

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
DANNY RAY SWANER,) Bankruptcy Case No. 88-41031
)
Debtor.)

NENA LOUISE SWANER,)
)
Plaintiff,)
)
vs.) Adversary Case No. 88-0309
)
DANNY RAY SWANER,)
)
Defendant.)

O P I N I O N

The issue before the Court in this matter is whether an obligation of the Debtor contained in the parties' Marital Settlement Agreement dated May 23, 1988, (Plaintiff's Exhibit #1), constituted a payment in the nature of alimony or child support to Debtor's former spouse, (Plaintiff), such that said obligation would be rendered non-dischargeable under 11 U.S.C. §523(a)(5).

A Judgment of Dissolution of Marriage of the parties was entered in the Circuit Court of Crawford County, Illinois, on May 23, 1988. The Judgment incorporated the parties' Marital Settlement Agreement which contained the following provision:

"HUSBAND shall pay unto WIFE, through the Circuit Court of Crawford County, Illinois, the sum of \$100.00 each month for a period of 3 1/2 years from August 1, 1987, said sum being in lieu of any maintenance, and to be applied toward payment of the car loan at the First National Bank of Oblong."

On November 4, 1988, the Debtor filed his Chapter 7 bankruptcy

petition in which he sought to be discharged from the indebtedness created by the parties' Judgment of Dissolution as fully-set forth above. On December 27, 1988, the plaintiff filed the instant adversary alleging that the debt in question was non-dischargeable under 11 U.S.C. 5523(a)(5) as it was in the nature of alimony or child support. Trial was held in this matter on April 28, 1989, at which time the parties appeared together with their counsel and presented sworn testimony and evidence. The Court has now had an opportunity to review the pleadings and the evidence and finds that the facts of this case are not substantially in dispute and are in pertinent part as follows:

1. The parties were married on October 25, 1980.
2. Two children were born to the parties as a result of the marriage, namely: Travis Swaner, age 7; and Danyel Swaner, age 4. The parties have joint custody with the physical custody in the plaintiff subject to every other weekend visitation of the Debtor.
3. At the time of the dissolution of marriage, both parties were represented by counsel and the matters of property settlement, child support, and maintenance were resolved by agreement between the parties without the necessity of a contested court hearing.
4. At the time of the dissolution, the Debtor was employed by ChemLink Petroleum and had an approximate net pay of \$1,570.00 per month; the Plaintiff was also employed, earning approximately \$522 net per month.
5. Under the parties' Marital Settlement Agreement, the

Debtor agreed to pay-plaintiff \$400 per month as and for child support and also to pay \$94.94 per month as reimbursement for the health insurance costs of the children. The \$100 per month payment at question here was to be paid in addition to these payments.

6. As a part of the Marital Settlement Agreement, the Debtor assumed certain debt obligations of the parties which amounted to approximately \$6,500. The Plaintiff assumed the debt obligation on a 1984 Mercury Marquis of \$12,500. The Debtor agreed to pay \$4,000 on this debt per the settlement provision now before this Court.

7. The monthly expenses of the Plaintiff total approximately \$1,523.44, (Plaintiff's Exhibit #3), including Plaintiff's car payment totalling \$336.44 per month.

As indicated above, this matter is controlled by 11 U.S.C. §523(a)(C)(5) which provides that an indebtedness to a former spouse for alimony, maintenance, or support of the spouse or the children of the parties which is memorialized in a divorce decree is not dischargeable. However, the division of marital property pursuant to a divorce decree is treated as a debt dischargeable in bankruptcy. In re Coil, 650 F.2d 1170, 1171 (7th Cir. 1982); In re Maitlen, 658 F.2d 446, 478 (7th Cir. 1981).

The factors to test whether a property settlement agreement is in the nature of alimony, maintenance, or support include the following:

1. Whether the settlement agreement includes payment for the ex-spouse;
2. Whether there is any indication that provisions within the agreement were intended to balance the relative income of

the parties;

3. The position of the assumption to pay debts within the agreement;
4. The character or method of payment of the assumption;
5. The nature of the obligation;
6. Whether children resulted which had to be provided for;
7. The relative future earning power of the spouse;
8. The adequacy of support absent debt assumption;
9. The parties, understanding of the provisions;
10. The label of the obligations;
11. The age of the parties;
12. The health of the parties;
13. Existence of "hold harmless" or assumption terminology;
14. Whether the assumption terminated upon death or remarriage;
15. Whether the parties had counsel;
16. Whether there was a knowing, voluntary, and intelligent waiver of rights;
17. Length of the marriage;
18. Employment of the parties;
19. The demeanor and credibility of the parties;
20. Other special or unique circumstances of the parties.

See, In re Seidel, 48 B.R. 371 (Bankr. C.D. Ill. 1984); In re Woods, 561 F.2d 37 (7th Cir. 1977), In re Maitlen, 658 F.2d 466 (7th Cir. 1981), In re Coil, 680 F.2d 1170 (7th Cir. 1982), In re Marriage of Lytle, 105 Ill. App.3d 1095, 61 Ill. Dec. 826, 435 N.E.2d 522 (1982), and In re Calhoun, 715 F.2d 1103 (6th Cir. 1983).

In deciding this matter, the Court has carefully considered the applicable factors stated above. While no one factor is controlling, the Court finds that in the instant case there is a combination of factors which leads the Court to determine that the debt in question is dischargeable under 11 U.S.C. §523(a)(5). As is more fully discussed below, this Court finds that the debt in question has the nature and effect of a division of marital debt in connection with division of marital property rather than alimony or child support.

First, the Court considers whether the assumption of the instant indebtedness had the effect of balancing the income of the parties. The Court finds that in this case the debt assumption did not serve to balance the income of the parties, but, in fact, gave the Debtor a net income somewhat lower than that of the Plaintiff. The Court further finds that the Debtor's child support and insurance payments amounted to approximately 31% of his net income, an amount substantially above the 25% minimum support guideline under Illinois Statutes. When the \$100 payment is added to these payments, it becomes evident that Debtor was paying nearly 38% of his income to the plaintiff under the terms of the parties' Marital Settlement Agreement. Based upon these computations, the Court further finds that the support paid by Debtor was adequate absent the \$100 payment.

The Court next considers whether the obligation was in the nature of a debt assumption. Absent the assumption in question, the Plaintiff assumed approximately \$12,500 in debt and Debtor assumed approximately \$6,500 in debt under the Marital Settlement Agreement. Upon the assumption of the \$100 payment, the Debtor in effect assumed

\$10,500 in debt, leaving Plaintiff with approximately \$8,500 in debt. From this, the Court is convinced that the parties intended to balance and divide debt in settlement of their property matters rather than balance income so as to provide additional support for Plaintiff and/or her children.

In addition to the factors already discussed, the Court further finds other factors which in combination with those discussed lead this Court to its determination. The Court finds that, at the time of the parties' dissolution, both were competently represented by counsel. There is a clear indication that maintenance was waived by plaintiff in a knowing, voluntary manner, and that the Debtor never agreed to pay maintenance. The assumption language clearly states that the payment was to be "in lieu of maintenance" and there is no indication the parties intended that the assumption would terminate upon death or remarriage, which is generally the case where a payment is intended to be alimony or maintenance. Finally, the Court notes that the parties in this case are both young and healthy; each with the ability and potential to be employed and increase their incomes in the future. These factors, together with those previously enumerated, point to an intended debt division rather than supplementary maintenance in the opinion of this Court.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure

ENTERED: May 16, 1989.

/s/ GERALD D. FINES
U.S. Bankruptcy Judge

