UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	Bankr. No. 97-40679
HAL ARDEN LANSDOWNE Soc. Sec. No. 504-90-8372	Chapter 7
Debtor.	
TRACY J. LANSDOWNE	Adv. No. 97-4055
Plaintiff,	
-vs-	MEMORANDUM OF DECISION RE: DISCHARGEABILITY OF DEBTS RELATED TO DIVORCE AND CHILD SUPPORT
HAL A. LANSDOWNE	
Defendant.	

The matter before the Court is the dischargeability complaint filed by Tracy Lansdowne. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and subsequent judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the debts owed to Midwest Associates, Utica Grain, and Kalin's are dischargeable under 11 U.S.C. § 523(a)(5) but that the debt owed to Plaintiff Tracy Lansdowne for attorney's fees arising from a pre-petition child support hearing is non dischargeable under 11 U.S.C. § 523(a)(5).

I.

The parties' stipulated facts filed May 5, 1998 are incorporated herein by reference.

II.

Under 11 U.S.C. § 523(a)(5), a debtor in a Chapter 7 case is not discharged from debts, inter alia, to a former spouse for alimony, maintenance, or support in connection with a divorce

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decree. The creditor, by a preponderance of the evidence, has the burden to show that the debt does not fall within the limits of § 523(a)(5). *Grogan v. Garner*, 498 U.S. 279 (1991). The Court must consider the question in light of all facts and circumstances relevant to the intent of the parties at the time the obligation was created. *Cummings v. Cummings (In re Cummings)*, 147 B.R. 747, 750 (Bankr. D.S.D. 1992)(citing *William v. Williams (In re Williams)*, 703 F.2d 1055, 1058 (8th Cir. 1983)).

> Though the decision of the state court should be regarded with deference, the bankruptcy court is not bound by state laws that define an item as maintenance or a property settlement, nor is the court bound to accept a divorce decree's characterization of an award as maintenance or a property settlement. [*Williams*, 703 F.2d at 1057.] The crucial question is the function the award was intended to serve. *Id.* Provisions to pay expenditures for the necessities and ordinary staples of everyday life may reflect a support function. *Id.* (cites therein). Moreover, the assumption of the other spouse's debt can be support for bankruptcy purposes. *Id.*

Cummings, 147 B.R. at 750. Although statutory exceptions to discharge are subject to narrow construction, exceptions from discharge for familial support receive a more liberal construction. *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 750-51 (8th Cir. 1995)(citing *Werner v. Hofmann*, 5 F.3d 1170, 1172 (8th Cir. 1993), and *Shine v. Shine*, 802 F.2d 583, 585 (1st Cir. 1986)).

The parties have stipulated that three issues remain unresolved or are disputed[1]:

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[1] The first two issues were listed as "unresolved" and the third, regarding attorneys' fees in this adversary proceeding, was listed as "disputed." Perhaps the parties meant they could not

(1) Whether debts to Midwest Associates, Utica Grain, and Kalin's that were awarded to Defendant-Debtor in the divorce decree are non dischargeable under § 523(a)(5)[2] ?

(2) Whether the debt to Plaintiff's attorney for attorney's fees incurred by Plaintiff arising from a post-divorce child support modification hearing are non dischargeable under § 523(a)(5)?

(3) Whether Plaintiff is entitled to recover attorneys fees from Defendant-Debtor relative to this dischargeability action?

III.

Plaintiff Tracy Lansdowne did not file a brief in support of her complaint as directed in the scheduling order entered April 7, 1998. Accordingly, the Court could only rely on the complaint, the stipulated facts, Defendant-Debtor's brief, and the applicable law to sort this matter out. Having done so, the Court concludes that Plaintiff has not carried her burden of proof regarding the nondischargeability of the debts to Midwest Associates, Utica Grain, and Kalin's. The divorce decree and related property settlement were not offered as a stipulated exhibit. There is, therefore, nothing in the record to indicate anything other than an equitable division of property and debts between Plaintiff and Defendant-Debtor occurred during the divorce. There is nothing in the record to show that the parties' respective present and future ability to pay these claims affected their division. There is no evidence that the debts were incurred for necessary living expenses

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agree that the third issue was "unresolved." Nonetheless, all three issues are addressed here.

[2] Plaintiff's complaint relied on both §§ 523(a)(5) and (a)(15). Defendant-Debtor's brief addressed both §§ 523(a)(5) and (a)(15). The Court looks only to § 523(a)(5), however, since that is the only sub-section under which questions were posed in the parties' stipulated facts and issues.

for the family or that Defendant-Debtor assumed debts incurred by Plaintiff.

The Court reaches a different conclusion regarding the attorney's fees arising from the child support hearing. The hearing arose at Defendant-Debtor's instigation. The trial court found that Defendant-Debtor was the appropriate party to pay them under all the circumstances presented, including the parties' respective ability to pay. Accordingly, this debt is deemed in the nature of support and is declared non dischargeable under § 523(a)(5). *Kline*, 65 F.3d at 751. That the fees may have been ordered directly paid to Plaintiff's attorney is not material. *Id.*

As to attorney fees in a dischargeability action, this Court's authority is somewhat limited to § 523(d), which does not apply here. Moreover, in most adversary proceedings in this District, each party is held responsible for his own attorney's fees and costs. The Court finds no basis to deviate from this policy here. Accordingly, no fee award will be made to either party.

Within ten days, counsel shall submit an agreed judgment.

Dated this 24 day of June 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT SEAL

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By:
Date: 6 24 98

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
JUN 24 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 97-04055 Form id: 122 Ntc Date: 06/24/98 Off: 4 Page : 1
Total notices mailed: 4

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