In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

GERALD A. PALLESEN *Debtor(s).*	Bankruptcy No. X92-00202S Chapter 7
GLORIA M. WOODARD *Plaintiff(s)* vs. GERALD A. PALLESEN *Defendant(s)*	Adversary No. X92-0075S

ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

The matter before the court is Gloria M. Woodard's complaint to determine the dischargeability of certain debts incurred by her which Debtor was ordered to pay pursuant to the parties' divorce decree entered in Clay County, South Dakota. The debts at issue are Woodard's student loans in the amount of approximately $20,300, a portion of her attorney fees for $3,500, and approximately $2,500.00 for utilities and for medical care for her and her son. Trial was held November 24, 1992 in Sioux city, Iowa. The court now issues its findings of fact and conclusions of law as required by Fed. R.Bankr. P. 7052. This is a core proceeding under 28 U.S.C. Sec. 157(b) (2) (I) .

FINDINGS OF FACT

Gloria M. Woodard is the former spouse of Debtor Gerald A. Pallesen. The parties met in October of 1986 and were married July 24, 1987. The marriage was the second or third for each party. There were no children born of the marriage. The couple separated at the end of July, 1988. On February 21, 1989, Woodard filed a complaint for divorce. In February, 1991, the court ordered temporary support for Woodard in the amount of $400.00 per month effective January, 1991.

The marriage was dissolved by decree entered December 13, 1991. An amended decree awarding support payments and dividing the parties' property was issued December 31, 1991. The court ordered Debtor to pay $400 per month for alimony with the last payment to be made on May 1, 1992. The court ordered Debtor to pay $3,500.00 of Plaintiff's attorney fees and all "marital debts", including student loans (Exhibits 9, 19).

The state court found that Woodard "should be able to find full-time employment at a moderate rate of income" upon completion of her Masters degree (Exhibit 8). In a Memorandum Opinion dated

October 21, 1991, and later incorporated into the court's finding, the court found that "as soon as [Woodard] completes her education, she should be fully employable at a good rate." The court then concluded that Woodard was not entitled to restitutional alimony and that she required support in the amount of $400.00 per month through May, 1992 as "rehabilitative or regular alimony" (Exhibit 7).

Pallesen is 63 years old (date of birth 5/22/29) and lives in Marcus, Iowa. He has a high school education. He retired from the United States Postal Service on May 1, 1987 and now receives a retirement annuity. He has worked as a sales representative for AAA since March 14, 1988. He filed his bankruptcy petition January 31, 1992.

Woodard is 58 years old (date of birth 8/3/34). She began working on a college degree at the University of South Dakota in Vermillion in January, 1985. She was a student when she met Pallesen in 1986 and had not completed her bachelor's degree when the parties were married in July of 1987. Woodard did not attend summer school that year. The parties lived in Marcus after they were married. Woodard did not attend classes during that time, but completed a required internship in Cherokee, Iowa from January to April, 1988. Woodard left the home in Marcus at the end of July, 1988.

Woodard returned to Vermillion and resumed classes. In June, 1989 she mistakenly believed she had completed all requirements for her undergraduate degree. She worked full time at the correction facility in Springfield, South Dakota from June, 1989 to approximately January 5, 1990. This work was related to her chosen field of work. She left this position and returned to complete her B.S. in Allied Health in May, 1990. In May, 1992 she completed her Masters in Educational Psychology and Counseling. Woodard is eligible for Level II or Level III certification by the state of South Dakota to be a chemical dependency counselor. She now works on a temporary research project at the University of South Dakota.

Woodard has a son, Aaron, from a previous marriage; he was born July 30, 1971. Aaron resided primarily with Woodard the year prior to the divorce. She claimed Aaron as a dependent on her 1990 federal income tax return (Exhibit 17). Aaron has also received student loans and has attended the University of South Dakota as a full time student.

Woodard came to the marriage with a large amount of indebtedness, including a judgment for credit card debt in the amount of $6,073.64 (Exhibit 2, page 13), judgments for more than $5,000.00 for debts related to a previous marriage (Exhibit 6, attachment B), and $9,700.00 owed for student loans (Joint Pretrial Statement, Docket No. 21, uncontested facts, paragraph 10). Her only assets at the time of the marriage were a few household goods and furnishings. She did not contribute financially to the acquisition of any of Pallesen's property.

After the parties separated but while they were still married, Woodard incurred $20,368.00 of student loan debt (Joint Pretrial Statement, uncontested facts, paragraph 11). The parties did not discuss who would pay for her student loans. They had no agreement about the student loans during the time they were living together or during their separation. There was also no agreement which classified debts as maintenance and support or as property division.

The parties stipulated to the following facts regarding their income and expenses:

> 16. In 1991, the plaintiff's [Woodard] monthly income was $1,561.25 which included student loans, work study, temporary alimony of $400 per month which ended in May 1992, and a graduate assistantship.

17. Plaintiff incurred monthly expenses during 1991 which included but were not limited to the following:

Rent (included son) (less rent assistance)	0.00
Heat (less heat assistance)	50.00
Lights	120.00
Miscellaneous utilities	110.00
Tuition ($30 x 9 hours/4 months)	67.50
Books ($75 x 3 courses/4 months)	56.25
Federal income tax ($88/12)	7.40
Auto payment and insurance paid by debtor	0.00
Health insurance paid by debtor	0.00
Food (included son) ($75 x 4.2 weeks)	315.00
TOTAL: (month)	$726.25

18. Plaintiff's 1991 cash flow:

Earned income per tax return (includes $400/mo. temporary alimony)	$9,892.00
EIC (for 1990 received in 1991)	660.00
Subtotal	10,552.00
(or monthly income of:)	880.00
Student loans: received in 1991	4,995.00
Student loan received 12/28/1990	3,220.00
Subtotal	8,175.00
(or monthly income of:)	681.25
Total monthly cash flow 1991	$1,561.25

19. In 1990, plaintiff's tax return showed taxable income of $4,703 and in 1989 of $7,274.57. At the time
of the divorce trial, the debtor had not filed his 1990 tax return but his 1989 return showed taxable income of $35,233.

20. At the time of the divorce trial, the debtor [Pallesen] was earning $4,412 per month consisting of

$1,812 from his pension and commissions averaging
$2,600 per month from AAA of Iowa.

Joint Pretrial Statement, uncontested facts, paragraphs 16, 17, 18, 19, 20.

DISCUSSION

Section 523(a)(5) of the Bankruptcy code excepts from discharge 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-
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> (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;

Pallesen has paid the monthly alimony payments of $400.00 through May, 1992, and they are not at issue. He seeks to discharge the obligation to pay Woodard's attorney fees and the marital debts. For Woodard to prevail in her claim that these debts are nondischargeable, she must show by a preponderance of the evidence that the attorney fees and marital debts are in the nature of alimony, maintenance or support. In re Slingerland, 87 B.R. 981, 984 (Bankr. S.D. Ill. 1988).

Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law. In re Williams, 703 F.2d 1055, 1056 (8th Cir. 1983). The issue is the function the award was intended to serve, determined as of the time of the decree. Id. at 1057; Draper v. Draper, 790 F.2d 52, 54 (8th cir. 1986). The bankruptcy court does not examine the present situation of the parties. Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984). The bankruptcy court is not bound by the labels that the state court has placed on the award, but must determine under federal law whether the award is in the nature of support. Williams, 703 F.2d at 1057.

An obligation to pay debts for necessities of everyday life may be in the nature of support. Id. Woodard, in her trial brief, claims the following bills for medical care and utilities should be nondischargeable:

St. Lukes	$ 134.68
Green Chiropractic	124.00
Dakota Hospital	326.40
Sacred Heart Hospital	824.50
Sioux City Urological	58.00
Dr. Wassmuth	240.00
Gordon Chemical	12.50
Assoc M/Health	245.95
Hummel Propane	189.47
Brown Optometric	14.25
Johnson Eye Clinic	14.00
Yankton Medical Clinic	365.35
Dick's Water Treatment	24.96
Yankton Radiology	5.25
Total	$2,579.31

These items correspond with items listed in Debtor's Pre-Trial Information in the divorce proceeding (Exhibit 5, pages 5-6) as unpaid marital debts. The dissolution court intended that Debtor pay marital debts incurred for Woodard's minor son as well as for Woodard (Exhibit 19, page 2). The items identified above all appear to be for necessary living expenses for Woodard and her son. woodard has shown by a preponderance of the evidence that the obligation to pay these debts is in the nature of support. This debt will be held nondischargeable.

An award in a divorce proceeding to pay the other spouse's attorney fees may be in the nature of support. Williams, 703 F.2d at 1057. An award of attorney fees may be necessary to enable the other spouse to bring or defend the divorce action and to obtain an award of support. The award of attorney fees is thus "so tied in with the award of alimony as to be in the nature of alimony." In re Brenegan, 123 B.R. 12, 13 (Bankr. D. Del. 1990). The purpose of the attorney fee award is to "provide the needier individual with the financial means of prosecuting or defending a court action." Id. A debt is usually nondischargeable if payment is necessary for reasonable support of the debtor's former spouse and the former spouse is unable at the time of the award to pay the debt. In re Kornguth, 111 B.R. 525, 527 (Bankr. W.D. Pa. 1990).

At the time of the dissolution, Woodard was a student and was unemployed. A large portion of her resources came from student loans, which were necessary to pay educational expenses. She was receiving food stamps and rental and heat assistance in order to meet her basic living needs. The attorney fee award was necessary to enable Woodard to bring the divorce action and obtain an award of support. Woodard was unable to make payments on many of her other debts at the time of the divorce and would not have been able to pay all of her attorney fees. Therefore, the court finds that the obligation of Pallesen to pay a portion of woodard's attorney fees was in the nature of support and will held nondischargeable.

Last, Woodard requests the court to find Pallesen's obligation to pay her student loans nondischargeable. Bankruptcy courts have examined a number of factors in determining whether debt payable to a third party is a support obligation. These 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's 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 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 and n.6 (Bankr. D. Md. 1985).

After consideration of the factors relevant to the circumstances of this case, the court concludes that the obligation to pay the student loans was in the nature of a property settlement and that the debt is dischargeable. The marriage was short. The parties are both in about the same state of health. Woodard was younger than Pallesen and had a higher education level. No minor children were involved. Woodard had some work experience at the time of the dissolution. The state court heard testimony about Woodard's employability after graduation (Exhibit A) and concluded that she would be able to support herself when she completed her education. She is employed now at a rate equivalent to an annual salary of $24,000.00.

The state court considered the various categories of support under state law and provided for a separate alimony award for a specific term. While this court is not bound by the state court's characterization of an award as "alimony" or , "property settlement", use of these terms is evidence of the court's intent. The court in its Memorandum Opinion referred to the award of marital debts as a property division before making the alimony award (Exhibit 7, pages 4-5). The award of marital debts in the decree is placed with the property division portions of the judgment, whereas the alimony and attorney fee awards are placed together (Exhibit 9).

Woodard argues that under South Dakota law, she would have been entitled to a support award but not a property settlement. She concludes that the award of student loan debt, therefore, must have been a support award. The bankruptcy court may consider state law in determining the intent of the state court, but is not bound by particular state laws that characterize an item as support or property division. Williams, 703 F.2d at 1057. Moreover, the factors Woodard cites are quite similar for both determinations. Age and health of the parties, length of the marriage, and earning capacity of the parties (competency of the parties to earn a living) are factors both in making a property settlement and awarding support. See Guindon v. Guindon, 256 N.W.2d 894, 898 (S.D. 1977) ("The factors for consideration in exercising [the discretion to award alimony] are similar to those used in the property division.") Since the factors are so similar, they prove just as well that Woodard was not entitled to a support award. This inquiry is not helpful to the court.

Woodard argues also that certain documents from the dissolution proceeding show that the court intended payment of the student loan debt as a support obligation. In a letter opinion dated December 20, 1991, the court stated:

> It was my intention that the educational costs that were incurred during the marriage were the responsibility of defendant, as these were what the parties were contemplating during this period of time. It also goes to the division of property and the length of any assistance of alimony in this case.

(Exhibit 19, page 2). The court finds that this statement is ambiguous and could also mean that the state court intended the order regarding marital debts as a property settlement. Woodard claims that the Memorandum opinion lists college education as a form of "support" she received during the marriage (Exhibit 7, page 3). However, the court was simply enumerating the ways in which she "has

materially gained throughout the marriage." Pallesen paid many of her debts, gave her jewelry, and took her on trips. Woodard also was able to complete her education. This language does not shown an intent to treat the student loan debt as "support" within the meaning of Bankruptcy Code § 523(a) (5) .

Woodard argues that the court intended the student loan payments as support because the payments were to begin immediately upon the cessation of the alimony payments in May,1992. This argument is speculative. There is no evidence that the state court was aware that Woodard had "used up" her grace period so that the loans would be immediately payable after graduation or that the court believed the student loan monthly payments to be approximately $400.00. The more plausible interpretation, supported by the state court's findings, is that the court intended support to end in May, 1992 because it believed Woodard would be able to support herself upon graduation. The state court certainly knew that Woodard's financial circumstances would change when she graduated. The court expected that she would find a job. The court knew that she would not be eligible for student loans, but also knew that she would not have the corresponding expenses of tuition, books and other education costs.

The debt for the student loan is not a provision for the basic necessities of everyday life. The large majority of the student loan debt acquired during the marriage, $13,868, was incurred during the time that Woodard was working on her Masters degree. She had been working before she went back to school to pursue the advanced degree.

Woodard argues that she had need for support beyond the $400.00 per month alimony award in order to meet basic living expenses. She requested $600.00 per month for rehabilitative alimony and $10,000.00 over two years for regular alimony (Exhibit 6, page 2). She claims that the order to pay the student loan debt served as the support requested. However, finding the student loan obligation in the nature of support would amend the decree to give Woodard even more support than she requested at trial.

A proceeding to determine dischargeability of debts awarded in a divorce decree is not an appeal of the dissolution court's decision. The bankruptcy court's task is merely to determine whether the award is in the nature of support. Draper v. Draper, 790 F.2d 52, 54-55 and n.3 (8th Cir. 1986), citing In re Harrell, 754 F.2d 902 (llth Cir. 1985) (court need not make a "precise inquiry into financial circumstances to determine precise levels of need or support").

The cases Woodard cites which involve debts for college expenses are distinguishable in light of the facts and circumstances of our case. In Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984), the parties had negotiated a settlement agreement in which the debtor agreed to pay all college and professional school education expenses for his two children. In Boyle, the debtor himself had suggested including the provision for his children's expenses. At the time of the divorce, he was a practicing psychiatrist with an annual gross income of approximately $100,000.00, while his wife was a student. An award for the benefit of a debtor's children may be less ambiguous since the obligation more likely arises from the duty of support. However, debt between spouses can result from a loan or property division as well as from a duty of support. See 2 Norton Bankruptcy Law & Practice Sec. 27.61.

In Portaro v. Portaro, 108 B.R. 142 (Bankr. N.D. Ohio 1989), the parties had been married 11 years and had one child, still a minor at the time of the divorce. The debtor was ordered to pay the school loans of his former spouse. The wife had interrupted her education during the marriage, whereas the husband obtained both a law degree and an M.B.A. Prior to the divorce, the wife completed a music degree so she could teach.

There may be a moral or legal obligation to provide for the education of a spouse who has foregone educational opportunities during the marriage. Studt v. Studt, 443 N.W.2d 639, 643 (S.D. 1989) (citing factors for awarding rehabilitative or reimbursement alimony). Woodard, however, had not foregone any opportunities for the sake of her marriage to Pallesen. She has benefitted materially from the marriage and now has far greater earning potential than she had before the marriage.

The facts and circumstances of this case indicate that the student loan award was not intended as a support obligation. Woodard has failed to prove otherwise. For all the foregoing reasons, Pallesen's obligation to pay Woodard's student loans will be held in the nature of a property settlement and will be dischargeable.

ORDER

IT IS ORDERED that Gerald A. Pallesen's obligation to pay $2,579.31 for debts incurred by Gloria Woodard for medical care and utilities for herself and her son is in the nature of support and is nondischargeable.

IT IS FURTHER ORDERED that Pallesen's obligation to pay $3,500.00 plus South Dakota sales tax at 6 per cent for Woodard's attorney fees in the dissolution proceeding is in the nature of support and is nondischargeable.

IT IS FURTHER ORDERED that Pallesen's obligation to pay $20,368.00 for Woodard's student loans is in the nature of a property settlement and is dischargeable.

SO ORDERED ON THIS 13th DAY OF JANUARY, 1993.

William L. Edmonds
Chief Bankruptcy Judge