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signed 11-21-01

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**ROBERT RICHARD WEEKS,  
DEBORAH JEAN WEEKS,**

**DEBTORS.**

**ROBERT RICHARD WEEKS,  
DEBORAH JEAN WEEKS,  
PLAINTIFFS.**

**v.**

**KANSAS DEPARTMENT OF SOCIAL &  
REHABILITATION SERVICES,  
DEFENDANT.**

**CASE NO. 96-42344-13  
CHAPTER 13**

**ADV. NO. 01-7014**

**MEMORANDUM OF DECISION**

This proceeding is before the Court for resolution of the complaint of Robert Richard Weeks (“the Debtor”) seeking a determination of the dischargeability of a debt he owes to the Kansas Department of Social and Rehabilitation Services (“SRS”). The Debtor appears by counsel Jerry L. Harper. SRS appears by counsel Timothy G. Givan. The matter has been submitted for decision on stipulations and briefs. The Court has reviewed the relevant materials and is now ready to rule.

**FACTS**

As indicated, the parties have stipulated to the relevant facts. In 1990, the Debtor was convicted of conspiracy with intent to sell marijuana. Leaving his wife and three minor children behind, he went to prison from December 1990 until October 1995. During this time, he could not earn any money. He lived in a halfway house from October 1995 through April 1996, and was unable to find a

job during this time. When he was finally released from custody, he resumed living with his wife and children.

While the Debtor was incarcerated, his wife received cash assistance from SRS for about sixty months for the benefit of the three children under the Aid to Families with Dependent Children (“AFDC”) program. By applying for that assistance, the Debtor’s wife was deemed to have assigned to SRS, pursuant to K.S.A. 39-709(c), all of her rights to obtain from the Debtor support for the children. SRS paid the Debtor’s wife a total of \$21,970.50 in assistance for the children. Before the Debtor was released from the halfway house, and without obtaining legal advice, he signed an agreed journal entry granting SRS a judgment against him for the amount of assistance it had provided for the children. The journal entry required the Debtor to pay \$10 per month on the judgment. The Court assumes this minimal payment requirement reflected SRS’s recognition that the Debtor needed to use most of his income to provide current support for his children, and that aggressive enforcement of its full legal right to recover from the Debtor would probably be detrimental to the children.

The Debtor and his wife filed a bankruptcy petition on October 7, 1996. Their proposed chapter 13 plan was confirmed, and they should complete their payments under the plan in the fall of this year. They have apparently paid \$1,000 on SRS’s judgment through their plan, but the balance remains unpaid.

#### DISCUSSION AND CONCLUSIONS

For the reasons that follow, the Court concludes that SRS’s judgment against the Debtor is a nondischargeable debt under 11 U.S.C.A. §§1328(a)(2) and 523(a)(5) and 42 U.S.C.A. §656(b). The Court will discuss the Bankruptcy Code provisions first.

Section 1328(a)(2) provides that when a debtor completes payments under a plan, the court shall grant a discharge of all debts except, among others, those made nondischargeable by §523(a)(5).

Section 523(a)(5), in turn, applies to a debt:

to a spouse, former spouse, or child of the debtor, for . . . support of such . . . child, in connection with a separation agreement, divorce or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as . . . support, unless such liability is actually in the nature of . . . support.

With respect to debts assigned to a state agency like SRS, because a debt covered by this provision must be “to a spouse, former spouse, or child of the debtor,” the Court is convinced that the parenthetical exception in subsection (A) applies only to support obligations which one of those persons could have enforced if the obligations had not been assigned to the State. *See Graham v. Kansas ex rel. Secretary, Dept. of Social and Rehabilitation Servs. (In re Graham)*, Case No. 89-40974-13, Adv. No. 89-7354, Order (Bankr.D.Kan. July 10, 1990). To the extent a State might have authorized its agency to recover directly from the parent or to recover from a parent more than the other parent or the child could have recovered, the debt is not covered by §523(a)(5). *See Graham*, slip op. at 5-6; *DeKalb County Division of Family and Children Servs. v. Platter (In re Platter)*, 140 F.3d 676, 681-82 (7th Cir. 1998) (direct obligation to state not covered by §523(a)(5); no assignment involved); *Saafir v. Kansas Dept. of Social and Rehabilitation Servs. (In re Saafir)*, 192 B.R. 964, 966-69 (Bankr. D. Neb. 1996) (direct obligation to state not covered by §523(a)(5); no assignment involved).

The Debtor's liability was established under K.S.A. 39-709(c) and his common law duty to support his minor children, a duty that is essentially the same as the obligation that SRS is authorized to enforce by K.S.A. 39-718b, *see State ex rel. Secretary of SRS v. Castro*, 235 Kan. 704, 711-14 (1984) (construing predecessor to 39-718b). Under K.S.A. 39-709(c), when SRS provides AFDC benefits to a child, it succeeds to the common law right of the custodial parent or the child to recover support for the child from his or her absent parent. *Castro*, 235 Kan. at 709-11 & 714-15. The custodial parent's right to obtain support for a child includes the right to recover, after the fact, amounts that were actually paid and reasonably necessary for the child's support. *Cheever v. Kelly*, 96 Kan. 269, 270 (1915); *Rowell v. Rowell*, 97 Kan. 16, 19-20 (1916); *Castro*, 235 Kan. at 712.

The Debtor does not question that SRS actually provided AFDC benefits for his children in the amount of the stipulated judgment. Instead, he complains that he could not have been ordered to pay any child support while he was in prison because he could not earn any money during that time, or at least, that any such obligation imposed on him then would not have been "actually in the nature of . . . support." While the determination of what is or is not support is a matter of federal law, state law provides guidance in determining whether an obligation is "in the nature of support." *Yeates v. Yeates (In re Yeates)*, 807 F.2d 874, 877-78 (10th Cir. 1986). If an obligation is not "support" under state law, it may still be "support" under §523(a)(5), *id.* at 878, and conversely, may not be "support" under §523(a)(5) even though it might be considered "support" under state law. At least before major changes were made in 1996, the main purpose of the AFDC program was to encourage the care of needy dependent children in their own homes or the homes of relatives by making available support in the form of financial aid and other services. *See* 42 U.S.C.A. §601 (1991 West).

State courts—the courts that almost exclusively determine child support obligations—do not agree whether incarceration is a legal justification for reducing, suspending, or otherwise modifying a parent’s child support obligations, and have divided into three camps on the question. Some courts hold that incarceration does not justify reducing or suspending support obligations because equity should not give relief as a result of the voluntary commission of criminal acts. *See, e.g., Mooney v. Brennan*, 848 P.2d 1020, 1022 (Mont. 1993) (while incarceration constitutes substantial and continuing change in circumstances, it does not make refusal to reduce or terminate existing child support order unconscionable, even though jailed parent has no income or assets with which to pay); *In re Marriage of Olsen*, 848 P.2d 1026, 1029-31 (Mont. 1993) (no abuse of discretion to impute income to incarcerated parent for purposes of determining child support obligation). Courts in another camp have held that incarceration alone does justify suspending or modifying a prisoner’s support obligations, reasoning that committing an intentional criminal act is not equivalent to intentionally limiting income; typically, the amount of an inmate’s support obligation is reduced to reflect his or her present earning capacity. *See, e.g., Johnson v. O’Neill*, 461 N.W.2d 507, 507-08 (Minn. Ct. App. 1990) (father’s incarceration as result of intentional criminal act unrelated to support decree was not unjustifiable self-limitation of income justifying imputation of income to father). Courts in the third camp hold that a parent’s incarceration is simply one factor among many to be considered in determining whether his or her support obligations should be reduced or suspended. *See, e.g., Oberg v. Oberg*, 869 S.W.2d 235, 236-38 (Mo. App. 1993) (change in financial condition resulting from parent’s incarceration does not excuse parent from child support obligation, but court must evaluate each situation on case by case basis).

Kansas answered this question in *In re Marriage of Thurmond*, 265 Kan. 715 (1998), joining the “no justification” camp. In *Thurmond*, faced with a lower court’s suspension of a child support order because the non-custodial parent was imprisoned, the court held that incarceration, by itself, was not a justification for suspending the obligation. The court specifically adopted the “no justification” rule, reasoning that:

[A] reduction of income from a cause beyond the obligor’s control, (such as illness, injury, lay-off, etc.) should be considered differently from those which arise from causes within his or her control. Criminal activity foreseeably can lead to incarceration and such activity is obviously within an individual’s control. Public policy considerations heavily favor the no-justification rule.

*Thurmond*, 265 Kan. at 729. Thus, it is the policy of the State of Kansas that simply because a parent obliged under a court order to pay child support is imprisoned and unable to pay, he or she is not entitled to a reduction or suspension of the support obligation while incarcerated.

Since imprisonment does not justify reducing or suspending a parent’s child support obligations in Kansas, the question arises how much the parent can be ordered to pay, or to reimburse to a party who actually provided support. In *Thurmond*, the incarcerated parent had obtained an order suspending during his imprisonment his previously imposed support obligation, so the decision did not directly address a reimbursement obligation imposed on a parent after release from prison. The Court believes, however, that the *Thurmond* court would apply much the same reasoning in that situation. If a parent already subject to a child support order cannot get the order reduced or suspended as a result of going to prison, the Court can see no logical reason why a parent not subject to a child support order should be able to avoid a reimbursement obligation as a result of having been in prison either.

Under Kansas law, a court establishing a child support payment obligation is required to follow the Kansas Child Support Guidelines (“the Guidelines”). *Thurmond*, 265 Kan. at 716. The Kansas Court of Appeals has declared that the Guidelines do not control when SRS seeks, pursuant to K.S.A. 39-718b, reimbursement of assistance provided to children, but indicated the absent parent’s equitable defenses based on age, station in life, and ability to pay should be considered. *State ex rel. Secretary, Dept. of SRS, v. Cook*, \_\_\_ Kan. App. 2d \_\_\_, 26 P.3d 76 (2001). Presumably, however, when they are relevant, the Guidelines would be among the equitable matters that should be considered in establishing a child support reimbursement obligation.

One facet of the Guidelines seems to be particularly relevant in this case. At least since 1990, the Guidelines have authorized courts to impute income to a noncustodial parent under appropriate circumstances. Specifically, the Guidelines state:

E. Imputed Income

1. Income may be imputed to the noncustodial parent in appropriate circumstances including the following:
  - a. Absent substantial justification, it should be assumed that a parent is able to earn at least the federal minimum wage and to work 40 hours per week.
  - b. When a parent is deliberately unemployed, although capable of working full time, employment potential and probable earnings may be based on the parent’s recent work history, occupational skills, and the prevailing job opportunities in the community.

Admin. Order No. 128, re: 1998 Kansas Child Support Guidelines, Part II(E), *reprinted in* 2000

Kan. Ct. Rules Ann. 99; *compare* Admin. Order No. 75, re: 1990 Kansas Child Support Guidelines,

Part II(E)(1)(a) & (b) (effective April 1, 1990), *reprinted in* 1990 Kan. Ct. Rules Ann. 56, 58

(identical to quoted provisions). By refusing to permit a support order to be modified solely because

the obligated parent has been sent to prison, the *Thurmond* decision effectively indicates that income must be imputed to that parent. In the case before this Court, the Debtor has presented no evidence of his pre-imprisonment earning capacity, or otherwise shown that the judgment awarded to SRS exceeded the amounts he might properly have been ordered to pay under the Guidelines. While the total amount of the judgment is relatively large, the time period during which the Debtor's children received AFDC benefits was over sixty months. On a monthly basis, the judgment gave SRS about \$350 per month for assistance provided to three children, hardly a shocking support obligation. The Court concludes that the judgment did not exceed an amount reasonably necessary for the children's support, and was therefore a proper child support reimbursement judgment under Kansas law. The Court is aware of no federal law or policy that would indicate SRS's judgment is not "actually in the nature of support" under federal law. Consequently, the judgment constitutes a debt "in the nature of support" that is nondischargeable under 11 U.S.C.A. §523(a)(5).

The Debtor's obligation to SRS is also made nondischargeable by 42 U.S.C.A. §656(b), which provides:

A debt (as defined in section 101 of title 11) owed under State law to a State (as defined in such section) or a municipality (as defined in such section) that is in the nature of support and that is enforceable under this part is not released by a discharge in bankruptcy under title 11.

The only substantial argument the Debtor can make under this statute is that the judgment is not "in the nature of support." The Court believes, however, that this phrase has the same meaning in this provision as it has in 11 U.S.C.A. §523(a)(5), so the Court's analysis under that provision of the Bankruptcy Code also explains why the judgment is "in the nature of support" under §656(b).

For these reasons, the Court concludes that SRS's judgment against the Debtor is not dischargeable. Given this conclusion, the Court finds it unnecessary to consider SRS's argument that the Rooker-Feldman doctrine precludes the Court from considering the dischargeability of the debt. The Court expects that SRS will continue to temper its collection efforts so long as the children are minors and the Debtor is providing current support for them.

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 November, 2001.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE

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**ADV. NO. 01-7014**

**KANSAS DEPARTMENT OF SOCIAL &  
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**JUDGMENT ON DECISION**

This proceeding was before the Court for resolution of the complaint of Robert Richard Weeks (“the Debtor”) seeking a determination of the dischargeability of a debt he owes to the Kansas Department of Social and Rehabilitation Services (“SRS”). The Debtor appeared by counsel Jerry L. Harper. SRS appeared by counsel Timothy G. Givan. The matter was submitted for decision on stipulations and briefs. The Court reviewed the relevant materials and has now issued its Memorandum of Decision resolving the parties’ dispute.

For the reasons stated in that Memorandum, judgment is hereby entered declaring that SRS’s judgment against the Debtor is a nondischargeable debt under 11 U.S.C.A. §§1328(a)(2) and 523(a)(5) and 42 U.S.C.A. §656(b).

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of November, 2001.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE