

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

Will this opinion be published? No

Bankruptcy Caption: In re Robert Carl Harr

Bankruptcy No. 97 B 35027

Adversary Caption: Lynn Harr v. Robert Carl Harr

Adversary No. 98 A 169

Date of Issuance: September 18, 2000

Judge: Susan Pierson Sonderby

Appearance of Counsel:

Attorney for Movant or Plaintiff: James P. Hilliard

Attorney for Respondent or Defendant: Gina B. Krol

Trustee or Other Attorneys:

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	
)	Chapter 7
ROBERT CARL HARR,)	
)	No. 97 B 35027
Debtor.)	
_____)	
)	
LYNN HARR,)	Honorable Susan Pierson Sonderby
)	
)	
Plaintiff,)	Adv. No. 98 A 169
)	
v.)	
)	
ROBERT CARL HARR,)	
)	
Defendant.)	

CERTIFICATE OF MAILING

I, Georgia Demeo certify that I caused to be mailed copies of the attached **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER** to the persons listed on the attached service list this 18th day of September, 2000.

Secretary to Chief Judge
Susan Pierson Sonderby

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court on the complaint under § 523(a)(5) of the Bankruptcy Code, 11 U.S.C. § 101 et seq. (“Code”) brought by Plaintiff Lynn Harr (“Lynn”), the Debtor’s former wife. The Court held a trial on May 4, 2000, and it has reviewed the documents submitted as exhibits.

Findings of fact

1. Debtor/Defendant Robert C. Harr (the “Debtor”) and Lynn were divorced pursuant to a judgment of dissolution of marriage (the “Judgment of Dissolution”) entered by the Domestic

Relations Division of the Circuit Court of Cook County, Illinois (the “State Court”) on April 22, 1985.

2. The Judgment of Dissolution incorporated a written agreement dated December 28, 1984 (the “Agreement”) that was intended to provide for settlement of all rights and matters arising out of the marital relationship.

3. Under the terms of the Judgment of Dissolution, Lynn was awarded custody of the parties’ three minor children.

4. Article VII of the Agreement, captioned “Periodic Allowance for Wife and Related Matters,” contained the following provisions regarding monthly payments to be made by the Debtor:

1. Robert shall pay to Lynn, as and for her allowance for unallocated support and maintenance, the following amounts, payments to be made in equal monthly installments beginning January 1, 1985 as follows:

- a. 1985 - \$10,560.00 per year
- b. 1986 - \$11,560.00 per year
- c. 1987 - \$12,560.00 per year
- d. 1988 - \$13,560.00 per year
- e. 1989 - \$14,560.00 per year

2. The payments to Lynn for unallocated support shall continue until the first to happen of the following:

- a. The death of Lynn, notwithstanding the intervening prior death of Robert;
- b. The remarriage of Lynn, notwithstanding the intervening prior death of Robert.
- c. Five years from the entry of the Judgment of Dissolution.

3. All of the payments to be made by the Husband to the Wife pursuant to this Article VII of this Agreement will be periodic payments in discharge of a legal obligation, which, because of the marital or family relationship, is imposed on or incurred by the Husband under a written instrument incident to a dissolution of marriage, all within the meaning and intent of Sections 71(a) and 215 of the Internal Revenue Code of 1954, as amended and as now in effect, and of similar provisions of future laws, and that such payments will be includible in the Wife’s gross income

pursuant to Section 71(a) and will be deductible by the Husband from his gross income pursuant to Section 215 in determining their respective taxable income.

4. Commencing with and including the calendar year 1985 and for the years as set forth in paragraph 1 above, so long as Robert pays the support allowances set forth herein Robert alone shall be entitled to claim Julie and Maureen as dependents on his Federal and State Income tax returns. Lynn alone shall be entitled to claim Catherine as a dependent on her Federal and State income tax returns. Upon the first to occur of the dates as set forth in paragraph 2 above, Robert shall alone be allowed Maureen as an exemption and Lynn shall then be allowed Julie and Catherine as exemptions.

5. At the first of any of the contingencies as aforesaid in paragraph 2 of Article VII, which shall terminate unallocated support, Robert shall then pay to Lynn an amount for child support pursuant to Ill. Rev. Stat. c. 40 Section 505 or the law which is in effect at that time.

5. Article X of the Agreement, captioned "Property Settlement," contained the following provision regarding the marital residence (the "Residence"):

1. Real Property - Marital residence - 2539 Marcy, Evanston, Illinois

a. Upon the effective date of this agreement, ROBERT shall be allowed to refinance the outstanding mortgage on said premises or apply for a second mortgage, the maximum amount to be \$35,000. Lynn shall, if necessary, cooperate and execute any and all documents in conjunction with said loan and completion of any applications. If Robert is unable to obtain a loan in the aforesaid amount, Robert's interest shall be \$35,000, which shall be paid him at the first of the following to occur:

- (1) Death of Lynn;
- (2) Last child reaching age 18 or emancipation;
- (3) Agreement of the parties;
- (4) Robert subsequently obtaining said financing for \$35,000.00.

b. Robert shall be allowed to keep said funds solely as his own money, as and for full consideration for his interest in said property, and, upon receipt of said money, shall quit claim any and all interest he has in said premises to Lynn, which shall not be recorded until said premises is sold pursuant to any of the contingencies as set forth above.

c. Robert shall be solely responsible for any and all mortgage payments on said

premises, including taxes and insurance and shall be allowed to take any and all interest deductions, tax deductions, and the like for the same.

d. If said document is recorded, or, if the Internal Revenue Service rules that said mortgage payments are in any way not deductible to Robert, it is agreed that any said sum paid by Robert shall be additional periodic payment in discharge of a legal obligation more fully set forth in Article VII, paragraph 3 above.

e. Any repairs to the marital premises shall be the sole responsibility of Lynn.

6. At the time of the parties' divorce, a first mortgage encumbered their interest in the Residence. However, the parties presented no evidence at trial concerning the value of the Residence in April 1985 or the amount of the mortgage lien at that time.

7. Shortly after entry of the Judgment of Dissolution, the Debtor obtained a second mortgage, and received the \$35,000.00 in loan proceeds contemplated under the Agreement. Per Lynn's uncontroverted testimony on the question,¹ as a consequence of having received the payment, the Debtor was not entitled to receive any portion of cash proceeds from a sale of the Residence.

8. Other provisions within Article X of the Agreement divided furniture and furnishings between the parties, and provided that the Debtor would pay Lynn \$9,000.00 for stocks, bonds and bank accounts held jointly or in the names of the Debtor and the children. Lynn was to keep all furs, jewelry, clothing or other personal items belonging to her, and each party was awarded an automobile. Lynn also released any interest she had in Robert's pension plan with his employer. The parties presented no evidence at trial as to how they valued most of these items of property.

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Because of Lynn's failure to name the Debtor as a witness, his testimony at trial was limited to matters on which his own attorney questioned him. The scope of the Debtor's direct testimony was very limited, and he did not challenge the credibility of most of Lynn's testimony.

9. Because of the lack of evidence concerning the value of marital properties, it cannot be determined whether the payment of amounts due on the mortgages would have had the effect of equalizing the division of marital property.

10. After the Debtor failed to make certain mortgage payments and to contribute toward payment of certain medical expenses, Lynn returned to the State Court in 1997. Although most pleadings from the State Court have not been made part of the record, a transcript of August 26, 1997 indicates that Lynn filed a petition for rule to show cause, and that the Debtor filed a motion to terminate maintenance. In the proceedings that followed, Lynn took the position the Debtor's obligation to make mortgage payments on the Residence was part of the property settlement incorporated into the Judgment of Dissolution. The Debtor countered that the payments were unallocated support, which needed to be modified.

11. The State Court judge did not hear testimony concerning the parties' financial needs and their intentions at the time the Agreement was drafted. Instead, based on his reading of the Agreement, he concluded that the Debtor's obligation to make mortgage payments was part of the parties' property settlement.

12. At the conclusion of the August 26, 1997 hearing, the State Court entered the following order and judgment ("1997 Judgment"):

This cause coming to be heard for hearing on Respondent's Petition to Terminate Maintenance to Petitioner, commence Maintenance to Respondent and for Other Relief and Petitioner's Amended Petition for Rule to Show Cause, both parties appearing with counsel, the Court hav[ing] conducted a hearing and finding the mortgage payments, real estate tax payments and insurance payments are not unallocated support, but part of a property settlement under the Judgment for Dissolution of Marriage and that the Respondent has an affirmative obligation to pay the mortgage, taxes and insurance and the Petitioner withdrawing her Amended Rule to Show Cause Petition and the parties agreeing to proceed on said Amended

Petition only to enforce Respondent's obligations under the Judgment for Dissolution of Marriage and the Court being otherwise fully advised in the premises:

IT IS HEREBY ORDERED, DECREED AND ADJUDGED:

A. Respondent Robert Harr has an affirmative obligation to continue to make the mortgage payments, insurance payments and real estate tax payments for the former marital residence pursuant to the Judgment for Dissolution of Marriage.

B. Respondent has incurred an obligation of \$19,621.08 for his failure to pay prior mortgage payments, insurance payments and real estate payments on the former marital residence and for his failure to pay for Petitioner's college education as provided for in the Judgment for Dissolution of Marriage. A Judgment of \$19,621 is hereby entered in favor of Petitioner Lynn Harr and against Robert Harr effective on this date.

C. Petitioner has failed to meet her burden of proving that Respondent has an obligation to make any payments for the medical needs of the children or the parties or for insurance payments for the reasons stated by the Court which are incorporated into this Order as though fully set forth herein.

13. Several months later, on or about October 14, 1997, Lynn brought an emergency petition for rule to show cause in which she complained that due to the Debtor's failure to comply with the State Court's order, there was an imminent danger of foreclosure on her interest in the Residence.

14. On November 13, 1997, the Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. In his schedule of nonpriority unsecured debts, the Debtor listed a first mortgage debt in the amount of \$35,871.94 and a second mortgage debt in the amount of \$24,448.91. In his schedule of priority unsecured debts, the Debtor included the 1997 Judgment in favor of Lynn, in the amount of \$19,621.00.

15. In this adversary proceeding, Lynn seeks a determination that all three debts are nondischargeable under Code § 523(a)(5). Because the 1997 Judgment arises primarily out of the

Debtor's failure to make payments on the two mortgages on the Residence, for purposes of determining dischargeability, that debt will hereafter be treated the same as the Debtor's unliquidated debts for failure to make payments on the mortgages.

Testimony at trial

16. Lynn was the only party who testified concerning the comparative financial situation of each spouse at the time their marriage was dissolved. In her testimony, which the Court finds to be credible, Lynn estimated that the Debtor earned \$70,000.00 or more per year, while she earned approximately \$30,000.00 per year in a part-time job.

17. Before 1990, Lynn received payments of unallocated support, which she reported as income on her tax returns. When the five-year period under Article VII of the Dissolution Agreement ended, the parties did not return to the State Court for a determination of the Debtor's obligation to pay child support. Instead, the Debtor determined the amount of child support that he would pay. Through June 1991, Lynn received child support payments totaling approximately \$1,000.

18. Although Robert stopped making child support payments in June 1991, he continued to make payments on the mortgages through 1996. Robert stopped making payments on the first mortgage before he stopped paying on the second mortgage. Lynn consulted an attorney when payments on the second mortgage ceased.

19. From the time the Judgment of Dissolution was entered until the Debtor stopped making payments on the mortgages, Lynn's income from employment was insufficient to cover expenses for the children and the home. In order to avoid foreclosure, Lynn had to borrow from friends and obtain loans from banks and her retirement account.

20. When asked about the parties' intentions at the time of their divorce, Lynn testified that she understood the mortgage payments to be support, and that she believed that the Agreement had been structured to provide tax benefits for the Debtor. Her objective was to receive as much as possible on a monthly basis.

21. Lynn professed inability to recall that during the 1997 proceedings in the State Court, she took the position that the mortgage payments were owed as part of a property settlement. When questioned at trial about the inconsistency, Lynn stated that she "didn't care what they called the payments."²

22. The Debtor testified that he did not understand the provision in Article X of the Agreement that if the Internal Revenue Service disallowed deductions for mortgage payments on his tax returns, the deductions would be recast as unallocated support and maintenance.

23. Having heard the testimony and viewed the parties' demeanor, this Court assigns little weight to the parties' averments of inability to understand or to recall statements made in previous litigation. Rather, it appeared that each party sought to overcome the effect of inconsistencies in the positions they previously have taken concerning the nature of the mortgage payments. Overall, however, this Court was persuaded that at the time the parties entered into the Agreement, they did not specifically consider whether the mortgage payments under Article X were in the nature of support or whether the payments were to equalize rights in marital property.

24. The Debtor's income tax returns for 1994, 1995, 1997 and 1998 show no deductions

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The parties have not provided a transcript of the trial in this adversary proceeding.

for alimony paid. The Debtor's returns for 1994 and 1995³ show deductions for taxes and interest. Lynn's tax returns for years 1990 through 1998 show that she recognized no income from alimony in those years.

25. The Residence was sold on or about July 30, 1999, with amounts due on the mortgages paid from the proceeds of sale. After the sale, Lynn filed an amended complaint in which she alleges that the Debtor's obligations under the two mortgages have been "lessened and determined by such sale and payment of the mortgages."

CONCLUSIONS OF LAW

1. Code § 523 (a)(5) provides that a debtor is not discharged 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 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 alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5).

2. Under the Code's framework for dealing with the marital obligations, a debt to a former spouse for alimony, maintenance, or support of the spouse or child pursuant to a divorce decree is

nondischargeable under § 523(a)(5), while a debt resulting from a division of marital property is only dischargeable under § 523(a)(15). Beasley v. Adams (In re Adams), 200 B.R. 630, 632-33 (N.D. Ill. 1996). The question whether a debt is in the nature of maintenance or support is a matter of federal bankruptcy law, rather than state law. Kolodziej v. Reines (In re Reines), 142 F.3d 970, 972 (7th Cir. 1998), cert. denied, 525 U.S. 1068, 119 S.Ct. 797 (1999); Goin v. Rives (In re Goin), 808 F.2d 1391, 1392 (10th Cir. 1987).

3. In determining whether an obligation is a liability for support or maintenance, the court must look to the substance of the obligation and not to labels imposed by state law. Maitlen v. Maitlen (In re Maitlen), 658 F.2d 466, 468 (7th Cir. 1981). “[I]t 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 Woods, 561 F.2d 27 (7th Cir. (1977)). The determination is made “looking at the substance of the agreement ‘viewed in the crucible of surrounding circumstances.’” Yeates v. Yeates (In re Yeates), 807 F.2d 874, 878 (10th Cir. 1986).

4. When no clear intent is expressed in a marital settlement agreement, the court must look to other factors and try to determine what the parties had in mind. Reines, 142 F.3d at 973. Although the Seventh Circuit has expressed reservations about the utility of “factor-counting,” see id., a number of decisions recite a list of the factors bearing on the question whether an obligation constitutes alimony, maintenance or support,. See, e.g., Nieman v. Nieman (In re Nieman), 237 B.R. 448, 452 (Bankr. N.D. Ill. 1999). Relevant factors include the labels used to describe the obligation, and the placement of the obligation within a particular section of a marital settlement agreement. Additional considerations include the timing and duration of payments, as well as economic factors such as disparity in the parties’ earnings and whether there are children to be

provided for. See id. Although these factors are useful to illustrate categories of relevant evidence, the ultimate inquiry is whether the parties intended to provide support. Sparks v. Spark (In re Sparks), 206 B.R. 481, 485 (Bankr. N.D. Ill. 1997).

5. An award of maintenance and support is intended to provide the former spouse with necessary goods and services which he or she would otherwise be unable to purchase. Nieman, 237 B.R. at 452. However, support is not necessarily limited to allowing the former spouse to “just get by,” but may include payments that permit the former spouse to retain the standard of living he or she enjoyed while married. Sparks, 206 B.R. 481, 486 (Bankr. N.D. Ill. 1997) (citing In re Fitzgerald, 9 F.3d 517, 521 (6th Cir. 1993)). The fact that the debt is paid to a third party will not affect dischargeability, provided that the debt is in the nature of alimony, maintenance, or support pursuant to a divorce decree. In re Brodsky, 239 B.R. 365, 370 (Bankr. N.D. Ill. 1999).

6. Here, the Debtor points out that the provision for payment of mortgage obligations is found in that section of the Agreement captioned “Property Settlement,” and not in the section designated “Periodic Maintenance.” Also, the obligation was a continuing one, and there was no set time at which payments were to cease. These two factors would tend to indicate that the payments were made as part of a property settlement.

7. On the other hand, the Debtor’s ownership interest in the Residence terminated at the time he received a payment of \$35,000 from the proceeds of a second mortgage loan. Inconsistently, the Agreement contemplated that the Debtor would be entitled to claim deductions for mortgage interest and property taxes paid, even though he would no longer own an interest in the Residence. Also, in the event tax deductions were disallowed, the payments would be recast as deductible maintenance under Article VII, ¶ 3. These considerations would indicate that the

payments were in the nature of support.

8. Overall, the Agreement does not make it clear whether the Debtor's obligation to make mortgage payments was intended as support or as a division of marital property.

9. The fact that Lynn did not include the mortgage payments in taxable income does not necessarily weigh in the Debtor's favor. As the Debtor correctly observes, where payments are made as part of a property settlement, they would not be deductible by the payor and would not be included in the recipient spouse's income. Tilley v. Jessee, 789 F.2d 1074, 1078 n.3 (4th Cir. 1986). However, payments from a former spouse are not included in a recipient's income either if they are in the nature of child support, or if the payments otherwise do not fall within the definition of "alimony or separate maintenance" under § 71(b) of the Internal Revenue Code.⁴ Were the mortgage payments here made to support the parties' children, they properly would have been excluded from income.

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Under the Bankruptcy Code, debts for alimony, maintenance or support are all nondischargeable under § 523(a)(5). Not all obligations under this subsection are taxable to the recipient and deductible by the payor, however. As set forth in the following paragraphs, payments of alimony and maintenance may be taxable, while payments of child support are nontaxable.

Under § 71(a) of the Internal Revenue Code, "[g]ross income includes amounts received as alimony or separate maintenance payments." 26 U.S.C. § 71(a). The terms "alimony" and "separate maintenance payments" are in turn defined at 26 U.S.C. § 71(b). Correspondingly, § 215(a) of the Internal Revenue Code provides that "[i]n the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year." 26 U.S.C. § 215(a). Section 215(b) provides that payments qualifying for the deduction must fall within the definition of "alimony and separate maintenance" at § 71(b). See 26 U.S.C. § 215(b).

On the other hand, payments for child support are not required to be reported as income. Under § 71(c) of the Internal Revenue Code, "[s]ubsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse." 26 U.S.C. § 71(c). There is no deduction from income for child support payments.

10. Finally, although Lynn took the position in the State Court that mortgages payments were required under the terms of a property settlement, she is not precluded from arguing here that the payments were intended to provide support. Even though he or she may have taken a contrary position in state court, a spouse is not barred from arguing in a bankruptcy court that certain obligations constitute alimony or support. Dennis v. Dennis (In re Dennis), 25 F.3d 274, 278 (5th Cir. 1994), cert. denied, 513 U.S. 1081, 115 S.Ct. 732 (1995). The reason for this rule is that parties and state courts generally do not label obligations with federal bankruptcy standards in mind. Id. In only limited circumstances may bankruptcy courts defer to the doctrine of collateral estoppel, ignoring the Congressional mandate that they provide plenary review of dischargeability issues. Id. Collateral estoppel applies in bankruptcy courts only if the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question, and the facts supporting the first court's findings are discernible from that court's record. Id.

11. At the time of the parties' divorce, there apparently were no factual findings made concerning marital property rights or Lynn's need for support. Compare Forsdick v. Turgeon, 812 F.2d 801, 803 (2d Cir. 1987); Long v. West (In re Long), 794 F.2d 928, 931 (4th Cir. 1986) (commenting that where award has been determined by trier of fact in a state court, characterization given award is entitled to some deference). Although the State Court ruled in August 1997 that the mortgage payments were not in the nature of support, this finding was based on an interpretation of the Agreement. Because there were no specific findings on dischargeability issues in 1997, Lynn is not precluded from arguing here that the payments are nondischargeable.

12. The party seeking to establish an exception to the discharge of a debt bears the burden of proof by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct.

654 (1991); In re McFarland, 84 F.3d 943, 946 (7th Cir.), cert. denied, 519 U.S. 931, 117 S.Ct. 302 (1996). To further the policy of the fresh start in bankruptcy, exceptions to discharge are construed strictly against a creditor and liberally in favor of a debtor. Reines, 142 F.3d at 972-73. “That policy of protecting and favoring the debtor is tempered, however, when the debt arises from a divorce or separation agreement.” In re Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998).

13. Applying those standards here, if the only factors considered were the terms of the Agreement and the manner in which the parties have dealt with the mortgage payments for tax purposes, the result would be a dead heat. Importantly, though, Lynn testified that at the time of the divorce, the Debtor’s earnings were more than twice the amount of hers. All three children lived with Lynn, and her income was insufficient to pay expenses for the children and the home. Finally, Lynn stated that when the Debtor ceased making payments on the mortgages, she had to borrow from third parties in order to remain in the Residence. All these factors are indicative that the mortgage payments were intended to be support.

14. Lynn’s testimony tips the scales in her favor. Because she has proven by a preponderance of the evidence that the debts at issue in this adversary proceeding were in the nature of support, those debts are nondischargeable under Code § 523(a)(5).

15. Where an award has been determined to be nondischargeable support, actions to collect the debt fall within the exception to the automatic stay under Code § 362(b)(2). Wright v Wright (In re Wright), 184 B.R. 318, 320 (Bankr. N.D. Ill. 1995). Accordingly, the automatic stay is modified to allow Lynn to seek a determination of the amounts owed her and seek collection of those debts in the State Court.

CONCLUSION

For the reasons stated above, the Court finds that the mortgage payments at issue in this adversary proceeding are nondischargeable obligations for support under § 523(a)(5) of the Bankruptcy Code. Judgment will therefore be entered in favor of Plaintiff Lynn Harr. The Court also grants Plaintiff's request for relief from the automatic stay, so that she may enforce those obligations in the Circuit Court of Cook County, Illinois.

ENTERED:

Date:

SUSAN PIERSON SONDERBY
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
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Plaintiff,)	Adv. No. 98 A 169
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v.)	
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ROBERT CARL HARR,)	
)	
Defendant.)	
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ORDER

For the reasons stated in its memorandum opinion entered on this date, the Court finds that the mortgage payments at issue in this adversary proceeding are nondischargeable obligations for support under § 523(a)(5) of the Bankruptcy Code. Judgment will therefore be entered in favor of Plaintiff Lynn Harr. The Court also grants Plaintiff's request for relief from the automatic stay, so that she may enforce those obligations in the Circuit Court of Cook County, Illinois.

ENTERED:

Date:

SUSAN PIERSON SONDERBY
United States Bankruptcy Judge