UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 7
DWIGHT C. McDOWELL,	:	
Debtor	:	Case No. 98-54657 RFH
DWIGHT C. McDOWELL,	:	
Plaintiff	:	
vs.	:	
CAROLYN J. McDOWELL,	:	
Defendant	:	Adversary Proceeding No. 98-5101

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Plaintiff: WESLEY J. BOYER
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For Defendant:

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MEMORANDUM OPINION

Dwight C. McDowell, Plaintiff, filed on November 3, 1998 a Complaint to Determine Dischargeability of Debt. Carolyn J. McDowell, Defendant, filed a response on January 28, 1999. A trial was held on February 8, 2000. The Court, having considered the evidence presented and the arguments of counsel, now publishes this memorandum opinion.

FINDINGS OF FACT

Plaintiff and Defendant were married in 1972. They resided in Albuquerque, New Mexico. Plaintiff was a lieutenant colonel in the United States Air Force. Defendant was an accountant with the Department of Defense. In 1973 Plaintiff was transferred to the Air Force base in Warner Robins, Georgia. Defendant was transferred to Atlanta, Georgia. Plaintiff retired from the Air Force in 1975. Plaintiff entered the real estate business about two years later. In 1979, Defendant moved to Warner Robins and resided with Plaintiff.

Defendant moved to Colorado in the summer of 1986. Plaintiff moved to Colorado some time later. In 1992 Plaintiff began spending most of his time in Georgia developing his real estate business. Plaintiff and Defendant began talking about a divorce in the summer of 1994. Defendant met with a divorce attorney on July 6, 1994.

Defendant filed for divorce in Boulder, Colorado, on August 25, 1994. The Colorado state court held a hearing on April 19, 1995. Defendant appeared and was represented by counsel. Plaintiff's counsel made a limited appearance. Plaintiff decided not to appear at the hearing for two reasons. First, Plaintiff was at a "critical stage" in a construction project. Second, Plaintiff's counsel had presented a "worse-case scenario" as to how Plaintiff probably would fair in the divorce proceeding. Plaintiff considered the worse case scenario to be acceptable.

The divorce proceeding did not go as Plaintiff had anticipated. The state court held that it had jurisdiction over the marriage of Plaintiff and Defendant, their property located in Colorado, and spousal support issues. The state court held that it did not have jurisdiction to divide any property that was located outside of Colorado.

The state court heard testimony from Defendant concerning her financial needs and Plaintiff's financial resources. The state court determined that Defendant needed

an additional $1,979 per month to meet her financial needs. The state court determined that Plaintiff had the financial resources to pay that amount.

In reaching its decision, the state court noted that Plaintiff and Defendant had been married for twenty-two and one-half years; Plaintiff was seventy-one years old; Plaintiff's monthly military pension and social security benefits totaled at least $4,400; Plaintiff had income from his real estate business; Defendant was fifty-seven years old; Defendant was still working for the Department of Defense as an accountant; Defendant's gross monthly income was $4,454 and her net monthly income was $2,561; Defendant was withdrawing $407 from her savings each month to help meet her expenses; Defendant's monthly expenses were $4,947; Plaintiff and Defendant had no children from their marriage;[1] the style of living Plaintiff and Defendant enjoyed during the marriage; and Defendant was suffering from health problems.

Defendant's counsel urged the state court to make a lump-sum maintenance award. Defendant's counsel argued that it would be very difficult for Defendant to collect a monthly maintenance award. Defendant's counsel argued that Plaintiff had been uncooperative, that Plaintiff was an out-of-state resident, and that Plaintiff did not have a job subject to

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[1] Plaintiff and Defendant both had adult children from prior marriages.

garnishment.

A certified public accountant testified that a lump-sum award of $652,591.40 would be needed to produce a monthly income stream of $1,979. The accountant, in his testimony, took into account Defendant’s life expectancy, interest, taxes, and the cost-of-living increases.

The state court awarded Defendant $652,591.40 as maintenance in gross. The maintenance in gross is to terminate upon Defendant’s remarriage or death, but not upon Plaintiff’s death. The state court held that its award represented spousal support and that it was taxable to Defendant and tax deductible by Plaintiff. The state court stated that it believed that Plaintiff would not cooperate in making monthly maintenance payments and that Defendant should not be burdened with having to pursue monthly collection proceedings.

The state court also awarded Defendant the following property, which was located in the state of Colorado: the marital residence, the household furnishings and the personal property in the marital residence, two cars, certain bank accounts, a Dean Witter account, a life insurance policy, a country club membership, and Defendant’s federal employee pension.

Plaintiff has filed several motions and appeals to overturn the lump-sum maintenance award. Plaintiff’s efforts

have not been successful. Plaintiff has an appeal pending in the Colorado court system.

Defendant has collected some money from Plaintiff's military pension and social security benefits. Defendant has reported, as taxable income, the funds that she has collected. Plaintiff testified that he put some funds in "offshore" accounts so the funds would be out of the reach of his creditors.

The Boulder District Court, Boulder County, Colorado, entered on December 29, 1997 an Order Re: Division of Marital Property.[2] Plaintiff and Defendant both were represented by counsel. The state court awarded to Plaintiff all the Georgia marital property. The state court ordered Plaintiff to pay $300,000 to Defendant as a lump-sum property settlement award. The state court amended its order on March 26, 1998. The amended order increased to $310,000 the property settlement award. Plaintiff made payments to Defendant of $80,000 in April 1998 and $235,000 in September 1998.

Plaintiff filed a petition under Chapter 7 of the Bankruptcy Code on October 26, 1998. Plaintiff is seventy-five years old. Plaintiff's first wife receives about forty percent ($1,572.01) of Plaintiff's military retirement and

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[2] Plaintiff consented to the Colorado court exercising jurisdiction over the marital property located in Georgia.

social security benefits.

A legal malpractice action was filed against the attorney who represented Plaintiff in the Colorado divorce proceeding. The Chapter 7 Trustee of Plaintiff's bankruptcy estate received $65,000 as a settlement of that action.

CONCLUSIONS OF LAW

Plaintiff contends that his lump-sum maintenance or "maintenance in gross" obligation to Defendant is dischargeable in bankruptcy. Plaintiff contends that neither section 523(a)(5)(B) nor (a)(15) of the Bankruptcy Code[3] prevents the discharge.[4] The section provides, as follows:

> **§ 523. Exceptions to discharge**
>
> **(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 the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree

[3] 11 U.S.C.A. § 523(a)(5)(B), (15) (West 1993 & Supp. 1999).

[4] Because the Court determines that Plaintiff's obligation is nondischargeable under section 523(a)(5)(B), the Court need not address section 523(a)(15).

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;

. . . .

(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 until 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.A. § 523(a)(5)(B), (15) (West 1993 & Supp. 1999).

Under section 523(a)(5)(B), an alimony, maintenance, or support obligation to a former spouse is dischargeable "unless such liability is actually in the nature of alimony, maintenance, or support." Defendant concedes that she has the burden of showing that Plaintiff's obligation is nondischargeable by a preponderance of the evidence.

"The validity of a creditor's claim [against a bankruptcy debtor] is determined by rules of state law. Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code." Grogan v. Garner, 498 U.S. 279, 112 L. Ed. 2d 755, 111 S. Ct. 654, 657-58 (1991).

In Harrell v. Sharp (In re Harrell),[5] the Eleventh Circuit Court of Appeals stated:

> The language used by Congress in § 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support." The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need

[5] 754 F.2d 902 (11th Cir. 1985).

as circumstances change.

754 F.2d at 906 (emphasis original).

The Eleventh Circuit continued, stating:

> We conclude that Congress intended that bankruptcy courts make only a simple inquiry into whether or not the obligation at issue is in the nature of support. This inquiry will usually take the form of deciding whether the obligation was in the nature of support as opposed to being in the nature of a property settlement. Thus, there will be no necessity for a precise investigation of the spouse's circumstances to determine the appropriate level of need or support. It will not be relevant that the circumstances of the parties may have changed, e.g., the spouse's need may have been reduced at the time the Chapter VII petition is filed. Thus, limited to its proper role, the bankruptcy court will not duplicate the functions of state domestic relations courts, and its rulings will impinge on state domestic relations issues in the most limited manner possible.
>
> Once the bankruptcy court in this case concluded that the alimony payments were "actually in the nature of alimony," its task was at an end. The obligation was thereby determined to be nondischargeable under § 523(a)(5). The district court correctly rejected the bankruptcy court's subsequent excursion to determine the precise level of the wife's need for support.

754 F.2d at 907 (emphasis original).

In Strickland v. Shannon (In re Strickland)[6] the Eleventh Circuit stated:

[6] 90 F.3d 444 (11th Cir. 1996).

> Because federal law, rather than state law, controls our inquiry, a domestic obligation can be deemed actually in the nature of support under § 523(a)(5) even if it is not considered "support" under state law. See [In re Harrell, 754 F.2d at] 905. Although state law does not control, it does provide guidance in determining whether the obligation should be considered in the nature of "support" under § 523(a)(5). In re Jones, 9 F.3d 878, 880 (10th Cir. 1993).
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> . . . Under Florida law, a former spouse is entitled to an award of attorney fees in a modification action such as the one filed here based on relative need and ability to pay. See Fla. Stat. § 61.16(1) (1993); Hyatt v. Hyatt, 672 So.2d 74, 76 (Fla. Dist. Ct. App. 1996). In awarding attorney fees to the former spouse, the state court therefore necessarily determined that she had a greater need and/or lesser ability to pay than did the debtor. Thus, the award of attorney fees can "legitimately be characterized as support," In re Harrell, 754 F.2d at 906, for the former spouse and therefore is nondischargeable under § 523(a)(5).

90 F.3d at 446-47.

In a divorce proceeding, a Colorado state court may, in special circumstances, award maintenance in gross rather than periodic alimony. The state court has broad discretion to determine the amount of alimony and whether the award should be maintenance in gross or periodic alimony. See generally In re The Marriage of Sinn, 696 P.2d 333 (Colo. 1985); Moss v. Moss, 190 Colo. 491, 549 P.2d 404 (Colo. 1976); Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (Colo. 1972).

Turning to the case at bar, Plaintiff argues that

the Colorado state court erred in awarding $652,591.40 as maintenance in gross to Defendant. The validity of the maintenance in gross award is determined by rules of state law. Grogan v. Garner, 111 S. Ct. at 657-58. It is not for this Court to decide whether the Colorado state court properly applied state law. The only issue for this Court is whether the state court award is dischargeable in bankruptcy.

The issue before this Court is controlled by federal law and is whether the maintenance in gross award was "actually in the nature of alimony, maintenance, or support."

The Colorado state court heard testimony on Defendant's financial needs and Plaintiff's financial resources. The state court determined that Defendant needed an additional $1,979 per month to meet her financial needs. The state court awarded that amount in the form of a maintenance in gross award. The state court also divided the marital property located in Colorado and in Georgia.

The Court can only conclude that the maintenance in gross award was actually in the nature of support. The Court should not inquire into the appropriate level of need or support. The Court’s inquiry is whether the state court award was in the nature of support rather than a property settlement. From the evidence presented, the Court can only conclude that the state court award was in the nature of support. Thus, it is nondischargeable in bankruptcy.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 4th day of May 2000.

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ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court