UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In Re

SHRI' JERRENE STROUD, Case No. 02-11512

Debtor.

SHRI' JERRENE STROUD,

Plaintiff,

v. Adv. No. 02-01111

CHARLES T. STROUD,

Defendant.

ORDER

This matter came on for hearing on the Plaintiff, Shri' Jerrene Stroud (hereinafter "Debtor"), to declare all debts, obligations and sums due or to become due from Debtor to Charles T. Stroud to be discharged pursuant to 11 U.S.C. §523(c), §523(a)(5) and (15). Appearances were noted in the record, Mr. Stroud having appeared pro se. The Court has jurisdiction to decide 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).

Shri' Jerrene Stroud, Debtor herein, filed an adversary complaint against her former spouse, Charles T. Stroud (hereinafter "Mr. Stroud"), seeking to declare all debts and obligations that she may owe to Mr. Stroud discharged under 11 U.S.C. §523(c). The Debtor filed a Chapter 7 bankruptcy on March 18, 2002. The declaratory judgment action was filed on June 25, 2002.

The documentary evidence in the case consisted of a divorce decree of the Circuit Court of St. Claire County, Illinois dated March 29, 2000. The parties were married in 1988 and have no

children. Mr. Stroud testified that prior to his marriage he had been iron worker. Ms. Stroud is a Lieutenant Commander in the United States Navy on active duty and a graduate of the U.S. Naval Academy. Following the marriage, Mr. Stroud gave up his trade as an iron worker in order to accompany his wife to her various duty stations where she was assigned so they could be together. During this period of time he would work various odd jobs. Mr. Stroud is 58 years old and Ms. Stroud is 36.

The divorce decree was entered into by agreement of the parties and provided for a property settlement as well as settlement of any other claims between them that arose out of the marriage relationship. Much of the testimony in the case concerned whether the division of property and payment of certain obligations which arose during their marriage were accomplished pursuant to the terms of the divorce decree.

Paragraphs 7, 8, 9, and 10 of the divorce decree all deal with terms of the property settlement and payment of marital debt. Paragraph 11 determined that Ms. Stroud's military retired/retainer pay was marital property subject to equitable division by the state circuit court. The state court made a finding that Ms. Stroud had consented to the court's jurisdiction for the purpose of dividing her disposable military retired/retainer pay. The agreed order provided that Mr. Stroud would receive as his portion of Ms. Stroud's future military retirement pay "20 % of the Petitioner's disposable retirement pay as an O-4." Paragraph 12 of the divorce decree recited an agreement by Ms. Stroud to pay temporary maintenance of $1,000 per month beginning in the year 2005, but contained certain conditions.

CONCLUSIONS OF LAW

The court records in the instant case fail to reflect that Mr. Stroud filed any adversary proceeding seeking to determine whether any portion of the marital debts or obligations referred to in the divorce decree were nondischargeable under §523(a)(15) or (5). Section 523(c)(1) states that

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

Stated simply, that means that if Mr. Stroud did not file an adversary proceeding within the time allowed by law seeking to determine whether any debts were nondischargeable under §523(a)(15), then any such obligations will be discharged by the bankruptcy. However, §523(c) does not discharge debts that fall within §523(a)(5). That section states as follows:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt - (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, . . . or property settlement agreement, but not to the extent that -
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> > (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

As these Code sections relate to this case, the Court must determine whether the obligations and debts referred to in the divorce decree are dischargeable pursuant to §727 and whether any debts are excepted from discharge under §523(a)(5).

The debtor has argued that all of the obligations in the divorce decree are property settlement and are not in the nature of alimony or support. The U.S. District Court for the Southern District of Alabama has outlined the parameters of the bankruptcy court's inquiry under § 523(a)(5)(B):

> 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. 779 (Bankr. M.D. Fla. 1993) (while label placed on obligation is not dispositive, it is indicative of parties' intent). Nor is it relevant or appropriate for the Court to conduct precise investigation of the financial circumstances of the parties to determine the proper level of need or support for the appellee. See Harrell, 754 F.2d 906-07 (noting that such an inquiry "would of necessity embroil federal courts in domestic relations matters which should properly be reserved to the state courts.").
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> Jacobs v. Jacobs, No. 95-0740-CB-C (S.D. Ala. May 20, 1996).

