

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI

IN RE:)
)
TODD DAVIS CHILDERS and) Case No. 04-443300-drd
PATRICIA CAROL CHILDERS,)
)
Debtors.) Adv. No. 04-5489
)
TODD DAVIS CHILDERS,)
)
Plaintiff,)
)
v.)
)
KATHERINE B. SCHRADER,)
F/K/A KATHERINE B. CHILDERS,)
)
Defendant.)

MEMORANDUM OPINION

Todd Childers (“Childers” or “Plaintiff”) filed a complaint seeking a determination that certain debts owed to Katherine Schrader (“Schrader” or “Defendant”) should be discharged pursuant to 11 U.S.C. § 523(a)(5) or (a)(15) on the grounds that the debts do not constitute alimony, maintenance or support or, in the alternative, that he does not have the ability to pay such debt and that all of his income is necessary for the support of himself and his dependents. In her answer, Defendant argued that the debts were for alimony and support and should not be excepted from discharge. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b)(1). The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure as made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. For the reasons set forth below, I find that the debts are in the nature of alimony,

maintenance or support and are nondischargeable pursuant to § 523(a)(5). Thus, the Court will not reach the issue of whether the claims are nondischargeable under § 523(a)(15) as that section relates only to non-support debts.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and Defendant were divorced in September 2002 after 15 years of marriage. They have two sons. Defendant testified that prior to the divorce she discovered that Plaintiff had [Redacted]. Plaintiff moved out of the marital home in Tennessee in 2001 and moved to Missouri where he began a relationship with his current wife, whom he married in November 2002.

The parties executed a Marital Dissolution Agreement (the “Agreement”) on August 22, 2002, which set forth the allocation of support and alimony and the distribution of the marital property and was incorporated into the Final Decree of Absolute Divorce.¹ The Agreement provided, among other things, that Defendant received all of the marital assets, including the home, a lake lot and a business, Fun Cuts, LLC, and assumed all of the marital debt.² The Agreement also provided that Plaintiff would pay, indemnify and hold Defendant harmless from any judgment which may be entered regarding a deficiency on a Kia vehicle which Plaintiff had owned, but surrendered because of inability to make the payments.. Such payment was stipulated to as necessary for the support of Defendant and the children.³ Additionally, the Agreement provided that Plaintiff would pay Defendant alimony in solido the sum of \$80,000 in

¹Plaintiff Ex. 1

²Pl. Ex. 1, Agreement ¶¶ 3, 4, 5, 6 & 7.

³Pl. Ex. 1, Agreement ¶ 9.

monthly installments commencing on September 15, 2002 and that Plaintiff would pay Defendant additional alimony in solido in the amount of \$9,000 in full within twelve months of the execution of the Agreement.⁴ The divorce decree was modified on September 10, 2003, to reduce the monthly payments of alimony in solido as set forth in paragraph 10 of the Agreement to \$175 per month.⁵

Plaintiff filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code on July 14, 2004. On October 14, 2004, he filed the Complaint to Determine Dischargeability and/or Exempt Status of Debt pursuant to 11 U.S.C. § 523(a)(5) and (a)(15).

II. DISCUSSION AND ANALYSIS

11 U.S.C. § 523(a)(5) provides that a debtor is not discharged from any debt-

(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. . . , but not to the extent that-

(A) . . .

(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.

Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. *See Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1056 (8th Cir. 1983). A divorce decree's characterization of an award as maintenance or alimony does not bind a bankruptcy court. *Id.* In order to determine whether an award represents a property settlement or a maintenance obligation, a court must look to the function an award was intended to serve. *See Kruger v. Ellis (In re Ellis)*, 149 B.R. 925, 927 (Bankr. E.D. Mo. 1993). The burden of proof under section 523(a)(5) is on the party asserting that the debt is

⁴Pl. Ex. 1, Agreement ¶¶ 10 & 11.

⁵Pl. Ex. 2, ¶ 5.

nondischargeable. *Lineberry v. Lineberry (In re Lineberry)*, 9 B.R. 700, 706 (Bankr. W.D. Mo. 1981).

Factors considered by the courts in making this determination include: the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary, the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments. *See Morgan v. Woods (In re Woods)*, 309 B.R. 22 (Bankr. W.D. Mo. 2004); *In re Tatge*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997); *Schurman v. Schurman (In re Schurman)*, 130 B.R. 538, 539 (Bankr. W.D. Mo. 1991) (citing *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990)). Exceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying § 523 favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party. *See Holliday v. Kline (In re Kline)*, 65 F.3d 749 (8th Cir. 1995); *Williams v. Kemp (In re Kemp)*, 242 B.R. 178, 181 (B.A.P. 8th Cir. 1999), *aff'd* 232 F.3d 652 (8th Cir. 2000).

In his post-trial brief, Plaintiff clearly requests that the Court determine that, notwithstanding the language of the marital dissolution agreement which is incorporated into the final decree, the \$80,000 and \$9,000 awards are not alimony in solido under Tennessee law. Plaintiff also appears to ask that the Court determine that regardless of how they are characterized, the obligations should be terminable on death or remarriage. However, this Court does not have the power to determine the state court was wrong, recharacterize the award or,

contrary to the language of the agreement and the applicable Tennessee law, determine that the award is terminable on death or remarriage. See *Bruggen v. Bruggen (In re Bruggen)*, 82 B.R. 515, 517 (Bankr. W.D. Mo. 1987); see also, *Chism v. Chism (In re Chism)*, 169 B.R. 163, 168 (Bankr. W.D. Tenn. 1994) (“Divorce, alimony, support, and maintenance are issues within the exclusive domain of state courts.”). The federal courts have traditionally deferred to the state courts with regard to matters of marital dissolution, except as to determining the dischargeability of obligations created by decrees of dissolution. Even if the Tennessee court had done something inconsistent with Tennessee law, Plaintiff’s remedy was to appeal those determinations through the Tennessee state court system.

The factors utilized by the Tennessee courts in determining whether or not to grant an award of alimony, as set forth in Tenn. Code Ann. § 36-5-101, are very similar to the factors that bankruptcy courts use in determining whether an award made by a dissolution court is one of alimony or property settlement.⁶ Although the label affixed to the award is not determinative of the parties’ or court’s intention, this award is labeled alimony in solido, one of the four types of alimony available under Tennessee law. Tenn. Stat. Ann. § 36-5-101.⁷ Plaintiff seems to argue that alimony in solido, because it is ordinarily not to be paid from future earnings but to come out of the “estate” of the other spouse, is somehow not an award intended as support. Tennessee cases, however, clearly indicate that alimony in solido can serve a support function and that the

⁶ Tenn. Stat. Ann. § 36-5-101 provides the following factors be considered when awarding alimony: relative earning capacity of the parties; relative education of the parties; duration of the marriage; age and mental condition of each party; physical condition of each party; ability of party to seek employment outside the home; separate assets of each party; provisions made with regard to marital property; standard of living during the marriage; extent to which each party has contributed to the marriage; relative fault of the parties; and other factors including tax consequences to each party, as are necessary to consider the equities between the parties.

⁷The four types of alimony recognized in Tennessee include alimony in futuro, rehabilitative alimony, transitional alimony and alimony in solido.

same factors are utilized in making an award of alimony in solido as for an award of alimony in futuro, a form of alimony more recognizable to those dealing primarily with Missouri law. *See Houghland v. Houghland*, 844 S.W.2d 619 (Tenn. Ct. App. 1992). In *Bailey v. Bailey (In re Bailey)*, 254 B.R. 901 (B.A.P. 6th Cir. 2001), a case arising out of Tennessee, the Sixth Circuit Bankruptcy Appellate Panel held that an award of alimony in solido was nondischargeable support under the circumstances. That court looked at the how the lower court labeled the award, who payments were directed to, whether payments were contingent upon death or remarriage and the other factors contained in the Tennessee statute. The court's observations in *In re Chism*, suggest that an award of alimony in solido is presumptively one for support, but the court might find otherwise after looking behind that label. 169 B.R. at 169-70.

In this case, although the \$80,000 and \$9,000 awards were lump sum awards, both of them are payable periodically. Testimony indicates that the \$80,000 award was in the amount of the debt on a tract of nonresidential property owned by the parties and that the periodic payments were in the approximate amount required to make the debt service payment on that loan. The courts have held that debt assumptions can serve a support function. *See In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983). The \$9,000 award of alimony in solido was, according to the testimony, designed to compensate Defendant for a portion of the attorneys' fees she incurred in the dissolution proceeding. The Tennessee courts have held that attorneys' fees can be awarded as alimony in solido and that in doing so the court examines the same factors relevant in making any other award of alimony. *See Houghland*, 844 S.W.2d at 623; *see also, Chism*, 169 B.R. at 170-71.

The Tennessee courts have also held that marital misconduct or fault is another factor

that can be taken into consideration in determining the propriety of awarding alimony. *Id.* at 622-23. Similarly, this is a factor used by the bankruptcy courts in determining whether an award is intended as support. *See Bailey*, 254 B.R. at 906. The court is more likely to impose an alimony obligation on a party guilty of marital misconduct or responsible in substantial part for the breakup of the marriage. There is no question in this case but that Plaintiff was guilty of significant marital misconduct, **[Redacted]**.

Although Defendant acquired most all the marital property, she took that property subject to significant debt. The testimony established that while Defendant was awarded the marital home, it was completely encumbered by debt and offered her no equity. While she also received another tract of land which she later sold, on which there was some equity, as noted above, the primary function of the \$80,000 award of alimony in solido appears to have been to permit Defendant to continue to support herself and her minor children while making the payments on that property so as to realize on that equity.

Plaintiff observes that one factor traditionally characterizing nondischargeable alimony is that it is capable of modification and points out that, under Tennessee law, alimony in solido is not modifiable. One difficulty with Plaintiff's argument is that in this case, the \$80,000 award was in fact modified, not as to its aggregate amount, but as to the required monthly payment. The initial monthly payment of \$563 was revised downward in a subsequent consent order modifying the final decree. That order was entered by the same judge who entered the decree incorporating the dissolution agreement. Even if that modification were improper, it does not follow that because alimony in solido is not modifiable that it cannot be support. While in some jurisdictions there may be a rigid distinction in which it is clear that a non-modifiable award is

property settlement and a modifiable award is alimony, maintenance or support, under Tennessee law, alimony in solido is one form of alimony, which can and often does form a support function and which is awarded based upon a consideration of the same factors as might justify an award of other forms of modifiable alimony. *See Hougland*, 844 S.W.2d at 623.

Plaintiff claims that the parties' respective tax treatment of the few payments made by Plaintiff on the alimony in solido awards demonstrates that they are not actually alimony. Plaintiff made three payments in the aggregate amount of \$826 in late 2003.⁸ Plaintiff did not claim this amount as a deduction from his gross income on his federal income tax return. Defendant's income tax return for the same period does not reflect income from receipt of this amount. From this, Plaintiff would have the Court draw the inference that the parties both consider payments on these awards to be something other than alimony. Neither party testified, however, that they treated the payments in this way as a result of their belief or understanding as to the nature of the payments. While Plaintiff's failure to deduct these amounts, which he would be entitled to deduct if they were alimony, may be consistent with his current contention, it is, of course, self-serving. Given the very small amount involved, the tax benefit to Plaintiff would be minimal, while the benefit of relieving himself of the awards of alimony in solido via bankruptcy discharge would be substantial. Similarly, while Defendant's failure to include these amounts in her gross income might give rise to an inference inconsistent with her present position, it appears, given the small amount involved, that the payments may simply have been overlooked. The Court simply does not find this factor compelling or entitled to great weight given all the other evidence.

⁸Pl. Ex. 6.

The Tennessee courts have consistently held that the most important factor in determining whether to make an award of alimony is the need of the spouse, followed closely by the other spouse's ability to pay. *See Houglan*, 844 S.W.2d at 623 (citing *Campanali v. Campanali*, 695 S.W.2d 193 (Tenn. Ct. App. 1985); *Cranford v. Cranford*, 772 S.W.2d 48 (Tenn. Ct. App. 1989)). The evidence of the parties' financial condition at the time of the dissolution and their prospective financial condition viewed from that standpoint, warrants the finding that Defendant was in need of support and that the parties intended to provide that support through the awards of alimony in solido contained in the agreement. Defendant testified that she has no college degree. Conversely, she supported Plaintiff during a period of time that he obtained a degree from the University of Memphis. While Defendant had an advertising business of her own at some point during the marriage, she testified that that was declining at the end of the marriage and has subsequently foundered. While she was granted an interest in a business with certain franchise rights, those rights have proven to be of little value, as the franchisees have either closed or are about to close their businesses and the initial store generated only \$161 in net income in 2003 according to the tax return of the partnership entity which runs the business.⁹ Plaintiff, on the other hand, has a history of being able to earn substantial income, at one point in excess of \$100,000. He admitted on cross-examination that he could reacquire his broker's license which would permit him to find more lucrative positions. Finally, Defendant was also left with the care of the minor children of the marriage.

Additionally, when determining whether an award is one of alimony, maintenance or support or a property settlement, the most important factor is the intent of the parties (in the case

⁹Defendant's Ex. 4.

of an agreement) or the court (in the case of an order) as to the function of the award. *See In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983); *In re Ellis*, 149 B.R. at 927. Defendant contends that the parties intended, through the awards of alimony in solido and the indemnification and hold harmless provision on the deficiency debt on the Kia automobile, to provide her with support. Her testimony to that effect was essentially uncontradicted. While Plaintiff suggests that the award may have been intended to punish him as a result of his marital misconduct, neither the agreement nor the decree makes reference to Plaintiff's conduct prior to the dissolution of the marriage. Accordingly, neither of those documents provides any evidence in support of the claim that there is some punitive element to any of the awards agreed upon and incorporated into the decree. With respect to the obligation to hold Defendant harmless from the deficiency liability on the Kia, in addition to all the above factors, the agreement itself specifically states that "this payment is in the nature of support and is necessary for the support of Wife and the parties' minor children."

Therefore, for the reasons stated above, the Court finds that the debts owed to Defendant under the dissolution decree be and are hereby excepted from discharge pursuant to 11 U.S.C. § 523(a)(5). This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law. A separate order will be entered pursuant to Fed. R. Bankr. P. 9021.

ENTERED this 31st day of May 2005.

/s/ Dennis R. Dow

THE HONORABLE DENNIS R. DOW
UNITED STATES BANKRUPTCY JUDGE

Copies to:

Troy Losh-North
Kenneth C. Jones