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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:
KELVIN W. KRAUSE,

Debtor.

Chapter 7 Proceedings
Case No. 03-21588-JES

KELVIN W. KRAUSE,

Plaintiff,

-v-

VICKY GROOM,

Defendant.

Adversary No. 04-2244

DECISION

INTRODUCTION

In this adversary proceeding, Kelvin W. Krause (hereafter "plaintiff" or "Kelvin"), the former spouse of the defendant, Vicky Groom (hereafter "defendant" or "Vicky"), is seeking a determination that his obligation to pay to Vicky the sum of $14,500 (which constitutes the unpaid balance of his original obligation to her in the sum of $18,000, arising out of a marital settlement agreement) is a property settlement debt and is therefore dischargeable, and is not maintenance within the meaning of § 523(a)(5) of the Bankruptcy Code.

In some circumstances, property settlement debts are nondischargeable, more specifically, those which meet the criteria under § 523(a)(15) of the Bankruptcy Code. However, the parties have agreed that § 523(a)(15) is not involved in this case. The issue, here, is limited solely to whether this

obligation is a form of maintenance under § 523(a)(5) of the Bankruptcy Code. If the obligation is a property settlement debt, it is dischargeable under § 523(a)(5).

It is undisputed that the $18,000 debt was payable to Vicky and arose out of the marital settlement agreement between the parties as embodied in the divorce decree. The only issue here is whether this obligation is in the nature of maintenance.

This adversary proceeding came on for hearing on February 16, 2005. At the conclusion of the testimony, the court took this matter under advisement. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

Kelvin and Vicky were married on June 25, 1983. They were divorced on October 7, 2002. Two children, Jeremy and Jason, were born to these parties. At the time of the divorce, Jason was 14 years old; Jeremy was 19 years old. In the divorce proceedings, each of the parties was represented by counsel. Neither Vicky's counsel nor Kelvin's counsel are the same attorneys who are representing them in this adversary proceeding. Kelvin and Vicky and their respective divorce attorneys executed a marital settlement agreement which was then embodied in the divorce judgment.

At the time the divorce was granted, Kelvin was employed at Prism Johnson Wax as a business development representative and was earning $5,113 per month gross as verified by the statement of income of the parties set forth in their "preliminary financial disclosure statement" dated October 2, 2002. Vicky at that time was a housewife and was unemployed.

The educational background of these parties is approximately the same. Vicky completed high school. Kelvin nearly completed high school, but in his words, he "went a week before graduation." Neither Vicky nor Kelvin furthered their respective educations thereafter.

One of the provisions of the marital settlement agreement, which is the subject of this adversary proceeding, deals with Kelvin's obligation to pay $18,000 to Vicky. This amount was payable at the rate of $500 per month over a period of 36 months, with payments to commence in December of 2002. These payments continued through either June or July of 2003 and resulted in total payments made by Kelvin to Vicky of $3,500, which left an unpaid balance of $14,500. Kelvin testified that he could not make any further payments after June or July of 2003 because his employment at Prism Johnson Wax was terminated.

On February 6, 2003 (approximately 4 months after the divorce was obtained), Kelvin filed a bankruptcy petition under chapter 13, which he subsequently converted on July 28, 2003 to a case under chapter 7. In his conversion bankruptcy schedules, the debtor listed the obligation to Vicky as "an unsecured non-priority claim for $14,500" and which he labeled in his schedules as a "property settlement."

LAW

Whether a debt is a maintenance obligation (and therefore nondischargeable under § 523(a)(5)) or is a property settlement obligation (and therefore dischargeable under § 523(a)(5)), is a matter of federal bankruptcy law rather than state law. That point was made in In re Reines, 142 F.3d 970, 972 (7th Cir. 1998). Reines also declared that exceptions to discharge of a debt are construed strictly against a creditor and liberally in the debtor's favor. However, shortly after Reines was decided, the Seventh Circuit in In re Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998), qualified some of the language in Reines by declaring that, although exceptions to discharge are generally construed strictly against the creditor and liberally in favor of the debtor, that policy is tempered when the debts in question deal with obligations for spousal and child support. Crosswhite stated that bankruptcy law has had a long-standing corresponding policy of protecting a debtor's spouse and children in matters of alimony, maintenance and

support. Crosswhite, 148 F.3d at 881-882. *See also* In re Portwood, 308 B.R. 351 (8th Cir. BAP 2004) ("Unlike other exceptions to discharge, domestic relations exceptions are liberally construed in favor of the objecting creditor.")

The burden of proving that this obligation in question is nondischargeable as maintenance, which must be established by a preponderance of the evidence, rests with the recipient of the payments – meaning, in this case, Vicky. In re Reines, 142 F.3d at 973; Grogan v. Garner, 498 U.S. 279 (1991).

This court also recognizes that each case must be decided on the basis of its own particular facts and circumstances. Consequently, the court must look to various factors which have been established in other cases over the years to ascertain the parties' intent of the obligation and the function for which the obligation was intended to serve.

The testimony in this case is sharply in dispute as between Kelvin and Vicky. Vicky testified that this obligation was not a property settlement debt but was intended to enable her to meet her on-going living expenses. Kelvin, on the other hand, maintains the obligation was a form of property division. He testified that the purpose of the obligation was to "even off" the division of property between the parties after taking into account the equity interest which he obtained in the real estate at 236 West Second Avenue, Elkhorn, Wisconsin, and which was given to him as part of the marital settlement agreement. Ultimately, it turned out that this home was foreclosed and left no resulting equity for Kelvin. Nonetheless, Kelvin testified that at the time of the marital settlement agreement he estimated the home to have a fair market value of approximately $136,000 and when measured against the unpaid mortgage balance of approximately $106,000 left a resulting equity of approximately $30,000.

In order to ascertain the intention of the parties and the function of Kelvin's $18,000 obligation, many factors need to be considered. Case law declares that these factors must be viewed in

light of the circumstances of the parties at the time they entered into their marital settlement agreement. In re Hamblen, 233 B.R. 430, 434 (Bankr. W.D. Mo. 1999); In re Mullins, 312 B.R. 399, 404 (Bankr. D. Nev. 2004); Ginsberg & Martin on Bankruptcy, § 11.06(h).

One key factor is the language itself, as contained within the marital settlement agreement. In the case at bar, there is ample language characterizing the $18,000 as a form of maintenance. The parties included their agreement for the payment of the $18,000 in paragraph V, which paragraph was labeled "Maintenance" and in very clear language identified these payments as "maintenance payments." This $18,000 obligation was not included in a separate paragraph of the marital settlement agreement labeled "Property Division." This court believes that this is a clear expression of what the parties intended, although it is not conclusive. That is what sharply distinguishes this case from Reines where the court declared in Reines that there was no clear intent expressed with respect to the treatment of certain debts which the debtor-husband had assumed in the marital settlement agreement.

The tax treatment by the parties with respect to this obligation is another key factor. Paragraph V(E) of the marital settlement agreement states that the maintenance payments shall be included as income on Vicky's income tax returns and also shall be allowed as a deduction on Kelvin's income tax returns. Indeed, both Vicky and Kelvin testified that they followed these provisions. Vicky reported the payments which she received on the $18,000 obligation as income, and Kelvin testified that he included these payments as deductions on his income tax returns.

The financial circumstances of the parties when they entered into the marital settlement agreement also is crucial. At that time, Kelvin was gainfully employed at Prism Johnson Wax, and as previously noted, he was earning approximately $5,100 per month gross. Vicky, however, was then unemployed.

The current financial status of the parties is irrelevant on the issue of whether the $18,000 debt is in the nature of maintenance. Collier on Bankruptcy § 523.11(6)(d) declares that the vast majority of courts hold that the current financial posture of the parties is not relevant to this determination. See also In re Mills, 313 B.R. 395, 399 (Bankr. W.D. Pa. 2004) ("Our inquiry is limited to considering the facts as they existed at the time of the obligation. Subsequent events – e.g. a later change in the respective financial situations of the spouses – are not relevant in this regard.") Kelvin's counsel argues that Reines stands for the proposition that the current financial posture of the parties is a factor to be considered. However, this court, upon its reading of Reines, questions that interpretation. It is unclear from Reines whether the court was referring to the circumstances of the parties at the time of the divorce (when the obligation was created) or the current financial posture of the parties. What leads this court to conclude that Reines was focusing upon the circumstances of the parties when the obligation was created was its reference to the case of Matter of Dennis, 25 F.3d 274 (5th Cir. 1994). Although Reines reached a different conclusion from Dennis, it was only because of the difference in facts between Reines and Dennis. The Fifth Circuit in Dennis clearly stated that the facts are to be considered "at the time of the divorce" and not at the time of the bankruptcy filing. This court also relies on Draper v. Draper, 790 F.2d 52, 54-5 n. 3 (8th Cir. 1986), which declared:

> A debtor's attempt to expand the dischargeability issue into an assessment of the ongoing financial circumstances of the parties to a marital dispute would of necessity embroil federal courts in domestic relations matters which should properly be reserved to the state courts.

quoting In re Harrell, 754 F.2d 902, 907 (11th Cir. 1985). The record in this case reveals that, at the time of the divorce, Vicky was living with her future husband. Under these circumstances, the court concludes

that the income of Vicky's future husband is a proper factor to be considered and has taken this into account in analyzing Vicky's financial condition which existed at the time of the divorce.

The health of each of the parties is yet another factor for the court's consideration. Kelvin has no known health problems. Vicky, on the other hand, is suffering from Ménière's disease, a disorder of the inner ear characterized by vertigo or a loss of balance and which limits her employability.

There are still other factors to be taken into consideration. These include the fact that the marital settlement agreement provided for periodic monthly payments on the $18,000 debt rather than a lump sum payment. This suggests that the parties intended this debt to be a form of maintenance. In addition, the court has not lost sight of the fact that these parties were married for over 19 years, and at the time of the divorce, Kelvin was the sole bread winner and Vicky's role was as an unemployed housewife and mother. Taking into consideration the relatively lengthy marriage, the amount involved ($18,000), and the fact that at the time of the divorce Kelvin was the only one of the two parties who was employed, it does not appear unreasonable for this sum to be treated as a form of maintenance. This was the result reached in In re Herbert, 2005 WL 525408 (E.D. N.Y. 2005). In Herbert, the district court held that a property settlement debt of $105,000 calling for payments over three years to a wife in a 15-year marriage was a nondischargeable form of maintenance, notwithstanding the fact that the agreement contained a waiver of maintenance.

In the case at bar, the marital settlement agreement does not contain any waiver of maintenance, which makes this an even stronger case for Vicky than Herbert. By the same token, recently in In re Weaver, 316 B.R. 705 (Bankr. W.D. Wis. 2004), Judge Martin, in analyzing a marital settlement agreement where maintenance was specifically waived, reached the same conclusion as in Herbert and

found that certain debts which the debtor-spouse had agreed to pay were nondischargeable as constituting a form of spousal maintenance.

There are, to be sure, factors which favor Kelvin's position. As noted in Reines, often these cases present a mixed bag of factors. The court fully recognizes that the $18,000 obligation does not terminate upon death or remarriage of Vicky. However, the absence of such a provision has been held not to be conclusive on the issue of whether it is or is not "maintenance." *See* In re Zaino, 316 B.R. 1, 7 (Bankr. D. R.I. 2004) (where the court stated that the mere fact a debtor is not relieved of his obligation in the event the non-debtor spouse dies or remarried does not alter the nature of the payment).

The court is also cognizant of the fact that the $18,000 obligation is not subject to alteration or modification, which also supports Kelvin's position.

Finally, the court addresses Kelvin's argument that the $18,000 debt was intended to balance out the property division because of what Kelvin stated he perceived to be his equity interest in the home he received in the marital settlement agreement. He testified that he classified this property in his bankruptcy conversion schedules as a "property settlement" debt. However, Kelvin's classification in his bankruptcy conversion schedules was a self-serving declaration on his part made after the divorce. It also pales in light of the clear language in the marital settlement agreement. Kelvin's testimony that this home had a $136,000 fair market value is sharply at odds with his own verified statement which he made when he entered into the marital settlement agreement where he declared the fair market value of the home at that time was $94,161 (see Exhibit "C" – Preliminary Financial Disclosure Statement). After applying the fair market value of $94,161 with the mortgage balance of approximately $106,000, there was no equity. Kelvin's testimony also is at odds with Vicky's testimony when she said that she knew at the time this

marital agreement was entered into that there was no equity in the home, stating: "We would have been lucky to sell it for the amount owed."

CONCLUSION

While there certainly are factors pointing in the direction of each of the parties, unlike the situation in Reines where the court declared it was a "dead heat," in this case, the key factors overwhelmingly support Vicky's position. The court is persuaded that this obligation to Vicky was intended by the parties to fulfill the function of maintenance.

This obligation, therefore, is found to be a nondischargeable debt under 11 U.S.C. § 523(a)(5) as maintenance in the sum of **$14,500** (after giving credit to Kelvin for the $3,500 he paid to Vicky).

This constitutes the court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 72 of the Federal Rules of Civil Procedure.

Dated at Milwaukee, Wisconsin, this 8th day of April, 2005.

BY THE COURT:

/s/
JAMES E. SHAPIRO
U. S. BANKRUPTCY JUDGE

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