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

In re:

Bk. No. 00-10982-MWV  
Chapter 13Neal Fanning f/d/b/a  
Mammoth Auto Sales and  
f/d/b/a Neal's Autobody,  
DebtorKathleen M. Fanning,  
Plaintiff

v.

Adv. No. 00-1079-JMD

Neal Fanning,  
Defendant

*Clifford P. Gallant, Jr., Esq.*  
*BELIVEAU FRADETTE DOYLE & GALLANT, P.A.*  
*Attorney for Plaintiff*

*Michael S. Askenaizer, Esq.*  
*THE LAW OFFICES OF MICHAEL S. ASKENAIZER*  
*Attorney for Debtor/Defendant*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

The Court has before it cross-motions for summary judgment<sup>1</sup> filed by defendant Neal Fanning (the “Debtor”) and plaintiff Kathleen M. Fanning, the Debtor’s former wife (the “Plaintiff”). At issue in this adversary proceeding are the dischargeability of several of the Debtor’s obligations under the parties’ divorce decree which issued on May 7, 1998 (the “Divorce Decree”), as amended on July 2, 1998 (the

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<sup>1</sup> At the hearing on the motions the parties agreed that they were seeking a decision on the matter based upon a joint evidentiary record rather than summary judgment because summary judgment is generally inappropriate with respect to actions brought under 11 U.S.C. § 523(a)(5). See Coe v. Johnson, Civil 92-500-B (D.N.H. May 10, 1993) (unreported decision) (indicating that “the intention of the state court and the parties in claims based upon 11 U.S.C. § 523(a)(5) is a fact to be found rather than a legal conclusion to be drawn”); Bilodeau v. Bilodeau (In re Bilodeau), Bk. No. 00-10078-JMD, Adv. No. 00-1050-JMD (Bankr. D.N.H. Sept. 22, 2000); Chaney v. Chaney (In re Chaney), 229 B.R. 266, 268 (Bankr. D.N.H. 1999).

“Modification”). The Plaintiff requests a ruling that the Debtor’s obligations are in the nature of alimony, maintenance, and support and thus nondischargeable under 11 U.S.C. § 523(a)(5). The Debtor requests a finding that the disputed obligations are dischargeable.

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**

The Debtor and the Plaintiff were married in 1961. The Plaintiff was eighteen years old at the time. Upon her marriage to the Debtor, the Plaintiff terminated her job at a local department store. She did not work outside of the home during the entire period of the parties’ marriage; rather, she spent her time caring for the couple’s five children and maintaining the family home. The Debtor became involved in the autobody business during the course of the parties’ marriage, and in 1973 he established his own shop called Neal’s Autobody.

In February 1997, the Plaintiff filed for divorce. After a two day trial held in April 1998 in the Family Division of the Rockingham County Superior Court (the “Divorce Court”), the Divorce Court issued the Divorce Decree on May 7, 1998. Pursuant to paragraph 9 of the Divorce Decree, the Debtor was obligated to pay alimony in the amount of \$400 per week for a period of three years and then \$300 per week for the next seven years. Pursuant to paragraph 11, the Debtor was obligated to maintain life insurance, in an amount no less than \$50,000 with the Plaintiff named as the beneficiary, until all alimony and property division orders were satisfied in full. Pursuant to paragraph 16, the Plaintiff was awarded a one-half interest in the Debtor’s autobody business to be paid at the rate of \$500 per month commencing on June 1, 2001. The Plaintiff was also given security for the \$75,000 obligation in the form of a second mortgage on the business real estate.

On May 26, 1998, the Debtor moved to reconsider and to clarify the Divorce Decree to reduce the amount and duration of alimony. On July 2, 1998, the Divorce Court issued the Modification, an order modifying the Divorce Decree. The Modification provided for alimony in the reduced amount of \$250 per week for three years and \$175 per week for the next four years. The Divorce Court also modified the security for the \$75,000 obligation by providing the Plaintiff with a third mortgage (instead of a second mortgage) on the business real estate, behind the existing first mortgage and a second mortgage not to exceed \$50,000, which was the amount the Plaintiff received under the Divorce Decree for the business real estate. It is undisputed that neither a second mortgage in the amount of \$50,000 nor a third mortgage in the amount of \$75,000 were placed on the property.

On April 3, 2000, the Debtor filed for bankruptcy. On June 12, 2000, the Plaintiff filed a complaint seeking a determination as to the dischargeability of several debts under the Divorce Decree and the Modification, specifically, the Debtor's obligation to pay the Plaintiff \$75,000. The Defendant filed a counterclaim requesting that the Court find additional obligations under Divorce Decree dischargeable, namely, the Debtor's obligations to maintain a life insurance policy, to pay almost \$75,000 in credit card debt, and to pay \$50,000 to the Plaintiff for her interest in the business real estate. On August 21, 2000, the Plaintiff filed an amended complaint setting forth two counts: Count I sought a determination that the Debtor's obligation to pay the Plaintiff \$75,000 is nondischargeable as being in the nature of alimony, maintenance, and support; and Count II sought a determination that the Debtor's obligation to maintain life insurance and to pay \$74,209 in credit card debt is nondischargeable as being in the nature of alimony, maintenance, and support.

After a pretrial hearing, the parties indicated that the case could be submitted on a written record consisting of copies of the relevant documents and pleadings from the Divorce Court proceeding as well as a transcript of the two day trial held in the Divorce Court. Accordingly, the parties filed an agreed-upon record and motions seeking judgment in their favor. The Court gave the parties an opportunity to present oral argument at a hearing held on January 24, 2001. At the hearing, the parties agreed that the only

outstanding issues before the Court were the dischargeability of the \$75,000 payment and the life insurance. The parties agreed that all other matters would be withdrawn and/or dismissed. At the conclusion of the hearing, the Court took the dischargeability issues under advisement.

### III. DISCUSSION

Section 523(a)(5) of the Bankruptcy Code provides in relevant part:

A discharge under . . . this title does not discharge an individual from any debt . . . 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 . . . divorce decree . . .

11 U.S.C. § 523(a)(5). The crucial issue in determining whether a debt arising from a divorce decree is nondischargeable under section 523(a)(5) is whether the debt is actually in the nature of alimony, maintenance, or support rather than a property settlement. The determination of this issue is a question of federal bankruptcy law, see Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8, 10 (Bankr. D.N.H. 1994); Coe v. Johnson (In re Johnson), 144 B.R. 209, 214 (Bankr. D.N.H. 1992), and the party seeking the nondischargeability finding bears the burden of proof, see Zalenski v. Zalenski (In re Zalenski), 153 B.R. 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.

#### A. The \$75,000 Obligation

The Court finds that the Debtor's obligation to pay \$75,000 to the Plaintiff in monthly installments of \$500 beginning June 1, 2001 is not in the nature of alimony, maintenance, or support but rather is part of the division of marital assets. The language and substance of the Divorce Decree and the Modification strongly indicate that the \$75,000 obligation was intended to be a property settlement. Paragraph 16 of the Divorce Decree, titled "Business Interests of the Parties," provides in full:

The spouse has been sole owner of the business known as Neal's Auto Body since 1973. In February 1997 after the parties separated, the spouse conveyed all the business assets to a corporation and for no consideration transferred half the stock ownership to two others (his son and a co-worker). The value of the corporation is determined to be \$150,000.00[.]

The petitioner is awarded one-half (50%) interest in that asset. Seventy-five thousand dollars (\$75,000.00) shall be secured by a second mortgage as the business real estate and paid as follows: \$500.00 per month commencing June 1, 2001, and payable on the first day of each month until paid in full.

Divorce Decree at ¶ 16. The Modification provides:

Section 16 shall be modified such that [Plaintiff's] \$75,000 shall be secured by a third mortgage on the business real estate behind the existing first and a second not to exceed \$50,000.

Modification at ¶ 3. On their face, these provisions deal with a division of property, i.e., the Debtor's business. The Divorce Court uses the term "asset" which suggests that the Divorce Court was thinking in terms of property settlement and not support. Divorce Decree at ¶ 16. The Court did not treat the Debtor's business as a stream of income as the Debtor requested during the Divorce Court proceedings. See Joint Evidentiary Stipulation (Doc. No. 12) at Tab 13, ¶ 16, page 26. Rather, the Divorce Court adopted the Plaintiff's position that the business was an asset that should be divided between the parties. See Joint Evidentiary Stipulation (Doc. No. 12) at Tab 13, ¶ 16, page 34. The Divorce Court further granted the Plaintiff's request that she receive her interest in the business in the form of cash payments rather than as a co-owner of the business. Id. at 34.

The conclusion that this obligation was part of the division of marital assets is further supported by the fact that alimony for the Plaintiff was provided in another provision of the Divorce Decree, specifically,

in paragraph 9. The Court also notes that the cash payments required by paragraph 16 of the Divorce Decree were not subject to termination upon either (1) the Plaintiff's death or remarriage or (2) the Debtor's death, unlike the Debtor'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, which obligation could be pursued by the Plaintiff upon the Debtor's death or by the Plaintiff's estate upon her death.

The Plaintiff argues that the obligation should be treated as support because it was not scheduled to commence until June 1, 2001, the date upon which the Debtor's alimony obligation decreased from \$250 per week (or \$1,083.33 per month) to \$175 per week (or \$758.33 per month). The Plaintiff argues that the Court should infer that the parties intended the \$500 per month payments to be additional support for the Plaintiff. While the Plaintiff's argument has some appeal, there is nothing in the record that requires such an inference. The Court finds that an equally plausible inference is that the Divorce Court delayed commencement of the \$500 per month payments based upon the belief that the Debtor would not be able to make the \$500 per month payments until the monthly alimony payments decreased. The driving motivation for the delay may not have been support for the Plaintiff but rather affordability to the Debtor.

While the Court is cognizant of the difference in financial resources and outlook between the parties at the time of their divorce in 1998, the language and substance of the Divorce Decree suggest that the \$75,000 obligation is a property settlement, and not alimony, maintenance, or support. Under such circumstances, the disparity in the parties' financial situation is a less significant factor in determining the parties' intent at the time of the divorce.

Overall, it appears from the Divorce Decree that the Debtor's \$75,000 obligation was intended to provide the Plaintiff with her share of the Debtor's business, a business that the Debtor formed and operated for a period of approximately twenty-five years during a time when the Plaintiff remained at home caring for the parties' children and maintaining the marital home. The Plaintiff has failed to meet her burden of establishing that the obligation was in the nature of alimony, maintenance, or support. As a

property settlement, the Debtor's \$75,000 obligation is dischargeable in accordance with section 523(a)(5) of the Bankruptcy Code.

### **B. The Life Insurance**

Paragraph 11 of the Divorce Decree, titled "Life Insurance," specifically provides:

The spouse shall provide life insurance on his life and shall name the [Plaintiff] as beneficiary. The death benefit of said life insurance shall be no less than \$50,000.00. The policy must be kept in effect until all alimony and property division orders are satisfied in full.

Divorce Decree at ¶ 11. The Plaintiff argues that the Debtor's obligation to maintain life insurance is nondischargeable under section 523(a)(5) as it is an obligation that is actually in the nature of alimony, maintenance, and support. The Debtor disagrees on the basis that the Debtor's life insurance provides no current support to the Plaintiff but merely protects her against calamity.

The Court finds that the language and substance of the Divorce Decree, the Plaintiff's need for support in the form of alimony at the time of the divorce, and the fact that the life insurance obligation was tied to outstanding alimony all support a finding that the life insurance obligation is in the nature of support. Such a finding is consistent with authority from other jurisdictions which hold that life insurance obligations are nondischargeable under section 523(a)(5) to the extent that they are intended to provide support to the former spouse should alimony prematurely cease due to the debtor's untimely death. See, e.g., Holder v. Holder (In re Holder), 92 B.R. 294, 297 (M.D. Tenn. 1988) (affirming the bankruptcy court's nondischargeability finding on the grounds that the life insurance was necessary to give the former spouse partial assurance that she would receive the support intended by the final divorce decree in the event of the debtor's death); Merrill v. Merrill (In re Merrill), 246 B.R. 907, 916 (N.D. Okla.), aff'd, 252 B.R. 497 (B.A.P. 10<sup>th</sup> Cir. 2000) (finding obligation to pay life insurance premiums nondischargeable as "the major if not the sole purpose of life insurance is to provide monies to replace the income stream lost upon the demise of the breadwinner"); Sweck v. Sweck (In re Sweck), 174 B.R. 532, 536 (Bankr. D.R.I. 1994) (holding that the debtor's obligation to maintain life insurance with his former wife as the beneficiary was a

nondischargeable support obligation given the large disparity in the parties' earning capacities and the former wife's need for continuing support because of her age and questionable and doubtful employability going forward); Vittorini v. Vittorini (In re Vittorini), 136 B.R. 632, 635 (Bankr. S.D.N.Y. 1992) (finding the debtor's obligation to maintain life insurance for the former wife's benefit for five years to be nondischargeable under section 523(a)(5)); cf. Dressler v. Dressler (In re Dressler), 194 B.R. 290, 298-99 (Bankr. D. Me. 1996) (declining to find nondischargeable a debtor's obligation to maintain life insurance for his children's benefit until they finished attending college). Accordingly, the Court finds that the Debtor's obligation to maintain life insurance under paragraph 11 of the Divorce Decree is in the nature of support for the Plaintiff and therefore should be excepted from discharge pursuant to section 523(a)(5) of the Bankruptcy Code.

#### **IV. CONCLUSION**

For the reasons outlined above, the Court grants in part and denies in part both the Plaintiff's and the Debtor's motions. The Debtor's obligation to pay the Plaintiff \$75,000 for her interest in the Debtor's business is not an obligation in the nature of alimony, maintenance, or support under 11 U.S.C. § 523(a)(5), but rather is a property settlement dischargeable under 11 U.S.C. § 1328(a). The Debtor's obligation to maintain a life insurance policy designating the Plaintiff as the beneficiary with a death benefit of no less than \$50,000 is an obligation intended to protect the payment of alimony and support obligations to the Plaintiff and, as such, is an obligation in the nature of alimony, maintenance, or support under 11 U.S.C. § 523(a)(5) and is nondischargeable under 11 U.S.C. § 1328(a). All other claims under the Plaintiff's amended complaint and the Debtor's counterclaim have been withdrawn or shall be dismissed by agreement of the parties.

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.



DATED this 31<sup>st</sup> day of January, 2001, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge