

#S-2

signed 12-11-2003
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

DANIEL WADE CRAMER,

DEBTOR.

**CASE NO. 02-40192-7
CHAPTER 7**

DANIEL WADE CRAMER,

PLAINTIFF,

ADV. NO. 02-7032

v.

VALORIE L. CRAMER,

DEFENDANT.

MEMORANDUM OF DECISION

This proceeding is before the Court on the plaintiff-debtor's complaint to determine that certain obligations imposed on him in a divorce proceeding are not debts for alimony or maintenance, which would make them nondischargeable pursuant to 11 U.S.C.A. §523(a)(5), and the defendant's counterclaim that the obligations are nondischargeable under §523(a)(15). The debtor appears by counsel Richard A. Medley. The defendant appears by counsel Woody D. Smith. The parties have submitted their dispute for resolution based on a stipulation of facts. The Court reviewed the stipulation, and has supplemented it with information (the accuracy of which has not been contested)

drawn from the debtor's bankruptcy schedules, signed under penalty of perjury.¹ The Court is now ready to rule.

I. FACTS

The debtor and the defendant were married in 1997, and had one child before the debtor filed for divorce in 2001. In January 2002, the state court granted the divorce, awarded primary custody of the child to the defendant, and divided the parties' property, but reserved the questions of child support, spousal maintenance, and division of debt for later decision. The defendant was awarded the parties' home, the only real estate they owned.

Before the remaining questions were resolved, the debtor filed a Chapter 7 bankruptcy petition on January 31, 2002. He did not list the defendant as a creditor, but did list joint unsecured debts owed to Conesco Finance, Fleet/Advanta, and Lowes. He listed an interest in the one piece of real property, but noted that the property had been assigned to his ex-wife in the divorce. The debtor reported owning a little over \$36,000 worth of personal property, including one vehicle valued at about \$10,000, another valued at about \$18,000, and a "pool" valued at about \$5,500. The vehicles and the pool, however, were all encumbered by liens for their full value. The other listed assets were \$1,000 in household furnishings, \$300 in clothing, and credits for apartment and utility security deposits totaling \$535. The Chapter 7 trustee determined that the debtor had no nonexempt assets with any realizable value for the estate, and abandoned them. Nothing in the court file indicates anyone ever questioned

¹*See In re Applin*, 108 B.R. 253, 257-58 (Bankr. E.D. Cal. 1989) (judicial notice of basic filings in bankruptcy case is permissible to fill gaps in evidentiary record of specific adversary proceeding or contested matter).

whether the debtor had disclosed all of his assets. Although the record is not clear on this point, it appears that one of the vehicles may have been awarded to the defendant in the divorce.

After the debtor filed for bankruptcy, the divorce court held a hearing on the reserved questions. The defendant testified that paying off the debts to Consec Finance, Fleet/Advanta, and Lowes (“the Debt”) would require \$300 per month for 57 months. The state district court judge ordered the defendant to pay the Debt, which, as indicated, was all unsecured, and then ordered the debtor to pay the defendant \$165 (slightly more than half the Debt) per month for 57 months. The journal entry signed by the court identified this obligation as “spousal maintenance,” but the parties have stipulated that the court stated the obligation was imposed as part of the property division. The order does not indicate that the obligation would be affected by the defendant’s remarriage, and according to her stipulated report of income and expenses, she has remarried. In addition, the debtor was ordered to pay \$200 to the defendant and her attorney as “partial attorney fees.”² Based on a child support worksheet submitted to the state court, the court also ordered the debtor to pay the defendant \$260 per month in child support. After these orders were entered, the debtor amended his bankruptcy schedules to list the defendant as a creditor owed \$9,605 (\$165 times 57, plus \$200), and her attorney as a creditor owed \$200.

On Schedules I and J as filed with his bankruptcy petition, the debtor reported monthly gross income of \$1,800, net income of \$1,359.30, and expenses of \$2,212.39. None of the reported expenses appear to be unusual or obviously excessive. Because the debtor filed the schedules before

²The attorney who represented the defendant in the divorce case is not the one representing her before this Court.

the divorce court awarded the child support and “spousal maintenance,” those items were not included in this report of his expenses. He did, however, report a “child care” expense of \$200 per month. He indicated his only dependent was the child he had with the defendant.

About two months after the debtor filed for bankruptcy, he commenced this adversary proceeding, seeking a determination that the obligations imposed on him in the divorce case to pay “spousal maintenance” and “partial attorney fees” were not actually in the nature of support or maintenance, and so were not excepted from discharge under §523(a)(5). The defendant answered the complaint, and also asserted a counterclaim for a determination that the obligations were excepted from discharge under §523(a)(15). The parties have submitted the proceeding for decision based on a stipulation of facts that was filed on March 12, 2003.

Among other things, the parties included with their stipulation reports of their current income and expenses. As was true at the time of the divorce, the defendant makes more money than the debtor. By the time the debtor completed his stipulated report, apparently in March 2003, his gross income had increased to \$1,915 per month. His net after deducting payroll and Social Security taxes was \$1,564, so his effective rate for those taxes was 18.33%. He indicated that the court-ordered child support and maintenance was being taken out of his pay, and reported that he pays another \$1,678 in expenses as well, for a total of \$2,103 in expenses that he must try to pay with his after-tax income. The debtor will have to continue paying the \$260 monthly child support obligation no matter what the outcome of this proceeding is, but if he did not have to pay the \$165 per month obligation, his expenses would still total \$1,938 per month, \$374 more than his current after-tax income. He no longer included any “child care” in his list of expenses, but his child support obligation exceeds the \$200

per month he reported for that item on his original bankruptcy schedules. The defendant has questioned none of the expenses included in the debtor's stipulated report.

The Court's own review of the debtor's latest report of expenses raises a few questions. The debtor included in his list a monthly expense of \$300 for health insurance, but he wrote "can't afford" by this item. The other expenses he listed add up to \$1,678, so the Court concludes that by "can't afford," he meant he does not pay that expense. Although he does not buy the listed health insurance, the debtor did not include any other amount in his report for medical and dental expenses. The divorce decree requires the defendant to maintain medical insurance for the parties' minor child, but makes the debtor responsible for one-half of any medical bills for the child that are not covered by insurance. Consequently, the Court believes it is more likely than not that the debtor will incur some medical and dental expenses, either for himself or for the child, on a regular basis.

Among the reported expenses that the debtor does pay, he listed \$65 for "storage" and \$55 for "credit cards," a total of \$120. Given the limited assets the debtor disclosed in his bankruptcy schedules, the Court is uncertain what he would need to store at a cost of \$65 per month. He had presumably been living in the home he had owned with his ex-wife, though, before moving to an apartment in the course of their divorce. Since he filed for bankruptcy, he has apparently moved again, presumably to a smaller apartment, reducing his rent by \$125. These moves might indicate that the household furnishings he listed on his bankruptcy schedules, items which typically cannot be sold for very much, are more bulky than they would have been if he had always lived in apartments, and might justify at least a short-term storage expense. The debtor received a Chapter 7 discharge in August 2002, so the Court assumes the \$55 expense for "credit cards" is for postpetition credit card

expenditures. Because the \$165 obligation to the defendant as well as the child support are being deducted from the debtor's pay before he receives the remainder and his reported expenses exceed his after-tax income even before either of those expenses are accounted for, the credit card expense probably indicates that the debtor has been using credit cards to finance his budget deficit. Between January 2002, when he filed for bankruptcy, and March 2003, when he submitted the stipulated report of expenses, the debtor substantially reduced many his personal living expenses, including his rent by \$125 and utilities by \$140. This fact helps to eliminate any concern the Court might otherwise have had that the debtor was exaggerating his current expenses in an effort to create a false impression that his expenses exceed his income.

According to the debtor's Statement of Financial Affairs, his annual income was \$28,675 for 1999, \$28,125 for 2000, and \$28,000 for 2001, so his monthly income for those years was \$2,389.58, \$2,343.75, and \$2,333.33, respectively. During that period, then, his gross income was quite a bit higher than it was when he filed for bankruptcy in 2002 and when he completed the stipulated report of his income and expenses in March 2003. On the Schedule I ("Current Income") that the debtor filed with his bankruptcy petition, he reported that he had been working at one job for six months and another for two weeks, indicating that he had changed jobs fairly recently, which may explain his reduced income. Nothing in the record explains his job change, though. If he could return to his 1999 through 2001 levels of income, and assuming his effective tax rate would stay at 18.33% (actually, it would increase by some unknown amount), his monthly after-tax net would be \$1,951.57 at the 1999 income level, \$1,914.14 at the 2000 level, and \$1,905.63 at the 2001 level.

As indicated above, the state court's order directed the debtor to pay \$200 in attorney fees to the defendant and her attorney. The debtor's adversary complaint asks for a determination that this obligation is dischargeable, but does not name the attorney as a defendant. Consequently, while the Court can determine whether this obligation is dischargeable to the extent it is owed to the debtor's ex-wife, the Court has no jurisdiction to determine whether the obligation is dischargeable to the extent it might be owed directly to the attorney who represented the defendant in the divorce case.

II. DISCUSSION AND CONCLUSIONS

As relevant here, §523(a) excepts from a bankruptcy discharge any debt:

(5) to a . . . former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a . . . divorce decree . . . , but not to the extent that—

. . .

(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;
. . . ; [or]

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce . . . 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

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The Court notes that the debtor does not question the nondischargeability of his obligation to pay \$260 per month in child support, but only his obligations to pay the defendant \$165 per month and \$200 in attorney fees. As a preliminary matter, the defendant has suggested that the debts under attack are postpetition obligations not involved in the debtor's bankruptcy case. The Court will address this

question first, then consider whether the debtor's obligations to pay the defendant \$165 per month for 57 months and \$200 in attorney fees are alimony or maintenance obligations covered by §523(a)(5), and finally, determine whether the debts are dischargeable under §523(a)(15).

A. Each Payment Obligation Constitutes a “Claim” Under §101(5), Not a Postpetition Debt

In her answer to the debtor's adversary complaint, the defendant suggested that the debtor's obligation to pay her \$165 per month is a postpetition debt that is not subject to discharge in the debtor's bankruptcy case because it was imposed after he filed for bankruptcy. If correct, this suggestion would seem to apply to the \$200 attorney fee debt as well. However, the Court cannot agree with the defendant. Section 727(b) of the Bankruptcy Code states in relevant part, “Except as provided in section 523 of this title, a [Chapter 7] discharge . . . discharges the debtor from all debts that arose before the date of the order for relief under this chapter.” Under §101(12), “debt” means “liability on a claim,” and under §101(5)(A), “claim” means “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” Under Kansas law, in every divorce case that is filed, courts are authorized to divide the parties' property, to award spousal maintenance, and to award attorney fees to either party.³ Since the parties' divorce case was pending when the debtor filed for bankruptcy, the possibility that the court would order the debtor to pay some or all of the parties' debts, or to pay the defendant maintenance or attorney fees was sufficiently tangible to make such

³See K.S.A. 2002 Supp. 60-1610(b)(1), (2), & (4).

obligations “claims” under §101(5)(A), even though the possibility did not become a reality until postpetition.

B. Neither the \$165 Per Month Obligation Nor the Attorney Fee Debt Is in the Nature of Alimony or Maintenance

The Tenth Circuit has ruled that the nature of a debt for purposes of §523(a)(5) is a question of federal law on which state law provides no guidance.⁴ In *Sampson v. Sampson (In re Sampson)*,⁵ the Circuit said:

Congress, by directing federal courts to determine whether an obligation is “actually in the nature of alimony, maintenance, or support,” sought to ensure that §523(a)(5)’s underlying policy is not undermined either by the treatment of the obligation under state law or by the label which the parties attach to the obligation. Thus, a debtor’s lack of duty under state law to support his or her former spouse does not control whether an obligation to the former spouse is dischargeable in bankruptcy. *Yeates [v. Yeates (In re Yeates)]*, 807 F.2d [874,] 877-78 [(10th Cir. 1986)]. *See also Matter of Biggs*, 907 F.2d 503, 505 (5th Cir. 1990). Similarly, §523(a)(5) requires federal courts to look beyond the label the parties attach to an obligation. *See Sylvester v. Sylvester*, 865 F.2d [1164,] 1166 [(10th Cir. 1989) (*per curiam*)] [parenthetical omitted]; [*In re*] *Goin*, 808 F.2d [1391,] 1392 [(10th Cir. 1987) (*per curiam*)] [parenthetical omitted]. Inquiry by federal courts into the actual nature of the obligation promotes nationwide uniformity of treatment between similarly situated debtors, *Matter of Seibert*, 914 F.2d 102, 106 (7th Cir. 1990), and furthers §523(a)(5)’s underlying policy favoring enforcement of familial support obligations over a debtor’s “fresh start.” [Citation omitted.]

Because the label attached to an obligation does not control, an unambiguous agreement cannot end the inquiry. As we stated in *Goin*, “a bankruptcy court *must* look beyond the language of the decree to the intent of the parties *and* the substance of the obligation” to determine whether the obligation is actually in the nature of alimony, maintenance or support. 808 F.2d 1392 (emphasis added).

⁴*Jones v. Jones (In re Jones)*, 9 F.3d 878, 880 (10th Cir. 1993); *see also Dewey v. Dewey (In re Dewey)*, 223 B.R. 559, 564 (10th Cir. B.A.P. 1998).

⁵997 F.2d 717, 722-23 (10th Cir. 1993).

Thus, this Court is required to determine whether the debtor's \$165 per month and attorney fee obligations to the defendant are actually in the nature of alimony, maintenance, or support.

According to the parties' stipulation, the defendant testified that because the debtor had filed for bankruptcy and she alone would be responsible to pay all their joint unsecured debts, she should be granted maintenance to offset these obligations. Stating that it was ordering "maintenance" as part of the property division and apparently relying on the defendant's testimony that she would have to pay \$300 per month for 57 months to pay off the unsecured debts, the divorce court ordered the debtor to pay the defendant 55% of the \$300 for the 57 months. The defendant's income was greater than the debtor's, indicating she did not need maintenance from him. The fact the defendant has remarried but the debtor's obligation has not terminated also indicates the obligation is not one for maintenance.

In this Court's view, the allocation of unsecured-debt payment responsibilities made in a divorce decree is ordinarily a division of the parties' property rather than an imposition of an obligation to support the other spouse or the children. An unsecured debt can be thought of as a negative asset, often incurred to obtain some positive asset, although for most debtors, the positive asset would ordinarily have been consumed—for example, food, clothing, medical care—and added nothing to the debtor's ability to pay debts. Frequently, the Court can see when one of the spouses files for bankruptcy after a divorce that the couple had debts they could not afford to pay when they were living together, and will simply have even more trouble paying now that they are living separately. While it is regrettable that discharge will relieve only the spouse who filed for bankruptcy from the excessive debt burden, the fact the non-filing spouse cannot pay the unsecured debts without help does not mean the filing spouse's obligation to pay them was in the nature of an obligation to support the non-filing spouse

or children. Furthermore, the non-filing spouse could probably also file for bankruptcy and discharge the debts owed to third parties, just as the spouse who did file for bankruptcy has done. Without some kind of evidence indicating the contrary, this Court must normally conclude that the division of existing unsecured debt in a divorce is a division of property, not an award of support. Nothing presented about the \$165 per month obligation takes it out of this general rule. That debt is not one for alimony or maintenance covered by §523(a)(5).

The attorney fee obligation is somewhat different because the defendant alone incurred the obligation to pay fees to her attorney in the course of the divorce case, rather than jointly with the debtor during the normal course of their marriage. Because K.S.A. 2002 Supp. 60-1610(b)(4) authorizes an award of attorney fees to either party in a divorce case, though, the attorney fees incurred by each party might reasonably be thought of as a joint debt. Viewed in this way, the attorney fee obligation is just like the \$165 per month obligation. The Court concludes this debt is also not one for alimony or maintenance covered by §523(a)(5).

C. The Debtor Does Not Have the Ability to Pay the \$165 Per Month Obligation Or the Attorney Fee Debt.

The debtor clearly incurred both the \$165 per month obligation and the attorney fee debt in the course of getting divorced from the defendant, so the Court's conclusion that neither obligation is covered by §523(a)(5) means that they are excepted from discharge under §523(a)(15) unless the Court finds that they are rendered dischargeable by §523(a)(15)(A) or (B). The Court will first consider, under subsection (A), whether "the debtor does not have the ability to pay such debt[s] from

income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor.”

Under §523(a)(15)(A), the debtor has the burden of proving that he is not able to pay the debts.⁶ Many courts have looked to the Chapter 13 disposable income test under §1325(b) for guidance in resolving the ability to pay question under §523(a)(15)(A).⁷ Because §1325(b)(1)(B) expressly demands consideration of the debtor’s future income (“projected disposable income”), the test might not be appropriate for all obligations that can be covered by §523(a)(15), such as an order for a single lump-sum payment, like the attorney fee debt involved here. However, an obligation to make monthly payments over time, like the \$165 per month obligation at issue here, properly brings the debtor’s future earning capacity into question. For such obligations, not only the debtor’s current financial status, but also his or her prior employment history and future employment prospects can affect the decision.⁸ On the other hand, different courts have different ideas about what expenses are “reasonably necessary” for a debtor’s support, some excluding only luxury items and obvious indulgences while others restrict debtors to expenses for their basic needs without regard to their accustomed lifestyle or former status in society.⁹

⁶*In re Hall*, 285 B.R. 485, 487-88 (Bankr. D. Kan. 2002).

⁷*See, e.g., Jodoin v. Samayoa (In re Jodoin)*, 209 B.R. 132, 142 (9th Cir. B.A.P. 1997); *Johnson v. Johnson (In re Johnson)*, 212 B.R. 662, 667 (Bankr. D. Kan. 1997).

⁸*See In re Molino*, 225 B.R. 904, 908 (6th Cir. B.A.P. 1998).

⁹*Johnson*, 212 B.R. at 667; *see also* Keith M. Lundin, 2 *Chapter 13 Bankruptcy*, 3d ed., §165.1 at 165-6 to -12 (2002) (discussing differing approaches and results courts have reached on “reasonably necessary” question).

In this case, the debtor's schedules show that he does not have any property that he could be required to sell to satisfy the obligations, and the defendant has not suggested that the debtor has any assets that were not disclosed in the schedules. The debtor might conceivably be able to liquidate enough assets to pay the \$200 attorney fee debt, but \$1,000 worth of household furnishings and \$300 worth of clothing are certainly reasonably necessary for the debtor's maintenance or support, and nothing before the Court indicates that the debtor has any way to recover the apartment or utility deposits from the parties holding them without giving up the apartment or utility service. His remaining assets are all encumbered for their full value, so he could not obtain \$200 by selling any of them. Of course, the debtor's limited assets would not enable him to pay \$165 per month to the defendant for 57 months, either.

The stipulated report of the debtor's current income and expenses shows that he does not have nearly enough income now to pay his reported living expenses, much less to pay them plus either \$165 per month to the defendant or the \$200 attorney fee debt. Even at the debtor's 1999 income level, the highest level the evidence here shows he has had, he would have only \$13.57 after expenses to contribute toward either obligation. As indicated earlier, the defendant has not questioned any of the debtor's reported living expenses. The overall total of expenses that the debtor reported appears to the Court to be reasonable. The items noted earlier that raised questions for the Court—the storage and credit card expenses—add up to only \$120, so even if the debtor entirely eliminated these items and could return to his 1999 income level, he still could not pay the \$165 monthly obligation. It might be more feasible for the debtor to totally eliminate these items for a single month, but that would not save him enough money to pay the attorney fee debt, either. In any event, the Court does not believe these

items fall completely outside the “reasonably necessary” zone, and would at most require the debtor to reduce them. In addition, the Court expects that the debtor and his minor child at least occasionally incur some uninsured medical or dental expenses, so he should properly budget some amount for such expenses. Consequently, from January 1999 through March 2003, more than four years, the Court concludes that the debtor never made enough money to pay either a \$165 monthly debt, or a one-time \$200 debt, in addition to paying his reasonably necessary current living expenses and \$260 per month in child support. The defendant has not suggested that the debtor’s present earning capacity is actually greater than this lengthy history shows it to be.

The Court finds that the evidence satisfies the debtor’s burden of proof under §523(a)(15)(A). The debtor is not able to pay the \$165 monthly debt or the attorney fee debt to the defendant, so the obligations are dischargeable. Given this decision, the Court need not address the dischargeability of the debts under §523(a)(15)(B).

III. Conclusion

For these reasons, the Court concludes that the debtor’s obligations to pay the defendant \$165 per month for 57 months and a lump-sum attorney fee are prepetition claims subject to discharge under §727(b). Neither of the debts is for alimony or maintenance excepted from discharge by §523(a)(5). The debts are covered by §523(a)(15) but are dischargeable under §523(a)(15)(A) because the debtor does not have sufficient income or property to pay them in addition to his reasonably necessary living expenses. Consequently, the debts are dischargeable.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A

judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and
FRCP 58.

Dated at Topeka, Kansas, this ____ day of December, 2003.

DALE L. SOMERS
BANKRUPTCY JUDGE
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct file-stamped copy of the above
MEMORANDUM OF DECISION was mailed via regular U.S. mail, postage prepared, on the
____ day of December, 2003, to the following:

Richard A. Medley
Attorney at Law
PO Box 786
Coffeyville, KS 67337
Attorney for Plaintiff-Debtor

Woody D. Smith
Attorney at Law
PO Box 805
Coffeyville, KS 67337-0805
Attorney for Defendant

Vicki D. Jacobsen
Judicial Assistant