

Not intended for publication

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

DANNY COBB,

CASE NO. 97-12854

Debtor.

Chapter 7

JOY COBB,

Plaintiff,

v.

Adv. Pro. No. 97-5342

DANNY COBB,

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT EXCEPTING DEBT TO JOY COBB
FROM DISCHARGE**

The Plaintiff, Joy Cobb, filed this complaint seeking to except from discharge various debts the debtor, Danny Cobb, agreed to pay to or on behalf of the plaintiff in the parties' marital dissolution agreement. The plaintiff contends that the debts in question are in the nature of alimony, maintenance and support or, in the alternative, arose in connection with her divorce from the debtor defendant and, thus, are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5) and/or (15). The Court conducted a trial in this matter on July 20, 1998. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The parties to this proceeding were married in 1970 and had one son, Danny Mac Cobb, Jr.. Danny Mac was born on January 31, 1987. After the birth of their son, Joy Cobb did not work outside the home. Instead, she stayed home to take care of the child and, when he was old enough, to home-school him.

Six years after their son's birth and nearly twenty-four years after they were married, the parties began to experience some difficulties in their marriage and decided to separate. To facilitate this separation, the parties entered into a Marital Dissolution Agreement ("MDA"). The MDA was executed

on September 23, 1993 and provided that the debtor/defendant, Danny Cobb, would pay, among other things:

1. [T]he sum of \$150.00 per week for the support and maintenance of the parties' child, Danny Mac Cobb, Jr.
2. [T]he sum of \$150.00 per week as alimony until the minor child, Danny Mac Cobb, Jr., reaches the age of 18 years or until the Wife shall remarry.
3. [O]ne-half of any medical, dental, optometric and pharmaceutical expenses of the child not covered by insurance.

MDA ¶¶ 3, 4, and 5. In addition to these periodic payments, the MDA also required the debtor/defendant to convey his interest in the family residence, located at Route 2, Kimery Store Road, Greenfield, Tennessee, to the plaintiff and to "assume and pay the mortgage indebtedness on the residence, and . . . to hold the Wife harmless from the collection of this debt." MDA ¶ 6. Pursuant to the terms of the MDA:

[w]hensoever the Husband is required . . . to assume responsibility for paying certain debts and/or indemnify and hold the other party harmless from any liability therefor, such obligation shall be deemed to be a support obligation under 11 U.S.C. Section 532(5) [sic] which is not dischargeable in bankruptcy as to the other party.

MDA ¶ 14. Under the MDA, Joy Cobb also received sole possession of the couple's 1988 Ninety -Eight Oldsmobile automobile. On January 12, 1994, the Chancery Court of Weakley County issued a Final Decree of Divorce to the Cobbs. This decree incorporated the provisions of the parties' MDA.

According to the testimony at the trial, Danny Cobb is current on his child support payments to Joy Cobb with the exception of one half of the child's medical expenses for 1997 and 1998. The proof at trial established that Danny Cobb's portion of these expenses is \$571.64.

In direct contrast to his continued payment of his child support obligation, Danny Cobb has fallen seriously behind on his alimony payments to the plaintiff. As of the date of the trial in this matter, the alimony arrearage was \$7950.00. Pursuant to the terms of the MDA, these alimony payments were to continue until the parties' child reaches the age of eighteen or until Joy Cobb remarries. Neither of these events has occurred so as to relieve Danny Cobb of his obligation to pay.

For some time after the divorce, Danny Cobb abided by the parties' agreement regarding the \$641.83 monthly mortgage payments. By November 1997, however, the mortgage was in default and the Bank of Sharon was forced to foreclose on the Kimery Store Road property. As of the date of the foreclosure, \$38,513.55, plus interest and expenses, was owed on the house and lot. According to the testimony of the Bank's Branch Manager, there was a deficiency balance of \$12,775.03 on the house after the sale. Joy Cobb and her son are currently renting another house in Greenfield for

\$295.00/month. Joy Cobb testified that she believed that the value of the Kimery Store Road property was \$35,000 at the time of the foreclosure.

Until August 1997, Joy Cobb did not have an outside source of income. Currently she is making \$256.00 per week; however, Joy Cobb's ability to earn an outside income is seriously impeded by her current medical condition. Joy Cobb suffers from cervical cancer and lung cancer. The radiation she has received for these cancers has caused her to develop colitis. She also experiences breathing problems as a result of the cancer. At the time of trial, Joy Cobb's overall condition was deteriorating.

According to her expense and income statement submitted at trial, Joy Cobb's monthly income is \$1374.00. This includes the \$645.00 in monthly child support payments from Danny Cobb. Joy Cobb's current monthly expense budget is \$1654.00. This includes the \$295.00 rent payment, \$200 for food, \$175.00 for ongoing medical and drugs, and several sums for the support of the couples' son. Joy Cobb also pays \$50.00 a month towards her unpaid medical bills which, according to her testimony, total several thousand dollars. Joy Cobb also testified at trial that the 1988 Oldsmobile vehicle she received in her divorce from Danny Cobb needs a substantial amount of work.

Although Danny Cobb is not rich by anyone's standards, he does earn substantially more money per month than does his ex-wife. Danny Cobb's Schedule I reflects a monthly gross income for the debtor of \$1733.00. According to the Schedule, \$260.00 is deducted from this gross for payroll taxes and social security and \$656.60 is deducted for insurance.¹ Danny Cobb's Schedule J, reflects total monthly expenses of \$2315.00. This figure includes the monthly child support payment Danny Cobb makes to Joy Cobb for the couples' son. These monthly expenses do not include any rent or house payments, nor do they include any car payments. According to the debtor's testimony at trial, he currently lives in a house which was deeded to his current wife when her previous husband died.² Danny Cobb also

¹ In examining the documents submitted at trial, the Court was unable to locate any other exhibit which corroborates Danny Cobb's claim of \$656.50/month being deducted from his gross salary for insurance. Danny Cobb's pay stub for the week ending July 3, 1998, shows \$0.42 deducted for dependent insurance and \$6.93 deducted for self insurance. The year to date totals on this pay stub reflect \$11.76 for dependent insurance, \$194.04 for self-insurance, and \$84.20 for medical insurance. While the Court makes no findings today regarding the accuracy of Danny Cobb's Schedule I, it does elect to amend the deductions for insurance from \$656.50 to \$50.00 for purposes of this adversary proceeding.

² The house was transferred to the current wife's children shortly before Danny Cobb filed his bankruptcy petition.

testified at trial that his employer furnishes him a 1995 Nissan Pickup truck to drive for work.

Danny Cobb's current wife is June Cobb. She and Danny Cobb married almost immediately after Danny and Joy Cobb divorced. June Cobb is currently employed as a nurse at Milan General Hospital. She grosses an average of \$1540.00 per month at that job. When added to Danny Cobb's monthly gross, the debtor's household earns \$3273.00 a month. According to an affidavit of assets and liabilities presented to the Court as an exhibit to the trial, Danny and June Cobb's monthly expenses total \$2048.25.³

At the trial, Danny Cobb testified that at the time of executing the MDA, he knew he could not pay everything the agreement required of him, but he agreed to the stipulations because he wanted out of the marriage. Danny Cobb does not dispute that he owes Joy Cobb the \$150.00 in weekly alimony payments and the \$7950.00 in alimony arrears. He also does not dispute the \$35,000 value of the house. What he does contend is that he simply does not have the present ability to pay the alimony and the expenses associated with the foreclosed home.

