IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 7
KERRY L. ELMORE,)
CARRIE L. ELMORE,)
)
Debtors.) Bankruptcy No. 01-03782
---------- KELLY L. CAVIN-ELMORE,)
) Adversary No. 02-9019
Plaintiff,)
)
vs.)
)
KERRY L. ELMORE,)
)
Defendant.)

ORDER RE COMPLAINT TO DETERMINE DISCHARGEABILITY

The matter before the court is Plaintiff's complaint to determine dischargeability of a debt. Trial was held June 18, 2002 in Cedar Rapids. Plaintiff Kelly L. Cavin-Elmore was represented by John Maher. Attorney John Titler appeared on behalf of Debtor/Defendant Kelly Elmore. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

The parties' Decree of Dissolution of Marriage ("Decree") was entered in the Iowa District Court on July 26, 2000. The Decree provided for a division of the parties' personal property. It required that Debtor continue to make loan payments on a 1993 GMC Astro Van, pay the future insurance premiums, and transfer title to Plaintiff.

At the time of the dissolution, Debtor's annual earnings were much more than that of Plaintiff's. The Child Support Worksheet presented in the dissolution shows that in July 2000, the month of the dissolution, Debtor's net monthly income was
$2,595.47. In comparison, Plaintiff's net monthly income was
$871.13.

At the time of the dissolution, Plaintiff told Debtor that she planned to move to Colorado though she had no job prospects. According to Plaintiff, Debtor was aware that Plaintiff's
ability to obtain and maintain employment depended upon her possession of an automobile. Plaintiff claimed that she and Debtor discussed the possibility of her using the van to resume her cleaning business in Colorado. Plaintiff testified that she and Debtor had conversations regarding their 17 year marriage and the disparities in income and eventually agreed that Debtor's assumption of the van loan and future insurance premiums would be in lieu of alimony. Plaintiff stated that the reason she agreed to forego alimony was because the van would help her make a living.

Debtor testified that he and Plaintiff never discussed alimony. Debtor stated that he agreed to continue to pay the loan payments as long as he could. Debtor was unable to pay the bills because the bills were greater than he anticipated.

Based on a Security Agreement dated November 17, 1998, Quaker Oats Credit

Union ("Credit Union") repossessed the van in May of 2002. Both Debtor and Plaintiff are signatories on the loan. The van was scheduled to be sold at a private sale some time in June of 2002. It is unlikely that the proceeds from the sale of a 1993 van with 206,000 miles will cover the approximately $12,000 balance of the loan. Thus, the Credit Union may attempt to hold Plaintiff responsible for any deficiency.

Plaintiff argues that Debtor's assumption of the loan obligation and insurance premiums were in lieu of support. Plaintiff seeks a determination that this debt is nondischargeable under 11 U.S.C. § 523(a)(5)(2002).

ISSUE

The issue to be resolved is whether Debtor's assumption of the loan obligation and promise to pay the insurance premiums on Plaintiff's vehicle constitute a nondischargeable debt under § 523(a)(5).

CONCLUSIONS OF LAW

Plaintiff asks this court to find the subject debt nondischargeable pursuant to § 523(a)(5). This section provides in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
> . . .
>
> (5) to a spouse, former spouse, or child of 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, ... , 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.

11 U.S.C. § 523(a)(5)(B).

The party asserting the nondischargeability of a marital debt under § 523(a)(5) has the burden of proof. In re Krein, 230 B.R. 379, 382-83 (Bankr. N.D. Iowa 1999). The Court applies the preponderance of the evidence standard of proof. Grogan v. Garner, 498 U.S. 279, 283 (1991).

Section 523(a)(5) establishes three requirements that must be met before a marital obligation becomes nondischargeable in bankruptcy: (1) the debt must be in the nature of alimony, maintenance or support, (2) it must be owed to a former spouse or child, and (3) it must be in connection with a separation agreement, divorce, or property settlement agreement. Krein, 230 B.R. at 383.

The second and third elements of §523(a)(5) are not in dispute. The assumption of the van loan is payable on behalf of Debtor's former spouse, in connection with the parties' dissolution proceeding. The first element constitutes the sole issue in this case, i.e., whether the assumption of the loan is in the nature of alimony, maintenance or support.

In In re Williams, 703 F.2d 1055, 1057-58 (8th Cir. 1983), the Eighth Circuit holds that "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." 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), and Adams v. Zentz, 963 F.2d 197, 199 (8th Cir. 1992) (stating crucial issue is function award was intended to serve). This is a question of fact to be decided by the Court. Adams, 963 F.2d at 200.

Intent of the Parties

"The crucial question is what function did the parties intend the agreement to serve when they entered into it." In re McLain, 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999) (citing Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984)). Numerous factors have been found to be indicative of such intent. In re Voss, 20 B.R. 598, 602 (Bankr. N.D. Iowa 1982). Courts that have identified relevant factors and discussed their importance have yet to settle on a common formula. In re Michaels, 157 B.R. 190, 193 (Bankr. D. Mass. Jul 23, 1993). This is understandable because, as the courts agree, each determination of the nature of an obligation requires an ad hoc inquiry. In re Gianakas, 917 F.2d 759, 764 (3d Cir. 1990). The courts do not so much disagree over the correct test as they simply tend to focus on different aspects of the inquiry as each case requires. Michaels, 157 B.R. at 193. The two cases that most specifically articulate the analysis required by § 523(a)(5) are In re Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983), and Gianakas.

Under Calhoun, an obligation is deemed a support obligation only if it is intended to create a support obligation and actually had the effect of providing necessary support. Id. at 194. A failure of either condition, intent or effect, would be dispositive. Id. This double condition approach has been rejected by the Eighth Circuit. "Assessment of the ongoing financial circumstances of the parties to a marital dispute ... would of necessity embroil the federal court in domestic relations matters which should properly be reserved to the state court." Draper v. Draper, 790 F.2d 52, 54-55 n. 3 (8th Cir. 1986).

The Eighth Circuit has instead chosen to apply the Gianakas analysis. See, e.g., In re Green, No. 99-01124-C slip op. at 4 (Bankr. N.D. Iowa Mar. 14, 2000); In re Stamper, 131 B.R. 433, 435 (Bankr. W.D.Mo. Aug 20, 1991). This Court in Green stated that "the Third Circuit has concisely set out three primary indicators which subsume the multiple factors relevant to intent used by various courts." Green, slip op. at 4. 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. The three "primary indicators" this test sets forth are not separate conditions but are three relevant factors in a single inquiry. Michaels, 157 B.R. at 194.

Language of the Agreement

The language and substance of the Decree must be examined in an attempt to ascertain the intent of the parties. Gianakas, 917 F.2d at 762. A state law or divorce decree that characterizes a debt as a support obligation is not binding upon bankruptcy courts. Adams, 963 F.2d at 199. Conversely, the fact that a divorce decree or stipulation does not call an obligation alimony, support, or maintenance does not prevent a bankruptcy court from finding it to be so. McLain, 241 B.R. at 419.

The Decree provided for a division of the parties' personal property. Debtor agreed to make payments for certain personal property, including the van which was to be retained by Plaintiff. The Decree does not indicate whether the van loan assumed by Debtor constituted maintenance, alimony, or support, or whether it constituted a property settlement. The Decree states

only that Debtor "will continue to make payments on the Astro Van and will continue to pay automobile insurance premiums until the loan is paid off. ... The parties will hold each other harmless from any responsibility and indemnify the other party for any liability they may incur on the debts they are assuming."

The language of the Decree alone does not provide a conclusive answer as to the parties' intent. The parties' financial circumstances and the function of the obligation, however, do shed light on whether the parties intended the assumption of the loan and payment of insurance premiums to serve as a support obligation.

Parties' Financial Circumstances

The parties' financial circumstances at the time of the settlement may evince the parties' intent. Gianakas, 917 F.2d at 762. The fact that one spouse was not employed or was employed in a less remunerative position than the other spouse is an aspect of the parties' financial circumstances that may assist a court in determining whether the obligation was intended to serve as support. Id. at 762-63.

At the time of the dissolution, Debtor's annual earnings were much more than Plaintiff's. The Child Support Worksheet shows that in July 2000, the month of the dissolution, Debtor's net monthly income was $2,595.47. In comparison, Plaintiff's net monthly income was $871.13. The fact that Debtor's income has decreased significantly since the time of the dissolution is of no relevance since a § 523(a)(5) inquiry examines only the parties' circumstances at time of the divorce, not their present circumstances. Draper, 790 F.2d at 54.

Plaintiff testified that this sizeable difference in income led to discussions on the issue of alimony. According to Plaintiff's testimony, she was willing to accept the van as a form of support in lieu of alimony. Debtor claims that he and Plaintiff never had discussions about alimony. The record, however, does not support the notion that the parties intended Debtor's assumption of the loan to be a mere property settlement. Debtor stated that he would continue to make payments on the van loan as long as he could. Plaintiff's income at the time of settlement would not have been sufficient to cover the payments on the $8,000 loan along with her other living expenses. In light of these facts, this Court finds that at the time of the dissolution the parties intended this obligation to function as an indirect form of support.

Function of the Obligation

A majority of courts have held that the assumption of a debt is in the nature of support, maintenance or alimony where the debt was incurred to pay necessities such as housing, food, transportation, education and medical expenses. See generally, Stamper, 131 B.R. at 435 (holding husband's obligation to make car payment and to maintain insurance on such vehicle is nondischargeable as support under 11 U.S.C. § 523(a)(5) where car was necessary for ex-wife's support); Williams, 703 F.2d at 1057 (opining that provisions for the payment of expenditures for necessities and the ordinary staples of everyday life are frequently reflective of a support function).

Plaintiff told Debtor that she planned to move to Colorado. At that time, Plaintiff did not have any job prospects in Colorado. According to Plaintiff's testimony, Debtor was aware that Plaintiff's ability to obtain and maintain employment depended upon her possession of an automobile. Plaintiff testified that she and Debtor discussed the possibility of Plaintiff using the van to resume her cleaning business in

Colorado. Plaintiff testified she agreed to forego alimony in exchange for Debtor's assumption of the van loan and payment of insurance premiums.

From the record it is evident that Plaintiff intended to use the van to provide for necessities. Not only would the van provide transportation to and from work, there was a possibility that the van would become an integral part of Plaintiff's cleaning business. In light of the parties' financial conditions at the time of the dissolution, it is apparent that the parties intended Debtor's assumption of the loan and payment of insurance premiums to be in the nature of support.

Remedy

At the time of trial, Plaintiff sought a judgment whereby she would obtain possession of the vehicle from the Credit Union and Debtor would be directed to make payments, including any deficiency payments, to the Credit Union in order to bring any deficiency current. Such a remedy is unworkable on numerous levels. First, the Court has no jurisdiction to direct return of the automobile to Plaintiff without the Credit Union first being compensated for any deficiencies. The Credit Union repossessed the vehicle in May of 2002. Both Debtor and Plaintiff are signatories on the loan. The van was to be sold at private sale during the month of June, 2002. It is unrealistic to assume that the sale proceeds would cover the $12,000 balance due on the underlying loan.

Second, while the Court can order Debtor to pay the deficiency to the Credit Union, this alone will not guarantee immediate compliance and return of the vehicle. Also, by this time, the vehicle has, in all probability, been disposed of by the Credit Union. Finally, even if possible, little would be gained by placing the parties in their former posture whereby Plaintiff would be in possession of a ten year old vehicle with over 200,000 miles and securing a loan in excess of $12,000. Therefore, a ruling simply making the debt nondischargeable would not restore to Plaintiff the benefit of her bargain.

The Court has concluded that the obligation is in the nature of support and is nondischargeable. The appropriate remedy is to properly fashion a resolution whereby Debtor must provide to Plaintiff the benefit of her bargain. To implement this in the most realistic manner, the Court will direct that Debtor be responsible to Plaintiff for the fair market value of the vehicle at the time it was repossessed by the Credit Union. Plaintiff has been unjustly deprived of possession of the vehicle as a result of Debtor's noncompliance with the dissolution decree in failing to remain current on the underlying loan to the Credit Union.

The most appropriate method to determine the fair value of this vehicle at the time of possession is to utilize the price obtained at the sale by the Credit Union. This price will provide the Court with the best evidence of the fair market value of the vehicle since the Credit Union is required to liquidate the vehicle in accordance with Iowa Code sec. 554.9610 (2002). In addition, the Court concludes that it was the expectation of Plaintiff and the intent of the parties at the time of the dissolution that the automobile insurance should be treated as indirect support and covered by Debtor until the loan was satisfied. Plaintiff now asserts that Debtor has not paid the insurance premiums on the van since late 2000. Debtor is responsible for any premiums for which Plaintiff was not reimbursed from that date until the time of repossession.

Additionally, Debtor is responsible for equivalent insurance until such time as the loan from the Credit Union would have been satisfied. These obligations are also nondischargeable.

SUMMARY

In summary, the Court finds that Debtor's dissolution obligation for payments and insurance on Plaintiff's van is an indirect form of support in lieu of alimony and, therefore, nondischargeable. The Court will enter a judgment in favor of Plaintiff and against Defendant for the value of the automobile at the time of its repossession. As this value is undetermined at this time, an additional hearing is necessary in order to make that determination. The presumptive value is the value obtained by the Credit Union. However, if such a value is not obtainable, any alternative valuation method may be utilized to determine the value of this vehicle.

The Court also finds that the insurance premiums are nondischargeable as an indirect form of support. The Court will enter a judgment in favor of Plaintiff and against Defendant for any insurance premiums determined to have been paid by Plaintiff and not reimbursed by Debtor from late 2000 until the time of repossession of the van. Premiums from the date of repossession until the contractual end date of the loan will be nondischargeable. Plaintiff will be responsible for future insurance premiums to be reimbursed by Debtor for this time period. If Debtor fails to reimburse Plaintiff for these premiums, she will be entitled to seek a remedy in State court.

Finally, after the sale of the automobile, a deficiency will probably remain due and owing to the Credit Union. If the Credit Union seeks collection of some or all of the balance of the loan against Plaintiff, she has the right to seek reimbursement from Debtor in State court.

WHEREFORE, the Court concludes that it is necessary to hold an additional hearing before a final order is entered. The order entered this date is not to be construed as final for appellate purposes until the Court holds a supplemental evidentiary hearing to determine the remaining issues.

FURTHER, the issues remaining for which evidence will be taken are:

1. The value of the vehicle in question at the time of its repossession.
2. The amount of insurance paid by Plaintiff which was unreimbursed by Debtor prior to repossession of the vehicle.
3. The date when the loan made by the Credit Union on this vehicle would have been satisfied if the contract had been completed.

FURTHER, counsel will be contacted by the Scheduling Deputy to set a brief evidentiary hearing on these issues at the earliest possible date.

FURTHER, upon resolution of the remaining issues, the Court will enter a final judgment order setting out completely the relief granted.

SO ORDERED this _29th_ day of July, 2002.

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE