

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

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U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

IN RE:

Graham Kennedy DuBose,

Debtor.

Graham Kennedy DuBose,

Plaintiff,

v.

Diane M. DuBose,

Defendant.

C/A No. 96-71148-W

Adv. Pro. No. 96-8119-W

JUDGMENT

Chapter 7

Based upon the findings of the Court as recited in the attached Order, the Defendant's Motion in Limine filed September 17, 1996, restricting any evidence at trial related to the current financial positions of the parties as not admissible is granted.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 24, 1996.

ENTERED

SEP 25 1996

J.G.S.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

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IN RE:

Graham Kennedy DuBose,

Debtor.

C/A No. 96-71148-W

Adv. Pro. No. 96-8119-W

Graham Kennedy DuBose,

Plaintiff,

v.

Diane M. DuBose,

Defendant.

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Defendant's Motion in Limine filed September 17, 1996, restricting any evidence at trial related to the current financial positions of the parties as not admissible pursuant to a 11 U.S.C. § 523(a)(5)¹ determination. Based upon the arguments of counsel, the Court finds as follows:

Section 523(a)(5) provides that a discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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, 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

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

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operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) 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 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 Fourth Circuit has held that a determination under this section must be made by looking primarily to the intent of the parties.

Relying upon this court's opinion in In re Melichar, 661 F.2d 300 (4th Cir. 1981), the bankruptcy court held that the question of whether an obligation contained in a divorce settlement is non-dischargeable alimony turns principally on the intent of the parties at the time the agreement was executed. The substance of the agreement rather than the terms affixed to it controls the nature of the obligation. The court concluded, therefore, that it was required to look beyond the plain language of the agreement and examine additional evidence on the intent of the parties.

Tilley v. Jessee, 789 F.2d 1074 (4th Cir. 1986). The extent of the examination of additional evidence; however, remains unanswered. In this Court's view, one of the reasons for this confusion is the language of § 523(a)(5)(B), which provides that not only must the debt be designated as alimony, maintenance, or support, but must be a debt that "is actually in the nature of alimony, maintenance, or support" to be non-dischargeable.

One of the early cases on this topic from the Sixth Circuit Court of Appeals found a two part test was needed to determine a § 523(a)(5) dischargeability issue. In re Calhoun, 715 F.2d 1103 (1983). Under the first prong of this test, a court had to determine the intent of the parties using the factors usually considered by the state courts; i.e. the nature of the obligations assumed, the structure and language of the parties' agreement or the court's decree, whether other lump sum or periodic payments were also provided, the length of the marriage, the existence of

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children from the marriage, relative earning powers of the parties, age, health and work skills of the parties, the adequacy of support absent the debt assumption, and evidence of negotiation or other understandings as to the intended purpose of the assumption. In re Calhoun, 715 F.2d at 1108, fn. 7.

It is the second prong of the In re Calhoun opinion that the Plaintiff wants this Court to adopt. Pursuant to the second prong of this test, even if a court has determined that the parties intended for a debt to be in the nature of alimony, maintenance or support, a court must then inquire into whether the debt had the effect of providing the support necessary to ensure that the daily needs of the former spouse and any children were being satisfied, a broad examination that may also require an inquiry into the parties' current financial positions.

The Fourth Circuit has suggested that this approach may be too broad.

In Calhoun, the court considered whether a loan assumption was dischargeable under § 523(a)(5). After holding that the parties' intent was not dispositive, the court prescribed a broad probe into the obligee spouse's current need for support and would limit even such necessary support if it were "manifestly unreasonable" as a matter of (yet to be developed) federal law. Calhoun was uniformly rejected by the other circuits, and the Sixth Circuit has since limited it to obligations not labeled by the state court as "alimony" or the like. In re Fitzgerald, 9 F.3d 517, 520-521 (6th Cir.1993). In short, after Fitzgerald, not even the Sixth Circuit would apply Calhoun here. We are not inclined to resuscitate it.

In re Catron, 43 F.3d 1465, 1994 WL 707966 (4th Cir.(Va.)) (unpubl.)². While not specifically finding that an inquiry into current financial positions of the respective parties is prohibited in a

² Although unpublished Fourth Circuit opinions are not binding precedent (I.O.P 36.5 and 36.6), they may supply "helpful guidance". In re Serra Builders, Inc., 970 F.2d 1309, 1311 (4th Cir. 1992).

§ 523(a)(5) inquiry, this opinion along with the Fourth Circuit's In re Robb, 23 F.3d. 895 (4th Cir. 1994) opinion in which the Court found that a court must examine the mutual intent of both parties *when* the parties executed the agreement, convince this Court that the bankruptcy court should not take into consideration the present needs or changed financial circumstances of the parties in making such a dischargeability determination. Also see In re Stone, 79 B.R. 633 (Bkrcty.D.Md. 1987), In re Catron, 164 B.R. 908 (Bkrcty.E.D.Va. 1992), In re Welborn, 126 B.R. 948 (Bkrcty.E.D.Va. 1991), Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987) and In re Sampson, 997 F.2d 717 (10th Cir. 1993).

The Plaintiff takes the position that this Court has previously considered the current economic positions of the parties in In re Scott 194 B.R. 375 (Bkrcty.D.S.C. 1995) and in In re Falcon, 96-70897-B (Bkrcty.D.S.C. 7/22/96)(unpubl.)³ and should allow that factor to have a controlling effect in the determination of dischargeability. In In re Scott, this Court looked to some of the In re Calhoun factors in making a § 523(a)(5) non dischargeability determination:

In In re Calhoun, 715 F.2d 1103 (6th Cir. 1983), four areas of inquiry were established by the Court to assist in determining the true nature of the obligation:

1. Whether the effect of the award was to provide support to insure daily needs;
2. Whether the apportionment of payment is within the spouses reasonable ability to pay;
3. Whether the amount is within the realm of traditional notions of support; and
4. Whether the divorce decree intended to provide support.

³ To the extent In re Falcon can be seen as a stronger case of reliance on current financial circumstances of the parties, this Court finds it distinguishable from the within case and not controlling precedent. Apparently in In re Falcon, the parties did not contest the admissibility of evidence of current financial circumstances.

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In re Scott, 194 B.R. at 379. In In re Scott's citation of the In re Calhoun factors, this Court did not assume In re Calhoun's emphasis on the current or changed financial circumstances of the parties as dispositive and the ruling in In re Scott was clearly not dependent thereon. Critical to the In re Scott decision and more specifically to the presentation of evidence before the Court, were the allegations of non-dischargeability pursuant to § 523(a)(15), which clearly mandates a balance of the current economic situations of the parties. In the instant case, neither party has plead or alleged § 523(a)(15).

At most, any reference to the post-agreement financial needs of the recipient of support in In re Scott was merely cumulative evidence that the need for support at the time of the agreement continued even beyond that time. A limited reference to post-agreement financial circumstances in so much as it relates to the expectations and intent of the parties at the time of the agreement does not offend Fourth Circuit authority or § 523(a)(5). However, such an approach is far from the position preferred by the Plaintiff who would have the Court adopt the entire In re Calhoun test and allow a change of financial circumstances to serve as a means to "modify" the intent of the parties. It is quite another matter to look beyond the intent of the agreement and allow evidence of a change of circumstances in considering the dischargeability of such payments merely because of a parties' current need for the payments or a parties' current ability or inability to make the payments. The majority of courts have refused to consider evidence such as a change of circumstances, drawing the line between a bankruptcy court's determination of dischargeability and the state family court's on-going responsibility to consider such factors in

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modifying such awards.⁴

For all of these reasons, the Court will allow evidence relevant to the intent of the parties at the time the family court obligations arose in its determination of dischargeability pursuant to § 523(a)(5) and not the current changed financial situations of the parties.

AND IT IS SO ORDERED.

Columbia, South Carolina,
September 24, 1996.


UNITED STATES BANKRUPTCY JUDGE

⁴ The Defendant has stipulated that certain evidence arising within the sixteen month period following the separation agreement is admissible and may be relevant as a factor to consider in determining the actual nature of the payments and the parties' intent at the time of the agreement. The Court will make any other determinations of relevancy upon objection during the trial.

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