Danny Cobb originally filed for bankruptcy relief under Chapter 13 on August 5, 1997. Subsequently, on October 14, 1997, he converted the case to a Chapter 7. Joy Cobb filed the instant adversary proceeding on December 18, 1997. In her complaint, Joy Cobb alleges that the current alimony payments and the arrearage are non-dischargeable under 11 U.S.C. § 523(a)(5). She also contends that the payments Danny Cobb was supposed to make on the family home are non-dischargeable under 11 U.S.C. § 523(a)(5). Because the house has already been foreclosed upon, Joy Cobb is asking the Court to find that Danny Cobb owes her the value of the house, \$35,000.00, and that this amount be non-dischargeable under 11 U.S.C. § 523(a)(5). She also asserts that the deficiency balance owing to the bank on the house is the responsibility of Danny Cobb and that this amount is also non-dischargeable under § 523(a)(5). Lastly, Joy Cobb alleges that Danny Cobb's share of their sons medical expenses in the amount of \$571.64 is non-dischargeable under § 523(a)(5). In the complaint, Joy Cobb contends that all of the above-listed debts are non-dischargeable under § 523(a)(15).

³ This figure includes \$656.68 in monthly car payments on June's 1994 Grand Prix and Danny's truck. Because Danny Cobb's testimony was that his employer pays for his truck, the Court feels that this figure may be inaccurate.

II. CONCLUSIONS OF LAW

The plaintiff seeks to have the various debts owed to her by the debtor/defendant declared non-dischargeable pursuant to § 523(a)(5) and/or (15). Section 523(a)(5) of the Bankruptcy Code provides that:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-

. . .
(5) to a spouse, former spouse, or child of the 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, determination made in accordance with State or territorial law by a governmental unit, 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). For a debt to be non-dischargeable under § 523(a)(5), it must be one that (1) is owed to a spouse, former spouse or child of the debtor; (2) has not been assigned to another entity, except pursuant to section 402 of the Social Security Act; (3) arose in connection with a divorce decree, separation agreement, property settlement agreement, order of a court of record or determination made by a governmental unit with state or territorial law; and (4) is “in the nature of alimony, maintenance or support.” See *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983). This requirement that payments be “in the nature of alimony, maintenance or support” was designed to avoid excepting from discharge debts which are actually property settlements disguised as support obligations. *Calhoun*, 715 F.2d 1103.

Agreements which are designated as “alimony, maintenance or support” and which meet some threshold definition of these terms, are generally found to be non-dischargeable under § 523(a)(5). *Fitzgerald*, 9 F.3d 521. Payments which are to cease upon the wife’s remarriage are typically found to be alimony. *Id.*

In the case at bar, the \$150.00 weekly payment Danny Cobb is required to make to Joy Cobb pursuant to the terms of the MDA and divorce decree is designated in the MDA as “alimony.” See MDA ¶ 4. Also, the debtor/defendant did not dispute that he owes Joy Cobb the \$150.00 as “alimony” at trial. As a result of these two factors, the Court finds that both the \$150.00 weekly alimony payment and the alimony arrearage owed to Joy Cobb are non-dischargeable under 11 U.S.C. § 523(a)(5).

The Court also finds that the sharing of medical expenses for the Cobbs' son to be "in the nature of alimony, maintenance or support." Consequently, the Court finds Danny Cobb's obligation to pay these expenses in the amount of \$571.64 to be non-dischargeable pursuant to § 523(a)(5). Although not mentioned in Joy Cobb's complaint, the Court also finds the debtor's \$150.00 weekly child support obligation to be non-dischargeable under § 523(a)(5).

With regard to the MDA's requirement that Danny Cobb continue making the monthly mortgage payments on the Kimery Store Road property, this Court must engage in a more detailed analysis of the facts of the case. As mentioned in the Findings of Fact portion of this opinion, the Cobbs' MDA contained a provision which stated that:

Whenever the husband is required by the terms of this Marital Dissolution Agreement to assume responsibility for paying certain debts and/or indemnify and hold the other party harmless from any liability therefor, such obligation shall be deemed to be a support obligation under 11 U.S.C. §532(5) [sic] which is not dischargeable in bankruptcy as to the other party.

MDA ¶ 14. At trial, the plaintiff asserted that by virtue of this language, the requirement that the debtor continue to make the monthly mortgage payment is "in the nature of alimony, maintenance or support." In the case of *Fitzgerald*, the Sixth Circuit dealt with the issue of whether "something denominated as alimony is really alimony and not, for example, a property settlement in disguise." *Id.* at 521. Even though an obligation may be designated as alimony or support, a Court faced with deciding a dischargeability issue must analyze the debt to see if it actually is "in the nature of support." *Id.*

_____ In the parties' MDA, all support obligations are discussed in ¶¶ 3, 4, and 5. Paragraphs 8, 9, 10, 11, and 12 all speak to the property settlement between Joy and Danny Cobb. Paragraphs 6 and 7 discuss which properties each party is to receive. Paragraph 6 states that Joy Cobb will get the family residence and Paragraph 7 states that Danny Cobb will get the rental property at the same location. As a result of these conclusions, the Court finds that the debt owed on the house by Danny Cobb is not in the nature of alimony, support or maintenance, but rather is simply a division of property, and § 523(a)(5) does not apply.

Although § 523(a)(5) does not apply to the debtor's obligation with respect to the family residence, the Court may still except the debt from discharge under subsection (a)(15) of § 523. This subsection excepts from discharge 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). Section 523(a)(15) has the effect of making 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). In a non-dischargeability action under this section, the plaintiff must prove by a preponderance of the evidence that (1) the debt is not a debt which is nondischargeable under § 523(a)(5) and (2) the debt was incurred “in the course of divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record” in order for it to be non-dischargeable. *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 391 (Bankr. W.D. Tenn. 1996). Once the debtor meets this hurdle, the burden shifts to the debtor who must either prove an inability to pay the debt under § 523(a)(15) or that a discharge of the debt would result in a benefit to the debtor that outweighs the detrimental consequences of a discharge to the spouse, former spouse, or children of the debtor under § 523(a)(15). *Id.*

In the case at bar, the debtor is currently obligated to pay \$150.00 per week for child support and \$150.00 per week for alimony. When added together, these payments amount to \$1290.00 per month. Danny Cobb grosses \$1733.00 per month, which leaves him \$443.00 per month for living expenses before taxes and insurance are deducted from his paycheck. Money for the alimony arrearage must also come out of this \$443.00. In light of these figures, the Court has no choice but to find that Danny Cobb does not have the ability to pay Joy Cobb \$35,000.00 for the value of the foreclosed home. The Court also finds that Danny Cobb does not have the ability to pay the deficiency balance for the home to the bank. As a result, these two debts may not be excepted from discharge pursuant to § 523(a)(15).

The Court notes that the decision regarding the dischargeability of the house debt was a difficult one to make. The Court understands that Joy Cobb is in a dire financial situation, but it cannot do something which the Bankruptcy Code prohibits and which would leave the debtor with no income. Section 523(a)(15) simply states that if the debtor does not have the ability to pay the debt, then it must

be discharged. The Court will award Joy Cobb pre- and post-petition interest on the alimony arrearage and will award Joy Cobb costs in this matter. The Court also awards Joy Cobb reasonable attorney's fees. An order will be entered in accordance herewith.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Complaint Excepting Debt from Discharge is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. The \$150 weekly debt owed by the Debtor/Defendant to the Plaintiff for alimony is excepted from the debtor's discharge.
2. Any and all alimony arrearage owed by the Debtor/Defendant to the Plaintiff is excepted from the debtor's discharge.
3. The medical expenses owed by the Debtor/Defendant on behalf of the parties' minor child in the amount of \$571.64 is excepted from the debtor's discharge.
4. The \$150 weekly debt owed by the Debtor/Defendant to the Plaintiff for child support is excepted from the debtor's discharge.
5. The loss to the Plaintiff resulting from the foreclosure on the family residence located at Rt. 2, Kimery Store Road, Greenfield, TN, is discharged.
6. The deficiency indebtedness owing to the Bank of Sharon by the Debtor/Defendant is discharged.
7. The Debtor/Defendant is ordered to pay pre- and post-petition interest on the alimony arrearage and the past-due medical expenses to the Plaintiff.
8. The Debtor/Defendant is ordered to pay the costs of this cause and a reasonable attorney's fee to the Plaintiff for representation in this matter.

IT IS SO ORDERED.

By the Court,

G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: September 28, 1998