

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:)	Bankr. No. 18-40227
)	Chapter 13
KEVIN JULIAN WINTER)	
aka Julian Winter)	
SSN/ITIN xxx-xx-5252)	
)	
Debtor.)	
)	
LISA MARLIN WINTER)	Adv. No. 18-4008
)	
Plaintiff)	
-vs-)	DECISION RE:
)	DISCHARGEABILITY
KEVIN JULIAN WINTER)	OF CERTAIN CLAIM
)	
Defendant.)	

The matter before the Court is Plaintiff Lisa Marlin Winter's complaint seeking a determination that her pre-petition claim against Debtor-Defendant Kevin Julian Winter is excepted from discharge pursuant to 11 U.S.C. §§ 1328(a)(2) and 523(a)(5). This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.R.Bankr.P. 7052. For the reasons discussed below, the Court finds Plaintiff Lisa Marlin Winter's claim is excepted from discharge as a domestic support obligation.

I.

Plaintiff Lisa Marlin Winter ("Lisa Winter") and Debtor-Defendant Kevin Julian Winter ("Debtor") are former spouses. Lisa Winter filed a proof of claim for \$130,000.00 (Proof of Claim 2-1) and a complaint to determine the dischargeability of her claim. She contends her claim is a domestic support obligation within the meaning of 11 U.S.C. § 101(14A) and is thus excepted from discharge under

11 U.S.C. §§ 1328(a)(2) and 523(a)(5). Debtor disagrees with Lisa Winter's characterization of her claim and argues it arises from a property settlement and should therefore be discharged in his chapter 13 case.

The parties eschewed an evidentiary hearing, opting instead to submit the matter on stipulated facts and exhibits,¹ which are incorporated herein by reference, and the following single issue:

Whether the debt [Debtor] owes to Lisa [Winter] is a "domestic support obligation" within the meaning of 11 U.S.C. § 101(14A), such that the debt is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(5) and 1328(a)(2).

II.

A debt for a "domestic support obligation" ("DSO") is excepted from a chapter 13 debtor's discharge. 11 U.S.C. §§ 1328(a)(2) and 523(a)(5). A DSO is defined as:

a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

¹The parties did not incorporate the depositions or any other documents from the adversary proceeding file in the stipulated facts.

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

The party asserting a particular claim falls under § 523(a)(5) bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991); *Phegley v. Phegley (In re Phegley)*, 443 B.R. 154, 158 (B.A.P. 8th Cir. 2011). "[T]he crucial question is the function the award was intended to serve." *Phegley*, 443 B.R. at 157. The determination is a question of federal bankruptcy law, not state law. *Id.* at 158. The state court's characterization of the claim serves as the starting point for the bankruptcy court in determining the claim's intended function, but that characterization is not binding on the bankruptcy court. *Id.*

In determining whether a particular claim is a DSO, a bankruptcy court should consider the following factors:

[1] the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; [2] the relative financial conditions of the parties at the time of the divorce; [3] the respective employment histories and prospects for financial support; [4] the fact that one party or another receives the marital property; [5] the periodic nature of the payments; and [6] whether it

would be difficult for the former spouse and children to subsist without the payments.

Id. Further,

[e]xceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying § 523 favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party.

Id.

III.

Based on the parties' stipulated facts and exhibits and considering each of the *Phegley* factors, the Court finds the money Debtor was obligated to pay Lisa Winter at the time of their divorce² was in the nature of support and thus cannot be discharged in Debtor's chapter 13 case.

Foremost, at the time of the divorce in 2005, Lisa Winter's monthly gross income of \$2,282.67³ was insufficient to support her and the couple's four children. During her separation from Debtor, Lisa Winter availed herself of approximately \$100,000.00 in financial support from her parents for her and the children's subsistence. The \$71,700.00 Debtor was to pay Lisa Winter under the divorce stipulation would have ameliorated her financial struggles.

²Though referenced by Lisa Winter in her brief, the Court did not consider the couple's post-divorce changes in financial circumstances relevant to its decision.

³The Order for Support & Health Care Coverage dated May 11, 2005 stated child support was to commence May 13, 2005. The parties' stipulated facts do not clarify whether Debtor paid any child support during the separation. Even if Lisa Winter had been receiving child support from Debtor during the separation, however, she still relied on her parents during the separation for approximately \$100,000.00 in assistance.

Second, the parties' divorce stipulation did not include any identification or division of jointly held assets.⁴ Instead, the language and substance of paragraphs 5, 7, 10, and 13 of their divorce stipulation focused on providing Lisa Winter financial protection and stability through mid-2021, when their youngest child would turn 23 and the agreed child support would end. The \$71,700.00 Lisa Winter was slated to receive from Debtor was not denominated by the parties as "her" share of any marital asset. Rather, as stated by the parties in their divorce stipulation, the sum was an "assignment of property" from Debtor to Lisa Winter and, as described by the parties in their stipulation of facts herein, the sum reflected roughly half of the retirement funds Debtor had already spent for living expenses.

Third, in the divorce stipulation, Debtor specifically waived alimony or a division of property. Lisa Winter did not.

Fourth, Debtor's income in 2005 was more than twice Lisa Winter's income. The funds Debtor was ordered to pay Lisa Winter would have reduced that disparity.

Fifth, the parties burdened Debtor, not Lisa Winter, with the children's post-secondary education expenses. By doing so, they indicated Debtor, not Lisa Winter, would have the financial wherewithal to cover those future costs.

Sixth, though the post-divorce legal documents and communications submitted with the parties' stipulated facts consistently refer to the \$71,700.00 obligation as a property settlement (including references by Lisa Winter herself), the language of the parties' divorce stipulation itself did not describe the \$71,700.00 obligation as a

⁴The parties' stipulation of facts herein suffers from the same shortcoming, which prevented the Court from considering the fourth *Phegley* factor.

property settlement. It instead identified the obligation as an "assignment of property" from Debtor to Lisa Winter, not an agreed division of a jointly held asset.⁵

On the other hand, two circumstances suggest the \$71,700.00 award might not be in the nature of support. First, neither party treated any payments Debtor made in partial satisfaction of the \$71,700.00 obligation as alimony for tax reporting purposes. Second, Debtor was supposed to pay Lisa Winter the \$71,700.00 on a date certain about seven months after their divorce, not periodically over a stated term. Alone or together, however, these circumstances do not balance the scale.

For all these reasons, the Court finds Lisa Winter's pre-petition claim against Debtor is a domestic support obligation and is thus excepted from any discharge Debtor might be granted in his chapter 13 case. The Court will enter an appropriate order and judgment.⁶

Dated: May 14, 2019.

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

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

⁵The Court notes in a post-divorce e-mail from Debtor to Lisa Winter dated July 21, 2015, Debtor initially described the money he owed Lisa Winter as a "property settlement." However, later in the e-mail he referred to his "other support obligations," thus suggesting he also viewed the funds he owed Lisa Winter as a support obligation.

⁶As requested by the parties, the Court is not determining the amount of Lisa Winter's claim.

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Debtor.)	
)	
LISA MARLIN WINTER)	Adv. No. 18-4008
)	
Plaintiff)	
-vs-)	ORDER DIRECTING
)	ENTRY OF JUDGMENT
KEVIN JULIAN WINTER)	OF NONDISCHARGEABILITY
)	
Defendant.)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED a judgment shall be entered for declaring Plaintiff Lisa Marlin Winter's pre-petition claim against Debtor-Defendant Kevin Julian Winter is excepted from discharge pursuant to 11 U.S.C. §§ 1328(a)(2) and 523(a)(5).

IT IS FURTHER ORDERED the amount of Plaintiff's claim is reserved for later determination.

So ordered: May 14, 2019.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

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