

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:) CASE NO. 186-00144
) ADVERSARY NO. 87-1014
LEROY KRAGE dba)
KRAGE SIMMENTALS -) CHAPTER 12
dba Farmer/Debtor)
) MEMORANDUM DECISION
VIOLET V. KRAGE ELTON,)
)
Plaintiff,)
-vs-)
)
LEROY KRAGE dba)
KRAGE SIMMENTALS)
dba Farmer/Debtor,)
)
Defendant.)

This case presents the an ex-spouse pursuant to a issue of whether a debt owed to decree of divorce entered by a state court is in the nature of alimony, maintenance or support so as to be nondischargeable under 11 U.S.C. Section 523(a)(5)(B). The case is considered on a stipulated record consisting of the state court Judgment and Decree of Divorce, Findings of Fact and Conclusions of Law, the divorce action pleadings and a partial transcript of the divorce hearing. Both Curt Ewinger, counsel for the debtor and Dan Fritz, counsel for Violet Krage Elton, have submitted argument in the form of briefs. Counsel are commended on the quality of their briefs.

BACKGROUND

The parties to this adversarial proceeding were granted a decree of divorce by the Honorable Philo Hall of the Fifth Judicial Circuit Court, Brown County, South Dakota on August 17, 1971. In part, the judgment and decree of divorce granted Mrs. Elton a cash award of \$272,700.00~ \$61,000.00 was to be paid at the time the divorce decree was entered. The balance of \$211,700.00 with interest at the rate of 10% per annum was payable in nine annual installments of \$36,933.34 commencing one year after the entry of the divorce decree.

Mrs. Elton was awarded some non-business personal property in addition to her monetary award. Mr. Krage was allowed to retain ownership of the Parties' cattle and ranching operation, including the couple's home. To secure unpaid installments Mrs. Elton was given a lien on the property retained by her ex-husband. Under the divorce decree this lien was subordinated to the security interest Mr. Krage conveyed in order to meet the installment payments.

Paragraph 7 of the state court judgment provided that if Mr. Krage could not make the installment payments, the assets of the ranch property would be sold to meet the payments. After Mr. Krage defaulted on his obligation to make an annual payment, Mrs. Elton initiated state court proceedings requiring him to appear in Circuit Court on December 3, 1985,

and show cause why paragraph 7 of the divorce judgment should not be invoked and his operation liquidated. Seeking protection from this action, Mr. Krage filed for relief under Chapter 7 of the Bankruptcy Code on May 30, 1986, which was subsequently converted to a chapter 12 Bankruptcy on February 12, 1987. Mrs. Elton has submitted a proof of claim in the amount of \$191,835.56. She brought the current adversary proceeding to determine the dischargeability of the divorce debt.

FACTS

The relevant portions of the divorce proceedings documents which comprise the stipulated record will be summarized at this point.

The partial transcript included as a part of the stipulated record in the adversarial proceeding is composed of Judge Hall's rendition of the facts of the case. Judge Hall stated both parties had proven a case of extreme cruelty against the other, that all five of the couple's children were well beyond the age of majority at the time of the divorce, and that the parties "worked together very well to raise their family, and to operate their ranch." He acknowledged the ranching success and the relatively high standard of living the couple had achieved.

Judge Hall described the nature of the couple's ranching operation in this fashion. "It's been a joint operation, and the Court feels, in a way, that this is not a division of marriage property really as much as it is a dissolution of a joint venture where both have contributed to this accumulation of property-" Judge Hall did not want to liquidate the ranch at the time of the

divorce, because farm and ranch property values were down, the cattle herd was under quarantine for bangs disease, and because liquidation entailed unfortunate tax consequences.

Judge Hall addressed the employability of Mrs. Elton. Mrs. Elton held a two year teacher's certificate and had done some substitute teaching during the marriage. Judge Hall found she was "not able to go back into teaching under present teaching standards . . . It would be difficult for her to go back into the market, and earn, although she certainly is employable in some respects." He added that while Mrs. Elton indicated that she might wish to begin a cattle operation of her own, he felt "that might be difficult unless she had some close cooperation of her sons or someone else who could work with her."

In discussing dividing the couple's property and the post-divorce support of the parties, Judge Hall stated "if alimony is to be paid, the property is needed for the production of the income to pay the alimony. If there is a straight division of the assets, each share of the assets perhaps could carry forward to support each of the parties."

Judge Hall states in the written Findings of Fact and Conclusions of Law that Mrs. Elton was found to be unable to go back into teaching under then current standards. Also, that in late July, 1981, approximately three weeks prior to the entry of the decree of divorce, but after his oral findings were made, Mrs. Elton suffered "an acute inferior wall myocardial infarct due to coronary thrombosis secondary to coronary atherosclerosis" and would be completely disabled for three to six months following the attack. He also found that she would "have 50 percent or more

disability for another year or more, and a degree of disability will likely persist indefinitely." Mr. Krage was found to be basically in good health.

The findings and conclusions also contained Judge Hall's property division. The Court found net marital property of \$713,804.00. Mrs. Elton was awarded forty percent of the marital property. Mr. Krage was required to pay basically all of the parties' debts, including \$5,500.00 in plaintiff's attorneys fees and sixty percent of Mrs. Elton's medical bills from July 25, 1981 to the date of the Divorce Decree. The parties had no medical insurance.

In the conclusions of law portion Judge Hall concluded "in view of the evidence presented and the substantial property awarded to the Plaintiff, this is not a proper case for the award of alimony and therefore no alimony is awarded" to Mrs. Elton. (See also Finding VIII). Mr. Krage was required to continue to make payments of temporary support until the \$61,000.00 first installment was paid. The award to Mrs. Elton was made to inure to her heirs and successors in interest, and Mr. Krage's obligation was binding upon his heirs and successors. The remainder of the documents in the record basically repeat the above relevant facts.

LAW

In In Re Neely, 59 B.R. 189 (Bkrtcy. D.S.O. 1986) Judge Ecker of this district published an informative opinion on the issue presently before this Court. Neely, supra lays down the following guidelines.¹ Determining whether a divorce award is in the nature of alimony, maintenance or support² is a question of fact to be determined by this Court under federal bankruptcy law, and not under state law. The finding is to be based upon the circumstances existing at the time of dissolution, and not the parties' present situation. The State Court's characterization of the obligation is not determinative. Besides the foregoing helpful guidelines, Neely also restated eighteen factors useful in determining the nature of

¹ These guidelines are derivatives of Eighth Circuit Court of Appeals opinions. See Draper V. Draper, 790 F2d 52, (1986) ; Boyle v. Donovan, 724 F2d 681 (1984) ; In Re Williams, 703 F2d 1055 (1983).

² The three terms are generally given synonymous meanings, Scheible, Defining "Support" Under Bankruptcy Law, 41 Vand. L.R. 1, f.n. 25 (1988) [hereinafter Scheible.]

a divorce obligation. What follows is this Court's application of those factors.

1. Whether there was an alimony award entered by the state court. Judge Hall characterized the award as a straight division of assets, with each share of the assets to provide support for each party, although he expressly stated no alimony would be awarded.

2. Whether there was a need for support at the time of the decree; whether the support award would have been inadequate absent the obligation in question- Judge Hall found that Mrs. Elton was unable to return to her teaching job even when healthy. Also she was found to have very recently suffered a heart attack, and to have been completely disabled for three to six months following the attack, to have been severely disabled for another year or more, and to suffer some degree of disability indefinitely. Also, she was required to pay forty percent of the pre-divorce decree costs associated with the heart attack. There was an obvious need for support at the time the decree was entered.

3. The intention of the Court to provide support. In light of this Court's finding under factors 1 and 2 above, and Judge Hall's provision that interim support payments continue until the first installment was made, this Court finds that Judge Hall intended to provide for Mrs. Elton's support.

4. Whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances. Mr. Krage's duty was made to benefit Mrs. Elton's successors, and bind Mr.

Krage's successors.

5. The age, health, work skills, and educational levels of the parties. Mr. Krage was found to be in basically good health. Factor 2 above sets out other relevant facts.

6. Whether the payments are made periodically over an extended period or in a lump sum. The payments were extended for a period of nine years.

7. The existence of a legal or moral 'obligation' to pay alimony or support- In this case this factor would be basically the same as factor 2. See also factor 16 below.

8. The express terms of the debt characterization under state law. In this case this factor would be identical to factor 1.

9. Whether the obligation is enforceable by contempt. No evidence was presented to this Court as to this factor.

10. The duration of the marriage. The parties were married thirty three years.

11. The financial resources of each spouse, including income from employment or elsewhere. In this case this factor would be basically the same as factor 2.

12. Whether the payment was fashioned in order to balance disparate incomes of the parties. Again, as Mr. Krage retained the income producing property this would be basically the same as factor 2.

13. Whether the creditor spouse relinquished rights of support in payment of the obligation in question. Judge Hall concluded that because of the substantial property awarded Mrs. Krage, no alimony would be awarded.

14. Whether there were minor children in the care of the creditor spouse. This criteria is moot since all of the children had reached their majority at the time of the divorce.

15. The standard of living of the parties during their marriage. Judge Hall found the parties had a relatively high standard of living.

16. The circumstances contributing to the estrangement of the parties. This factor probably is not very relevant in this case. It can be said, however, that Judge Hall did not find that Mr. Krage's ex-wife was particularly at fault in causing the divorce or to have engaged in other behavior which would have tended to relieve Mr. Krage of making alimony or support payments.

17. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties. The debt does not arise from a division of marital debts. Marital debts were dealt with elsewhere by Judge Hall. The debt is not designed for the payment of a specific future obligation. An obligation to pay a future debt tends to demonstrate a support obligation. See Draper, supra. note 1 (obligation to pay future educational costs). Again, Judge Hall characterized the debt sought to be discharged as arising from a property settlement.

18. Tax Treatment of the payment by the debtor spouse. There was no evidence submitted to this Court on this factor.

Cognizant that the creditor, Mrs. Elton, bears the burden of proof³, this Court finds that the debt created by the dissolution of the debtor's marriage to the plaintiff in this adversarial

³ E.g., Matter of Myers, 63. BR 891 (Bkrtcy. NW.. Ga. 1986).

action is best characterized as an award in the nature of support, and is therefore nondischargeable. This finding is warranted from the evidence that Judge Hall was keenly aware of Mrs. Kr-age's inability to provide for herself at the time of the divorce. For this reason the award by necessity was intended to provide Mrs. Elton with the essentials of life. The fact that Judge Hall characterized the award as a straight division of the assets and expressly declared no alimony would be awarded is not a controlling factor in this case, in light of the obvious need for providing Mrs.. Elton support. See Williams, supra note 1 (divorce decree "property settlement" was actually in nature of support where at the time of divorce the dependant spouse was in poor health, had been unemployed for a long period and had little outside income). Judge Hall's rationale for not awarding separate alimony was that he had already taken care of Mrs. Elton's support in the "property settlement."

The facts of this case do not provide for an obvious resolution of the issue. The Neely factors do not all weight in favor of Mrs. Elton. Judge Hall's decision is perhaps more properly characterized as a mixture of an alimony/property settlement award. The Code has been criticized for drawing a bright line between support and property divisions.⁴ For the reasons stated above the Court finds the debt in this case to fall on the support side of

⁴ "Because of the diminishing distinctions between support and property division, both state and federal law acknowledge that today property division and support frequently are functional equivalents. The final area in which classification remains critical - perhaps anachronistically - is in bankruptcy.." Scheible, supra note 1, at 18.

the line.

This opinion shall constitute the findings of facts and conclusions of law pursuant to Bankruptcy Rules 7052 and 9014 and F.R.Civ..P. 52. This matter is a core proceeding under 28 U.S.C. 157. Counsel for Mrs. Elton is directed to prepare an appropriate judgment. See Bankruptcy Rule 9021.

Dated this 23rd of March, 1988.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy

(SEAL)