

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 05-12770-JMD
Chapter 7

Timothy G. Savoy,
Debtor

Claire D. Savoy,
Plaintiff,

v.

Adv. No. 05-1193-JMD

Timothy G. Savoy,
Defendant

*Claire D. Savoy
Pro Se Plaintiff*

*Timothy G. Savoy
Pro Se Defendant*

MEMORANDUM OPINION

I. INTRODUCTION

Claire D. Savoy, the Debtor's former spouse (the "Plaintiff"), filed an adversary complaint against Timothy G. Savoy, the Debtor (the "Defendant"), pursuant to 11 U.S.C. § 523(a)(5). The issue in this adversary proceeding is whether the Defendant's \$10,000.00 obligation to the Plaintiff for legal fees arising from the couple's divorce decree is in the nature of alimony, maintenance, or support and thus non-dischargeable under the Bankruptcy Code.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On March 16, 1991, the Plaintiff and the Defendant married. On August 30, 2004, they executed a permanent stipulation of divorce, and on September 1, 2004, the Hillsborough County Superior Court approved the stipulation and incorporated it into a divorce decree (the “Divorce Decree”).

At the time of the parties’ divorce the Plaintiff was disabled and unable to work. She had applied for (and was later awarded) ongoing Social Security benefits on account of her permanent disability. According to the financial affidavit attached to the couple’s permanent stipulation, at the time of the divorce, the Defendant was employed earning \$17,811.15 per month. Pursuant to the terms of the Divorce Decree, the Plaintiff was awarded primary physical custody of the couple’s child, and the Defendant became obligated to pay child support in the amount of \$3,000.00 per month. The Defendant also was responsible for maintaining health and dental insurance coverage for the couple’s child while the Plaintiff was responsible for paying all co-payments and unreimbursed medical expenses. The Plaintiff was responsible for paying the cost of their child’s private school tuition.

The Divorce Decree provided alimony to the Plaintiff in the amount of \$2,000.00 per month with such alimony continuing for a period of eight years or until the Plaintiff died or

remarried. The Divorce Decree also obligated the Defendant to maintain health insurance coverage for the Plaintiff but the Plaintiff was required to pay any unreimbursed medical expenses. The Plaintiff was responsible for maintaining her own dental insurance coverage and paying any unreimbursed dental expenses.

The Divorce Decree contained several provisions that dealt with the couple's property. The Plaintiff and the Defendant were each awarded a car and a time share, all furniture and other personal property already in their possession, and all bank accounts in their own names. The Plaintiff was awarded a one-half interest in a business presumably owned and operated by the Defendant. The Plaintiff also was awarded the marital home which at the time of the Divorce Decree had equity of \$115,000.00. The Plaintiff ultimately sold the marital home for \$232,000.00 from which she received approximately \$152,000.00 in proceeds. In accordance with the Divorce Decree, the Defendant did not receive any proceeds from the sale of the marital home.

Pursuant to the Divorce Decree each party was solely responsible for all debts incurred by each of them in their own names. The Defendant was responsible for any deficiency related to a repossessed vehicle. The outstanding balances on a Discover Card account and a Citizens Bank overdraft were to be paid from the proceeds of the sale or refinance of the marital home.

Under a subsection entitled "Legal Fees" in a section of the Divorce Decree entitled "Other Requests" the Defendant was required to pay \$10,000.00 toward the Plaintiff's attorneys' fees, with the first installment of \$5,000.00 due within six months and the second installment due within one year. The Defendant failed to make these payments to the Plaintiff.

During the course of the divorce proceedings, the Plaintiff incurred approximately \$66,000.00 in legal bills. To date, she has paid her lawyers approximately \$48,000.00, consisting of a \$10,000.00 retainer, approximately \$8,000.00 in monthly payments of \$1,000.00 prior to entry of the Divorce Decree, and \$30,000.00 from proceeds of the sale of the marital home. The Plaintiff's outstanding legal fees total approximately \$18,000.00.

III. DISCUSSION

Section 523(a)(5) of the Bankruptcy Code excepts from discharge debts owed to a former spouse that are in the nature of support and connected with a separation agreement, divorce decree, or other court order. Specifically, it provides:

(a) A discharge . . . 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—

(A) such debt is assigned to another entity . . . ; or

(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). In determining whether a debt is excepted from discharge under section 523(a)(5), “the critical issue is whether the divorce court judge ‘intended’ a particular award to be for support or for something else.” Werthen v. Werthen (In re Werthen), 329 F.3d 269, 273 (1st Cir. 2003). Whether a debt is in the nature of support or a property settlement is an issue of federal bankruptcy law and not state law, regardless of the labels attached to the debt by state

law. See Peterson v. Peterson (In re Peterson), 292 B.R. 228, 231 (Bankr. D.N.H. 2003) (citing Werthen v. Werthen (In re Werthen), 282 B.R. 553, 558 (B.A.P. 1st Cir. 2002); Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8, 10 (Bankr. D.N.H. 1994)). Whether an obligation to a former spouse is support within the meaning of the section 523(a)(5) is a “case-specific, factual determination.” Cowell v. Hale (In re Hale), 289 B.R. 788, 791 (B.A.P. 1st Cir. 2003). The party seeking the nondischargeability finding bears the burden of proof. See Werthen, 329 F.3d at 271-72; Zalenski v. Zalenski (In re Zalenski), 153 BR. 1, 3 (Bankr. D. Me. 1993).

The issue of whether an obligation is in the nature of alimony, maintenance, or support turns solely on the issue of whether, at the time of the divorce, the obligation was intended to have such a purpose. See Bourassa, 168 B.R. at 10. In determining intent, the Court considers three primary factors: “(1) the language and substance of the agreement or order; (2) the relative financial circumstances of the parties at the time of the agreement or order; and (3) how the payment at issue is structured (e.g., whether it is periodic or a lump sum, or whether it terminates upon the occurrence of a future contingent event).” Smith v. Anderson (In re Anderson), Bk. No. 97-13781-JMD, Adv. No. 98-1165-JMD (Bankr. D.N.H. Sept. 23, 1999). “These factors are listed in descending order with respect to interpretative significance and will be used only as aids in resolving the question of intent.” Id.

Fanning v. Fanning (In re Fanning), 2001 BNH 004, at 4-5. Subsequent changes in the parties’ circumstances post-divorce are irrelevant for purposes of section 523(a)(5). See Hale, 289 B.R. at 791; Bourassa, 168 B.R. at 10.

Thus, the issue before the Court is whether the Plaintiff and the Defendant intended the Defendant’s obligation to pay \$10,000.00 toward the Plaintiff’s legal fees to be in the nature of alimony, maintenance, or support at the time the Divorce Decree entered on September 1, 2004. The Court first notes that the Plaintiff was awarded alimony in the amount of \$2,000.00 per month and such obligation was set forth in paragraph 9 of the Divorce Decree under the heading of “Alimony.” The Defendant’s obligation to pay \$10,000.00 toward the Plaintiff’s legal fees

was provided in paragraph 24.A of the Divorce Decree under the headings “Other Requests” and “Legal Fees.” While not binding on the Court, the labels in the Divorce Decree do not support a finding that this obligation was in the nature of alimony, maintenance, or support.

The Court notes additionally that the \$10,000.00 obligation was to be paid out in two lump sums and was not subject to termination upon the Plaintiff’s death or remarriage unlike the Defendant’s obligation to provide alimony. This tends to suggest that the payments were not intended to be a form of support for the Plaintiff but instead were part of a property settlement. See Werthen, 329 F.3d at 273.

An examination of the parties’ relative financial circumstances at the time of the Divorce Decree reveals that the Defendant was working and earning significant sums while the Plaintiff was unable to work because of her disability. On an annual basis, the Defendant was earning \$213,734.00 while the Plaintiff expected to receive a total of \$60,000.00¹ plus Social Security benefits if approved.² In addition, the Defendant was required to provide medical insurance for both the Plaintiff and the couple’s child as well dental insurance for their child.

Under the Divorce Decree, the Plaintiff and the Defendant were each awarded a car, a time share, and their own personal property and bank accounts. The Plaintiff was awarded a one-half interest in the Defendant’s business. The Plaintiff was awarded the marital home, which the parties believed had equity of \$115,000.00 at the time. Ultimately, the Plaintiff received \$152,000.00 from its sale.

¹ The Defendant was required to pay the Plaintiff \$24,000.00 on account of alimony and \$36,000.00 on account of child support.

² At the time of trial the Plaintiff was receiving a total of \$1,133.50 per month in Social Security benefits (\$806.50 for herself and \$327.00 for the couple’s child) or \$13,602.00 per year. The Plaintiff indicated that she received a comparable, but lesser, amount commencing in late 2004.

In addition, with respect to marital debts, each party was to assume liability for their own debts, and the Defendant was to assume responsibility for a car lease deficiency and any 2002 and 2003 tax liability. Two additional debts were to be paid from proceeds from the sale or refinance of the marital home.

The record is clear that the Defendant's income was much greater than the Plaintiff's at the time of the Divorce Decree. However, the Plaintiff was awarded a disproportionate share of the marital home. While it is possible that the \$10,000.00 payment toward the Plaintiff's legal fees could have been considered support by the parties, it is just as likely that it could have been considered a property settlement.

At trial, the Defendant's lawyer testified that the payment of these legal fees by the Defendant was a request made by the Plaintiff after all other aspects of the Divorce Decree had been negotiated and settled by the parties. He indicated that there was no discussion by anyone concerning the \$10,000.00 being an element of support. Rather, the issue of alimony and child support had already been negotiated and settled when the Plaintiff raised the issue of legal fees.

Given the foregoing, the Court concludes that the Plaintiff has not met her burden under section 523(a)(5) of establishing that the Defendant's obligation to pay her attorney's fees was in the nature of alimony, maintenance, or support.

IV. CONCLUSION

Because the Court has concluded that the Defendant's obligation to pay the Plaintiff \$10,000.00 toward her legal fees was not in the nature of alimony, maintenance, or support within the meaning of section 523(a)(5), the Plaintiff's complaint shall be denied and the

Defendant's obligation shall be discharged. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: August 16, 2006

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge