7 My statements on the record at the
8 conclusion of the evidence will constitute my
9 findings of fact and conclusions of law as
10 permitted by Federal Rule of Bankruptcy Procedure
11 7 0 5 2 .

12 Should my ruling be transcribed for any
13 reason -- appeal or use in a state court action, I
14 reserve the right to review it to be certain that
15 the sentences are broken in the right places so my
16 meaning and intent are not lost on whoever might
17 read the cold pages.

18 Court is adjourned.

19 (Proceedings concluded at 4:40 p.m.)

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C E R T I F I C A T E

2 I, the undersigned, a Certified Shorthand
3 Reporter of the State of Iowa, do hereby certify
4 that I acted as the official court reporter at the
5 hearing in the above-entitled matter at the time
6 and place indicated.

7 That I took in shorthand all of the
8 proceedings had at the said time and place and
9 that said shorthand notes were reduced to a
10 transcript through the use of a computer-aided
11 transcription device under my direction and
12 supervision, and that the foregoing pages are a
13 full and complete transcript of the shorthand
14 notes so taken.

15 Dated at Des Moines, Iowa, this 24th day
16 of September, 1996.

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CERTIFIED SHORTHAND REPORTER

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