In the United States Bankruptcy Court

for the Northern District of Iowa

BERNIE B. BARKER
Debtor(s).

Bankruptcy No. 97-01813-C
Chapter 7

WANDA VANDER WERF
Plaintiff(s)

vs.

BERNIE B. BARKER
Defendant(s)

Adversary No. 97-9176-C

ORDER RE COMPLAINT OBJECTING TO DISCHARGE

This matter came on before the undersigned on March 19, 1998 on the Complaint Objecting to Discharge. Plaintiff Wanda Vander Werf appeared, represented by H. Raymond Terpstra II and John Hedgecoth. Defendant/Debtor Bernie B. Barker appeared, represented by Thomas McCuskey. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

STATEMENT OF THE CASE

Plaintiff holds claims against Debtor, her ex-husband, based on their Decree of Dissolution entered July 14, 1995 and subsequent modifications. She asserts these debts are nondischargeable based on 11 U.S.C. §§523(a)(5) and (15). Debtor argues that the debts do not constitute payment for support and thus are not excepted from discharge under §523(a)(5). He also asserts he does not have the ability to pay and the benefit to him of discharge of the debts outweighs detrimental consequences to Plaintiff, making the debts dischargeable under §523(a)(15)(A) and (B).

FINDINGS OF FACT

Plaintiff Wanda Vander Werf married Debtor Bernie Barker in May 1994. The marriage lasted seven weeks before they separated. The Decree of Dissolution of Marriage was entered July 14, 1995.

Prior to and during their marriage, the parties endeavored to build a new family home in Jones County. They never jointly occupied the home, which remained under construction at the time the dissolution was final. Debtor lived in the house for a time. Eventually, however, he deeded the property back to the bank to satisfy the mortgage.

Ms. Vander Werf lives in Pella, Iowa in the home she owned prior to meeting Debtor. When she met Debtor, Ms. Vander Werf's home was debt-free. In April 1994, she entered into a mortgage with Monroe County State Bank to pay off Debtor's credit card debt of $12,500. The Decree of Dissolution awards Ms. Vander Werf $10,696 as a lien against the Jones County house. This amount represents the balance due on that mortgage at the time the Decree was entered. The Decree also orders Debtor to pay mortgages on both the Jones County house and on Ms. Vander Werf's house in Pella which had been obtained to fund construction of the Jones County house.

When Debtor defaulted on payments, Ms. Vander Werf sought a second mortgage from Marion County State Bank for $25,000. On Joint Application, the parties modified their Decree of Dissolution in May 1996 whereby the parties would

pay off Homeland Bank, Monticello, Iowa, for the debt on the Jones County house and Debtor would be responsible for making the payments to Marion County State Bank. This is in addition to his obligation to pay the Bank for the amount of the previously existing loan. The Order Modifying Decree states Debtor is solely responsible for the $25,000 loan due to Marion County State Bank over ten years at 8.5% interest with monthly payments of $310.00. It also states Debtor shall continue to pay on the previously existing loan with the current balance of $9,775.53 at $152.09 per month. It is these obligations imposed on Debtor in the dissolution proceeding which Ms. Vander Werf seeks to have excepted from discharge.

On June 6, 1997, the Iowa District Court found Debtor in contempt for defaulting on those payments. The court ordered Debtor to pay the arrears within two weeks or be confined to the Marion County Jail. Debtor brought the mortgage payments current, then filed his Chapter 7 petition on June 12, 1997.

At the time of trial, the approximate total balance of the two mortgage loans at Marion County State Bank was $16,000. Ms. Vander Werf has paid $15,000 on the mortgages from funds she borrowed from her children. Her children held C.D.'s from life insurance proceeds from the 1991 death of their father. She also made extra payments totaling approximately $1,600, hoping to stave off the Bank when it started putting pressure on her and threatened foreclosure.

Ms. Vander Werf has subsequently entered into a third mortgage loan which she used to purchase a car in the summer of 1997. She took out a fourth mortgage in February 1998 to pay off unsecured debt of $18,848. This mortgage is due in August 1998.

Ms. Vander Werf is self-employed as a real estate agent, selling mostly residential property in the Pella area. She received her real estate license approximately 2½ years ago. She previously ran a tanning and hair care business but currently receives no income from that endeavor. Ms. Vander Werf has received approximately $1,800 in commissions in 1998. Her 1997 tax return shows total income of $24,691, which includes income from an pension annuity arising from her former husband's death.

Ms. Vander Werf's oldest daughter, Amy, is 23 and is seeking a Master's Degree from Drake University. She works part-time in a retail store in Pella and lives at home. Ms. Vander Werf's son, Ross, attends Central College, living in the dorm. Her youngest daughter, Angela, lives at home and attends high school. Ms. Vander Werf testified that she continues to provide a home and support for all three children.

Debtor concedes that he is obligated to pay the first and second mortgage loans to Marion County State Bank. He currently resides in a mobile home alone and has no dependents. Debtor works for Franklin Industries, earning approximately $30,000 a year as Production Manager and doing some purchasing. His father owns the stock of Franklin Industries. While the parties were married, Debtor had higher income, approximately $45,000 to $49,000. This included gambling income and income from being mayor of Monticello.

Franklin Industries is the successor of a former corporation called Franklin Equipment which filed for bankruptcy a few months prior to Debtor filing his Chapter 7 petition. Debtor had owned stock in Franklin Equipment, was an officer of the corporation and was personally liable on company loans. He has no equity interest in the successor corporation which now employs him. Debtor does not expect any increase in his income from Franklin Industries next year. He lost some employment benefits when the new company took over, including $5,000 in annual income, use of a company truck, bonuses, and director's fees.

Debtor testified that he has reaffirmed some debts. Two reaffirmation agreements are filed in Debtor's Chapter 7 case: (1) Sears, Roebuck & Co. for a total of $930.53 with monthly payments of $23.00 and (2) Monogram Credit Card Bank for a total of $2,435.45 with monthly payments of $61.00. Debtor testified that he has also verbally reaffirmed debts to First Iowa Bank of $8,600 and $17,500 for loans co-signed with his father and the loan on his mobile home. These carry monthly payments of $400. Debtor also testified he verbally reaffirmed debts in small amounts to J.C. Penney's, Younkers and Hugh's Garage.

Debtor runs a sole proprietorship named B & B Sales. He primarily does painting and cleaning in his spare time, renting equipment from Franklin Industries as needed. Debtor testified at trial that B & B had gross sales of approximately $6,900 in 1997 and $230 to $250 in 1998, and no income in 1996. Net income from B & B in 1997 was $1,400

according to Debtor's trial testimony. Debtor testified that he does not intend to continue doing this outside work in the future.

In a deposition in October 1997, Debtor testified that his only income came from Franklin Industries. Debtor also did not disclose any income from B & B in his Chapter 7 Statement of Affairs. Debtor's 1996 tax return does not list any income from B & B. His 1997 tax return was prepared the day before the trial. It shows gross receipts of $6,938 and net profit of $1,387. These amounts support Debtor's testimony.

Ms. Vander Werf produced a witness, Diane Osterkamp, who is office manager at Welter Storage Equipment Co. in Monticello, Iowa. Ms. Osterkamp testified that in 1996, 1997 and 1998 she paid Debtor for work done by three different entities: B & R Services, B & B Services and B & B Sales. Debtor received over $7,000 in 1997 and $4,500 in 1996 for work done for Welter Storage. Debtor also did some work for them in January 1998. These amounts can not be reconciled Debtor's testimony or with Debtor's tax returns.

Both parties filed Affidavits of Financial Status as Exhibits. The Court is able to make the following findings based on these affidavits, along with the other evidence presented.

NET WORTH

Asset:	Debtor	Plaintiff
Home and car	$2,750	$38,000
Life insurance cash value	5,000	3,009
IRAs	100	4,000
Household goods	800	1,000
Total Net Worth	$8,650	$46,009

INCOME (Monthly)

Current gross income	$2,500	$2,058
Additional income		
$800 S. S. A. for daughter		800
648 Pepsico stock sale		648
Net plus additional:	$2,500	$3,506

EXPENSES (Monthly)

Employment taxes	$ 547	$ 496
Deduction for IRA		167
House payment/lot rent, insurance, taxes and home maintenance	213	463
Meals and food	120	554
Clothing	25	392
Car expenses, including gas, insurance, license	143	351
Medical, dental expenses, drugs, glasses/contacts and health		

insurance	60	238
Utilities	203	201
School lunches, allowances and school activities	0	190
Life Insurance	42	0
Laundry & dry cleaning	25	25
Recreation, entertainment, cable, papers and magazines	80	150
Incidentals	120	132
College accounts and books	0	524
Total monthly expenses:	$1,031	$3,216

DEBT PAYMENTS (Monthly)

Reaffirmed debts ($3,358 total)	$ 125	
Atty. Mike Bowman ($700 total)	40	
Business, mobile home and pre-marital home	400	
Personal loans		$ 250
Total debt payments	$ 565	$ 250

DISPOSABLE INCOME

Monthly income	$2,500	$3,506
minus expenses	1,031	3,216
minus debt payments	565	250
Disposable income:	$ 904	$ 40

ADDITIONAL DEBT

Atty. Tom McCuskey	$2,028	
Hughes garage (postpetition)	361	
Loans from children's C.D.s		$10,149
Co-signed student loans		16,630
4th mortgage		18,848
Total additional debt:	$2,389	$45,627

DISSOLUTION DEBT IN CONTROVERSY

Mortgage on Plaintiff's home:	$16,000.00
Amounts Plaintiff paid on debt:	16,600.00
Monthly payments:	$ 462.09

CONCLUSIONS OF LAW
SECTION 523(A)(5), SUPPORT OBLIGATIONS

The Eighth Circuit considered the §523(a)(5) dischargeability of obligations for support, alimony or maintenance 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).

The legal conclusions 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, 508 U.S. 943 (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. 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). 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.

The Decree of Dissolution does not mention support or alimony. Nor does the Order Modifying Decree. The record does not reflect the state of the parties' finances at the time of the dissolution. The parties and the Iowa District Court did not express the intent to have the assignment to Debtor of liabilities relating to the Jones County house function as support. Under the Decree, Debtor is made responsible for the debts relating to the Jones County house and his previous credit card debt. This is a determination of personal liability on personal debt, which does not function as support, alimony or maintenance. The Court concludes the §523(a)(5) exception to discharge does not apply.

SECTION 523(A)(15), NON-SUPPORT OBLIGATIONS

A debt incurred in the course of a divorce which does not constitute support is nondischargeable unless either of the exceptions in §523(a)(15) applies. That section provides that a Chapter 7 discharge does not discharge debt:

> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--
>
> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
> >
> > (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental

> consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15).

Plaintiff's prima facie case under §523(a)(15) to except the debt from discharge is established by a showing that the debt was incurred in divorce proceedings and it is not debt for alimony, maintenance or support. In re Jodoin, 209 B.R. 132, 138-39 (B.A.P. 9th Cir. 1997); In re Williams, 210 B.R. 344, 346 (Bankr. D. Neb. 1997). The burden is upon Debtor to prove that he does not have the ability to pay the debt or that discharging the debt would give him a benefit that outweighs the detriment to Plaintiff. Id.; In re Haverhals, No. 96-51916XS, slip op. at 7 (Bankr. N.D. Iowa Jan. 30, 1998). He must establish his proof by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286, 111 S. Ct. 654, 659 (1991). Debtor need only succeed on one, not both prongs of §523(a)(15) to be entitled to have the debt discharged. In re Deppe, ___ B.R. ___, 1998 WL 55160, at *8 (Bankr. D. Minn. Feb. 2, 1998).

The time of trial is the appropriate time to apply the §523(a)(15)(A) and (B) tests as they require an examination of current circumstances. Jodoin, 209 B.R. at 142; Deppe, at *7. The test of a debtor's ability to pay for purposes of §523(a)(15)(A) is similar to the disposable income analysis in Chapter 13 cases. Jodoin, 209 B.R. at 142; Deppe, at *7. The Court looks at the debtor's current circumstances including prospective income and reasonable expenses. Id. This analysis is based solely on the debtor's financial situation. In re Henson, 197 B.R. 299, 304 (Bankr. E.D. Ark. 1996).

The "detriment analysis" of §523(a)(15)(B) takes into account numerous factors regarding both parties' total financial situation in their new lives, their needs and a determination of who will suffer more. Id.; Jodoin, 209 B.R. at 143. The Court must balance the equities, considering such factors as:

> the income and expenses of both parties; whether the nondebtor spouse is jointly liable on the debt; the number of dependents; the nature of the debts; any reaffirmation of debts; and the nondebtor spouse's ability to pay.

Deppe, at *8. The court in In re Williams, 210 B.R. 344, 347 (Bankr. D. Neb. 1997), adopted the following analysis for a determination of dischargeability under §523(a)(15)(B):

> [T]he best way to apply the 11 U.S.C. §523(a)(15)(B) balancing test is to review the financial status of the debtor and the creditor and compare their relative standards of living to determine the true benefit of the debtor's possible discharge against any hardship the spouse, former spouse and/or children would suffer as a result of the debtor's discharge. If, after making this analysis, the debtor's standard of living will be greater than or approximately equal to the creditor's if the debt is not discharged, then the debt should be nondischargeable under the 523(a)(15)(B) test. However, if the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the debt should not be discharged.

CONCLUSIONS

Ms. Vander Werf has established her prima facie case. The debt arises from the parties' dissolution proceedings. It does not constitute alimony, support or maintenance.

The Court finds that, under §523(a)(15)(A), Debtor has the ability to pay the dissolution debt in controversy. Some of the evidence and exhibits present conflicting information regarding Debtor's current expenses and obligations. The Court has deduced, however, that Debtor has disposable income of approximately $900 monthly. This is based on a calculation of monthly income minus expenses listed in Debtor's affidavit of financial status and approximate existing monthly debt payments.

Debtor has a substantial income and no dependents. He has budgeted payments of $125 per month on reaffirmed debts as well as what appears to be a $400 monthly payment covering his mobile home, a pre-marital obligation on a former home, and business debt which Debtor cosigned with his father. Even making these payments, Debtor has sufficient income to pay the monthly payments of $462.09 on the obligations spelled out in the Polk County District Court's Order Modifying Decree. Therefore, Debtor has failed his burden to prove he does not have the ability to pay the dissolution

debt under §523(a)(15)(A).

Under §523(a)(15)(B), Debtor must prove "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to [the plaintiff]." Detriment to Ms. Vander Werf is evident from the record. Her home is encumbered by mortgages totaling at least $16,000 for the obligations assigned to Debtor by the dissolution court. She has borrowed $15,000 from her children's C.D.s which constitute their inheritance from their father. Her income is healthy but not reliable, considering the vagaries of a real estate sales business. She has had to borrow further on her home for other personal needs, including a vehicle. If Debtor's obligation on the debt is discharged and Ms. Vander Werf is unable to pay, she could lose her house, her children's inheritance and her car.

Ms. Vander Werf has three dependents, all high school or college students. Her total living expenses are considerably higher than Debtor's, which is understandable in this situation. She has disposable income of $40 monthly, compared to Debtor's $900.

The benefit to Debtor from discharging the dissolution debt is that he would have more monthly income at his disposal and a lower amount of total debt. Debtor apparently had no financial difficulty in reaffirming debts and making monthly payments for unsecured claims including J.C. Penney's, Hughes Garage, Younkers, and Sears. He also had no difficulty in making payments on a business loan cosigned with his father. It is apparently only the dissolution debt which Mr. Barker finds difficult to pay. This Court concludes that Debtor/Defendant Bernie Barker is quite capable financially of paying the dissolution debts as ordered by the state court.

Discharge of the debt would undoubtedly result in Debtor being able to support a higher standard of living than Ms. Vander Werf's. From the record, it appears likely that Debtor's standard of living would remain higher than Ms. Vander Werf's if the dissolution debt is excepted from discharge. The Court concludes that Debtor has not met his burden of proof under §523(a)(15)(B). The dissolution debt is therefore nondischargeable.

WHEREFORE, Plaintiff Wanda Vander Werf's Complaint Objecting to Discharge is GRANTED.

FURTHER, Debtor's dissolution obligations are not excepted from discharge under §523(a)(5).

FURTHER, the obligations of Debtor Bernie Barker under the original July 14, 1995 Decree of Dissolution of Marriage and Order Modifying Decree dated May 24, 1996 are nondischargeable pursuant to §523(a)(15).

FURTHER, judgment shall enter accordingly.

SO ORDERED this 7th day of April, 1998.

Paul J. Kilburg
U.S. Bankruptcy Judge