In the United States Bankruptcy Court

for the Northern District of Iowa

LARRY CARSON EWING Debtor.	Bankruptcy No. 92-11343LC Chapter 7
WILMA ANN EWING Plaintiff vs. LARRY CARSON EWING Defendant.	Adversary No. 92-1231LC

ORDER

Trial was held on September 28, 1993 on Plaintiff Wilma Ewing's Complaint to determine dischargeability of debts. Attorneys Larry Thorson and Douglas Meyer represented Plaintiff. Attorneys Dan Childers and Kate Corcoran represented Defendant/Debtor Larry Ewing. Evidence was presented after which the Court took the matter under advisement. The parties were granted until October 8, 1993 to file post-trial briefs. Briefs have now been submitted and the matter is ready for determination. This is a core proceeding under 28 U.S.C. 157(b)(2)(I).

FINDINGS OF FACT

The 28-year marriage of Wilma and Larry Ewing was dissolved by a Decree of Dissolution on June 10, 1991. The Decree was stipulated by the parties. It did not include child support as the parties have no minor children. The only mention of the issue of alimony, maintenance or support for either party was a statement on page 1 of the Stipulation that the "parties have reached a Stipulation and Agreement on assets and debts and support of the parties." At the time of the dissolution, Larry earned approximately $20,000 per year as a truck driver and Wilma earned approximately $150 per week as a domestic worker.

The decree sets out specific property distributions concerning household goods and an Oldsmobile automobile. Paragraphs 5, 6 and 7 on page 3 state the essence of the agreement:

5. Wilma Ewing is awarded the sum of $30,000.00 as property settlement to be paid in full within 60 days from this Decree, and will receive 10% per annum on that amount if not paid in 60 days.

6. Wilma Ewing has possession of the house until the award is paid in full. Larry Carson is to give Wilma Ewing at least 48 hours notice to vacate the premises.

7. That Larry Carson Ewing is awarded all of the remaining property, real and personal set forth in the financial statement that the parties filed herein, including all equity rights, title and interest in the property.

Larry failed to make the $30,000 payment to Wilma required by the decree. He filed a petition for relief under Chapter 7 on July 15, 1992. The Court ordered discharge on October 30, 1992.

Also relevant to Plaintiff's Complaint is distribution of a $1,000 check from Century Concrete Company. Century Concrete Co. paid $1,000 for annual quarry rent by check dated June 5, 1992 payable to both Wilma and Larry Ewing.

Larry cashed the check and retained the entire $1,000. Wilma asserts that she was entitled to $500 of the rent payment. When Larry refused to turn over $500, Wilma decided to retain the washer and dryer awarded to Larry in the dissolution decree which she valued at $500. The stipulation and decree make no specific reference to this quarry rent.

Wilma's adversary complaint asserts that the $30,000 payment owed by Larry under the decree is nondischargeable under 11 U.S.C. 523(a)(5). Wilma argues that the payment is in the nature of alimony, maintenance or support. Count II of the complaint asserts that Larry owes Wilma half of the $1,000 quarry rent and that this debt is nondischargeable under 523(a)(6).

Larry asserts that the $30,000 payment is a property settlement rather than support. He denies that he owes Wilma half of the quarry rent. He asserts that cashing the check does not constitute willful conversion.

PROPERTY VS. SUPPORT, 523(a)(5)

The Eighth Circuit considered the dischargeability of obligations arising from dissolutions of marriage in In re Williams, 703 F.2d 1055 (8th Cir. 1983).

> The Bankruptcy Reform Act of 1978 prohibits the discharge of a debtor's obligation to make alimony, maintenance, or support payments to his or her former spouse. Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. Debts payable to third persons can be viewed as maintenance or support obligations; the crucial issue is the function the award was intended to serve. Though we of course regard the decisions of the state courts with deference, bankruptcy courts are not bound by state laws that define an item as maintenance or property settlement, nor are they bound to accept a divorce decree's characterization of an award as maintenance or a property settlement. . . . "Provisions to pay expenditures for the necessities and ordinary staples of everyday life" may reflect a support function. . . . Whether in any given case such obligations are in fact for 'support' and therefore not dischargeable in bankruptcy, is a question of fact to be decided by the Bankruptcy Court as trier of fact in light of all the facts and circumstances relevant to the intention of the parties.

Id. at 1057-58 (citations omitted); 11 U.S.C. 523(a)(5).

These pronouncements in Williams have been followed in In re Morel, 983 F.2d 104, 105 (8th Cir. 1992) (issue is one of intent of the parties), cert. denied, 113 S. Ct. 2423 (1993); Adams v. Zentz, 963 F.2d 197, 199 (8th Cir. 1992) (crucial issue is function award was intended to serve); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986); and Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984). In determining intent, the court should focus on the function that the obligation was intended to serve when the parties entered into the agreement, and not examine the present situation or needs of the parties. Boyle, 724 F.2d at 683. The court need not make a precise inquiry into financial circumstances to determine precise levels of needs or support. Draper, 790 F.2d at 55 n.3. A proceeding to determine dischargeability of debts awarded in a divorce decree is not an appeal of the dissolution court's decision. In re Pallesen, No. X92-00202S, Adv. No. X92-0075S, slip op. at 14 (Bankr. N.D. Iowa Jan. 14, 1993).

Many factors have been found to be indicative of intent in this context. In re Voss, 20 B.R. 598, 602 (Bankr. N.D. Iowa 1982) focuses on four factors in finding that the debtor's obligation to make payments on a second mortgage constitutes support. That case also notes that several other factors are relevant. Id. at 602 n.4. Other cases in this district list from six to fifteen factors relevant to a determination of the parties' intent that an obligation is in the nature of support. See In re Pence, No. L-90-1163C, Adv. No. L-90-0172C, Adv. No. L-90-0173C, slip op. at 6 (Bankr. N.D. Iowa Sep. 30, 1991); Pallesen, slip op. at 9-10. The Third Circuit has concisely set out three principal indicators which subsume the multiple factors relevant to intent used by various courts. In re Gianakas, 917 F.2d 759, 762 (3d Cir. 1990). These factors are 1) the language of the agreement in the context of surrounding circumstances, 2) the parties' financial circumstances and 3) the function served by the obligation at the time of the divorce or settlement. Id. at 762-63.

In applying the foregoing, the burden of proving an exception to discharge is always on the party seeking such relief. In other words, the party objecting to dischargeability has the burden to prove by a preponderance of evidence that the obligation is in the nature of alimony, maintenance or support. Pallesen, slip op. at 6. More specifically, as set forth in Williams, Id., the ultimate issue for the Court's determination is establishing the function or purpose that the award was intended to serve at the time of the entry of the dissolution. A determination of intent is often elusive. Often, neither the parties nor the Court entering the dissolution decree made a specific determination when the decree was entered nor did they contemplate the effect which a bankruptcy might have. The Bankruptcy Court must frequently, after the fact, establish the constructive intent of the parties on a case by case basis. In re Gianakas, 917 F.2d 759, 763 (3d Cir. 1990); In re Alloway, 37 B.R. 420, 425 (Bankr. E.D. Pa. 1984). While an almost endless list of factors can be considered on the issue, ultimately, the Court must look at each case individually and determine what factors are relevant to a determination of the critical issues of intent.

The Court will discuss those factors which the Court feels are probative on the issue of the parties' intent in distributing the property in this case. The parties' stipulated dissolution decree states that "Wilma Ewing is awarded the sum of $30,000 as property settlement." While not controlling, the labels given to an award must be given significant consideration. The parties were represented by counsel at all stages of the dissolution proceedings. Counsel were certainly aware of the distinctions between property and alimony. The parties and their counsel chose, in this case, to categorize the $30,000 award as property settlement as opposed to alimony or support.

The decree does not specifically discuss alimony or support except to state that the parties have reached an agreement "on the assets and debts and support of the parties." It is obvious that an obligation is easily categorized either as property or alimony where the decree has separate provisions for each. See In re Morel, 983 F.2d at 105. However, in this case, the Court does not have the luxury of such categorization. While State law is not binding on this issue in this Court, State law can be instructive on what the parties intended at the time of the entry of the dissolution in State Court. Iowa law provides that if the dissolution decree is silent on the issue of alimony, no alimony is awarded and no alimony may thereafter be allowed by modification. In re Marriage of Carlson, 338 N.W.2d 136 (Iowa 1983). While not dispositive, the parties stated that they had reached agreement on the issue of support. The parties, therefore, were cognizant of the issue of support, and chose to not address the issue further. This silence can reasonably be interpreted to mean that alimony was not intended then or in the future.

The manner of payment is important on the issue of intent. The appropriate obligation was agreed to be $30,000. This award was payable in a lump sum within 60 days of the decree. It is instructive to the Court that this was designed as a lump sum payment as opposed to a support or alimony payment which is ordinarily payable in installments over an extended period of time.

It is important to an analysis of this issue whether the award is tied to a condition such as death or remarriage of one or both of the parties as support payments are often conditional. In this case, the award is unconditional. It is payable immediately and no provisions are made for forgiving the obligation under any circumstances.

The division of property between the parties is almost exactly equal if the award of $30,000 is considered property settlement. The net estate of the parties in the financial statement filed in the dissolution proceeding was between $63,000 and $64,000. A division of property in a percentage greater than would be considered equitable can be interpreted as lump sum alimony in lieu of periodic support. In this case, however, the allocation is almost 50% of the net estate which is consistent with property distribution. If this were considered support or alimony, the property distribution would be completely inequitable. The Plaintiff would be awarded household goods and the automobile whereas the Debtor would have received the remainder of all of the property of the parties. It is not reasonable to assume that the trial judge in the dissolution proceedings intended such a result.

Certain factors provide some evidence that this award could be construed as support. The Plaintiff has historically had less remunerative employment than the Debtor. Disparity of income is a circumstance which sheds some light on the inquiry. However, absent further evidence on this issue, it is not dispositive. The parties' children are grown. The Plaintiff is responsible only for her own welfare. While earning a lesser wage, the Plaintiff is employed and has been consistently employed in the last years. The second factor which has a bearing on this issue is the length of marriage of the parties. In this case, the parties were married 28 years. This is a sufficient period that under some circumstances would justify an award of alimony or spousal support. However, absent other factors, this Court cannot conclude that this is decisive on this issue.

The burden of proof is upon the Plaintiff to establish the exception to discharge which she has pled. The Court has considered all of the factors which it considers to be relevant on the issue. The language of the decree describing this as a property settlement, the fact that the lump sum payment represents one-half of the marital estate, as well as the testimony of the parties regarding their intent, leads the Court to conclude that the Plaintiff has not established that the parties intended the payments to be support as opposed to property settlement. While certain of the factors weigh in favor of the Plaintiff, such as her comparative financial position and the length of the marriage, these factors do not convince the Court by a preponderance of evidence that this property distribution constitutes an award of support as opposed to property distribution. As the Plaintiff has failed to carry her burden of proof, the Debtor's $30,000 obligation is not excepted from discharge pursuant to 523(a)(5).

CONVERSION, 523(a)(6)

The second issue raised by the Plaintiff relates to a check in the amount of $1,000 paid by Century Concrete Co. to the respective parties. This is quarry rent which was payable yearly to the parties. The Plaintiff states that the Debtor cashed this check and Plaintiff received none of it whereas she was to receive one-half. Because of this, Plaintiff claims that this constitutes a willful conversion and she is entitled to $500 of this rental payment.

Section 523(a)(6) states that a debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity". A willful and malicious conversion is an "injury" under 523(a)(6). In re Holtz, 62 B.R. 782, 785 (Bankr. N.D. Iowa 1986). The creditor asserting nondischargeability has the burden of proof by a preponderance of the evidence. In re Kayser, No.

L92-00760W, Adv. No. L92-0119W, slip op. at 3 (Bankr. N.D. Iowa Jan. 29, 1993).

"Bankruptcy Courts must look to state law to define conversion. Iowa defines conversion as 'the act of wrongful control or dominion over chattels in derogation of another's possessory right thereto.'" Holtz, 62 B.R. at 785 (citations omitted). In Holtz, the debtor's failure to apply sales proceeds against the Bank's loans constituted conversion. The Bank had a security interest in the proceeds. The court focused on aggravating features of the debtor's conduct such as the concealment of funds and the deliberateness of the sale after the creditor had attempted to assert its rights in concluding that the debt was nondischargeable.

A mere technical conversion does not satisfy 523(a)(6). Nondischargeability turns on whether the conduct is (1) headstrong and knowing ("willful") and, (2) targeted at the creditor ("malicious"), at least in the sense that the conduct is certain or almost certain to cause financial harm. In re Long, 774 F.2d 875, 881 (8th Cir. 1985). Long held that the debtor's conduct was willful because the debtor knew the diversion of funds was contrary to the collateral agreement. Id. at 882. However, the malice element was not met because the debtor did not intend or expect to harm the economic interests of the creditor.

Plaintiff has the burden of proof. It is the conclusion of this Court that Plaintiff has failed to prove willful and malicious injury under 523(a)(6). Based on the evidence, Plaintiff's possessory right to the $1,000 quarry rent check remains fairly

debatable. The quarry rent payment is not specifically awarded to either party in the dissolution decree. Arguably, it would thus fall within the clause awarding "all of the remaining property, real and personal set forth in the financial statement" to Debtor. Debtor asserts that he believed the $1,000 proceeds of the check were legally his. This colorably justifiable belief negates an assertion of willfulness or maliciousness under 523(a)(6). The Court concludes that any debt to Plaintiff arising from the $1,000 quarry rent check is not nondischargeable under 523(a)(6).

WHEREFORE, the debt of $30,000 which Larry Ewing owes to Wilma Ewing from their dissolution degree is not excepted from discharge under 523(a)(5).

FURTHER, any debt owing to Wilma Ewing from the $1,000 quarry rent check is not excepted from discharge under 523(a)(6).

FURTHER, judgment is entered against Plaintiff Wilma Ewing and in favor of Debtor Larry Ewing.

SO ORDERED this 3rd day of November, 1993.

Paul J. Kilburg, Judge
U.S. Bankruptcy Court