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JUDGE: M. A. Mahoney

PARTIES: Joseph Michael Lee, Sr., Marguerite Luanne Elkins Lee, Ava D. Lee

CHAPTER: 7

ATTORNEYS: N. Nagrich, F. V. Anderson

DATE: 12/15/97

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JOSEPH MICHAEL LEE, SR.
MARGUERITE LUANNE ELKINS LEE

Case No. 97-11287

Debtors.

AVA D. LEE

Plaintiff

v.

Adv. No. 97-1176

JOSEPH MICHAEL LEE, SR.

Defendant.

ORDER

Nicholas Nagrich, Mobile, Alabama, Attorney for Ava D. Lee.
Frank V. Anderson, Mobile, Alabama, Attorney for Joseph Michael Lee, Sr.

This matter came before the Court on the complaint of Ava Lee to determine pursuant to 11 U.S.C § 523(a)(5) or (a)(15) the dischargeability of Joseph Lee's obligation to pay the amounts owing on four credit cards. The 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, Joseph Lee's obligation to pay the credit card indebtedness is discharged pursuant to 11 U.S.C. § 523 (a)(5) and (a)(15).

FACTS

Joseph Lee and Ava Lee were married on November 27, 1988. The Lees had one child, Alexander Nathaniel Lee, who was born on September 29, 1992. The Lees were divorced on November 20, 1995. A final judgment of divorce was entered in the Circuit Court of Baldwin

County, Alabama. The final judgement of divorce incorporates a settlement agreement. Plaintiff's Exhibit 1. Relevant parts of the settlement agreement state:

...

2. The parties agree that it would be in the best interest of the minor child to terminate Husband's parental rights, and the parties evidence their intent by executing this agreement. The parties agree that Husband's visitation rights with the minor child be terminated and all child support is hereby waived by Wife. It is, therefore, the parties' intent that this court terminate all of Husband's parental rights as it relates to the minor child of the marriage, namely, ALEXANDER NATHANIEL LEE, born September 29, 1992.

3. Husband agrees to pay the following credit card indebtedness:

	<u>Name of Creditor</u>	<u>Balance Due</u>
a.	<u>Capital ONE</u>	\$2,500
b.	<u>First Card - VISA</u>	3,700
c.	<u>Sears</u>	3,000
d.	<u>GM - MasterCard</u>	3,700

...

9. The parties agree that neither is entitled to alimony in gross or periodic alimony from the other and neither shall be responsible hereafter for the debts of the other, except as enumerated herein. The parties further agree to indemnify and hold harmless the other from any claim arising out of any debt which they have individually herein agreed to pay.

Mr. Lee filed a Chapter 7 bankruptcy petition on April 7, 1997. Mr. Lee listed in his bankruptcy schedules the four credit cards and the current balances. His schedules indicated the following:

<u>Name of Creditor</u>	<u>Amount of Claim</u>
Capital ONE	\$6,239
First Card - VISA	3,347
Sears	2,135
GM - MasterCard	3,534

The Chapter 7 Trustee, on May 21, 1997, determined that there was no property available for distribution to creditors from the bankruptcy estate.

Ms. Lee is a co-debtor on the four credit cards. On May 30, 1997, she filed a complaint in order to contest Mr. Lee's attempt to discharge his obligation to pay the amounts owing on the credit cards. It is Ms. Lee's position that Mr. Lee's payment obligation pursuant to the settlement agreement was in the nature of alimony and/or support; therefore, the obligation is nondischargeable. It is Mr. Lee's position that his payment obligation was a property settlement. Furthermore, in his answer to the complaint, Mr. Lee contends that the hardship to himself, if the debts are not discharged, would be greater than the relative to the hardship to Ms. Lee. A hearing was held on October 21, 1997.

Ms. Lee testified that Mr. Lee agreed to pay the credit card debts as alimony and/or support. The credit cards had been used to purchase items for the Lee's son and appliances for their home. At the time of the divorce, the balances due on the credit cards were as stated in the settlement agreement. Ms. Lee testified that she waived any right to receive alimony and/or child support in exchange for Mr. Lee's agreement to pay the credit card indebtedness.

If Mr. Lee were allowed to discharge the credit card debts, Ms. Lee testified that the affect on her would be a bad one. She would be forced to either file bankruptcy or go on state aid. Ms. Lee works as a waitress at Shoney's. She has worked there for the past six years. She works twenty-five to thirty hours per week. She earns \$2.19 per hour plus tips. She earns approximately \$169 in tips per week. She testified that her annual income, as last reported to the IRS, was \$11,573. She does not anticipate that her wages will go up or that she will receive a promotion. She does not have any source of income, other than her job at Shoney's. Ms. Lee rents a mobile home and she

does not own a vehicle. She currently applied for Medicaid for her son. She has not purchased any clothes for herself in the past two years.

Mr. Lee works at Hood's Discount Home Center. He earns \$11 per hour and grosses \$440 per week. He does not receive any overtime. He does not have any other source of income. Mr. Lee is not living with his current wife, Marguerite Luanne Elkins Lee. Mr. Lee indicated that his monthly expenses include a child support payment of \$300 per month for two children from a prior marriage. He testified that he lives in a van parked at a friend's place. He gives his friend a couple hundred dollars per month to use the friend's electricity. He does not see himself moving out of the van in the foreseeable future.

In reference to the four credit cards, Mr. Lee testified that he has used the Capital One card since the divorce. He used the Capital One card to finance work on his van and he purchased a jeep with a cash advance. The jeep was later sold and money from the sale was used to pay other bills. He has not used the First Card - Visa, GM - MasterCard, or Sears cards. Mr. Lee testified that he made monthly payments on the credit cards prior to filing bankruptcy. He has not paid off any one of the cards in full. In reference to the GM - MasterCard, by order dated August 14, 1997, this Court found that the credit card issuer, Household Credit Services, had violated the automatic stay. Mr. Lee was awarded punitive damages in the amount of five thousand dollars.

Recently, the Circuit Court of Baldwin County ruled that the Lees could not waive Alexander Lee's right to child support payments. A motion to determine what, if any, child support Mr. Lee will be required to pay is currently pending. Using the Alabama child support guidelines, Mr. Lee's child support obligation for Alexander Lee computes to \$463 dollars per month. This computation is based on: (1) a monthly adjusted gross income of \$1,606 for Mr. Lee (a monthly gross income of \$1906 minus a preexisting child support payment of \$300); (2) a monthly adjusted gross income

of \$964 for Ms. Lee (an annual salary of \$11,573 divided by 12); (3) work-related child care costs of \$250; and (4) health insurance costs of \$100. Mr. Lee's child support obligation for Alexander Lee would be \$244 per month if work-related child care costs and health insurance are not included in the computation.

Mr. Lee testified that he will have very little additional money in his budget, once he begins paying child support for Alexander Lee. Mr. Lee offered the following itemization of his expenses:

Net Monthly Take Home Pay	\$1,312.99
Rent	\$200.00
Food	200.00
Transportation	120.00
Automobile Insurance	50.00
Current Child Support	300.00
Future Child Support	416.00
Total Monthly Expenses	<u>\$1,286.00</u>

Defendant's Exhibit 1.

Ms. Lee's counsel argued that it was the intent of the parties that payment of the credit card debts be treated as alimony and/or child support. Counsel argued that the Court must look beyond the words of the agreement. Public policy favors a result that would not force Ms. Lee into bankruptcy or make her dependant on public assistance. Under a § 523 (a)(15) analysis, Ms. Lee would suffer the greatest hardship. Counsel argued that the relative hardship of the parties could not be based on an unknown child support amount. Mr. Lee's counsel contended that the Court when analyzing the relative hardship of the parties should consider the foreseeable award of child support. Mr. Lee will definitely be required to pay some amount for the support of his five year-old son. If Mr. Lee is denied a discharge of his obligation to pay the credit card indebtedness and he is

required to pay child support for Alexander Lee, then Mr. Lee will be unable to afford his basic monthly expenses.

LAW

Section 523(a)(5) of the Bankruptcy Code provides that a debt to a former spouse or child for “alimony to, maintenance for, or support of such spouse or child” is not dischargeable. In a § 523 case, the burden is on the plaintiff/creditor to prove his or her case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

The U.S. District Court for the Southern District of Alabama has outlined what a court must look at to determine dischargeability under § 523 (a)(5):

It is well established that the issue of whether a particular debt is a support obligation or part of a property settlement is governed by federal bankruptcy law, rather than by state law. *See Carver v. Carver*, 954 F.2d 1573, 1578-79 (11th Cir. 1992); *In re Harrell*, 754 F.2d 902, 905 (11th Cir. 1985); *In re Snipes*, 190 B.R. 450, 451-52 (Bankr. M.D. Fla. 1995); *but see In re Bedingfield*, 42 B.R. 641, 645 (S.D. Ga. 1983) (although federal law controls, state law should not be ignored completely). The mere labeling of an obligation in an agreement as alimony is not determinative of whether that particular obligation constitutes nondischargeable alimony. On the contrary, the Court’s inquiry concerns the substance of the obligation rather than its form. *See In re Chalkley*, 53 F.3d 337 (table), 1995 WL 242314*1 (9th Cir. Apr. 25, 1995); *Ackley v. Ackley*, 187 B.R. 24, 26 (N.D. Ga. 1995); *Bedingfield*, 42 B.R. at 645; *but see Coleman v. Coleman*, 152 B.R. 79 (Bankr. M.D. Fla. 1993) (while label placed on obligation is not dispositive, it is indicative of parties’s intent). . . . In determining whether a given obligation should be deemed alimony or part of a settlement, the focus is on the intent of the parties in entering the dissolution agreement, and on the substantive effect of that obligation. *In re MacDonald*, 194 B.R. 283, 287 (Bankr. N.D. Ga. 1996).

Jacobs v. Jacobs, No. 95-0740-CB-C (S.D. Ala. May 20, 1996).

The first issue before the Court is whether the obligation to pay the credit card indebtedness is in the nature of alimony and/or support and therefore nondischargeable under § 523 (a)(5). Ms. Lee contends that it was the intent of the parties that the obligation was in fact alimony and/or support. However, the provision in the Lees settlement agreement requiring Mr. Lee to pay the

credit card indebtedness and hold Ms. Lee harmless is a property settlement on its face. Paragraphs 3 - 7 clearly make a division of the marital property. Ms. Lee agreed to accept certain personal property, title and ownership of the land on which the couple's mobile home was located, the 1987 Dodge mini-van, and liability for payment on the land. Mr. Lee agreed to accept certain personal property, the couple's mobile home, the Ford van, and liability for payment of the credit card indebtedness. Mr. Lee's obligation is not labeled as alimony and/or support. Furthermore, the settlement agreement specifically states, "all child support is hereby waived by wife" and "the parties agree that neither is entitled to alimony in gross or periodic alimony." In light of the clarity of the settlement agreement, the facially equal division of debts and assets, and the lack of any proof of intent beyond the parties own statements which are equally credible, the Court determines that Mr. Lee's obligation to pay the credit card indebtedness is not "in the nature of alimony, maintenance or support", see *In re Harrell*, 754 F.2d 902 (11th Cir. 1985), but is instead part of the Lee's property settlement. Ms. Lee did not prove by a preponderance of the evidence that the obligation was support. At best the evidence is in equipoise.

The second issue before the Court is whether the obligation to pay the credit card is nondischargeable under § 523 (a)(15). The Court finds that Mr. Lee's obligation to pay the credit card debts is a property settlement. A property settlement obligation may be discharged under § 523 (a)(15) if either of two conditions exist. If under § 523 (a)(15)(A) a debtor does not have the ability to pay a certain debt or if under § 523 (a)(15)(B) the benefit to a debtor outweighs the detrimental consequences to the non-debtor spouse, the debt should be discharged. Once the former spouse establishes the existence of the debt and the debt is determined not to be alimony, maintenance or support, the debtor has the burden of proof to establish his entitlement to a discharge under either subsection of § 523(a)(15). *In re Stone*, 199 B.R. 753, 783 (Bankr. N.D. Ala. 1996).

Section 523 (a)(15)(A) requires the Court to determine whether paying the debt in question would reduce the debtor's income below the amount which is necessary for the support of himself and his dependents. First, the Court must determine what amount of money is reasonably necessary to support Mr. Lee and his dependents. The Court must then see if funds are left for payment of the credit card indebtedness.

Mr. Lee indicated that his net monthly income is \$1,313.99 and his total monthly expenses are approximately \$1,114.00. The amount of \$1,114.00 was arrived at by adding the following expenses:

Rent	\$200.00
Food	200.00
Transportation	120.00
Automobile Insurance	50.00
Preexisting Child Support	300.00
Child Support for Alexander Lee	244.00
	<hr/>
	\$1,114.00

In light of the recent ruling by the Circuit Court of Baldwin County, this Court will take into account that some amount will be owed month by the debtor as child support payments for Alexander Lee. A reasonable estimate is at least \$240 - \$250 dollars per month. A debtor's financial condition is determined by examining the debtor's current and future circumstances rather than the circumstances as of some fixed point in time. *In re McGinnis*, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996).

Mr. Lee has disposable income of \$199.99 per month. However, the above itemization does not take into account: (1) health insurance or work-related child care costs for Alexander Lee; or (2) utility payments. Based on the amounts in Mr. Lee's bankruptcy schedules, the credit card debts

total \$15,255.00. Mr. Lee does not have sufficient monthly income to pay these debts monthly and in full.

Although the Court does not believe that Mr. Lee is in a position to pay the credit card debts from his monthly salary, the Court does believe that Mr. Lee's punitive damage award can be used to partially satisfy the debts. "[A] debtor has the ability to pay an obligation, for purposes of 11 U.S.C. § 523 (a)(15), if the debtor has sufficient disposable income to pay all or a material part of the property settlement within a reasonable amount of time." *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). Five thousand dollars (or part of it) could pay as much as one third of the charges. The punitive damage award was not calculated based upon any actual losses of Mr. Lee. It is funds, available within a reasonable time, capable of paying the debts.

The debtor has sustained his burden of proving that payment of the credit card debts is not possible except possibly from the punitive damage award. Ms. Lee did not assert that this award should be used to partially pay the debt. However, the award was the subject of a final order by the time of trial. In light of the fact that Mr. Lee has no housing other than his van, the Court will not require that the punitive damage award be used to pay a portion of the debts. With a net income of \$1,313 per month, he does not have extra income. Furthermore, even if the Court ordered all of the \$5,000 award paid toward the credit card debts, it would still leave Ms. Lee with approximately \$10,000 in debt. On her limited income, with a five year old son, \$10,000 is as impossible to pay as \$15,000.

Section 523 (a)(15)(B) requires that the Court weigh the effects of the discharge on the debtor and his former spouse. Mr. Lee has met his burden as to this prong also. Both the Lees appear to be in dire financial straits. Once child support payments are deducted from his salary, Mr. Lee is left with \$1,069.99 per month. There does not appear to be any area in which Mr. Lee can

reduce his expenses. When Ms. Lee starts receiving child support for Alexander Lee, she will have approximately \$1,208 to support herself and her son. This will leave her with no excess monthly funds either. Neither party has the monthly disposable income to afford the credit card debts. The benefit to Mr. Lee of discharge will free him of the credit card debts and leave him better able to pay child support when ordered to do so. This is a benefit to him and to Ms. Lee which outweighs the detrimental consequences to Ms. Lee. If Mr. Lee receives a discharge of the credit card indebtedness, Ms. Lee will probably find it necessary to file bankruptcy. This is a result the Court deplors but cannot change. A bankruptcy court should deny the debtor his fresh start simply because his former wife has chosen not to seek the same relief on her own behalf. *In re Daiker*, 5 B.R. 348, 352 (Bankr. D. Minn. 1980). *See also In re Hill*, 184 B.R. 750, 776 (Bankr. N.D. Ill. 1995).

A debt may be discharged under § 523 (a)(15) if either under subsection (A) a debtor does not have the ability to pay the obligations or if under subsection (B) the benefit to a debtor outweighs the detrimental consequences to the non-debtor spouse. The test under subsections (A) and (B) are disjunctive. *In re Butler*, 169 B.R. 371 (Bankr. D. Vt. 1995). Both tests have been met. Pursuant to § 523 (a)(15)(A) and § 523 (a)(15)(B) the credit card debts are dischargeable.

Therefore, IT IS ORDERED that the obligation of the debtor to Ava D. Lee provided for in paragraph 3 of their divorce decree in the Circuit Court of Baldwin County dated November 20, 1995 is DISCHARGED and judgment is awarded for the defendant.

Dated: December 12, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE