United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

Will this opinion be published?	**NO**
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Bankruptcy No.	02 B 38618
Adversary Caption:	Patricia Mulvihill Mohr v. Donald R. Mohr
Adversary No.	03 A 01893
Date of Issuance:	**May 16, 2005**
Judge:	**Susan Pierson Sonderby**
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
DONALD R. MOHR,	)	Case No. 02 B 38618
	)	
Debtor.	)	
PATRICIA MULVIHILL MOHR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Pro. No. 03 A 01893
	)	
DONALD R. MOHR,	)	
	)	
Defendant.	)	Hon. Susan Pierson Sonderby

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed copies of the attached **MEMORANDUM OPINION** and **ORDER** to the persons listed on the attached service list this 16th day of May, 2005.

_____
Vina-Gail R. Springer
Secretary

SERVICE LIST

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DONALD R. MOHR,	)	
	)	
Defendant.	)	Hon. Susan Pierson Sonderby

MEMORANDUM OPINION

This matter comes before the court on the Motion of the plaintiff, Patricia Mulvihill Mohr for Judgment on the Pleadings (the "Motion"). For the reasons stated herein, the Motion will be granted in part and denied in part.

This court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334(b) and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. The proceeding concerns the determination as to the dischargeability of particular debts and is therefore a core proceeding under 28 U.S.C. §157(b)(2)(I). Venue is properly placed in this court pursuant to 28 U.S.C. § 1409(a).

BACKGROUND

On October 3, 2002 ("Petition Date") Donald R. Mohr ("Donald") filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code (the "Code"). The plaintiff herein, Patricia Mulvihill Mohr ("Patricia") is Donald's ex-wife. They were married on October 2, 1982 and had four children.

In 1998, Patricia filed a Petition for Dissolution of Marriage in the Circuit Court of Cook County, Illinois, Domestic Relations Division (the "Divorce Court"). On March 7, 2000, more than two years prior to the Petition Date, the Divorce Court entered a Judgment for Dissolution of Marriage (the "Divorce Judgment"), which incorporated the couple's Marital Settlement Agreement dated December 14, 1999 (the "Marital Settlement Agreement"). The Marital Settlement Agreement contains, *inter alia*, the following provisions, which were "freely and voluntarily" agreed to by Donald and Patricia:

Article III
Child Support

3.1 Based on a determination of the needs of the children, DONALD shall pay PATRICIA child support of $8,000 per month. Said payment shall begin on the 1st day of the month following the entry of [the Divorce Judgment].

3.2 Said amount exceeds the statutory guidelines because the parties'(*sic*) have established the amount based upon the children's needs which include parochial school and other expenses.

3.3 Child support shall be reduced by the amount of $2,000 per month upon the emancipation of each child and shall terminate entirely based upon the emancipation of all four children.

Article V
Medical Expenses of the Minor Children

5.1 DONALD has obtained and maintained in full force and effect the major medical insurance policy with Blue Cross/Blue Shield which covers all possible major medical needs of the children. In the event that the policy with Blue Cross/Blue Shield is no longer available, then DONALD shall be required to obtain an alternative medical coverage plan for the children similar in terms and provisions to the existing Blue Cross/Blue Shield Plan. At no time should the children be without medical insurance coverage. DONALD shall be required to pay the premium cost for the children's medical coverage, provide proof of premiums paid, and to

provide PATRICIA with current identification cards in order to enable her to identify the children's coverage under the hospital and medical insurance policy to be provided by him hereunder.

5.2 All uncovered medical, dental, optical, psychological expenses incurred on behalf of the children shall be paid by DONALD, including any co-pays and deductibles due thereon. PATRICIA shall be required to submit any uncovered medical expense information to DONALD and DONALD shall have thirty (30) days to reimburse PATRICIA for the uncovered medical cost.

5.3 DONALD's obligation with respect to the children's medical and dental expenses shall terminate when the children complete their college education but in no event past the age of twenty-three (23) unless otherwise agreed by the parents.

Article VI
College Education Expenses

6.1 DONALD shall have the financial obligation to pay for the college education of each child, provided that all funds available for said purpose (including any money set aside by any family members for said purpose) have been used first. If no such funds are available, the college expenses shall be paid by DONALD.

Article IX
Life Insurance

9.1 DONALD agrees to maintain in full force and effect certain policies of life insurance sufficient to equal a cumulative face value and coverage under those policies to be at least TWO HUNDRED FIFTY THOUSAND ($250,000) dollars, and shall name the minor children of the parties as irrevocable beneficiary of said policies, with PATRICIA as Trustee, until such time as the child reaches emancipation as hereinbefore defined.

On May 14, 2003, Patricia filed an eight-count adversary complaint ("Complaint") with this court to, *inter alia*, determine, pursuant to section 523(a)(5) of the Code, the dischargeability of Donald's debts arising under the Divorce Judgment, including: (a) the Article III child support

obligation which, as of the Petition Date, totaled $139,300 (Count I); (b) the Article V medical expense obligation (Count II); (c) the Article VI college expense obligation (Count III); and (d) the Article IX life insurance obligation (Count VI).

Donald filed his answer to the Complaint on June 25, 2003 ("Answer"). He states therein in response to allegations in Count I (which concerns the $8,000/month child support payments) that "the matter is subject to pending litigation in the [Divorce Court] and any amount should be determined by [the Divorce Court]." Answer, p. 2, ¶ 11. It is on that basis that Donald prays in his Answer that this court hold Count I in "abeyance" until the Divorce Court rules on the issue of the proper amount of the monthly payments. Donald further states in his Answer that, "[s]hould the [Divorce Court] rule that (*sic*) amount of child support should be within the statutory guidelines as established in the Illinois Revised Code, [he] would agree that the amounts are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5)." Id., p. 3. This court takes that statement as an admission that, other than for the issue of the proper monetary amount, the obligation referenced in Count I is nondischargeable under section 523(a)(5) of the Code. As for Counts II, III and VI of the Complaint, Donald unequivocally denies that the obligations to pay his children's medical bills, provide adequate health insurance coverage for them, pay their college expenses, and maintain a life insurance policy for their benefit are nondischargeable under section 523(a)(5).

On January 3, 2005, Patricia filed this Motion seeking judgment on Counts I, II, III and VI, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, made applicable herein by Federal Rule of Bankruptcy Procedure 7012(b).

DISCUSSION

Rule 12(c) provides, *inter alia*, that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Commentators note with respect to motions for judgment on the pleadings that:

> The federal courts have followed a fairly restrictive standard in ruling on motions for judgment on the pleadings. Although the motion may be helpful in disposing of cases in which there is no substantive dispute that warrants the litigants and the court proceeding further, thereby easing crowded trial dockets in the federal district courts, hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his or her claim or defense.

Wright & Miller, Federal Practice and Procedure: Civil 3d § 1368.

Motions for judgment on the pleadings are typically filed for one of two reasons and the standard for deciding the motion varies based on the reason for bringing it. If the motion is brought to raise procedural defects (usually by the defendant who has already answered the complaint), courts will apply the standard applicable to a motion to dismiss brought pursuant to Rule 12(b)(6). Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993). Accordingly, in that context, the motion for judgment on the pleadings will not be granted when, viewing all facts in the light most favorable to the non-movant, it appears beyond doubt that the non-movant can prove no set of facts which would entitle him to relief. Id. at 336.

When a motion for judgment on the pleadings is addressed to the substantive merits at issue, however, the proper standard to employ is that which is applicable to motions for summary judgment. Id. (*citing* Nat'l Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987)). Accordingly, in that context, a judgment on the pleadings will not be granted unless no genuine issues of material fact remain to be resolved and unless the moving party is entitled to judgment as a matter of law. Id.; Guise v. BWM Mortg. LLC, 377 F.3d 795, 798 (7th Cir. 2004);

and N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 453 (7th Cir. 1998). As with a summary judgment motion, the court is not resolving factual disputes or weighing evidence, but determining whether any genuine issues need to be resolved. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The court must take as true all well-pleaded allegations in the complaint and view all reasonable inferences drawn therefrom in a light most favorable to the defendant. Alexander, 994 F.2d at 336 (*citing* Republic Steel Corp. v. Pennsylvania Eng'g Corp., 785 F.2d 174, 177 n. 2 (7th Cir. 1986)). Finally, it is important to note that although the summary judgment standard is applied, the court in ruling on a Rule 12(c) motion can only review the pleadings, any written instruments attached as exhibits to the pleadings, and any matters of which the court can properly take judicial notice. N. Ind. Gun, 163 F.3d at 453.

In this matter, the Motion is addressed to the substantive merits of the Complaint, *i.e.*, whether the subject obligations arising from the Divorce Judgment are nondischargeable under section 523(a)(5) of the Code. Accordingly, the court will employ the summary judgment standard in reviewing the Motion but will limit its review to the Complaint, the Divorce Judgment appended thereto, and the Answer.

The substantive law at issue in the Motion is section 523(a)(5) of the Code, which provides in pertinent part:

> 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, a determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, 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.

11 U.S.C. § 523(a)(5).

The burden of proof in this matter is on Patricia to demonstrate by a preponderance of the evidence that the obligations are in the nature of support and thus excepted from discharge under section 523(a)(5). In re McGunn, 284 B.R. 855, 860 (Bankr. N.D. Ill. 2002)(*citations omitted*). Ordinarily, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor." Id. at 861 (*quoting* In re Scarlata, 979 F.2d 521, 524 (7th Cir. 1992)). However, the policy of strict construction against a creditor is tempered when the debt arises from a divorce or separation agreement. Id. at 861 (*citing* Matter of Crosswhite, 148 F.3d 879, 881 (7th Cir.1998)).

Three requirements must be met in order for a debt to be dischargeable under section 523(a)(5):

> (1) the underlying debt must be in the nature of alimony, maintenance, or support; (2) the debt must be owed to a former spouse or child; and (3) the debt must be incurred in connection with a separation agreement, divorce, or property settlement agreement or other order of a court record.

Id. It is axiomatic that the determination of whether a debt is in the nature of support, as opposed to a division of marital property, is a matter of federal bankruptcy law. In re Reines, 142 F.3d 970, 972 (7th Cir. 1998), *cert. denied* Kolodziej v. Reines, 525 U.S. 1068, 119 S.Ct. 797 (1999). It is also recognized that "[b]ankruptcy law has a longstanding corresponding policy of protecting a debtor's spouse and children when the debtor's support is required." Crosswhite, 148 F.3d at 881.

Further, "[t]he unquestionable purpose of § 523(a)(5) is to ensure that spouses, former spouses and children receive support even though a support provider has declared bankruptcy." In re Platter, 140 F.3d 676, 683 (7th Cir. 1998). Support is therefore broadly defined. In re Tadish, 220 B.R. 371, 375 (Bankr. E.D. Wis. 1998). Indeed, "for bankruptcy purposes, a debt may be classified as support even though it would not qualify as support under state law." Estate of Mayer v. Hawe, 303 B.R. 375, 377 (E.D. Wis. 2003)(*citing* Reines, 142 F.3d at 972; Matter of Seibert, 914 F.2d 102, 106 (7th Cir. 1990)). As for support of children, "[u]nder the bankruptcy laws, courts have found that not only support in the traditional sense of periodic child support is nondischargeable, but that debts in the nature of support are also nondischargeable." Seibert, 914 F.2d at 105 n. 4.

To determine whether the obligation "was created to enforce the debtor's duty to support his or her . . . child" the court determines the intent of the parties and the substance of the obligation. Mayer, 303 B.R. at 378; *see also* In re Woods, 561 F.2d 27, 29 (7th Cir. 1977)("It is the basis for creation of the obligation which determines whether it was intended as an equalization of property rights or as support and maintenance."); In re Sillins, 264 B.R. 894, 896 (Bankr. N.D. Ill. 2001)(pointing out that the parties' shared intent when the obligation arose is relevant, "not one party's state of mind"); In re Gatliff, 266 B.R. 381, 388 (Bankr. N.D. Ill. 2000); Collier Family Law and the Bankruptcy Code ¶ 6.04[2] (Alan N. Resnick & Henry J. Sommers eds.)("The overriding general considerations guiding courts in deciding whether marital obligations are nondischargeable . . . support debts are the intent of the parties or the court in fixing the obligation and the purposes of the obligation in light of the parties' circumstances at the time"). The parties' intent is determined by examining the language of the marital settlement agreement or divorce decree

creating the obligation and "the circumstances surrounding the debt's creation." Mayer, 303 B.R. at 378. The surrounding circumstances may include:

> (1) whether the obligation terminates upon the death or remarriage of either spouse (termination of the obligation indicates the obligation was for support);
>
> (2) whether the obligation is payable in a lump sum or in installments over a period of time (obligation spread over time indicates the obligation was for support);
>
> (3) whether the payments attempt to balance the parties' income (payments to balance income indicate the payments were for support);
>
> (4) the characterization of the obligation in the decree (obligations described as support indicate the obligation was for support);
>
> (5) the placement of the obligation in the decree (obligations under the heading support indicate the obligation was for support);
>
> (6) whether there is any mention of support payments (separate mention of support payments indicate the obligation is not for support);
>
> (7) whether there are children who need support (if children are of the age when support is required, this indicates the payments may be for support);
>
> (8) whether there is a large differential in net income (a large differential in income would indicate the payments were for support);
>
> (9) whether the obligation was thought to be taxable to the recipient (payments thought to be taxable indicate the payments were for support); and
>
> (10) waivers of maintenance.

McGunn, 284 B.R. at 862 (*citing,* Woods, 561 F.2d at 29). The Woods considerations are not exhaustive. In re Coil, 680 F.2d 1170, 1172 (7th Cir. 1982).

In this matter, Patricia seems to be urging the court to limit its review to the express

language of the Marital Settlement Agreement incorporated in the Divorce Judgment. Numerous courts, however, have considered themselves bound not only to consider the document giving rise to the obligation (even if that document is unambiguous), but to also examine the substance of the obligation, which can be understood by considering the circumstances surrounding its creation. *See*, In re Goin, 808 F.2d 1391, 1392 (10th Cir.1987); In re Seixas, 239 B.R. 398, 402-03 (9th Cir. BAP 1999); In re Tatge, 212 B.R. 604, 610 (8th Cir. BAP 1997); In re Hansel, 1992 WL 280799 at *4 (N.D. Ill. Oct. 2, 1992)("[u]nder federal bankruptcy law, a court is permitted to look beyond the 'four-corners' of the agreement to determine the 'substance' of [the debtor's] obligation regardless of the agreement's status as ambiguous or unambiguous.")[1]; Collier Family Law and Bankruptcy ¶ 6.04[3]("[e]ven when an agreement or order states specifically that an obligation is intended to be in the nature of support . . . the court can and must look beyond the label to determine the true nature of the obligation.").

In this matter, the question is thus whether a motion for judgment on the pleadings is appropriate when operating under an analytical framework that includes consideration of surrounding circumstances.

Count I

As noted earlier, Donald admits in his Answer that the obligation to make regular periodic payments to Patricia as child support arising under Article III of the Marital Settlement Agreement and referenced in Count I is nondischargeable under section 523(a)(5). The only remaining issue

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[1] In a similar vein, the Seventh Circuit Court of Appeals adopted the decision of a district court which questioned the applicability of a rule of contract construction if the ultimate issue, *i.e.*, dischargeability, is not related to the performance of the contract. In re Maitlin, 658 F.2d 466, 470 (7th Cir. 1981).

he has is with the proper "dollar amount" of the obligation, which according to Donald "remains to be determined." That is not an entirely accurate characterization. The amount of the child support obligation was determined by the Divorce Court upon entry of the Divorce Judgment, when that court ordered him to pay $8,000 per month to Patricia (subject to reduction upon emancipation and later termination).

Donald has filed a petition for relief from the Divorce Judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure and various post-decree motions to modify the obligation. It is the fact of the pendency of those motions before the Divorce Court that he bases the request in his Answer for an abeyance on Count I.

The pendency of the post-judgment section 2-1401 motion and modification motions before the Divorce Court is not cause to delay this court from entering a judgment on Count I of this Complaint based on Donald's admission. Donald stands before this court with an obligation arising from the final Divorce Judgment which constitutes a debt to Patricia who holds a right to payment. The dischargeability of that debt under federal law has been put into question by Patricia before this court. Whether the Divorce Court modifies the monetary amount of the obligation under applicable state law does not prevent this court from declaring nondischargeability as a matter of federal law. *See, e.g.* Reines, 142 F.3d at 972 (affirming decision finding an award to be in the nature of a marital property division notwithstanding the pendency of state court appeals concerning the propriety and value of that award). Moreover, the court notes that the statute Donald is proceeding under before the Divorce Court for post-judgment relief provides that such petitions for relief have no effect on the efficacy or operation of a divorce judgment. 735 ILCS § 5/2-1401(d) ("[t]he filing of a petition under this Section [5/2-1401] does not affect the order or

judgment, or suspend its operation.").

As a final matter, although no reference to it is made in Patricia's motion for judgment on the pleadings, Count I includes a request for an award from this court of unspecified attorneys' fees Patricia incurs in this adversary proceeding. This court is unable to make such an award because of the absence of statutory authority to do so. *See* In re McDade, 282 B.R. 650, 662 (Bankr. N.D. Ill. 2002); In re Kusmierek, 224 B.R. 651, 657-59 (Bankr. N.D. Ill. 1998); In re Beattie, 150 B.R. 699, 704 (Bankr. S.D. Ill. 1993)(bankruptcy court observed that although it could not award fees incurred in the dischargeability action, "a party may seek recovery of such fees in the state court as fees incurred in the enforcement of a support order."). Accordingly, the judgment on Count I will not include an award of fees.

Counts II, III and VI

Donald denies that his obligations to pay his children's medical and college expenses and to provide adequate health insurance and a life insurance policy naming the children as beneficiaries are nondischargeable. Generally speaking, a parent's obligations to pay his or her children's medical and educational expenses, and to provide the children with the "safety net" of an insurance policy, are usually determined to be nondischargeable support obligations under section 523(a)(5). *See*, *e.g.*, Seibert, 914 F.2d at 105 ("As a general matter, medical expenses are in the nature of support."); In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985)(college expenses); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984)(college expenses); Seixas, 239 B.R. at 401(medical expenses); In re Grijalva, 72 B.R. 334, 337-38 (S.D.W.Va. 1987)(college expenses and life insurance obligation); In re Shaw, 299 B.R. 107, 114 (Bankr. W.D. Pa. 2003)(college expenses); Gatliff, 266 B.R. at 388 (private high school tuition); In re Rouse, 212 B.R. 885, 890

(Bankr. E.D. Tenn. 1997)(medical expenses and life insurance obligation); In re Christison, 201 B.R. 298, 306-07 (Bankr. M.D. Fla. 1996)(health insurance); In re Olson, 200 B.R. 40, 42-43 (Bankr. D. Neb. 1996)(medical expenses); In re English, 146 B.R. 874, 876-77 (Bankr. S.D. Fla. 1992)(medical expenses). Most, if not all of those cases, however, were decided either after a trial or on a motion for summary judgment in response to which the debtor failed to introduce a genuine issue of fact. The debtors in those cases were thus given a full opportunity to present the facts demonstrating the merits of their arguments against finding the subject debts to be in the nature of support. As such, the circumstances surrounding the creation of the debt were presumably vetted. In this matter, they are not so vetted. The court cannot conclude by examining the pleadings alone that there are no genuine issues left to be resolved as to the dischargeability of the obligations referenced in Counts II, III and VI of the Complaint. Consequently, a Rule 12(c) judgment on those counts is not indicated. *See* Matter of Gonzalez, 27 B.R. 81, 83 (Bankr. N.D. Ohio 1983)(denying Rule 12(c) motion on section 523(a)(5) complaint).

CONCLUSION

For the reasons stated herein, the court grants the Motion as to Count I of the Complaint and denies the Motion as to Counts II, III and VI. A separate judgment in favor of Patricia Mulvihill Mohr will be entered on Count I of the Complaint, declaring the child support payments referenced in Article III of the Marital Settlement Agreement to be excepted from discharge.

Date: ENTERED:

_____
SUSAN PIERSON SONDERBY
United States Bankruptcy Judge

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v.	)	Adv. Pro. No. 03 A 01893
	)	
DONALD R. MOHR,	)	
	)	
Defendant.	)	Hon. Susan Pierson Sonderby

JUDGMENT ORDER DETERMINING DEBT EXCEPTED FROM DISCHARGE

For the reasons set forth in its Memorandum Opinion of even date, judgment on Count I of the adversary complaint is entered in favor of the plaintiff, Patricia Mulvihill Mohr. The court determines that the child support obligation of Donald Mohr arising under Article III of the Marital Settlement Agreement dated December 14, 1999 which is incorporated in the Judgment for Dissolution of Marriage entered on March 7, 2000, is excepted from discharge under 11 U.S.C. § 523(a)(5).

Dated: ENTERED:

_____
SUSAN PIERSON SONDERBY
United States Bankruptcy Judge