

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

DONA A. TENNIHILL,

Case No. 6:11-bk-09316-ABB

Chapter 7

Debtor.

_____ /

ORDER

This matter came before the Court on the Motion to Compel Debtor to Turnover Property of the Estate (Doc. No. 19) filed by the Chapter 7 Trustee Lori Patton (“Trustee”) against the Debtor Dona A. Tennihill seeking turnover of two cashier’s checks totaling \$17,250.00 and the Debtor’s Objection thereto (Doc. No. 21). An evidentiary hearing was held on December 5, 2011 at which the Debtor, her counsel, the Trustee, and the Trustee’s counsel appeared.

The Court directed the parties to file post-hearing briefs within seven days. The Trustee timely filed a post-hearing brief (Doc. No. 38) and the Debtor untimely filed a Motion to extend the briefing deadline (Doc. No. 39), which was denied pursuant to the Order entered on December 15, 2011 (Doc. No. 40).

The Trustee’s Motion to Compel is due to be denied. The Court makes the following findings and conclusions after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

Marital Home

The Debtor and her former husband Thomas W. Tennihill (“Mr. Tennihill”) were divorced in 2006 pursuant to a Final Judgment of Dissolution of Marriage entered by the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. The

Debtor was awarded sole and exclusive possession of the marital home located at 1430 Deerfoot Road, Deland, Florida (“Property”), which is a sizable single-family residence situated on ten acres in Volusia County, Florida.¹ The Property was encumbered by two mortgages in 2006. Mr. Tennihill, pursuant to the divorce decree, was solely responsible for payment of the mortgages and various household expenses.²

The divorce decree provides the Debtor and Mr. Tennihill agreed the Property was to be sold “as expeditiously as possible” with a minimum sale price to be set at \$650,000.00.³ The Debtor anticipated selling the Property and receiving net sales proceeds of at least \$150,000.00 based upon the equity in the Property in 2006. Despite attempts to sell the Property a sale was not consummated and the real estate market in Volusia County deteriorated. Mr. Tennihill, in 2008, petitioned the Florida State Court to relieve him of his obligation to pay the mortgages and Property expenses due to the declining real estate market and the improbability of realizing a sale price of \$650,000.00.

Modification of Divorce Decree

The parties litigated Mr. Tennihill’s attempts to modify the divorce decree. The balances of the mortgages exceeded the value of the Property and no equity existed by 2011. The parties, both represented by counsel, engaged in a voluntary mediation which resulted in a Mediation Settlement Agreement on March 15, 2011.⁴ The Mediation Settlement Agreement provides, in part:

¹ Debtor’s Ex. A.

² Id. Post-divorce, the two mortgages were refinanced into a single mortgage and a line of credit was opened with Bank of America as a junior mortgage, from which the Debtor withdrew funds of \$48,000.00.

³ Id.

⁴ Trustee’s Ex. 1.

- (i) Mr. Tennihill is to pay the Debtor monthly child support of \$1,200.00, which obligation had been abated pursuant to the original divorce judgment;
- (ii) Mr. Tennihill is to provide health, dental, and vision insurance for the parties' minor child.
- (iii) Mr. Tennihill is to make a lump sum payment of \$15,000.00 to the Debtor within ten days.
- (iv) Mr. Tennihill is required to pay the Debtor durational alimony of \$1,500.00 per month for thirty-six months.
- (v) Mr. Tennihill is relieved of his obligation to pay the mortgages and any household expenses.⁵

The Florida State Court entered two orders in the divorce proceeding after the parties executed the Mediation Settlement Agreement. It entered a Final Judgment of Modification on April 1, 2011 approving the Mediation Settlement Agreement⁶ and an Agreed Order⁷ on June 16, 2011 directing Mr. Tennihill to pay the Debtor \$2,250.00 by June 19, 2011 and waiving the Debtor's claim for attorney's fees and costs awarded in a previous judgment.

Mr. Tennihill, pursuant to the Mediation Settlement Agreement and the June 16, 2011 Order, issued two cashier's checks to the Debtor, one in the amount of \$15,000.00 and the second in the amount of \$2,250.00 (collectively, the "Checks").⁸ The Debtor placed the Checks in a safe deposit box and has not cashed them. The Checks remain in the safe deposit box in the Debtor's possession. Neither the originals nor copies of the Checks have been presented.

⁵ Id.

⁶ Trustee's Ex. 2.

⁷ Trustee's Ex. 4.

⁸ The Trustee in her Motion to Compel and the parties at trial reference cashier's checks in the amounts of \$11,000.00 and \$2,250.00. The Debtor sets forth in her Amended Schedules (Doc. No. 25) Mr. Tennihill issued to her cashier's checks in the amounts of \$15,000.00 and \$2,250.00. The discrepancy in amounts is unexplained.

Bankruptcy Filing and Turnover Motion

The Debtor, just days after the entry of the June 16, 2011 Order, filed a Chapter 7 case and she did not disclose the Checks in her original Schedule B list of assets.⁹ The Trustee conducted the Debtor's Section 341 meeting of creditors on July 27, 2011 and declared the case a no asset case. The Trustee, through communications initiated by Mr. Tennihill, learned of Mr. Tennihill's issuance of the Checks and designated the case an asset case in September 2011.¹⁰

The Trustee seeks turnover of the Checks pursuant to 11 U.S.C. Section 542 based upon two theories: (i) the Checks have not been classified as domestic support, child support, or alimony in the Florida State Court divorce documents and constitute non-exempt property of the estate; or, alternatively, (ii) the Checks are not necessary for the support and maintenance of the Debtor and her children, as established by the Debtor's failure to cash the Checks, and constitute non-exempt property of the estate.

Amended Schedules

The Debtor did not list the Checks in her original Schedules (Doc. No. 1). She testified she understood the funds constituted alimony or support and she was not required to list them. The Debtor is unsophisticated with legal matters, but had consulted with at least two bankruptcy attorneys prior to filing her bankruptcy case. Her belief she was not required to disclose the Checks in her Schedules was erroneous; the Checks constitute assets which the Debtor was required to disclose in Schedule B. The Debtor's

⁹ The Debtor filed for Chapter 7 protection on June 20, 2011. The Trustee filed an adversary proceeding against the Debtor captioned *Lori Patton, Trustee v. Dona Tennihill*, Adversary Proceeding No. 6:11-ap-00246-ABB seeking denial of the Debtor's discharge pursuant to 11 U.S.C. Section 727(a) for the Debtor's failure to disclose the Checks. The adversary proceeding is pending in its early stages.

¹⁰ Mr. Tennihill is not a creditor in this case and will reap no monetary benefit from his communications with the Trustee regarding the cashier's checks.

failure to disclose the Checks in her original Schedules and to expeditiously file her Amended Schedules has caused the Trustee to expend time and resources. The Debtor has delayed the administration of this case.

The Debtor filed Amended Schedules B and C on November 10, 2011 (Doc. No. 25) listing the Checks as “back child support from Dissolution of Marriage. She claims the funds as fully exempt pursuant to Fla. Stat. Section 222.201 and 11 U.S.C. Section 522(d)(10).¹¹

The Trustee filed an Objection (Doc. No. 34) objecting to the exemptions on the grounds: (i) the Mediation Settlement Agreement does not classify the \$15,000.00 or the \$2,500.00 payment obligation as a domestic support obligation, child support, or alimony; and (ii) the funds are not alimony, support or separate maintenance reasonably necessary for the support of the Debtor or her dependents.

The Trustee’s turnover motion and the exemption dispute are intertwining matters involving the core issue of whether the Checks are in the nature of support that is reasonably necessary for the support of the Debtor and her children. The Checks are exempt and not subject to turnover to the Trustee, if the Checks are in the nature of support that is reasonably necessary for the support of the Debtor and her children. The turnover motion and exemption objection involve the same facts and legal issues. The Trustee’s exemption objection has not been set for hearing, but the issues raised in the objection were fully litigated at the December 5, 2011 evidentiary hearing and are ripe for adjudication. The Trustee consents to adjudication of the exemption objection.

¹¹ Fla. Stat. Section 222.201(1) allows an individual debtor to, in addition to any allowable Florida State law exemptions, exempt any property listed in Section 522(d)(10) of the Bankruptcy Code.

Analysis

The Checks issued by Mr. Tennihill to the Debtor emanate from the lump sum \$15,000.00 payment obligation of Paragraph 3 of the Mediation Settlement Agreement and the \$2,250.00 payment obligation of Paragraph 1 of the June 16, 2011 Order. The June 16, 2011 Order is derivative of the parties' mediated settlement. Mr. Tennihill issued the Checks to the Debtor in fulfillment of those obligations.

The Mediation Settlement Agreement does not classify the \$15,000.00 payment obligation as domestic support, child support, or alimony. It references the obligation as a "lump sum payment" without further description. The Final Judgment of Modification and the June 16, 2011 Order do not delineate or classify the obligation; the June 16, 2011 Order does not describe or delineate the \$2,250.00 payment obligation. The Debtor asserts the Checks are necessary for the support and maintenance of her and her children and do not constitute property of the estate.

Failure to Classify Objection: The Trustee asserts the failure of the Florida State Court documents to classify the \$15,000.00 and \$2,250.00 payment obligations renders the obligations something other than domestic support obligations, child support, or alimony. While the Florida State Court documents do not specifically classify those payment obligations as domestic support, child support, or alimony, the absence of classification is not determinative. In re Wilbur, 304 B.R. 521, 526 (Bankr. M.D. Fla. 2003). "Whether a given debt is in the nature of support is an issue of federal law." Cummings v. Cummings, 244 F.3d 1263, 1265 (11th Cir. 2001).

The statutory provisions of the Bankruptcy Code do not require a payment obligation to be specifically classified in order to constitute domestic support, child

support, or alimony. Section 101(14A) broadly defines a “domestic support obligation” as any debt that is owed to or recoverable by a spouse, former spouse, or child of the debtor pursuant to a separation agreement, divorce decree, property settlement agreement, or order of a court that is in the nature of alimony, maintenance, or support of such spouse or child “*without regard as to whether such debt is expressly so designated.*” 11 U.S.C. § 101(14A) (*emphasis added*). Section 522(d)(10) exempts from property of the estate a debtor’s right to receive “alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” 11 U.S.C. § 522(d)(10)(D).

A Bankruptcy Court is required to “look beyond the label to examine whether the debt actually is in the nature of support or alimony.” Cummings, 244 F.3d at 1265. The determination turns upon “a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support.” Id. The two main considerations in the analysis are: (i) the intent of the parties or the State Court in creating the obligation; and (ii) the purpose of the obligation in light of the parties’ circumstances, particularly financial circumstances, at the time the obligation arose. In re Wilbur, 304 B.R. at 526.

The context of the Florida State Court documents and the surrounding circumstances of Mr. Tennihill’s payment obligations establish the \$15,000.00 and \$2,250.00 payment obligations constitute domestic support and child support. The Debtor, while she and Mr. Tennihill were married, raised their two sons and assisted Mr.

Tennihill with his business. The Debtor is a co-guarantor of some of Mr. Tennihill's business debts, including a Bank of America debt of \$95,008.00.¹²

The Debtor was not employed outside the home and did not have work experience or post-high school education. The Debtor and her children had lived at the Property for many years and she was awarded the Property in the divorce where she continued to raise their sons. Mr. Tennihill moved to Titusville, Florida where he owns a home and is the manager of an aviation company earning \$120,000.00 per year.

The Florida State Court required Mr. Tennihill to maintain the family in the Property by paying the mortgages and the household expenses. Those payment obligations fundamentally constitute domestic and child support obligations. They allowed the Debtor and the children to have stability and continuity in their lives. The Debtor and her children were able to continue to live at the Property and remain in the same school district without disruption. The Debtor was and continues to be financially unable to provide such stability and continuity for herself and the children.

Mr. Tennihill was ultimately released of the monthly mortgage and household expense payment obligations due to the unexpected and extreme deterioration of the real estate market. The release of his payment obligations was negotiated by the parties in March 2011 when it was clear the Property was over-encumbered by the mortgage debts. Mr. Tennihill agreed to do certain things for the release of those payment obligations. The release, as set forth in Paragraph 6 of the Mediation Settlement Agreement, was in consideration of all of the matters set forth in the Agreement, including the payment of \$15,000.00 and other payments by Mr. Tennihill to the Debtor. Mr. Tennihill's ongoing monthly obligations to maintain the Property, which constituted domestic and support

¹² Doc. No. 1, Schedule F.

obligations, were exchanged for finite and lump sum payment obligations in the Mediation Settlement Agreement. The lump sum payment of \$15,000.00 is a component of that negotiated release. The lump sum payment constitutes a domestic support and a child support obligation.

Mr. Tennihill's \$2,250.00 payment obligation pursuant to the June 16, 2011 Order emanates from the parties' negotiated release. The \$2,250.00 payment obligation is a component of the release of Mr. Tennihill's monthly Property obligations and constitutes a domestic support and a child support obligation.

The absence of classification of the payment obligations is of no effect. The Checks constitute domestic support and child support payments pursuant to the context of the Florida State Court documents and surrounding circumstances. The Checks constitute domestic support and child support payments pursuant to the statutory definition of Section 101(14A) of the Bankruptcy Code. The Checks are exempt pursuant to 11 U.S.C. Section 522(d)(10)(D) and are not subject to turnover pursuant to 11 U.S.C. Section 542(a).

Failure to Cash Objection: The Trustee asserts as her alternative position that the Debtor's failure to cash the Checks establishes the funds are not necessary for the Debtor's or her children's' support. The Checks constitute Mr. Tennihill's negotiated fulfillment of his mortgage and household expense obligations, which obligations constituted domestic support and child support obligations. The Debtor's decision to not cash the Checks does not change the nature of the Checks.

The Checks are necessary for the support of the Debtor and her children. The Debtor, post-divorce, received a Pell Grant and enrolled in a technical college to become

a medical records technician. She has worked in this field for two years earning monthly gross income of \$1,840.00. It is unlikely she can obtain higher-paying employment given her educational background, her lack of work experience, and the current economic conditions in Central Florida.

The Debtor has been solely responsible for caring for the children and the upkeep of the Property with little involvement by Mr. Tennihill. The Debtor has been maintaining the Property without help for several years including the yard maintenance of the ten acres and repairs to the house. She has been frugal, saving as much money as possible knowing that soon she and the children will need to move from the Property to another home. Her younger son is in fourth grade. She hopes to keep him in the same school district to limit the disruption in his life.

The Debtor keeps the Checks in a safe deposit box because her older son has drug dependency issues and has stolen funds from her in the past. The Debtor has not cashed the Checks because she needs to save the money for the inevitable move from the Property. She deposits funds into her checking account to pay immediate expenses. The monthly costs of maintaining the family, including moving expenses, rent or mortgage payments for a new home, utility deposits, food, clothing, and other necessary living expenses will fully expend the Checks.

The Checks are reasonably necessary for the support of the Debtor and her children. The Checks constitute exempt property pursuant to Section 522(d)(10)(D) of the Bankruptcy Code. The Trustee is not entitled to turnover of the Checks pursuant to 11 U.S.C. Section 524(a). The Trustee's Objection to the Debtor's exemptions in

Amended Schedule C is due to be overruled and her Motion to Compel is due to be denied.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Trustee's Objection to Exemptions (Doc. No. 34) is hereby **OVERRULED** and the Debtor's claims of exemption in Amended Schedule C (Doc. No. 25) for the cashier's checks of \$15,000.00 and \$2,250.00 are hereby **ALLOWED** and the cashier's checks are exempt pursuant to 11 U.S.C. Section 522(d)(10)(D); and it is further

ORDERED, ADJUDGED and DECREED that the Trustee's Motion for Turnover (Doc. No. 19) is hereby **DENIED**.

Dated this 15th day of January, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge