

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

In re:

Case No. 01-20051-8G7

IROS PEIXOTO DELIMA

Debtor.

Chapter 7

ELZA MACEDO GIACCAGLIA, f/k/a
ELZA MACEDO DELIMA, and
ROLAND DOCAL

Adv. No. 02-56

Plaintiffs,

v.

IROS PEIXOTO DELIMA,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND MEMORANDUM OPINION**

THIS ADVERSARY PROCEEDING came on for final evidentiary hearing on the Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. §523(a)(5) and §523(a)(15) filed on January 28, 2002 by Elza Macedo Giaccaglia, f/k/a Elza Macedo Delima, and Roland Docal (the "Plaintiffs"). Iros Peixoto Delima (the "Defendant" or the "Debtor") filed his answer on February 28, 2002.

Background

The Debtor filed his Chapter 7 bankruptcy petition on October 29, 2001. On his Schedule F, Creditors Holding Unsecured Nonpriority Claims, he listed "Elza Macedo Roscio"

with a "marital settlement" in the amount of \$14,000 and "Roland Docal, Esquire" with an "attorney fee in divorce" of \$12,000.

At the hearing, the Court heard the testimony of the Debtor, both Plaintiffs, and Mr. Wilson Baird. In addition to his brief testimony, Mr. Baird, who is the pastor and friend of the Debtor, translated the proceedings from English to Portuguese for the Debtor. Mr. Baird also translated the Debtor's testimony from Portuguese to English. The translations were made with the consent of the Plaintiffs. In addition, the Plaintiffs proffered eleven documents as exhibits.

According to the Marital Settlement Agreement, the Debtor and his former wife were married on February 26, 1997, in Pinellas County, Florida, and separated on October 13, 1999. At the time of the marriage, the Debtor worked with brick pavers and Plaintiff Giaccaglia cleaned houses. After they were married, Plaintiff Giaccaglia sold property she owned in Brazil and used it to help the Debtor start his own paving business. The paving business was in her name since the Debtor did not have a social security number at the time. Plaintiff Giaccaglia went to Brazil for surgery in September 1999, and returned to the United States in November of that year. At that point the parties decided to obtain a divorce.

A Marital Settlement Agreement was drafted by Roland Docal, Esq. which, among other things, provided that \$14,318 was to be paid to Plaintiff Giaccaglia, with \$8,000 payable monthly over five years and \$6,318 payable monthly over eighteen months. In addition, the title to a 1996 Honda Accord was to be transferred to Plaintiff Giaccaglia and the responsibility of certain debts and obligations were specified between the parties. The Final Judgment of Dissolution of Marriage was entered on November 13, 2000, by the State Court in Pinellas County, Florida.

On August 1, 2001, an Order on Petitioner/Former Wife's Motion for Civil Contempt/Enforcement, Motion to Compel Discovery and For Attorney's Fee and Costs, and Three Verified Motions for Order to Appear and Show Cause (the "Contempt Order") was entered by the State Court, which contained the finding that Debtor had the present ability to pay spousal support and attorney's fees as ordered. In addition, the court sentenced the Debtor to 30 days in jail, subject to various purge conditions. At that time the arrearages and attorney's fees and costs totaled \$8,296.20.

In their complaint, the Plaintiffs submit that the following debts owed them by the Debtor are excepted from the Debtor's discharge:

1. Pursuant to Paragraph 4.A of the Marital Settlement Agreement, the Plaintiff Giaccaglia was to receive nominal cash and a 1996 Honda Accord valued at \$9,600.00.
2. Pursuant to Paragraph 5.B of the Marital Settlement Agreement, the Debtor was to make all payments on the debt owed on the 1996 Honda Accord, estimated at \$8,049.24.
3. Pursuant to Paragraph 8 of the Marital Settlement Agreement, the Debtor agreed to pay lump sum spousal support (alimony) as follows:
 - A. The sum of \$6,318.00 payable over 18 months from the date of the Final Judgment of Dissolution of Marriage and bearing interest at the rate of 10% per annum, with monthly payments of \$379.49.
 - B. The sum of \$8,000.00 payable over 60 months from the date of Final Judgment of Dissolution of Marriage and bearing interest at the rate of 10% per annum, with monthly payments of \$169.99.
4. Pursuant to Paragraph 7 of the Final Judgment of Dissolution of Marriage, the Debtor is responsible for the sum of \$2,416.63 as attorney fees and costs in connection with such legal action, payable at the rate of no less than \$250 per month, with interest at the rate provided by law for legal interest on judgments.

5. Pursuant to Paragraph 10 of the Final Judgment of Dissolution of Marriage, the Debtor was ordered to transfer title to the 1996 Honda Accord to the Plaintiff Giaccaglia.

6. Pursuant to Paragraph 3.B of the Contempt Order, the Debtor is responsible for \$8,296.20 in arrearages and additional attorney's fees and costs, payable \$1,000 per month.

Discussion

The Plaintiffs rely on 11 U.S.C. §523(a)(5) and 11 U.S.C. §523(a)(15) in their complaint as grounds for the determination that such obligations are nondischargeable.

Section 523(a)(5) of the Bankruptcy Code provides as follows:

11 U.S.C. §523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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, 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;

This section provides that a debt or obligation to a former spouse for "alimony to, maintenance for, or support of such spouse" is not dischargeable in bankruptcy.

The bankruptcy court should consider the substance of the agreement or order that created the obligation to determine whether such obligation is actually in the nature of alimony, maintenance or support. Cummings v. Cummings, 244 F.3d 1263, 1265 (11th Cir. 2001), *citing* In re Harrell, 754 F.2d 902, 904 (11th Cir. 1985). This requires the Court to look beyond any label used by the parties in the divorce agreement or order. Campbell v. Campbell (In re Campbell), 74 B.R. 805, 809 (Bankr. M.D. Fla. 1987). The determination should be based on "a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support." Cummings v. Cummings, 244 F.3d 1263, 1265 (11th Cir. 2001), *citing* In re Harrell, 75 F.2d 902, 906 (11th Cir. 1985). There are two main considerations in such analysis: the intent of the parties or the state court in creating the obligation and the purpose of the obligation in light of the parties' circumstances (particularly financial circumstances) at that time. See Sampson v. Sampson (In re Sampson), 997 F.2d 717, 725-726 (10th Cir. 1993).

In light of these considerations, the Court determines that the monthly support payments to the Plaintiff Giaccaglia and the transfer of the 1996 Honda Accord pursuant to the Marital Settlement Agreement were in the nature of support to her. At the time of the divorce the Plaintiff Giaccaglia could not support herself. This is evidenced by her undisputed testimony that she was recovering from surgery, unable to pay her living expenses or afford rent, and borrowing money from her brother for that purpose in the months following her return from Brazil. See Transcript of the Final Evidentiary Hearing, September 10, 2002, (hereinafter "Transcript") pages 20-21, lines 20-6; page 23, lines 8-10; and page 25, lines 1-17. Since the Plaintiff Giaccaglia sold her property that she owned in Brazil and put the proceeds in the

Debtor's paying business during their marriage, she had no remaining proceeds from the sale of the Brazilian property to live on. Transcript, page 18, lines 17-19. The 1996 Honda was necessary for the Plaintiff Giaccaglia to be able to obtain work as a housekeeper. Transcript, page 20, lines 7-12.

The Final Judgment of Dissolution of Marriage between Plaintiff Giaccaglia and the Debtor entered in the State Court in Pinellas County, Florida, on November 13, 2000, contains the following provision:

6. The Court finds that Respondent/Husband has the present ability to pay the spousal support agreed to in the Marital Settlement Agreement as ratified and made part of this Final Judgment. The Court finds that the spousal support payments agreed to in the Marital Settlement Agreement as ratified and made part of this Final Judgment are not includible in Petitioner/Wife's gross income under §71 of the Internal Revenue Code, and not allowable as a deduction from Respondent/Husband's gross income under §215 of the Internal Revenue Code.

In the Contempt Order entered on August 1, 2001, the State Court again found that the Respondent/Former Husband had the present ability to pay spousal support and attorney's fees and costs as ordered (Page 3, Paragraph 1), prior to imposing a sentence of 30 days in the Pinellas County jail subject to various purge conditions. Also, pursuant to Paragraph 3.C of that order (Page 4), the State Court also found that the "Respondent/Former Husband has the present ability to pay the purge amount set forth in 3.B. above based upon Respondent/Former Husband's Family Law Financial Affidavit, testimony at this hearing, and testimony at deposition on June 13, 2001, as to his income and expenses."

In light of the credible evidence presented by the Plaintiff Giaccaglia, the lack of dispute by the Debtor as to these matters, and the findings by the State Court, the Court determines that the two separate monthly support payments (over 18 months and over five years) and the transfer

of title of the 1996 Honda Accord ordered in the Final Judgment of Dissolution of Marriage on November 13, 2000, all constitute support to the Plaintiff Giaccaglia. It should be noted that both monthly financial obligations of the Debtor to the Plaintiff Giaccaglia, one in the amount of \$8,000 to be payable over five years, and one in the amount of \$6,318 to be payable over eighteen months, were denominated as spousal support in the Marital Settlement Agreement, as ratified in the Final Judgment of Dissolution of Marriage. No testimony or evidence was proffered in the final evidentiary hearing that it was the intention of the State Court or the parties that either of the two monthly amounts was to be treated as a property settlement amount or anything other than spousal support. In addition, the provision that the Debtor was responsible for the loan on the 1996 Honda Accord pursuant to Paragraph 5.B of the Marital Settlement Agreement is support to the Plaintiff Giaccaglia. Obligations such as the transfer of title of certain property and assumption of liability as to the debt associated with the property may be determined as a nondischargeable support obligations. See Johnson v. Johnson (In re Johnson), 156 B.R. 338, 342 (Bankr. M.D. Fla. 1993) and In re Burch, 100 B.R. 585, 590 (Bankr. M.D. Fla. 1989). As such, all of these obligations are nondischargeable obligations of the Debtor pursuant to §523(a)(5).

The Court notes that the Debtor testified at the hearing that he is currently in poor financial straits: "...she has a good life today. And my situation, it's real bad I don't have a way to pay for now." Transcript, page 65, lines 11-13. However, any "post-divorce downturn in the debtor's finances" does not impact a court's analysis pursuant to §523(a)(5). Robinson v. Robinson (In re Robinson), 193 B.R. 367, 372, n.1 (Bankr. N.D. Ga. 1996), *citing* Harrell v. Sharp (In re Harrell), 754 F.2d 902, 906-7 (11th Cir 1985)("It will not be relevant that the

circumstances of the parties may have changed.") Any modification of the support ordered by the State Court is a matter for the State Court. See Harrell v. Sharp (In re Harrell), 754 F.2d 902, 907, n.7 (11th Cir. 1985).

Attorney's fees awarded by a State Court in connection with the dissolution of marriage to the attorney of an ex-spouse and payable directly to the attorney may be considered as support to the ex-spouse and therefore nondischargeable pursuant to §523(a)(5). Cibula et al. v. Ackerman (In re Ackerman), 247 B.R. 336, 339 (Bankr. M.D. Fla. 2000).

Florida Statutes Section 61.16 (Chapter 61. Dissolution of Marriage; Support; Custody) provides:

61.16 Attorney's fees, suit money, and costs.--

(1) The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals. . . .

(Emphasis supplied).

The Eleventh Circuit Court of Appeals, considering the dischargeability of attorneys fees awarded by a Florida State Court in an action involving the modification of a custody and child support order, noted that: "Under Florida law, a former spouse is entitled to an award of attorney fees in a modification action such as the one filed here based on relative need and ability to pay."

In re Strickland, 90 F.3d 444, 446-447 (11th Cir. 1996). The Eleventh Circuit concluded:

In light of the foregoing, we hold that an attorney fees award arising from a post-dissolution custody action constitutes "support" for the former spouse under 11 U.S.C. §523(a)(5) where, as here, the award is based on ability to pay. In the absence of special circumstances showing otherwise from the record in the underlying proceedings, the district court properly determined that the debt in this case is not dischargeable.

Id. at 447. Since in Florida the same considerations apply to the award of attorneys fees in the original divorce action as in any modification, Strickland provides guidance for this determination.

Additionally, ". . . the fact that an award of attorney's fees is payable directly to the attorney rather than the former spouse is immaterial for dischargeability purposes." Hoogewind v. Hendricks (In re Hendricks), 248 B.R. 652, 656 (Bankr. M.D. Fla. 2000). ". . . [I]t is clear and well-established that, in spite of the seemingly clear language of Section 523(a)(5), an ex-spouse's attorney has standing to seek a determination of dischargeability of attorney's fees awarded in connection with a dissolution of marriage proceeding." Cibula et al. v. Ackerman (In re Ackerman), 247 B.R. 336, 339 (Bankr. M.D. Fla. 2000).

In Paragraph 7 of the Final Judgment of the Dissolution of Marriage, the State Court found that "Petitioner/Wife is unable to pay her attorney's fees and costs Respondent/Husband has the present ability to pay reasonable attorney's fees and costs..." The State Court based its award of fees on its determination that at the time of the dissolution of marriage the Plaintiff Giaccaglia was unable to support herself while the Debtor continued with his paving business. Accordingly, the award of attorney's fees to Plaintiff Docal was also in the nature of support to the Plaintiff Giaccaglia, and as such the attorney's fees and costs are nondischargeable pursuant to 11 U.S.C. §523(a)(5)

In his testimony the Debtor made reference to the amount of the attorney's fees, that it was greater than he had anticipated. Transcript, page 65, lines 15-24. However, any question or possible modification of any amounts owing under the judgment and orders issued by the Circuit Court in connection with the dissolution of marriage proceeding are not a subject for review by

this Court. See Cibula et al. v. Ackerman (In re Ackerman), 247 B.R. 336, 340 (Bankr. M.D. Fla. 2000)("This Court is not in a position to revisit the reasonableness of these amounts since they were as a result of a final determination made by a court of competent jurisdiction, thus, not subject to review by this Court.")

Therefore, the Court determines that all amounts due and owing the Plaintiff Giaccaglia and the Plaintiff Docal under the Marital Settlement Agreement, the Final Judgment of Dissolution of Marriage and the Contempt Order constitute support obligations of the Debtor and as such are excepted from his discharge pursuant to 11 U.S.C. §523(a)(5).

Conclusion

The Plaintiffs assert that the obligations of the Debtor pursuant to the final judgment and orders issued by the State Court in Pinellas County, Florida, are nondischargeable pursuant to §§523 (a)(5) or (a)(15) of the Bankruptcy Code. The Court determines that the obligations were support to the Plaintiff Giaccaglia and thus were nondischargeable pursuant to §523(a)(5). Accordingly, the obligations of the Debtor to both Plaintiffs in connection with the dissolution of marriage are excepted from his discharge in the Debtor's Chapter 7 case.

Accordingly:

IT IS ORDERED that:

1. The debts owed to the Plaintiffs, Elza Macedo Giaccaglia, f/k/a/ Elza Macedo Delima, and Roland Docal, are excepted from the Debtor's discharge pursuant to § 523(a)(5) of the Bankruptcy Code.

2. A separate Final Judgment shall be entered consistent with this Opinion.

DATED this 31st day of March, 2003.

BY THE COURT

P. Glenn
PAUL M. GLENN
United States Bankruptcy Judge