UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 97-13229-MWV
Chapter 7

Richard Allen Uresky,
Debtor

Barbara Uresky and
Allison Uresky,
Plaintiffs

v. Adv. No. 97-1367-MWV

Richard Allen Uresky,
Defendant

MEMORANDUM OPINION

The Court has before it the complaint of Barbara Uresky and Allison Uresky ("Plaintiffs") against Richard Allen Uresky ("Debtor" or "Defendant") seeking a determination that certain obligations of the Defendant to the Plaintiffs are excepted from discharge pursuant to 11 U.S.C. § 523(a)(5). At the outset of the trial, the Court denied the Plaintiffs' motion to amend to include a claim under section 523(a)(15) for the reasons set out in the record. The Court notes that the motion to amend was filed three days prior to the hearing on the merits, and counsel to the Defendant had not seen it prior to the hearing on December 4, 1998.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

The Plaintiff, Barbara Uresky, and the Defendant, Richard Uresky, were divorced on or about September 2, 1992. The Plaintiff, Allison Uresky, is their daughter, who was fourteen at the time of the divorce. As part of the divorce, a permanent stipulation was entered into, which provided for, among other things, the following:

1. Ten acres on the east side of Route 10 was to be deeded jointly to the Defendant and Allison Uresky. (Stip. ¶ 7.)

2. The business assets were to be sold and the proceeds split 50/50. (Stip. ¶ 9.)

3. Any uninsured medical expenses of Allison were to be split 50/50. (Stip. ¶ 10.)

4. The Defendant shall pay one-half of Allison's college tuition and wedding costs. (Stip. ¶ 11.)

5. The Plaintiff waives any claim for child support in consideration of the joint ownership of the ten acres. (Stip. ¶ 12.)

On December 16, 1992, the divorced parties entered into an amendment to the permanent stipulation, which included the following:

1. The property located on the westerly side of NH Route 10 (known as the "Blueberry Field"), in an approximate amount of 5.85 acres, shall be deeded exclusively to the parties' minor child, Allison Uresky. Richard Uresky shall have the right to use said property with the stipulation that for so long as he uses the property, or until Allison Uresky turns 27, whichever comes last, he shall pay the taxes on said property. At the time that Allison turns 27, should Richard Uresky wish to continue to use the Blueberry Field, he will then be obligated to negotiate whatever terms he and Allison deem appropriate for his continued use. (Am. Stip. ¶ 1.)

2. The land located on the easterly side of NH Route 10, being approximately 12 acres and shown as Lot 1 on Plan #7412 as recorded in the Grafton County Registry of Deeds, shall be deeded by Barbara Uresky to Richard Uresky for his sole and exclusive ownership. This property shall be subject to a right of first refusal running from Richard Uresky to Allison Uresky. At such time as Richard Uresky decides to sell, further encumber beyond the existing mortgage, give, or in any other way transfer said property, or upon his death, whichever comes first, Allison Uresky shall have the right to purchase said property from Richard Uresky or his estate, for the sum of One Dollar ($1.00). This right of first refusal shall be binding upon Richard Uresky's heirs and assigns. (Am. Stip. ¶ 2.)

3. In the event that Richard Uresky becomes delinquent in his payment of the taxes on the Blueberry Field or the taxes and mortgage on Lot 1, he shall be obligated to immediately

> inform Barbara Uresky and, after she has turned 18, Allison Uresky, so that they may make said delinquent payments should they choose to do so. (Am. Stip. ¶ 3.)

(Def.'s Ex. 109.)

On April 12, 1995, the marital master ruled that the sum of $5,272.70 was due the Plaintiff, Barbara Uresky, from the Defendant pursuant to the terms of the permanent stipulation.

On or about May 7, 1996, Allison Uresky deeded the blueberry field to Beverly and Robert Dennis. Beverly Dennis is the sister of the Defendant. The consideration for the transfer was the payment of back real estate taxes, not only on the blueberry field, but on other property where the Debtor resided, as well as the forgiveness of monies otherwise owed by the Defendant to the Dennises. Allison Uresky had just turned eighteen and received no cash out of the transaction.

Finally, on October 17, 1996, Plaintiff Barbara Uresky was awarded a judgment from the Grafton County Superior Court which stated that "[f]ollowing hearing, the Court finds that defendant agreed to reimburse plaintiff for a pro-rated share of living expenses for the time he lived with her following divorce. Judgement for the Plaintiff in the amount of $2,899.33 together with interest and costs." (Def.'s Ex. 112.)

It is these three obligations that the Plaintiffs argue should be excepted from discharge pursuant to section 523(a)(5) of the Bankruptcy Code. A hearing was held on December 4, 1998, at which Barbara Uresky and Richard Uresky testified. The Plaintiff, Allison Uresky, did not appear at the hearing.

DISCUSSION

To begin, the Court first notes that it may recharacterize the nature of particular obligations specified in divorce decrees pursuant to section 523(a)(5) of the Bankruptcy Code. The following is an excerpt from this Court's decision in Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8 (Bankr. D.N.H. 1994):

> This Court does have some discretion in recharacterizing the nature of awards made in divorce proceedings, for nondischargeability purposes under section 523 of the Bankruptcy Code, notwithstanding the labeling of a provision as a property settlement when in substance it fairly can be characterized as in the nature of, or clearly in lieu of,

> alimony or support. Murphy v. Nowac (In re Nowac), 78 B.R. 638, 639 (Bankr. D.N.H. 1987). Whether a particular debt is an obligation for support or a property settlement is a question of federal bankruptcy law. In re Brody, 3 F.3d 35, 39 (2d Cir. 1993). Thus, a state law characterization of a debt is not binding upon a bankruptcy court. Id. Nor is a bankruptcy court bound by the label given to the debt by the parties. Id. at 38.
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> To determine whether a debt constitutes nondischargeable alimony or support, the Court must find whether the obligation in question is "actually in the nature of alimony, maintenance or support." 11 U.S.C. §523(a)(5). When determining whether an obligation is actually in the nature of alimony, maintenance or support, the Court will look no further than "the intent of parties at the time a separation agreement is executed." In re Brody, 3 F.3d at 38.

Bourassa, 168 B.R. at 10.

At the outset, the Court accepts the uncontroverted testimony of Barbara Uresky that she was the subject of physical and mental abuse and fearful for her life at the time of the divorce. The Court further accepts her uncontroverted testimony that the Defendant would not agree to child support as he had also refused to pay child support in connection with the dissolution of a previous marriage. Having accepted this testimony, the Court finds that the express waivers of spousal support and child support found in the permanent stipulation are not controlling and will look to the circumstances of the parties at the time of the divorce to determine whether each obligation is, in fact, in the nature of support and, thus, excepted from discharge under section 523(a)(5) of the Bankruptcy Code.

First, the Court finds that $5,088.80 of the "proceeds" claim is a property settlement and not excepted from discharge under section 523(a)(5). The remaining amount of $183.90 for uninsured medical expenses of the Plaintiff, Allison Uresky, is in the nature of child support and, thus, excepted from discharge. The Court bases this finding on the relative financial positions of the parties at the time of the divorce. Both parties had worked in a family greenhouse business at the time of the divorce, but that business was to be sold and the net proceeds divided equally pursuant to the permanent stipulation. This was the Defendant's only source of income, which was soon to be terminated. On the other hand, the Plaintiff, Barbara Uresky, was also employed as a teacher by the Haverhill School District. The majority of the "proceeds" claim arose out of the sale of some of the business assets, one-half of the proceeds of which

were not paid to the Plaintiff, Barbara Uresky, by the Defendant. One thousand dollars of this "proceeds" claim arose out of the sale of a motorcycle for which the Plaintiff, Barbara Uresky, was to be reimbursed for her payment of some obligations of the Defendant. In short, other than the uninsured medical expenses, the Court finds that the "proceeds" claim is in the nature of a property settlement and not excepted from discharge under section 523(a)(5).

The Court will turn next to the reimbursement claim pursuant to the October 17, 1996 judgment from the Grafton County Superior Court. On this claim, the Court agrees with the Defendant that the Grafton County Superior Court order was not an order in connection with the "divorce decree . . . or property settlement" of the parties to the adversary proceeding. The obligation arose out of an oral agreement of the Defendant to reimburse the Plaintiff, Barbara Uresky, for living expenses when the Defendant continued to live in the same house as the Plaintiffs during the period of the divorce proceedings. This obligation is not found in any stipulation or order in connection with the divorce decree. Instead, it was originated in the district court and transferred to the superior court as a separate and distinct matter. This obligation is not excepted from discharge under section 523(a)(5).

Finally, the Court finds that the Defendant's obligation in connection with Allison's ownership of the blueberry field was in the nature of child support and excepted from discharge under section 523(a)(5). As indicated above, the Court has adopted as a finding that the Defendant, from the outset, would not agree to any portion of the permanent stipulation, as amended, to be designated as child support. At the time of the divorce, Allison was a minor. The stipulation, as amended, provided that the blueberry field would be deeded to Allison and that the Defendant was obligated to pay the taxes on the property as long as he used it or until Allison turned twenty-seven years old, whichever was later. The amendment further obligated the Defendant to immediately notify the Plaintiff, Barbara Uresky, and Plaintiff Allison Uresky, after she became eighteen, if he became delinquent on the taxes so that they could pay them if they desired. The testimony of the Plaintiff, Barbara Uresky, and the Defendant was that the notice was not given. Barbara

Uresky further testified that if she had been aware of the delinquency in the taxes, she would have paid them.

The Court finds that the intent of deeding the blueberry field to Allison and providing that the Defendant pay the taxes was to provide Allison with an unencumbered asset that she could look to for her support. Instead, the property was transferred by Allison shortly after her eighteenth birthday at the request of the Defendant to the Defendant's sister and brother-in-law in consideration of their paying the back taxes on the blueberry field, his residence and the forgiveness of his debt to one or both of the Dennises. This arrangement to provide an unencumbered real estate to Allison was clearly negotiated as a means of support for Allison. As such, it is excepted from discharge under section 523(a)(5) of the Bankruptcy Code.

Finally, the Plaintiffs, in their requests for rulings, have requested the Court to find that Allison's right of first refusal on Lot 1 is a debt or obligation that cannot be discharged in this case. This issue was not pled or argued and is not a matter of exception pursuant to section 523(a)(5), and this opinion is not intended to make any finding or ruling in connection with that issue.

At the conclusion of trial, the Court denied the Defendant's motion for reconsideration of attorneys' fees and other relief, but indicated it would rule on the reasonableness of the amount in connection with this opinion. Having reviewed counsel for the Plaintiffs' statement of fees and costs, the Court allows, as reasonable, fees of $627.50 and expenses of $21.18. The Court has reduced the fees by $100, finding that $275 for the preparation of the motion for default judgment is excessive and allows $175. Payment of this award is to be made by the Defendant alone and is not intended to indicate any wrongdoing on the part of Defendant's counsel.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 14th day of January, 1999, at Manchester, New Hampshire.

Mark W. Vaughn
Bankruptcy Judge