To determine whether a debt should be treated as alimony rather than part of a property settlement under 11 U.S.C. § 523(a)(5)(B), courts have used a number of tests. The elements vary in different courts, but most courts employ some or all of the following factors: 1) whether the obligation ends upon the happening of contingencies, such as remarriage; 2) whether the payments are periodic or lump sum; 3) whether the parties have minor children whose support is in question; 4) whether the obligation was constructed to reduce the disparities in the parties' relative earning power; 5) whether the spouse is directly or indirectly benefitted by the payment; and 6) whether applicable state law would deem the obligation to be alimony or property settlement. See In re

MacDonald, 194 B.R. 283, 287 (Bankr. N.D. Ga. 1996); In re Snipes, 190 B.R. 450, 452 (Bankr. M.D. Fla. 1995); Appling v. Rees, 187 B.R. 27, 29 (N.D. Ga. 1995); and In re Bedingfield, 42 B.R. 641, 645-46 (S.D. Ga. 1983).

It is clear from the divorce decree that paragraphs 7, 8, 9, and 10 are merely terms of a property settlement between the Debtor and Mr. Stroud and all such obligations or debt treated therein are dischargeable. The two remaining paragraphs at issue are paragraphs 11 and 12. Paragraph 12 states in pertinent part as follows:

> Due to the income potential of the parties, the Petitioner agrees to pay temporary maintenance in the amount of $1,000 per month beginning in the year 2005 so long as she is on active duty with the United States Navy, the Respondent pays the marital debts as listed above, there is no termination even (sic) as listed in 750 ILCS 5/510(c) and the Respondent's income remains below $36,000 per year.

Applying the factors referred to above as to whether a debt should be treated as alimony rather than a property settlement, it is the opinion of this Court that the obligation under said paragraph is of a contingent nature. For the Debtor to pay anything to Mr. Stroud, the obligation would not even begin until the year 2005. The key factor, however, is the condition that Mr. Stroud pay the marital debts as listed in the divorce decree. The Court therefore holds that any obligation under Paragraph 12 of the Debtor to Mr. Stroud is in the nature of a property settlement and not alimony, maintenance, or support. The contingent nature of the obligation, in addition to the fact that it was an exchange for Mr. Stroud fulfilling his obligations to pay certain debts of the marriage indicate that it was a property settlement.

The Court now turns to whether the obligation referred to in Paragraph 11[1] of the divorce decree is within the purview of 11 U.S.C. §523(a)(5). The threshold issue is whether the military retirement benefit referred to in said paragraph is a "debt" as defined by 11 U.S.C. § 101(12) of the Bankruptcy Code.

Several courts have held that such benefits "constitute the sole and separate property of a debtor's former spouse where the spouse received an award of a portion of debtor's military retirement benefits pursuant to a divorce decree or other order of a court." *Williams v. Califf (Matter of Califf)*, 195 B.R. 499, 501 (Bankr. N.D. Ala. 1996); *Farrow v. Farrow (In re Farrow),* 116

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[1] Paragraph 11 of the divorce decree in pertinent part is as follows:

> 11. The evidence shows that the Petitioner is on active duty with the United States Navy. The evidence shows the Petitioner has a future military retirement pay and the Respondent shall receive as his portion a percentage of Petitioner's disposable retirement as an O-4 according to the following:
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> 20% of the Petitioner's disposable retirement pay as an O-4.
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> In the course of the Parties' marriage, the Petitioner performed at least 10 years of service creditable in determining his [sic] eligibility for retired/retainer/separation pay. The parties were married on August 23, 1988 and divorced on March 29, 2000. The Petitioner is now on active duty with the Untied [sic] States Navy. . . . The Court finds that the Petitioner's military retired/retainer pay is and shall be accruing as a result of her service in the United States Navy and that the disposable military retired/retainer pay is marital property subject to the equitable division by the family court of the Circuit Court of St. Clair County, Illinois pursuant to the Revised Statutes. The Court finds further that it is competent to divide the parties' marital property incident to their divorce pursuant to Illinois law. The Court finds further that it has jurisdiction over the Petitioner for the purpose of dividing her disposable military retired/retainer pay because the Petitioner has consented to the Court's jurisdiction to divide her disposable military retired/retainer pay.
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> The Petitioner has been afforded her rights under the Soldiers and Sailors civil Relief Act of 1940 (50 USC 501-591).
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> The Court shall retain jurisdiction over the Petitioner's military retired/retainer pay for so long as both parties shall live. The Court shall also have the authority to make every just and equitable order not inconsistent with the other provisions herein and not inconsistent with the Uniformed Services Former Spouses Protection Act or other applicable law.

B.R. 310 (Bankr. M.D. GA. 1990)

(finding that plaintiff's interest in debtor's military pension was the sole and separate property of plaintiff rather than a debt of the debtor).

"Congress proscribed the treatment to be afforded to a former spouse of a retired military service member in the Uniformed Services Former Spouses Act (USFSPA). 10 U.S.C. §1408. Section 1408(c)(1) of the USFSPA provides that:

> a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of jurisdiction of such court.

Williams v. Califf (Matter of Califf), 195 B.R. 499, 501 (Bankr. N.D. Ala. 1996).

The state court in the divorce case designated the disposable military retired pay as marital property subject to the equitable division of the Illinois court. As in the *Farrow* case, Mr. Stroud's entitlement was fixed pre-petition in the divorce judgment, and the Debtor's entitlement to receipt of the retirement did not come into being until some time after the filing of bankruptcy. The Debtor in this case has argued that a distinction should be drawn between the facts in the instant case and those of the *Califf* case and the cases cited therein, because Ms. Stroud is not yet vested with the retirement benefits. Therefore, the Debtor argues that the retirement benefits should not be categorized as property of the Debtor's former spouse, Mr. Stroud. Under Illinois law, "all pension benefits . . . acquired by either spouse after the marriage and before a judgment of dissolution of marriage . . . are presumed to be marital property, regardless of which spouse participates in the pension plan." 750 Ill. Comp. Stat. §5/503(b)(2) (West 1999). The Court is of the opinion that whether the retirement benefits had vested in the Debtor or not, under Illinois law, it is considered as marital property subject to division and is not a debt.

This Court, however, finds that even if the retirement benefit is not a property interest, the ultimate result in this case does not change. The Court agrees with the *Farrow* decision that the obligation to pay any retirement benefit pursuant to 10 U.S.C.A.§ 1408 is the obligation of the Secretary of the Navy. *In re Farrow*, 116 B.R. at 312. Other courts have also held that the division of the military pension is not a "debt" under the Bankruptcy Code. In the case *In re Hall,* 51 B.R. 1002, 1003 (D.C. S. D. Ga. 1985), Judge Alaimo stated as follows:

> For purposes of Title 11 of the U.S. Code, "debt" means liability on a claim. (citation omitted). Division of the pension indeed gave Mrs. Hall a "claim" to the funds. However, "liability" for that claim rests with the United States, not with Thomas Hall. Under the state court order and federal statute, the United States is responsible for making good Mrs. Hall's claim. Hall has no duty to make payments from the pension funds to his former wife. He has no power to terminate the Government's payments to her without ending as well the payments to himself. The rights and responsibilities created by the property division resulted in no debt between Mr. and Mrs. Hall, as the term debt is defined in 11 U.S.C.§ 101(11) [now (12)]. *In re Hall*, 51 B.R.at 1003. Also see, *In re Teichman*, 774 F.2d 1395, 1398 (9th Cir. 1985); *In re McNierney*, 97 B.R. 648, 651 (Bankr. S.D. Fla. 1989).

Based on the foregoing, the Court finds that Paragraph 11 of the divorce decree is not a "debt" under the Bankruptcy Code, and as such, any obligation created thereunder is nondischargeable. It is hereby

ORDERED that Paragraph 11 of the Stroud divorce judgment is nondischargeable.

It is further ORDERED that Paragraphs 7, 8, 9, 10 and 12 of the Stroud divorce judgment are Dischargeable.

Dated: January 29, 2003

William S. Shulman

WILLIAM S. SHULMAN
BANKRUPTCY JUDGE