

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

MICHAEL G. ERWIN,

Debtor,

Case No. 87-2868-C

KRISTINE ANNETTE ERWIN,

Adv. No. 88-0050

Plaintiff,

Chapter 7

V.

MICHAEL G. ERWIN,

Defendant.

ORDER - COMPLAINT TO DETERMINE
DISCHARGEABILITY OF DEBT

On July 18, 1988, a trial was held on the complaint to determine dischargeability of debt. Gary J. Rolfes appeared on behalf of Plaintiff, and David J. Zimmerman appeared on behalf of Defendant. At the conclusion of said trial, the Court took the matter under advisement upon a briefing deadline of July 29, 1988. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the pleadings, arguments of counsel, evidence presented and briefs, now enters its findings and conclusions pursuant to F.R. Bankr.

P. 7052.

FINDINGS OF FACT

1. On May 20, 1983, a decree of dissolution of marriage incorporating a written stipulation and property settlement agreement between Plaintiff and Defendant was entered in the Iowa District Court for Clinton County.

2. Pursuant to said agreement, Plaintiff and Defendant became owners and tenants in common of real estate that had been the family residence.

3. Concerning child support, said agreement provided that Defendant was to pay \$150.00 per month for so long as Plaintiff continued to reside in the homestead of the parties. At such time as Plaintiff ceased to occupy the homestead, Defendant's child support obligation was to automatically increase to \$400.00 per month.

4. It was further agreed that Plaintiff would have the exclusive use and occupancy of the property until payment of child support was no longer required, Plaintiff chose to no longer occupy the property, or Plaintiff remarried, whichever event should first occur, at which time the property was to be sold for the highest obtainable price.

5. Defendant agreed to make the monthly mortgage payments on the property, including both the first mortgage and the home improvement loan at Clinton Federal Savings and Loan Association, Clinton, Iowa. In addition, Defendant agreed to pay the taxes, insurance and upkeep of the

property; upkeep being defined as any major item of repair or necessary capital improvement costing more than \$200.00.

5. At the time of the divorce, plaintiff had net earnings of approximately \$124.56 per week, and Defendant had net earnings of approximately \$390.00 per week.

6. Plaintiff was awarded the sole care, custody and control of the parties' two minor children, and Plaintiff continues to reside with the two minor children in the property that had been the family residence.

7. On December 23, 1987, Defendant filed a voluntary Chapter 7 petition.

8. Defendant has failed to make payment on the mortgage indebtedness to Clinton Federal Savings and Loan Association for the months of September, October, November, and December of 1987, and January and February of 1988, each in the amount of \$333.98. In addition, Defendant has failed to make the payments on the home improvement loan at Clinton Federal Savings and Loan Association for the months of August, September, October, November, and December of 1987, and January and February of 1988, each in the amount of \$84.51. Finally, Defendant has failed to pay a necessary capital improvement consisting of a roof which was repaired at a cost of \$1,325.00. The total amount of missed payments equals \$3,920.45.

9. On February 29, 1988, Plaintiff filed this complaint to determine whether Defendant's obligation to

pay the mortgage payments, taxes, insurance and upkeep is dischargeable in bankruptcy. In said complaint, Plaintiff argues Defendant's obligation constitutes child support which is nondischargeable under section 523(a)(5) of the Bankruptcy Code.

10. On March 30, 1988, Defendant filed an answer to said complaint. Defendant argues that all of his obligations pursuant to the dissolution decree are part of a property settlement and thus are dischargeable in bankruptcy.

DISCUSSION

Section 523 (a) (5) of the Bankruptcy Code excepts from discharge any payments:

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce, decree ... or property settlement agreement, but not to the extent that--

(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 interpreting section 523(a) (5), the Court in In re Massimini, 8 B.R. 428, 431 (Bankr. W.D. Pa. 1981) noted:

The intent ... is to insure that the debtor's dependents will not be left destitute and that the debtor will not be relieved of his legal obligation to support his children by the provisions of the [Bankruptcy] Code which grant debtor a fresh start.

The question of whether payments under a divorce decree are in the nature of support, alimony or child support is a matter of federal law to be determined by the bankruptcy court. In re Williams, 703 F.2d 1055, 1056 (8th Cir. 1983); Massimini, 8 B.R. at 431. A bankruptcy court is not bound by state laws that characterize an item as maintenance or property settlement. Williams, 703 F.2d at 1056. Nor is a bankruptcy court bound by the labels used in a divorce decree to identify an award as alimony or as a property settlement. *Id.* at 1057; In re Voss, 20 B.R. 598, 601 (Bankr. N.D. Iowa 1982). The court may look behind the decree to determine the real nature of liabilities. In re Ramey, 59 B.R. 527, 530 (Bankr. E.D. Ark. 1986). Whether an obligation in a divorce decree is in fact one for support depends upon the intent of the parties. In re Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983); Matter of Walker, 50 B.R. 523, 525 (Bankr. D. Del. 1985).

Courts have considered several factors in an effort to decipher the intention of the parties and the real nature of the liabilities. Those factors include:

1. Whether there was an alimony award entered by the state court.
2. Whether there was a need for support at the time of the decree; whether the support award would have been inadequate absent the obligation in question.
3. The intention of the court to provide support.

4. Whether Debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances.
5. The age, health, work skills, and educational level of the parties.
6. Whether the payments are made periodically over an extended period or in a lump sum.
7. The existence of a legal or moral "obligation" to pay alimony or support.
8. The express terms of the debt characterization under state law.
9. Whether the obligation is enforceable by contempt.
10. The duration of the marriage.
11. The financial resources of each spouse, including income from employment or elsewhere.
12. Whether the payment was fashioned in order to balance disparate incomes of the parties.
13. Whether the creditor spouse relinquished rights of support in payment of the obligation in question.
14. Whether there were minor children in the care of the creditor spouse.
15. The standard of living of the parties during their marriage.
16. The circumstances contributing to the estrangement of the parties.
17. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties.
18. Tax treatment of the payment by the debtor spouse.

In re Coffman, 52 B.R. 667, 674-75 (Bankr. D. Md. 1985)

(and citations contained in footnote 6 at p. 674).

Furthermore, bankruptcy courts may only consider the

circumstances existing at the time of dissolution and "not the present situation of the parties." Boyle v. Donovan, 726 F.2d 681, 683 (8th Cir. 1984); In re Neely, 59 B.R. 189, 193 (Bankr. D.S.D. 1986).

A debtor's obligation, pursuant to a dissolution decree, to pay first and second mortgages and real estate taxes until the house is sold evidences an intent to provide the wife with economic security which is in the nature of support and thus nondischargeable. Hixson v. Hixson, 23 B.R. 492, 496 (Bankr. S.D. Ohio 1982). If a divorce decree ties the amount of child support directly to payment of a second mortgage, a debtor's second mortgage obligation on the residence of debtor's former wife and children is in lieu of child support and thus nondischargeable. In re Mullins, 14 B.R. 771, 773 (Bankr. W. D. Okla. 1981).

Applying the facts in the case at bar to the above law, the Court concludes Defendant's obligation to pay the first and second mortgage payments plus taxes, insurance and upkeep is in the nature of support and thus nondischargeable pursuant to Bankruptcy Code section 523 (a) (5). The Court reaches this conclusion for a number of reasons. First, at the time of the divorce, Defendant's net weekly earnings of approximately \$390.00 were more than three times larger than plaintiff's net weekly earnings of approximately \$124.56. Second, Defendant's child support obligation of \$150.00/month would automatically increase to \$400.00/month

if Plaintiff ceased to occupy the homestead, at which time the property was to be sold, so Defendant's obligation to maintain the home while Plaintiff and their two children resided there was in lieu of child support.

Balancing disparate incomes, tying the amount of child support directly to occupancy of the homestead, and requiring Defendant to pay the first and second mortgage payments plus taxes, insurance and upkeep evidences an intent to provide Plaintiff and their two children with economic security which is in the nature of support. If Plaintiff was required to pay \$418.49 in monthly mortgage payments plus pay taxes, insurance and upkeep while supporting two children on \$124.56 net earnings per week and \$150.00/month in child support, Plaintiff and the two children would quickly become destitute. This the Court absolutely refuses to allow.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Defendant's obligation, pursuant to a dissolution decree, to pay the first and second mortgage payments plus taxes, insurance and upkeep is in the nature of support under 11 U.S.C. §523(a) (5).

IT IS ACCORDINGLY ORDERED that Defendant's obligation to Plaintiff and their two children is nondischargeable.

IT IS FURTHER ORDERED that Plaintiff shall have judgment against Defendant in the amount of \$3,920.45.

Dated this 29th day of August, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE