UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
JOHN W. GOLLOWAY,	BANKRUPTCY CASE NO. 03-13160-WHD
Debtor.	
MARTHA CLARK,	
Plaintiff,	ADVERSARY PROCEEDING NO. 04-1706
v.	
JOHN W. GOLLOWAY,	
Defendant.	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

Currently before the Court is the "Complaint to Determine Dischargeability" filed by Martha Clark (hereinafter the "Creditor") against John Golloway (hereinafter the "Debtor"). The Creditor seeks a declaration that certain divorce-related obligations owed her by the Debtor are nondischargeable under § 523(a)(5) and (15) of the Bankruptcy Code.[1] After a half day of trial, the Court took this case under advisement. This matter falls within the

[1] The Complaint also contained an allegation that the Debtor's discharge should be denied pursuant to § 727(a)(3) of the Bankruptcy Code. However, the Creditor appears to have abandoned this count of her complaint by failing to refer to the count in the pre-trial order and by failing to present any evidence or argument to support the count at trial. Accordingly, this portion of the Complaint is hereby **DISMISSED**.

subject matter jurisdiction of the Court, *see* 28 U.S.C. §§ 157(b)(2)(I); 1334, and the following constitutes the Court's findings of fact and conclusions of law. *See* FED. R. BANKR. P. 7052.

FINDINGS OF FACT

The Creditor and the Debtor were divorced by entry of a final decree in the Superior Court of Clayton County, Georgia on or about August 2, 1994. Prior to entry of the divorce decree, the parties executed a Settlement Agreement.[2] The Creditor was awarded the "permanent care, custody, and control" of the parties' three minor children. (Settlement Agreement at § 3). Two provisions of the Settlement Agreement are applicable to the present controversy. First, section 4 of said agreement states that:

> Husband shall pay Wife for the support and maintenance of the minor children of the parties the sum of $925.00 per month for so long as child support is payable for three children. When child support is payable for two children, Husband shall pay Wife the sum of $825.00 per month for support and maintenance of said children. When child support is payable for one child, Husband shall pay Wife the sum of $666.00 per month for the support of that child. The payment for the support of each child shall terminate upon the death, marriage, emancipation, or attainment of age 18 of that child, PROVIDED, however, that child support shall continue for a child who has not previously remarried or become emancipated and who is enrolled in and attending a secondary school (high school), and who has attained the age of majority before completing his or her secondary school education and who is not yet 20 years of age. The payments made hereunder shall begin on July 1, 1994, and is payable on the first day of each month for so long as due hereunder. Husband shall receive a credit for his child support so long as he pays the mortgage payment in connection with the former marital home each month, and he has provided proof to Wife that he has made said payment.

---

[2] The Settlement Agreement was incorporated into the final divorce decree.

Settlement Agreement at § 4. Second, section 10 states that:

> The marital home of the parties . . . shall be in the exclusive use and possession of Wife. Husband shall remove his person and property therefrom within 60 days of the date hereof. Husband shall make the payments on the mortgage on said property in the amount of $957.00 per month (and late charges if paid late), until the property is sold.
>
> ***
>
> On or about January 1, 1995, the property shall be placed on the market for sale. . . . The net proceeds from the sale shall be divided equally between the parties. "Net proceeds" shall mean the sales price, less the balance on the mortgage(s), less reasonable closing costs and real estate commission(s).

Settlement Agreement at § 10.

From the time of the entry of the divorce decree, the Debtor paid the mortgage payment on the Creditor's home and did not pay child support directly to the Creditor. At some time prior to 2003, the Debtor began to fall behind on making the mortgage payment. Thereafter, the Debtor was injured on the job and later suffered a stroke. Subsequent to these medical problems, the Debtor considered filing for protection under the Bankruptcy Code. At that time, because two of the Debtor's children were no longer minors, the Debtor determined that, under the Settlement Agreement, he was permitted to pay the lower figure of $666 per month directly to the Creditor. The Debtor also stopped making the mortgage payment.[3]

---

[3] The parties presented no evidence as to how many mortgage payments have come due, how many mortgage payments were paid by the Debtor, or how much money the Debtor may have paid directly to the Creditor. Accordingly, the Court makes no finding of fact as to the amount of the debt owed by the Debtor to the Creditor.

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on November 18, 2003. On February 13, 2004, the Creditor filed the instant complaint, asserting that: 1) the Debtor had ceased making the mortgage payment, resulting in a significant arrearage owed to the mortgage creditor; and 2) the Debtor's obligation to pay the mortgage debt is in the nature of child support and is therefore a nondischargeable debt pursuant to § 523(a)(5). Alternatively, the Creditor contends that the debt is nondischargeable under § 523(a)(15).

CONCLUSIONS OF LAW

In order for a debt to be nondischargeable under § 523(a)(5), the creditor must establish that: 1) the debt at issue is owed to a "'spouse, former spouse, or child'" of the debtor; 2) the debt is "'actually in the nature of' (as opposed to simply designated as) alimony, maintenance, or support"; and 3) the debt was incurred "'in connection with a "separation agreement, divorce decree or other order of a court of record.'" *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (citing 11 U.S.C. § 523(a)(5)). In this case, the parties do not dispute the fact that the Debtor's obligation to pay the mortgage payment is a debt owed to a former spouse of the Debtor[4] or that the debt was incurred in connection with the parties' divorce decree. Accordingly, the Court need only determine whether the Debtor's obligation

[4] The fact that the payee of the mortgage payments was a third party is irrelevant to this issue. *See In re Maddigan*, 312 F.3d at 593 ("The fact that the debt is payable to a third party . . . does not prevent classification of that debt as being owed to [the debtor's] child.").

to pay the mortgage payment is "actually in the nature of support."

The question of whether a debt constitutes "support," within the meaning of § 523(a)(5), is a question of federal law. *In re Strickland*, 90 F.3d 444 (11th Cir. 1996). "Thus, a label placed upon the obligation by the consent agreement or court order which created it will not determine its subsequent dischargeability in bankruptcy." *In re Robinson*, 193 B.R. 367, 372 (Bankr. N.D. Ga. 1996) (Drake, J.). Instead the Court should consider the intent of the parties in including certain provisions within the settlement agreement. If the evidence suggests that the parties agreed to impose an obligation upon the debtor as a means of providing support for the parties' children or the debtor's former spouse, the Court should find that the obligation is in the nature of support. On the other hand, if the evidence suggests that the parties were attempting to divide the marital property or liabilities, the Court should find that the obligation is not in the nature of support. In determining the intent of the parties, it is helpful for the Court to consider such factors as: 1) whether the obligation is tied to a contingency, such as a child reaching the age of majority; 2) whether the obligation appears to have been imposed as a means of balancing the disparate incomes of the parties; 3) whether the obligation is payable in a lump sum or in installments; 4) the respective physical health of the spouses and their levels of education; and 5) whether there was an actual need for support at the time of the divorce. *Id.* The burden of proof on the issue of whether a debt is nondischargeable under § 523(a)(5) rests with the creditor. *Id.*

Having considered the provisions of the Settlement Agreement and the testimony of the parties in light of the above-referenced factors, the Court concludes that the parties

intended to award child support to the Creditor in the specific amounts listed within section 4 of the Settlement Agreement and intended this amount to decrease as the parties' minor children became able to support themselves. The Creditor has argued that, by including the language in section 4 entitling the Debtor to receive a credit in the amount of any mortgage payments made, the parties intended to convert the Debtor's obligation to pay the mortgage into an obligation to pay child support and, in that manner, changed the amount of child support due to $957 per month. In other words, the Creditor's position is that, by choosing to pay the mortgage instead of giving her cash for the child support, the Debtor agreed to pay $957 per month instead of $925 per month, and agreed that he would not benefit from any reduction in the amount of child support due as each child reached the age at which he or she could provide for his or her own support.

This position requires the Court to ignore the structure of the Settlement Agreement, as well as the fact that the Debtor was under a separate obligation, placed in section 10 of the Settlement Agreement, to pay the mortgage. In effect, he could not have chosen to simply pay the $925 directly to the Creditor and not pay the mortgage payment. The structure of the Settlement Agreement suggests that the parties intended the Debtor to pay the mortgage payment until the Creditor sold the house, receive a credit in the amount of payments made against the amounts due under section 4, and, at the time he no longer had to pay the mortgage payments because the house had been sold, resume making the payments directly to the Creditor, as called for under section 4.

Additionally, the Court finds that the parties included the Debtor's obligation to pay

the mortgage payment until the marital home could be sold strictly as a means of dividing the marital property and liabilities and not as a means of providing additional child support or spousal support to the Creditor.[5] This conclusion is supported by the fact that the Debtor was granted a credit for paying the mortgage against the child support otherwise due to the Creditor. This indicates that the intent of the provision placed in section 10 was merely to keep the mortgage current until the house could be sold and the proceeds divided equally. Additionally, the fact that the Settlement Agreement contemplated that the Creditor would soon sell the marital home supports this finding. The time during which the Debtor was supposed to have to pay the mortgage was not tied to any contingency related to the ages or educational or marital status of the children. It seems to the Court that, if the parties intended the full mortgage payments to be made as a means of providing child support, the parties would have provided for the Creditor to retain the home and the Debtor to continue paying the mortgage for as long as the parties' minor children continued to reside in the home. For these reasons, the Court must conclude that the Debtor's obligation to pay the mortgage payment is not "in the nature of support" within the meaning of § 523(a)(5).

That being said, it is clear that the Debtor's obligation to pay child support in accordance with section 4 of the Settlement Agreement is "in the nature of support" within the meaning of § 523(a)(5). The total amount due under that section, calculated by considering the decreasing amount due as each child reached the age of majority, less a

---

[5] The Creditor admitted during trial that she was not awarded any alimony under the terms of the Settlement Agreement.

credit for any amount that the Debtor paid on the mortgage on the Creditor's home, shall be nondischargeable in accordance with § 523(a)(5).

However, there remains a question as to whether the Debtor's separate obligation to pay the mortgage payments is nondischargeable under § 523(a)(15). Section 523(a)(15), which was added to the Bankruptcy Code in 1994, operates to make all divorce-related obligations subject to a presumption of nondischargeability. *Cleveland v. Cleveland (In re Cleveland)*, 198 B.R. 394, 397 (Bankr. N.D. Ga. 1996) (Drake, B.J.). Section 523(a)(15) provides as follows:

> (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–
>
> (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). This statute was designed to make it more difficult for a debtor to discharge divorce-related debts. *Smolinski v. Arnott (In re Arnott)*, 210 B.R. 651, 655 (Bankr. S.D. Fla. 1997); *Anthony v. Anthony (In re Anthony)*, 190 B.R. 433, 436 (Bankr.

N.D. Ala. 1995). Notwithstanding that purpose or intent, § 523(a)(15) is limited in two respects. First, the exception does not apply if a debtor lacks "the ability to pay" the marital debts. Second, the exception does not apply if a discharge would benefit the debtor more than it would harm the creditor. Inasmuch as § 523(a)(15) is phrased in the disjunctive, a debt must be discharged if a debtor meets either of the two exceptions. Regarding the burden of proof in a § 523(a)(15) case, the "creditor bears the initial burden of establishing that the debt owed to it actually arose in connection with a divorce or separation agreement." *Cleveland*, 198 B.R. at 397. "From and after that point, however, the burden of coming forth shifts to the debtor, thereby requiring him to demonstrate either (1) that he lacks the ability to pay the debt in question from income and property not necessary for the support of himself and his dependents, or (2) that the allowance of a discharge would produce benefits exceeding any consequent harm to the Creditor." *Id.* at 397-98; *see also Simons v. Simons (In re Simons)*, 193 B.R. 48, 50 (Bankr. W.D. Okla. 1996).

That the Debtor's obligation to pay the mortgage payment arose by virtue of a divorce decree is undisputed. Thus, the burden shifts to the Debtor to prove that an exception to § 523(a)(15) applies. At trial, the Debtor presented some testimony that appeared to focus on the "ability to pay" exception. *See* 11 U.S.C. § 523(a)(15)(A). This Court has previously held that the proper focus of the "ability to pay" analysis is the totality of a debtor's financial circumstances, with an emphasis on the following factors:

(1) the debtor's "disposable income" as measured at the time of trial;
(2) the debtor's opportunities for more lucrative employment;
(3) the extent to which the debtor's burden of debt will be lessened in the near term; and
(4) the extent to which the debtor previously has made a good faith effort to fully employ himself and to satisfy the debt in question.

Cleveland, 198 B.R. at 398; *Humiston v. Huddelston (In re Huddelston)*, 194 B.R. 681, 688 (Bankr. N.D. Ga. 1996) (Drake, B.J.). In so holding, the Court reasoned that "[a]bsent such an expansive inquiry, no certain conclusion may be had regarding the debtor's true capacity to satisfy those debts which came as a consequence of his divorce." *Huddelston*, 194 B.R. at 689.

The Debtor testified that, at the time he filed his bankruptcy petition, he had lost his job, had suffered significant medical problems, and could not afford to make the mortgage payment. However, the Court cannot assume that the Debtor's present or future situation is or will be similar to that in which he found himself at the time of the filing. Therefore, the record is lacking with regard to evidence concerning the Debtor's disposable income, current employment and possibilities for more lucrative employment, and the likelihood of any future decrease in his expenses. Additionally, the Debtor produced no evidence to support a finding that the discharge of his obligation to pay the mortgage payments would produce benefits to him that outweigh any consequent harm to the Creditor. That being the case, the Court can only conclude that the Debtor has failed to meet his burden of producing evidence pertinent to the § 523(a)(15) analysis. Accordingly, the Court finds that the Debtor's obligation to pay mortgage payments under section 10 of the Settlement Agreement

is nondischargeable pursuant to § 523(a)(15) of the Bankruptcy Code.

The Court makes no finding as to whether the Debtor has satisfied his obligation to pay the mortgage payment, or whether or when he should have been relieved of that obligation due to the fact that the Creditor has not performed her obligation under the Settlement Agreement to sell the marital residence and has not provided the Debtor his one half of the net sale proceeds. The parties have informed the Court that the Debtor has filed a petition for modification of the Settlement Agreement in Superior Court of Clayton County, Georgia.[6] Because the Court has declined to address the issue, the parties shall be free to obtain a determination from the state court as to whether the Debtor owes any amount under section 10 of the Settlement Agreement or whether he has satisfied that obligation by making the mortgage payments long after the Creditor was supposed to have sold the house. The parties have also indicated their agreement that, if they are unable to stipulate to the amount of the child support due in accordance with section 4, taking into consideration the reduction in the monthly amount due as the children reached the age of majority and a credit for the amount of the mortgage payments made by the Debtor, the state court should determine the amount due.

Any amounts determined to be due and owing, either by the state court or by stipulation of the parties, either for child support incurred in accordance with section 4, or as mortgage payments incurred under section 10, shall be nondischargeable pursuant to

---

[6] The Creditor has also filed a voluntary petition under Chapter 13 of the Bankruptcy Code. *See* Case Number 03-71330-CRM. However, the Debtor has been granted relief from the automatic stay in the Creditor's case to file the petition in state court.

§ 523(a)(5) and (a)(15) respectively.

CONCLUSION

Having given this matter its careful consideration, the Court concludes that the Creditor is entitled to the relief requested in her complaint. The Debtor's divorce-related obligations owing to the Creditor are nondischargeable in bankruptcy pursuant to 11 U.S.C. §§ 523(a)(5) and (15). A judgment in favor of the Creditor shall be entered.

IT IS SO ORDERED.

At Newnan, Georgia, this 19 day of January, 2005.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE