

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)	Bankr. No. 98-50422
)	
RONALD EDWARD TIDWELL)	Chapter 7
Soc. Sec. No. 461-25-4654)	
)	
Debtor.)	
)	
HOLLY HAYDEN)	Adv. No. 00-5016
)	
Plaintiff,)	
)	
-vs-)	DECISION RE:
)	NONDISCHARGEABILITY OF
)	A DIVORCE-RELATED DEBT
RONALD EDWARD TIDWELL)	
)	
Defendant.)	

The matter before the Court is Plaintiff Holly Hayden's Complaint that a certain divorce-related claim against Defendant-Debtor Ronald E. Tidwell is nondischargeable under 11 U.S.C. § 523(a)(5). This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order and Judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the subject debt is nondischargeable.

I.

Robert E. Tidwell ("Tidwell") and Holly Hayden ("Hayden") separated in February 1996 and were divorced in May 1996. As part of the divorce, the parties entered into a "full and complete settlement and payment" agreement approved by the divorce court regarding "all legal obligations imposed upon the parties because of their marital and family relationship." Their division of debts

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and property was mutually deemed to be "equitable," not equal.

The agreement provided, in part, that Tidwell would assume a certain credit card debt, known presently as the Fleet credit card debt, of about \$7,500. Hayden and Tidwell also agreed to indemnify the other as to the debts each had assumed.

In early August 1997, the divorce court held a contempt hearing regarding Tidwell's failure to pay the Fleet credit card debt.¹ The court ordered that Tidwell could purge himself from the contempt by meeting certain conditions. He met those conditions. At a subsequent hearing in September 1997, the divorce court ordered Tidwell to apply proceeds from the sale of a pickup to the Fleet credit card debt, to apply his 1997 and 1998 income tax refunds to the debt, and to pay the debt in full within 18 months. The divorce court held that Tidwell would be relieved of the terms of the order if he were able to get Hayden's name removed from the debt. Tidwell made payments on the Fleet debt into May 1998.

Tidwell (hereafter "Debtor") filed a Chapter 7 petition on July 31, 1998. At the September 3, 1998 meeting of creditors, Debtor acknowledged the credit card debt he owed to Fleet and he

¹ Attorney Catherine Mattson represented Hayden in the contempt proceedings.

acknowledged the divorce court's contempt orders.² At a 2004 examination conducted by Hayden's attorney on October 13, 1998, Debtor agreed to reaffirm the Fleet credit card debt to resolve the contempt action brought by Hayden before the divorce court and in lieu of Hayden bringing a nondischargeability action before the Bankruptcy Court. He acknowledged that he had the financial ability to pay the credit card debt to Fleet. Hayden's attorney volunteered to present a written stipulation to the Bankruptcy Court, but neither an agreed order regarding nondischargeability nor a reaffirmation agreement were ever filed.

Hayden filed a nondischargeability complaint on September 8, 2000. She sought a declaration that the Fleet credit card debt was nondischargeable under § 523(a)(5) or § 523(a)(15). Hayden's complaint under § 523(a)(15) was dismissed for untimeliness by a Decision and Order entered November 29, 2000. A trial under § 523(a)(5) was held April 24, 2001.

Hayden's and Debtor's testimony at trial established that at the time of their divorce, their incomes were roughly equal, they both had good health, and they both had comparable education and

² Attorney James P. Hurley represented Hayden at the meeting of creditors, at the 2004 examination, and through the several months thereafter when he and Debtor's counsel were trying to memorialize the oral agreement reached at the 2004 examination. Around August 2000, Attorney Mattson began representing Hayden before this Court.

job skills. Neither had any dependents.

Hayden was earning \$1,164.70 net a month as a employee of a local grocery store. Her monthly income, however, exceeded her expenses by only \$20. Her expenses included paying the debt on a car and a loan from her employer (both debts that were assumed in the divorce) and a loan against her 401k earnings.

According to Hayden's testimony, at the time of the divorce Debtor was earning \$1,380 as a member of the United States Air Force. She stated that at the time of their divorce, Debtor lived on base and did not incur housing or utility costs, except telephone and cable television. Debtor also benefitted from free medical care and food and clothing discounts offered at the base commissary. According to Hayden's calculations, based on her experience as the couple's bill payer, Debtor's income exceeded his monthly expenses by \$700. In contrast, he estimated that he had \$300 left over at the end of the month after paying his living expenses. His expenses included repayment of the credit card debts to Fleet,³ MBNA, and Traveller's Acceptance, the debts he had assumed in the divorce. The MBNA and Traveller's Acceptance card debts had been incurred only by Debtor shortly before the couple separated. She said the debt was all for an extended trip Debtor

³ At the time of the divorce, this credit card debt was held by VISA Gold.

had taken out-of-state. He contended the debt included bedroom furniture purchased for her when the couple decided to separate.

Hayden testified that they divided the debts in their divorce with the understanding that the division (more to Debtor than Hayden) would allow each to meet their living expenses. She said she did not ask for alimony based on the understanding that Debtor would pay the Fleet credit card debt and that he would pay that debt, in part, with proceeds from a truck that Debtor took in the divorce and planned to sell. Debtor had no recollection of any pre-divorce discussion with Hayden about paying her alimony.

Hayden valued the property she received in the divorce at \$8,250; Debtor testified it was worth \$14,600. Their biggest dispute was over the value of the 1993 Cavalier that Hayden received in the divorce. He said it was worth \$10,000; she said \$5,000. She valued the property he received in the divorce at \$11,820; he thought it was worth \$10,590. No one item accounted for the difference. The property he received included the couple's federal income tax return for 1995 and all of his retirement benefits with the Air Force, which neither party could value. Debtor acknowledged he has sold some property he received in the divorce, but that he had not applied the proceeds to the Fleet credit card debt.

Hayden stated she has paid or is paying the debts she assumed

in the divorce. Her ability to obtain new credit, however, she testified, has been impaired by Debtor's failure to pay the Fleet credit card debt.

Debtor stated he tried to pay the credit card debts he assumed in the divorce. He says he met his present wife shortly after his divorce from Hayden. He has adopted his new wife's child and they have had another child. While he admits that his efforts to repay debt were not perfect, he says he did the best he could, in light of his changed circumstances, before declaring bankruptcy.

II.

Under 11 U.S.C. § 523(a)(5), a debtor (any chapter) does not receive a discharge of debts owed to a spouse, former spouse, or child for alimony, maintenance, or support in connection with a separation agreement, divorce decree, or other order of a court of record. Whether a particular debt falls under § 523(a)(5) is a question of federal law. *Scholl v. McLain (In re McLain)*, 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999); *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997). 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, not at the time of the dischargeability trial. *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)).

The spouse, former spouse, or child, by a preponderance of the evidence, has the burden to show that the debt falls within the limits of § 523(a)(5). *Grogan v. Garner*, 498 U.S. 279, 286-90 (1991). The crucial issues are the intent of the parties and the function the award was to serve at the time of the divorce. *Tatge*, 212 B.R. at 608; *McLain*, 241 B.R. at 419.

Although statutory exceptions to discharge are subject to narrow construction, the exception from discharge for a familial support debt receives a more liberal construction. *Williams v. Kemp (In re Kemp)*, 232 F.3d 652, 653 (8th Cir. 2000) (citing *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))). This exception to discharge favors enforcement of the support obligation over the debtor's fresh start. *Kemp*, 232 F.3d at 653.

How the state court or state law characterized the debt is not binding on the Bankruptcy Court. *McLain*, 241 B.R. at 419. Plain language in the support obligation, however, may compel a conclusion that the debt is for support if there is a stated exchange of obligations so that the non debtor spouse or former spouse will have the means necessary to adequately support the family unit. *Id.* at 420. Further,

[p]rovisions 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. Primary factors the Court may consider include:

- (1) the relative financial conditions of the parties at the time of the divorce or separation;
- (2) the parties' respective employment history and future prospects for financial stability;
- (3) whether one party received more marital property than the other;
- (4) whether the payments are periodic in nature;
- (5) whether it would be difficult for the spouse, former spouse, or child to meet daily living expenses without the debtor's assumption of the subject debt.

Tatge, 212 B.R. at 608 (cites therein). Other relevant factors to weigh may include whether the obligation is enforceable by contempt and whether the payments were fashioned in order to balance disparate incomes of the parties. *Neely v. Neely (In re Neely)*, 59 B.R. 189 (Bankr. D.S.D. 1986) (from a list of 18 factors).

III.

Several factors demonstrate that Tidwell's obligation to pay the Fleet credit card debt was an obligation in the nature of support. Hence, the debt may not be discharged under § 523(a)(5).

First, Hayden's financial condition at the time of the divorce was inferior to Tidwell's. Though the parties' take home pay,

education, and health were commensurate at the time of the divorce, Tidwell received valuable, non cash benefits in the form of housing supplied by the Air Force, access to the base commissary, and free health care. Hayden no longer would enjoy some of these privileges as his spouse. She thus had more basic living expenses to meet with her take home pay.

Second, Tidwell received more property in the divorce than Hayden, some of which the parties expected Tidwell to eventually sell to pay marital debt. Had the assignment of the Fleet credit card debt to Tidwell been only a division of assets and liabilities, rather than an obligation in the nature of support, Hayden would have received more marital assets and probably more marital debt. Instead, the parties' intent at the time of the division, specifically reflected in their agreement, was equity, not equality.

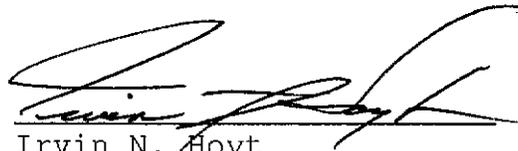
Third, but for Tidwell paying the Fleet credit card debt, Hayden would have difficulty meeting her daily living expenses. At the time of the divorce, Hayden simply did not have the means to pay the debt. Tidwell did. Her financial cushion at month's end, without that debt, was only \$20. Tidwell's cushion, after paying his basic expenses, *including* an installment payment on the Fleet debt, was at least \$300 by his own admission, or as much as \$700 based on Hayden's calculations.

Finally, the divorce court concluded that Tidwell's obligation to pay the Fleet credit card debt was enforceable by contempt. Had the obligation been in the nature of a debtor-creditor relationship, rather than support of Hayden arising from the marital relationship, enforcement through a contempt action may not have lied. See S.D.C.L. § 16-15-6; *Simmons v. Simmons*, 290 N.W. 319, 320-21 (S.D. 1940) (attempted enforcement of support order does not violate constitutional provision against imprisonment for debt arising from contract); *Fritz v. Fritz*, 187 N.W. 719, 719-20 (S.D. 1922).

An order and judgment of nondischargeability shall be entered.

Dated this 13th day of June, 2001.

BY THE COURT:



Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: *Shan Shoup*
Deputy Clerk



NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUN 13 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

JUN 13 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By: *[Signature]*

Case: 00-05016 Form id: 122 Ntc Date: 06/13/2001 Off: 3 Page : 1
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