In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	
MICHAEL B. PERRY	)	
(Chapter 7 Case 91-20656)	)	
	)	
Debtor	)	
	)	
	)	
	)	
SHARON HENRY PERRY	)	Adversary Proceeding
	)	
Plaintiff	)	Number 91-2044
	)	
	)	
v.	)	
	)	
MICHAEL B. PERRY	)	
	)	
Defendant	)	
	)	
And	)	
	)	
MICHAEL B. PERRY	)	Adversary Proceeding
	)	
Plaintiff	)	Number 91-2045
	)	
	)	
v.	)	
	)	
SHARON HENRY PERRY	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

FINDINGS OF FACT

The trial of the above-captioned case was held in Brunswick, Georgia, on December 9, 1992. At issue is the dischargeability of certain obligations of the Plaintiff/Husband to the Defendant/Wife arising out of a final judgment and decree of the Superior Court of Camden County, Georgia. That decree, filed on June 23, 1988, incorporated an agreement between the parties dated May 26, 1988. It provided for payment of $333.00 per month per child as child support. The decree further ordered that, in accordance with the agreement of the parties, "the husband shall execute a promissory note in favor of the wife in the amount of $185,000.00. This obligation shall be considered a property distribution. The note shall be for a period of nine years with no interest. As security for said note the husband shall execute . . . " The security provisions for the promissory note conformed to the provisions of the separation agreement found in paragraph "9" of the agreement of the parties which provided that the husband, who was retaining the marital residence, would secure his obligation with a second mortgage on the parties' residence and a second mortgage on his one-half interest in an office building in which he practiced law. According to the provisions of the agreement the note came due at the expiration of nine years. However, upon sale of the office or sale or refinancing of the home the wife would receive certain monies in reduction of the $185,000.00 note. In addition, she was to receive ten percent of husband's net income in years that his income exceeded $60,000.00 per year and said monies would also be applied to the balance on the note.

Paragraph "9" of the agreement provided that the $185,000.00 note "shall be considered to be a property distribution." In paragraph "10" the wife obligated herself to pay up to $5,200.00 per year per child toward their college education but in the event the children did not attend college she was not under an obligation to refund any amount of money on account of that obligation's non-occurrence.

Paragraph "13" of the agreement provided "that the transfers and distribution of real and personal property is not to be construed as alimony, but as a property division and settlement of all of the assets acquired by the parties. This agreement and its provisions and requirements shall not be affected by any subsequent change in either the marital status of either party or if either party shall enter into a meretricious relationship."

The Plaintiff/Husband earned a bachelor's degree in business administration in 1967 and a law degree in 1973. The parties were married in 1977 and now have three minor children. There was no award of alimony, denominated as such, in the agreement or the decree. The Defendant/Wife was in college at the time she and the Plaintiff were married at which time she dropped out of school. During the time of the marriage Defendant/Wife worked outside the house in her husband's office. She worked a total of approximately three years as his secretary and filled vacancies that occurred in the staff position in his office. Ultimately, in the mid-1980's she returned to college at the University of North Florida, earned a degree in 1986, and took a job outside of the home unrelated to the husband's law practice. The Debtor/Husband's gross income in his law practice for 1987 was $287,000.00 and he netted $189,000.00 after expenses. The wife during that same calendar year earned $19,272.00. In 1988 the husband's law firm grossed $164,000.00 and netted $70,000.00 while the wife earned less than $25,000.00.

Debtor/Husband testified that he agreed to the $185,000.00 figure based on the fact that he was making good money and because of the equity which existed in both his home and his office building, based on appraisals that he considered reliable. He has earned a net of more than $60,000.00 only once since the effective date of the decree and that was

in 1988 when he paid approximately $7,000.00 toward the retirement of this obligation.

At the time of the divorce he believed that the value of the equity in his one-half interest in the office building was approximately $42,500.00. In addition, he had a $20,000.00 certificate of deposit, an unimproved residential lot worth $6,000.00, and approximately $40,000.00 equity in his home. He concedes that there is no legal bar under Georgia law to the Defendant/Wife's receipt of alimony.

The Defendant/Wife contributed to the marriage through her employment in the husband's office, through her community activities, and child rearing. At the time of the divorce she anticipated annual increases in her income, but nothing which would have exceeded cost of living increases. She believes the value of the fixed assets as of the time of the divorce to have been approximately $111,000.00. When asked how they arrived at the $185,000.00 figure she testified that she had negotiated the figures with her husband. She stated that he wanted to retain his office, the home, the furniture and so forth. Exhibit "P-1" is a handwritten calculation prepared by the Defendant/Wife which reveals her calculations of the money she felt she was due resulting from the divorce. It shows that she placed a value on the three years wages that she had contributed to the husband's law practice. She attempted to place a value on his future income from the law practice. She included estimated costs for colleges and the equity in the home and an automobile. The net amount that she sought out of the dissolution of the marriage came to $204,800.00 which very closely approximates the $200,000.00 settlement that was reached. The difference between the $200,000.00 and $185,000.00 represented by the note was paid in cash at the time the divorce was consummated. She described "P-1" as an illustration of how she tried to value her economic contribution to the marriage.

Debtor/Husband contends that he had intended a property distribution in executing an agreement. Tax considerations as well as the guaranty that her benefits would not be terminated in the event of her remarriage were factors which allegedly caused her to agree to the provisions contained in the agreement and decree. The wife contends that all the traditional state law considerations supporting an award of alimony exists in this case and since there is no express award of alimony the court should determine that the payments from husband to wife are actually in the nature of support and thus are not dischargeable obligations. She points to the length of the marriage, the imbalance in the parties' income, the existence of children, and the fact that the husband had agreed to transfer property worth more than his entire net worth at the date of the decree as evidencing the fact that the award was something other than a true division of property. The husband argues that the fact that the financial obligation does not terminate upon remarriage that it is expressly provided to be in the nature of a property distribution and the fact that her calculation of the amount she was entitled to upon the dissolution was made without reference to monthly or annual cash needs for her support and that of her children illustrate that the award was not actually in the nature of support. He further points out that the sum payable over nine years with no interest had a present day value when the decree became final that was no greater than his equity in property he retained.

CONCLUSIONS OF LAW

Congress in 11 U.S.C. Section 523(a)(5) created an exception to discharge for any debt

> . . . 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 . . . designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. §523(a)(5). The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state laws." Harrell, 754 F.2d 902 (11th Cir. 1985) (Quoting H.R.Rep.No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U.S.Code Cong. & Admin. News 5787, 6319). To be declared non-dischargeable, the debt must have been actually in the nature of alimony, maintenance or support. Harrell, 754 F.2d at 904.

The non-debtor spouse (or spouse asserting an exception to dischargeability) has the burden of providing that the debt is within the exception to discharge. Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). The exceptions to discharge in Section 523 must be proved by a preponderance of the evidence. Grogan v. Garner, __ U.S. __, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.[1] *Accord* Sylvester v. Sylvester, 865 F.2d 1164 (8th Cir. 1986); Long v. Calhoun, supra. It is the substance of the obligation which is dispositive, not the form, characterization, or

[1] Harrell overrules In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (Edenfield, J.), only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding." Bedingfield, 42 B.R. 641 (S.D.Ga. 1983). The Eleventh Circuit in Harrell concluded that only the facts and circumstances existing at the time the decree or agreement was entered are to be considered. Harrell 754 F.2d at 906-07.

designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46; *Accord* Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983).

According to the Eleventh Circuit in Harrell:

> The language used by Congress in Section 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support." The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell court determined that only "a simple inquiry" was needed, the court did not set forth the guidelines or factors to be considered. The bankruptcy court may consider state law labels and designations although bankruptcy law controls. *See* In re Holt, 40 B.R. 1009, 1011 (S.D.Ga. 1984) (Bowen, J.).

The bankruptcy court must determine if the obligation at issue was intended to provide support. Calhoun, 715 F.2d at 1109. In making its determination, the court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Id. If a divorce decree incorporates a settlement agreement, the court should consider the intent of the parties in entering the agreement; if a divorce decree is rendered following actual litigation, the court should focus upon the intent of the trier of fact. In re West, 95 B.R. 395 (Bankr. E.D.Va. 1989). *See*

generally In re Mall, 40 B.R. 204 (Bankr. M.D.Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); In re Helm, 48 B.R. 215 (Bankr. W.D.Ky. 1985) ("It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super-divorce courts.' It is only those cases . . . in which former spouses settle their support differences by agreement albeit with resulting state court approval, that bankruptcy courts may later reopen and reexamine.")

In order to determine if an obligation is actually in the nature of support, the following factors must be examined:

> 1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.
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> 2) "The presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. (Citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977).)
>
> 3) If the divorce decree provides that an obligation

> therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).
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> 4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into consideration all the provisions of the decree. *See* In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

See generally Shaver v. Shaver, 736 F.2d 1314 (9th Cir. 1984); In re Goin, 808 F.2d 1391 (10th Cir. 1987).

The court should examine the function of the obligation, including whether or not the payment at issue is used to provide necessities such as food, housing or transportation. In re Gianakas, 917 F.2d 759, 763 (3rd Cir. 1990). *See also* In re Youngman, 122 B.R. 612, 614-15 (Bankr. N.D.Ga. 1991).

I conclude that Defendant has not proved that the entire obligation at issue

is actually in the nature of support.

The circumstances at the time the settlement was entered indicate that Plaintiff's income substantially exceeded Defendant's income. However, Defendant's income at the time was sufficient to meet her needs for food, housing, and other basic necessities. When asked what she would do with the monthly payments, Defendant testified that she would pay some bills, take a vacation, and buy some extras for the children. Defendant's testimony does not indicate that the payments were or are needed for support.

I conclude that the sum of $64,400.00 is actually in the nature of support because the parties contemplated that wife would use those funds to provide for the children's college education. However, the balance of the monies are not in the nature of support for the Defendant and is properly characterized in the parties' settlement agreement as "property division and settlement." The husband testified that his intent was not to pay alimony but to divide property. The wife likewise testified that the monetary settlement was derived from her analysis of the value of certain assets or of her financial contributions and not based on an analysis of her need for support. Indeed at the time of the divorce, her income was sufficient to meet her needs and she testified that the proceeds of the settlement would be used for non-necessities. Since the critical inquiry is to determine whether the award is actually in the nature of support and because the intent of the parties in this case is not inconsistent, I conclude that as to all obligations other than the projected college costs, the obligation is dischargeable.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Michael B. Perry to pay $64,400.00 to Plaintiff, Sharon Henry Perry, is non-dischargeable. The balance of the obligations at issue in this case are dischargeable in these proceedings.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 31st day of March, 1993.