

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
BARRY G. ROSS, : Case No. 90-1649-D H
Debtor. : Chapter 7

PATSY JEAN FRICKE, :
Plaintiff, :
vs. : Adv. No. 90-171
BARRY G. ROSS, :
Defendant. :
- - - - -

ORDER - DISCHARGEABILITY OF MARITAL DEBT

The trial on the complaint to determine dischargeability of debt came on for hearing on May 23, 1991. Thomas J. Yeggy, attorney at law, appeared for the Plaintiff; and Timothy D. Roberts, Anderson, Roberts & Porth, attorneys at law, appeared for the Defendant/Debtor. At the conclusion of the hearing, the Court took the matter under advisement upon a briefing schedule. The parties have filed timely briefs 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 now enters its findings of fact and conclusions pursuant to Fed.R.Bankr.P. 7052.

ISSUES

The complaint was filed in two counts. Count I was a

complaint to determine dischargeability under 11 U.S.C. § 523(a)(5), a debt in the nature of support. Count II was a complaint to deny discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4)(A).

Plaintiff dismissed Count II at the commencement of trial and the only issues presented are those issues pursuant to 11 U.S.C. § 532(a)(5).

FINDINGS

1. An order for relief under Chapter 7 of the Bankruptcy Code was entered on June 19, 1990, for the Debtor, Barry G. Ross.

2. Patsy Fricke was scheduled as an unsecured creditor, whose claim was for a "Divorce Property Settlement Included in Federal Land Bank Debt" in the amount of \$40,500.00.

3. Patsy and Barry were married on August 30, 1970, and two children were born of the marriage. They are: Mason Dean Ross, b/d 8/20/74 and Samuel Russell Ross, b/d 11/8/76.

4. Their marriage was dissolved by decree filed on January 26, 1981.

5. The parties have stipulated to the following facts:

a. On the 26th day of January, 1981, the Iowa District Court in and for Henry County entered a Decree of Dissolution of Marriage between Patsy and Barry.

b. On or about January 26, 1981, the parties, as part of their Dissolution of Marriage, entered into a Stipulation which was incorporated in the terms of the

Decree of Dissolution of Marriage.

c. Patsy was awarded, inter alia, the family home and furnishings contained therein in Winfield, Henry County, Iowa. Said real estate being described as follows:

Commencing at a point 30 feet North and 30 feet East of the Center of the intersection of Wallace and Maple Street in Out Lot 11 in Winfield, Iowa thence North along the East line of Maple Street 21 rods and 9 links to the half section line, b.o.b. for this tract from the aforesaid point of beginning East 150 feet, thence South 80 feet, thence West 150 feet, thence North 80 feet to the point of beginning.

d. Patsy was required to pay the real estate taxes, and insurance payments on this property.

e. Barry agreed to assume sole responsibility for, and hold the petitioner harmless on, the mortgage on said property in favor of Federal Land Bank of Mt. Pleasant, Iowa.

f. Patsy and Barry agree that they each received the following assets and were assigned the following liabilities:

<u>Received by Patsy</u>		:	<u>Received by Barry</u>	
Homestead	\$60,000	:	Homestead	Debt
\$(45,900)				
1978 Car	4,500	:	Cabin	
25,000				
Snowmobile	1,700	:	Cabin	Debt
(2,400)				
	: 1978		Car	Debt
(920)				

	:	Snow Mobile	2,050
	:	Cont. West. Stock	540
	:	WARC Stock	125
	:	Sunrise Terr. stock	
700			
	:	Bus. Stock	
60,840			
	:	Land in Trlr. Court	
7,500			
	:	Lot	3,000
	:	Lot	Debt
(1,460)			
	:	Snowmobile	950
	:	Snowmobile	Debt
(950)			
	:	1976 Boat	
4,100			
	:	Jon Boat	
3,300			
	:	Jon Boat Debt	
(2,700)			
	:		
		<u> </u>	
		\$66,200	
	:		
<u> </u>			
\$53,775			
	:		
Plus Furniture and Appliances	:	Plus Furniture and Appliances	

g. Patsy was awarded custody of the minor children with support from Barry in the sum of \$150.00 per month per child.

h. As a part of that dissolution of marriage, Patsy filed an Affidavit of Financial Status. Barry did not file a Financial Affidavit.

i. Patsy's affidavit asserted that she had net income of \$103.21 per week at the time of the decree.

j. Barry filed an Application for Modification of the Decree of Dissolution on April 28, 1987.

k. Barry's 1981 income tax return illustrates that his gross income was \$34,840.00 and from that income respondent assumed obligations of \$240,020.00 in his divorce decree.

l. On June 9, 1987, Patsy filed a Motion for Separate Adjudication of Law Points.

m. Barry conceded in the adjudication of law points proceeding that the Federal Land Bank payment was a part of the property settlement which could not be modified under Iowa law.

n. The court ruled on the Motion for Separate Adjudication of Law Points on the 26th day of January, 1988 and held that those paragraphs of the stipulation pertaining to payment of the Federal Land Bank obligation, as incorporated into the Decree of Dissolution of Marriage, constituted a property settlement and were not subject to modification on the basis of changed circumstances.

6. The dissolution of marriage decree also provided as follows:

a. Barry was to secure and maintain a decreasing term life insurance policy in the initial amount of \$75,000.00 with Patsy as the beneficiary until Barry's child support obligation terminated and the mortgage obligation to Federal Land Bank was paid in full.

b. "[N]either party shall pay alimony to the other."

c. Barry was to secure and maintain health insurance on the children during the entire term of his child support obligation.

d. Patsy and Barry were to share equally in the payment of all medical expenses not paid by insurance.

e. Barry was required to quit claim his interest in the family home to Patsy. In exchange for this quit claim deed Patsy was to relinquish all interest in 12,000 shares of stock in a corporation which Barry was to receive and Patsy was to resign as an officer of that corporation.

f. If Patsy sold the family home prior to the satisfaction of the mortgage with Federal Land Bank, Patsy was to pay the entire amount of the mortgage at the time of the sale and Barry was to make the remaining mortgage payments to Patsy under the same terms and conditions set forth in the Federal Land Bank note.

7. The terms of the payment of the note to Federal Land Bank was for a payment over a term of years not related to Patsy's or Barry's obligation to provide support for the children.

8. The house was purchased in 1971 for \$18,000.00. Approximately \$30,000.00 worth of improvements were added in

1979. The original debt was refinanced in 1979 when there was a balance of approximately \$14,000.00 on the original debt. At the time of the decree there was a balance of \$45,809.68 due on the mortgage and the monthly payments were \$538.07 per month.

9. The effect of Barry's assumption of the Federal Land Bank debt was to equalize the respective net worth of Patsy and Barry.

10. Patsy, as part of the settlement process, demanded the house, a car, personal property, household furniture and fixtures, no debt, and her independence. She received all she demanded.

11. Barry was not represented by counsel at the time of the stipulation and dissolution of marriage decree. Patsy's attorney drafted the stipulation.

12. Patsy had marketable skills at the time of the decree and obtained employment shortly after the decree.

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 other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, 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 order to prevail, a plaintiff must show by a preponderance of the evidence that the mortgage debt sought to be excepted from defendant's discharge is a liability in the nature of alimony, maintenance, or support. In re Slingerland, 87 B.R. 981, 984 (Bankr. S.D. Ill. 1988). 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). A bankruptcy court is not bound by state laws that characterize an item as maintenance or property settlement. Id. at 1057. 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.; 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. See Voss, at 601-02.

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 levels 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 a 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 of 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 & n.6 (Bankr. D. Md. 1985).

Furthermore, bankruptcy courts are not to examine the present situation of the parties: the crucial question is what function did the parties intend the agreement to serve when they entered into it. Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984) (bankruptcy court's decision finding consensual obligation to pay for children's higher education nondischargeable was not clearly erroneous); In re Neely, 59 B.R. 189, 193 (Bankr. D. S.D. 1986); but cf. Voss, 20 B.R. at 603 (allowing debtor to show changed circumstances warranting cessation of support).

A debtor's obligation, pursuant to a dissolution decree, to pay first and second mortgages and real estate taxes until the house is sold may evidence an intent to provide the spouse with economic security which is in the nature of support and thus nondischargeable. In re Erwin, Case No. 87-2868-C Adv. No. 88-0050 (Bankr. S.D. Iowa Aug. 29, 1988) (Judge Hill's Decision Book #49) (citing 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 spouse and children is in lieu of child support and thus nondischargeable. Id. (citing In re Mullins, 14 B.R. 771, 773 (Bankr. W.D. Okla. 1981)).

In In re Erwin, supra, this Court considered issues and circumstances similar to the case at bar. In Erwin, the debtor-defendant's obligations to make mortgage payments and pay taxes, insurance, and upkeep were held to be in the nature of support and thus nondischargeable pursuant to 11 U.S.C. § 523(a)(5). Id. at 7. At issue, then, is whether there is anything that distinguishes this case from In re Erwin such that the debtor-defendant's obligation to make mortgage payments can be found not to be in the nature of support and therefore dischargeable.

A number of circumstances distinguish the present case from Erwin. In Erwin, if plaintiff ceased to reside in the homestead on which defendant was making mortgage payments, then the child support obligation was to increase. Erwin, at 2. Child support and the mortgage payments were related. Here, however, defendant's child support payments appear not to be related to or conditioned on the mortgage payments. Furthermore, the defendant in Erwin paid child support in the amount of \$150.00 per month to provide for two children. The Defendant in this case pays double that figure, \$150.00 per month per child, or \$300.00 per month in child support obligations. In addition, Defendant must provide the children

health insurance and pay half of the medical expenses that insurance does not cover.

There are further distinguishing factors. Seven years after the dissolution decree, the parties litigated whether the mortgage debt was part of a property settlement or rather a support or maintenance obligation. Plaintiff won her argument and the Iowa District Court held the mortgage obligation was part of a property settlement and not subject to modification. Ordinarily, a debtor who owes a dissolution decree obligation that is alimony, maintenance or support has recourse to the state courts to seek a modification of that obligation. See In re Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983) (declining to follow In re Voss, 20 B.R. 598 (Bankr. N.D. Iowa 1982), to the extent Voss considered current financial status). Here, however, the Plaintiff has sought and received a state court ruling that the mortgage obligation is a nonmodifiable property settlement debt. This Court finds the state court ruling highly probative of the nature of the mortgage obligation. See Hixson, 23 B.R. at 495.

This Court finds the defendant's obligation to make mortgage payments was not designated as, nor was it in the nature of, alimony, maintenance or support. In addition to the circumstances stated above, the following other factors indicate the obligation is not alimony, maintenance or support: the Plaintiff exchanged shares of stock for the

defendant's interest in the house subject to the mortgage and neither Plaintiff nor Defendant have treated the mortgage payments as alimony for tax purposes.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes defendant's obligation, pursuant to a dissolution decree, to make mortgage payments is not in the nature of support, alimony, or maintenance under 11 U.S.C. § 523(a)(5).

IT IS ACCORDINGLY ORDERED that the Defendant's obligation to Plaintiff to make mortgage payments pursuant to their dissolution decree is dischargeable.

Dated this 25th day of November, 1991.

RUSSELL J. HILL
U.S. Bankruptcy Judge