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

IN RE:)
) Chapter 7
KENT D. STURTZ,)
)
Debtor.) Bankruptcy No. 02-02057
---------- DIXIE LEE STURTZ,)
) Adversary No. 02-9099
Plaintiff,)
)
vs.)
)
KENT D. STURTZ,)
)
Defendant.)

ORDER RE COMPLAINT TO DETERMINE DISCHARGEABILITY

The above-captioned matter came on for hearing on April 17, 2003 on Plaintiff's complaint to determine dischargeability of a debt. Plaintiff appeared with Attorney Melissa Nine. Debtor/Defendant appeared with Attorney Don Gottschalk. Evidence was presented to the Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(1).

FINDINGS OF FACT

Plaintiff and Debtor were husband and wife. The parties separated and Mr. Sturtz filed a petition for dissolution.
The decree of dissolution was entered July 31, 2001 in Tama County, Iowa. The facts surrounding the parties' marriage, employment history, children and other relevant factors are set out at considerable length in the decree of dissolution and will not be repeated here.

In summary, the parties have two children. The parties' youngest son, Ryan, is presently a student in college. Prior to the separation of the parties, Dixie Sturtz was employed in the family business. Since the dissolution of the parties, she now has employment at Coots Materials in Vinton, Iowa with an hourly salary of $8.45. She has a history of significant illness. She suffers from Burgher's Disease, a
circulatory ailment. In addition, she suffers from panic attacks.

Mr. Sturtz was self-employed at the time of the parties' dissolution in the snow blowing and lawn mowing business.
This is a business which began in 1989. It appears that Mr. Sturtz is somewhat a jack of all trades and has earned money also from chimney sweeping, some roofing, some subcontracting in construction, as well as trimming trees, carpentry, and remodeling. The evidence suggests that he earned in excess of $40,000 in the year 2000.

The relevant facts, as they impact upon the hearing today, establish that during the course of the dissolution proceeding, a temporary support order was entered on August 10, 2000. This order stated that "The petitioner shall, during the pendency of this action, pay all monthly family obligations as they become due, including the house payment." Mr. Sturtz made some minimal payments but, by and large, did not pay substantial amounts of family expenses and was in arrears $4,825 in unpaid house payments as of the time of the entry of the dissolution decree.

The Court, in its decree, stated that "The Court will figure the $4,825 in

unpaid house payments through July in its property distribution." In the decree, the Court ordered that Mr. Sturtz pay to Mrs. Sturtz the sum of $13,000 as property settlement. This was ordered as a judgment with interest accruing at 8% interest per year effective February 1, 2002. Based upon the language of the decree, and the fact that no further reference is made to the $4,825, it appears that this sum is included in the $13,000 property settlement.

In addition to the award of a property settlement, Mr. Sturtz was ordered to pay child support for the parties' son Ryan in the amount of $447.30 per month. Mr. Sturtz was ordered to pay to Mrs. Sturtz spousal support in the amount of $300 per month from the date of the entry of the decree until she dies or remarries.

The evidentiary record reflects that Mr. Sturtz's annual gross receipts for the four years prior to the entry of the dissolution decree was $54,500. This was earned through the snow removal and mowing business as well as numerous other activities which generated income for the family. The dissolution Court noted that "Kent has the ability, through
health and a history of hard work, to continue to earn about twice as much as Dixie."

Unfortunately, since the entry of the dissolution decree, Mr. Sturtz has apparently made a concerted effort to avoid most, if not all, of his responsibilities under the dissolution decree. He owes in excess of $10,000 in back support, in addition to the $4,825 set out in the dissolution decree, as well as the property settlement and attorney's fees. He has been in court three times for contempt in Iowa District Court and is apparently scheduled for another contempt proceeding in the near future. The record is devoid of any real reason why Mr. Sturtz has failed to pay on his obligations. It appears that he has completely terminated his mowing and snow removal business. He testified that he terminated his business because the snow removal business is undependable. As of the time of hearing, he was employed at Sam's Club in Des Moines, Iowa, working 37 1/2 hours at $9.40 per hour with no overtime. A part of his check is being garnished for delinquent support payments.

The present action for nondischargeability is brought under both 11 U.S.C. § 523(a)(5) and § 523(a)(15). As appears from the factual record, there is some overlap in the manner in which the obligations were treated. The Court will discuss both exceptions to dischargeability.

Section 523(a)(5)

Plaintiff asks this court to find a portion of 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 -
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> . . .
>
> (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.

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.

Section 523(a)(15)

The dischargeability of nonsupport debt incurred in the course of a divorce is governed by § 523(a)(15) of the Code. This section provides that "a discharge under 727 of this title does not discharge an individual debtor from any debt--not of a kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation." 11 U.S.C. § 523(a)(15). To find a § 523(a)(15) debt nondischargeable, the court must initially determine whether the debt is one "not of kind described in" § 523(a)(5). In re Fellner, 256 B.R. 898, 902 (B.A.P. 8th Cir. 2001).

If the debt is a nonsupport property settlement award, a rebuttable presumption of nondischargeability is created. In re Moeder, 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998). The burden then shifts to Debtor to establish that either: 1) he is unable to pay the debt; or 2) the benefit to him of discharging the debt would outweigh the detriment to Plaintiff. Id. Debtor must prove one of these exceptions to § 523(a)(15) by a preponderance of evidence. Grogan v. Garner, 498 U.S. 279, 286 (1991).

An inability to pay under § 523(a)(15)(A) exists if excepting a debt from discharge would reduce a debtor's income to below a level necessary for the support of the debtor and the debtor's dependents. In re Hall, No. 98-1035-W, slip op. at 4 (Bankr. N.D. Iowa Sept. 16, 1999) (citing In re Anthony, 190 B.R. 433, 436 (Bankr. N.D. Ala. 1995)). To make this determination, the Court may consider factors similar to those applied in a Chapter 13 disposable income analysis under § 1325(b)(2). In re Windom, 207 B.R. 1017, 1021 (Bankr. W.D. Tenn. 1997) (noting the language in § 523(a)(15)(A) is nearly identical to language in § 1325(b)(2)).

In calculating disposable income for purposes of Chapter 13, this Court looks at Debtor's current and future financial status, including potential earnings, and whether Debtor's expenses are reasonably necessary. In re Barker, No. 97-01813-C, slip op. at 8 (Bankr. N.D. Iowa Apr. 7, 1998) (citing In re Jodoin, 209 B.R. 132, 142 (B.A.P. 9th Cir. 1997)). In evaluating whether expenses are reasonably necessary, the Court seeks a balance between allowing a debtor a reasonable lifestyle and insuring a serious effort to pay creditors by

eliminating "unnecessary and unreasonable expenses." In re Beckel, 268 B.R. 179, 183 (Bankr. N.D. Iowa 2001); In re Gleason, 267 B.R. 630, 633 (Bankr. N.D. Iowa 2001).

The second prong of the alternative test under § 523(a)(15) requires the Court to determine whether the benefit to Debtor is greater than the detriment to Plaintiff in discharging the debt. Fellner, 256 B.R. at 904. In balancing benefit versus detriment, the Court compares the relative standards of living of the parties. In re Lumley, 258 B.R. 433, 437 (Bankr. W.D. Mo. 2001). When a debtor's standard of living is greater than or equal to creditor's, discharge of the debt is not warranted. In re Williams, 210 B.R. 344, 347 (Bankr. D. Neb. 1997). Conversely, if the debtor's standard of living falls materially below that of the creditor's, a court may grant a discharge under § 523(a)(15). Id.

CONCLUSIONS

It appears clear that the temporary allowances order of August 10, 2000 was intended to be in the nature of support. In fact, Mr. Sturtz does not suggest otherwise. Nevertheless, the intent of the parties and the nature of the obligation is the true test of whether this is support. Clearly, it was intended to be temporary support and, in lieu of direct monetary payments, Debtor was directed to pay all family obligations as well as the house mortgage payment. He failed in part to do these things and, as a result, incurred an obligation of $4,825. It also appears clear that this was carried forward into the property settlement and became part of the $13,000. This Court, however, is required to determine whether or not the obligation itself is dischargeable. Once that determination is made, if the parties disagree as to the specific amount or if the decree itself is subject to interpretation, the total amounts owing are subject to clarification by the Iowa District Court.

The Court has applied the foregoing legal tests to these obligations. It is the determination of this Court that any obligation still unpaid and incorporated into the decree of dissolution from the temporary order is in the nature of support and is nondischargeable. Additionally, any spousal support or child support which was ordered for payment after the entry of the decree of dissolution and which has remained unpaid is also in the nature of support under 11 U.S.C. § 523(a)(5) and is, therefore, also nondischargeable.

The only real issue to evaluate is that portion of the $13,000 property settlement judgment which does not constitute support under bankruptcy law. This includes the portion of the $13,000 judgment remaining after subtracting the unpaid support obligations which were carried over into the judgment. The test to determine dischargeability is set forth in the conclusions of law and is defined by 11 U.S.C. § 523(a)(15). In this analysis, the portion of the $13,000 judgment which is not support is one not of a kind described in § 523(a)(5). As such, a rebuttable presumption of nondischargeability is created. It is the determination of this Court, based on the factual findings, that Debtor has historically been able to generate substantial income for himself and his family during the parties' marriage. While no real change has occurred in his health or his ability to earn income, he has been found in contempt on several occasions for willful failure to pay his obligations under the decree. It appears that Debtor has intentionally reduced his income in an attempt to create an illusion of inability to pay. It is the conclusion of this Court that, with increased motivation, Debtor could generate sufficient income with which to pay these obligations in a relatively short period of time.

The second prong of the test requires the Court to determine whether the benefit to Debtor is greater than the detriment to Plaintiff in discharging this debt. The former Mrs. Sturtz has significant health problems. Mr. Sturtz is in good health. Mrs. Sturtz, though she has health problems, continues to work and provide for herself and her son. If this debt were to be discharged, clearly the former Mrs.
Sturtz would suffer the greater detriment. This is particularly so since Mr. Sturtz has made a concerted effort to avoid his responsibilities as imposed under the decree of dissolution.

WHEREFORE, the complaint to determine dischargeability of debts pursuant to § 523(a)(5) and § 523(a)(15) is GRANTED.

FURTHER, Debtor has failed to prove, by a preponderance of evidence, an inability to pay, or that discharging the debt would result in a benefit to Debtor that outweighs the detrimental consequences to Mrs. Sturtz. Thus, those debts properly categorized as property settlement are nondischargeable pursuant to § 523(a)(15).

FURTHER, Debtor's obligation to provide support and those obligations properly categorized as support are excepted from discharge pursuant to § 523(a)(5).

SO ORDERED this 22nd day of April, 2003.

_____ PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE