

DOCKET NUMBER: 95-04141

ADV. NUMBER: 95-80010

JUDGE: M. A. Mahoney

PARTIES: James S. Tucker, Patricia S. Tucker, Mary Levita Tucker

CHAPTER: 7

ATTORNEYS:

DATE: 12/19/95

KEY WORDS:

PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re

JAMES S. TUCKER and
PATRICIA A. TUCKER,

Case No. 95-04141
Chapter 7

Debtors.

MARY LEVITA TUCKER,

Plaintiff,

v.

Adv. No. 95-80010

JAMES S. TUCKER,

Defendant.

ORDER

This matter is before the Court on the complaint of Mary Levita Tucker, the Plaintiff, objecting to the dischargeability of certain debts in this case pursuant to 11 U.S.C. § 523(a)(5) and (a)(15). This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the debt owed by the Defendant, James S. Tucker, to First Bank of Arkansas is not dischargeable.

FACTS

A. The Divorce

Mary and James Tucker were married on March 4, 1978 and divorced on July 21, 1994. Their sixteen year marriage yielded two children, two autos, two real estate parcels, and a lot of debt. The debt at issue in this adversary case is one payable to First Bank of Arkansas in the

amount of \$18,954.28. Mary Tucker alleges the debt is alimony or a nondischargeable property settlement under 11 U.S.C. §523(a)(15). James Tucker alleges the debt is a property settlement provision of their divorce decree and he does not have the ability to pay it and it should be discharged under § 523(a)(15).

When the Tuckers separated, they negotiated their own terms of divorce. Mr. Tucker obtained the services of an attorney to draft the agreement. He brought the first draft to Mary. Together, they made changes to the agreement. James then took the agreement back to the attorney to modify. Once revised, James brought the document back to Mary. They both signed it. Later, they executed a supplement to the agreement, switching autos between themselves and transferring the auto debt to James.

In the divorce, each party took primary custody of one child and one car. Each waived all alimony rights. In fact, they never even discussed alimony as an option for either of them. Since each had one child, no child support was established. James Tucker agreed to pay and indemnify and hold Mary harmless from paying the joint debts of the parties, consisting of a debt to First Bank Card Center for \$3,000; a debt to Sears for \$590; a debt to AAFES DPP for \$1,000; and the debt to First Bank of Arkansas for \$18,000. Mary Tucker received the house she purchased after the parties separated (which James helped her to purchase by arranging for a VA loan). Mary is responsible for that debt.

The parties are the owners of a 10 acre parcel of land with a house in Arkansas upon which the First Bank of Arkansas debt is a first lien. The Tuckers purchased the property from Billy and Mary Lawrence, Mary's parents, in 1984 when the Lawrences were in financial difficulty. The Tuckers agreed to pay the Lawrences \$200 per month for the property and to let the Lawrences have a life estate in it. Mary Tucker's mother still lives on the property. The life

estate is not memorialized in any document introduced into evidence, but neither Tucker denied that it was the agreement. The mortgage requiring the \$200 per month payment was recorded in the county records. About \$18,000 of this debt is unpaid. In 1990, the Tuckers and the Lawrences were in need of a consolidation loan to pay some credit card debts of the Lawrences and to pay for siding, carpeting and a wood heater for the home on the property at this time. They obtained a loan from First Bank. So that the loan could be approved, the Lawrences subordinated their mortgage to that of First Bank.¹ In 1992, the Tuckers refinanced the loan at a lower interest rate at First Bank. Approximately \$18,900 remains due on this loan.

In the divorce settlement agreement, Mary Tucker was awarded title to the Arkansas property “once the collateral loan at First Bank of Arkansas is paid off.” James Tucker testified that he would deed the property to her now, even though the decree did not so obligate him. He claimed no interest in the property. At the time of trial however, title to the property was in both Tuckers’ names.

The parties’ cash incomes were very similar at the time of the divorce; however, James Tucker had additional nonmonetary income in the form of free on-base housing, so his income was greater. Mr. Tucker had vested rights in a military pension based on over sixteen years of service at the time of the divorce. Mrs. Tucker believed she had rights to 50% of it on a monthly basis for life.² Mrs. Tucker had a federal civil service pension with a value of approximately \$9,000 at the time of the divorce. Mr. Tucker had a right to 34-36% of the value. Mary

¹James Tucker believed the loan to the Lawrences was cancelled when they obtained the consolidation loan at First Bank of Arkansas; however, there is no release of lien in evidence.

²Counsel for James Tucker in questioning elicited that he believes she gets one-half of 50% or 25%. What Mary Tucker believed is the important issue in order to establish intent, whether her belief is correct or not.

Tucker's rights in James' pension were much more valuable than his rights in her pension. She testified that the reason that they agreed that he would pay the marital debts was to balance out her waiver of rights in his pension. She felt support over the next five years was of more value to her than the pension rights she would have when James left the military at 20 years of service. She was most in need of money at the time of the divorce. Mary Tucker testified that James knew she could not make ends meet without his payment of the joint debts. For this reason, Mary believes the debt repayment is support.

B. James Tucker

James Tucker remarried on July 25, 1994. His new wife, Patricia, has two children whom he has not adopted. He and Patricia filed their joint Chapter 7 bankruptcy case on February 21, 1995. Mary Tucker has not remarried. The daughter who was in her custody has now turned eighteen. James' and Mary's minor son is still in James' custody.

James and Patricia Tucker list monthly expenses as \$1,954.85 and net income as \$1,769.27 for a family of five. This income does not reflect the free housing which the James Tucker family has at Eglin Air Force Base. He does not list the \$283.32 per month debt to the First Bank of Arkansas as part of his expenses. He received income tax refunds of over \$1,500 last year. He claims he will not get as much for 1995.

James Tucker's new family unit has a large monthly medical expense—\$275. Seventy five dollars of the amount is for needed orthodontia work on one of Patricia's children. The other \$200 is to cover the 20% co-pay for Patricia's daughter's operation every 3 to 6 months to remove polyps from her throat. If the operation is not done, she cannot breathe. Prior to this, three surgeries were done at Eglin Air Force Base without charge. The government has instituted a new policy which prohibits operations on all dependents of military personnel.

Therefore, the surgery will now cost the family 20% of an estimated \$2,500 to \$4,000 two to four times per year.

The James Tuckers also purchased a new vehicle since bankruptcy. The 1995 Camaro has a payment of \$420 per month and higher insurance costs by \$20 per month. The former automobile, a Chevrolet Blazer, had a payment of \$261 per month. However, the Blazer was not reliable and was costing the Tuckers as much as \$200 per month for repairs. The new vehicle uses one-half of the gas that the Blazer used and has no repair problems. The Tuckers only have one car.

Patricia Tucker's ex-husband is required by their divorce decree to pay \$66 per week (or approximately \$283 per month) in child support. Patricia has never received the money and does not intend to attempt to collect it. She does not want her former spouse to have contact with the children. If she does not pursue him, she believes he will leave them alone.

The Tuckers discharged over \$67,000 in debt. They reaffirmed two debts—the secured portion of the Sears debt and the AAFES DPP debt totalling about \$2,000. The Tuckers desired to keep the secured merchandise from Sears. They needed to reaffirm the DPP debt in order to cash checks on base. James and Mary Tucker's daughter is now 18, so they owe no child support for her. James gets regular annual raises of 2-3% with the military.

Patricia Tucker is not employed. She is physically and mentally able to work; she is a licensed cosmetologist in Arkansas and even had her own shop during her prior marriage. She has no other skills, such as secretarial ones. She testified that she could only work part-time in light of her children's ages and schedules, and, most importantly, because the Tuckers only have one car. The base is not close to the nearby communities with job opportunities. Also, James

Tucker goes on temporary duty away from Eglin with some frequency and work would then be difficult with the children.

C. Mary Tucker

Mary Tucker lists monthly expenses of \$1,734 and net income of \$1,326 per month. Mary Tucker pays \$200 per month to her mother, Mary Lawrence, on the mortgage debt to her. Her budget reflects a \$177 per month tithe, \$200 per month in attorneys fees and \$104 per month to repay individuals from whom she has received loans to pay the interest on the First Bank loan to prevent foreclosure. She commenced interest payments when James and Patricia Tucker quit paying the First Bank of Arkansas debt in December 1994, shortly before they filed bankruptcy. Mary Tucker presumably gets cost of living increases annually as a government employee. Mary Tucker did not list the debt to First Bank in her expenses. She received a sizeable income tax refund for 1994 but claims she will receive less for 1995.

D. Legal Fees

Both James and Mary Tucker have expended significant sums for counsel for this suit. There is also a suit pending in state court in which Mary and James Tucker are seeking alternative relief for which significant legal costs were predicted.

LAW

Mary Tucker alleges that the debt to First Bank of Arkansas is not dischargeable on alternative grounds. First, the debt is a nondischargeable alimony obligation under 11 U.S.C. §523(a)(5). Second, if the debt is not alimony, then it is a nondischargeable property settlement under new Bankruptcy Code § 523(a)(15).

A. Section 523(a)(5)

Section 523(a)(5) states that a debt is nondischargeable if it is “to a . . . former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order of a court of record.” What constitutes alimony or support is determined under federal bankruptcy law and not state law. *Harrell v. Sharp (In re Harrell)*, 754 F.2d 902, 905 (11th Cir. 1985). The determination is made based upon the circumstances of the parties and their intent at the time of their divorce. *Id.* at 907.

The Court may look at many factors to determine whether an obligation is support or alimony, including the relative incomes of the parties, custody of children, age and health of the parties, whether the award is labeled as support or property settlement, whether the award is modifiable, and the stated intent of the parties. These factors dictate that the agreement of James Tucker to hold Mary Tucker harmless from obligation on the First Bank of Arkansas bill was not alimony or support. The incomes of the two parties were relatively equal at the time of the divorce. Each assumed primary custody of one child. The parties testified they never even discussed alimony as an option. Mary Tucker felt that James should pay the bills in exchange for her waiver of any rights in his military pension. The parties were balancing the assets and debts they had. Also, the award was not modifiable. James was to pay the debts no matter what the parties’ circumstances were in the future. For these reasons, the obligation James Tucker agreed to pay at First Bank is not alimony or support under 11 U.S.C. §523(a)(5).

B. Section 523(a)(15)

Since the obligation is not alimony, it is only nondischargeable if it is a property settlement which meets the tests established in Section 523(a)(15). Section 523(a)(15) states that a debt is nondischargeable if it is:

[N]ot of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation . . . unless—(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . ; or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse.

Therefore, there is a rebuttable presumption that the First Bank debt should not be discharged unless one of the two tests are met. The tests under (A) and (B) are disjunctive. *Kessler v. Butler (In re Butler)*, 186 B.R. 371 (Bankr. D. Vt. 1995). The Court is to determine whether either of these tests is met based upon the parties' situations at the time of the filing of the complaint, not at the time of the divorce as is the case for Section 523(a)(5). *Harrell* at 907 (re time to determine Section 523(a)(5) issues). Therefore the Court must look at the two Tuckers' lives as of May 26, 1995.

Prior to reaching the substantive issues, the Court must look at the issue of which party has the burden of proof as to the debtor's establishment of the requirements of the two tests. Courts have already split on whether the debtor or the creditor must offer the proof in the first instance. The majority of the courts have held that the debtor has the burden of proving the dischargeability of the debts once the adversary is filed. *Becker v. Becker (In re Becker)*, 185 B.R. 567 (Bankr. W.D. Mo. 1995); *Hill v. Hill (In re Hill)*, 184 B.R. 750 (Bankr. N.D. Ill. 1995); *Comisky v. Comisky (In re Comisky)*, 183 B.R. 883 (Bankr. N.D. Cal. 1995); *Florio v. Florio (In re Florio)*, 1995 WL 602871 (Bankr. W.D. Mo. 1995); *Silvers v. Silvers (In re Silvers)*, 1995 WL 590208 (Bankr. W.D. Mo. 1995). Other cases have held that the nondebtor spouse carries the burden of proving that the tests are not met. *Butler* at 374; *Woodworth v. Woodworth (In re Woodworth)*, 187 B.R. 174 (Bankr. N.D. Ohio 1995). Although it may be a significant issue in some cases, both parties offered evidence as to the tests in this case, and the decision of the

Court does not rise or fall on the burden of proof. Therefore, although the issue may be a serious one in some future case, the Court need not decide where the burden rests in this case.

The “ability to pay” test requires that the debtor have an inability to pay the debt in question while supporting himself and his dependents. *Becker* at 569. The Court must look first at what amount of money is “reasonably necessary” to support James Tucker and his dependents. Then, the Court must see if funds are left for payment of the First Bank debt. James and Patricia Tucker list monthly expenses of \$1,954.85 and income of \$1,769.27 for a family of five. In general terms, their expenses are not extravagant for five people. They are living from paycheck to paycheck, but two problem areas exist. Section 523(a)(15) speaks in terms of support reasonably necessary for a debtor and his dependents. Are the expenses of the two children of Patricia Tucker who are not adopted includible? Cases which have considered who are “dependents” under the Bankruptcy Code have construed the wording to have a common sense, colloquial meaning. A “dependent” is an individual supported financially, either directly or indirectly, by another who reasonably relies on the support. *In re Rigdon*, 133 B.R. 460 (Bankr. S.D. Ill. 1991); *In re Gonzales*, 157 B.R. 604 (Bankr. S.D. Mich. 1993). Therefore, the children of Patricia Tucker are James’ dependents. However, the Court also must take into account the Tuckers’ rights to receive other monthly income. This means that, even though not receiving it, the Court must add in the \$283 per month child support that Patricia should be collecting, but is not. The parties then have approximately \$100 of income over their expenses. The daughter of Patricia Tucker who needs surgery two to four times per year adds roughly \$200 per month to the family expenses. Her biological father is required to pay one-half of this amount. Therefore, unless it were shown that he cannot do so (and it was not), then the debt added to the monthly expenses of the James Tuckers should be only \$100. This adds an additional \$100 of monthly

income. Also, as of May 26, 1995, the James Tuckers had not purchased their new vehicle with the \$420 per month payment and \$20 per month higher insurance. The James Tuckers could have purchased a safe, new car with a payment much lower than \$420 per month. Therefore, some additional amount was available to the Tuckers as well, perhaps as much as another \$80-100. Without an additional \$250-300 per month in income over their expenses, the James Tuckers can pay the First Bank debt.

Since the first test is met, the debt is nondischargeable. Therefore, there is no need to discuss the “balancing test.” However, in the event the Court is wrong on the “ability to pay” test, it is appropriate to discuss what the results would be. The balancing test weighs the effects of the discharge of the debt on the debtor and his former spouse. This test weighs in Mary Tucker’s favor as well. The Court believes the benefit of the discharge of the debt to James Tucker would hurt Mary Tucker if she is left to pay the debt more than vice versa.

First of all, if James and Patricia Tucker’s uncollected child support and medical expense income and cheaper car payment are added in, the James Tuckers are able to meet their expenses and have over \$250 per month left over. Ms. Mary Tucker has monthly expenses that exceed her income by approximately \$400. In these expenses are \$200 for attorneys fees, \$177 for tithes and \$104 for repayment of loans which would be repaid within one year. If this Court were evaluating Mary Tucker’s expenses on the “reasonably necessary” standard, some of these would be questionable as necessary to survival. Even leaving these expenses aside, however, she barely breaks even. She has a cheaper car, cheaper insurance and other expenses than the James Tuckers. Admittedly, some of her expenses are higher than what the per capita cost of items is for the James Tuckers, but that is normal. There is some economy to size. The James Tuckers have approximately the same life style now as Mary Tucker. If they collected the child

support due them, and did not have to pay the First Bank of Arkansas debt, they would have a better lifestyle. The debt is one for which Mary Tucker remains liable if James Tucker does not pay it. It is true she will get the benefit of the asset, but only when the debt to First Bank of Arkansas is paid in full. Until that time, she obtains no personal benefit from the asset. Within five years, James will be receiving the pension Mary gave up to get this debt paid. He will be receiving value too. The balancing test weighs more heavily on the James Tuckers since the Court is adding to their income money they do not have. However, the decision not to collect child support and to purchase an expensive new auto versus more economical transportation was, and is, theirs. The Court cannot let Mary Tucker suffer because of voluntary choices the James Tuckers wish to make. Once those amounts are added to the income, the James Tuckers reap a benefit from the discharge of the bank debt which is greater than the detriment suffered by Mary Tucker if she were required to pay it.

C. Legal Fees

Mary Tucker seeks an award of attorneys fees to her for fees incurred in bringing this action to collect the property settlement debt owed to her. The amount of those fees and costs is not specified or proven. Fees and costs ancillary to a nondischargeable debt may be nondischargeable. *Haast v. Frumkes (In re Haast)*, 27 B.R. 93 (Bankr. S.D. Fla. 1983). These fees include prebankruptcy fees of the nondebtor spouse to collect support or property settlement debts. Since this action is one to collect a divorce debt, the fees are incurred to enforce a divorce obligation and the fees may be ordered to be paid by the nonpaying spouse.

In this case, these fees also need to be reviewed under the Section 523(a)(15) standards. The payment to First Bank is \$283. This is all of the income the Court found the Tuckers had that was not “reasonably necessary” to their support. Therefore, the court cannot find James

Tucker has an ability to pay the fees. The Court also cannot find that James Tucker benefits more from discharge of the fees than Mary Tucker suffers from having to pay them. Both budgets are equally sparse once the James Tuckers take on the \$283 per month debt to First Bank. Therefore, although the fees and costs could be dischargeable in the right circumstances, this is not the case. Equity will not allow it.

For the reasons indicated, the Court ORDERS and ADJUDGES that the debt of James Tucker to First Bank of Arkansas described in paragraph 15 of the Marital Settlement Agreement of Mary Levita Tucker and James Samuel Tucker dated June 6, 1994 is a nondischargeable debt pursuant to 11 U.S.C. §523(a)(15).

Dated: December 19, 1995

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE