11 U.S.C. § 523(a)(5)
attorney fees

In re Walker Case No. 390-36254
Bagley v. Walker Adv. No. 91-3087

7/11/91 Judge Luckey unpublished

After considering the circumstances, Judge Luckey found that attorney fees awarded to the plaintiff in a dissolution decree were not intended as a form of spousal support. Therefore the attorney fees were dischargeable under § 523(a)(5).

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Case No. 390-36254-P7
	)	
WALTER DALE WALKER,	)	
	)	
Debtor.	)	
_____	)	
	)	
CORY LYNN BAGLEY,	)	Adversary No. 91-3087
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
WALTER DALE WALKER,	)	
	)	
Defendant.	)	

This matter came before the court on the plaintiff's motion for summary judgment seeking a determination that an award of $1,900 attorney fees in the parties' earlier dissolution case is a nondischargeable obligation. The defendant, although opposing the plaintiff's motion, agreed, as did the plaintiff, that the record would not be improved by additional evidence beyond the record now before the court. The parties agreed that

the court could rule upon the merits of the case based upon the existing record.

Discharge is favored under the Bankruptcy Code, and the party asserting nondischargeability pursuant to 11 U.S.C. § 523(a)(5) has the burden of showing that the obligation at issue is in the nature of alimony, support or maintenance. In determining whether the obligation is in the nature of alimony, support or maintenance, the court must look to the intent of the parties and the substance of the obligation under all the facts of the particular case. Factors indicating need for support include the presence of minor children, an imbalance in the relative income of the parties, and whether the obligation terminates on a certain event such as the remarriage of the recipient. See In re Gibson, 103 B.R. 218 (9th Cir. BAP 1989); Stout v. Prussel, 691 F.2d 859 (9th Cir. 1982).

Determination of the dischargeability is a federal question and federal law is to be applied. See Stout v. Prussel, supra. The majority of cases dealing with nondischargeability of attorney fees hold that such fees may be treated as alimony, support or maintenance under 11 U.S.C. § 523(a)(5) if the award was based on the need of the recipient spouse or the financial circumstances of the parties. Where an attorneys' fee award was not based on financial need, dischargeability has been found. See In re King, 15 B.R. 127 (Bankr. D. Kan. 1981).

In these proceedings, the record reflects that at the time of the dissolution, the defendant was earning about $40,000 annually and the plaintiff between $8,000 and $8,500 supplemented by a $300 monthly contribution from a roommate. There were three minor children of the marriage aged 7, 9 and 11, of whom the plaintiff had custody subject to defendant's visitation rights.

The decree of dissolution signed February 22, 1990, nunc pro tunc January 5, 1990, (the day the dissolution case came before the court) provided for child support of $841.37 monthly for the three children, and "permanent" spousal support of $100 per month.

The decree divided the $23,925.42 sale proceeds of the previous home of the parties between them after deduction for pre-separation obligations of the parties. Each spouse was to receive over $5,000 net after the deduction proceeds. In addition, the plaintiff received a credit for reimbursement of $1,050 for a mortgage payment made by her in 1989.

The court based its monetary rulings on the stipulation of the parties (p. 2, lines 17 and 18) which provided for each party to receive $5,510.21 as the house proceeds after the deductions. In addition to the $100 spousal support and $841.37 child support, the court ordered that the defendant pay the plaintiff's attorney fees and costs in the amount of $1,900.

On August 30, 1990, a modified Judgment of Dissolution of

marriage was signed, also nunc pro tunc January 5, 1990. The modified decree increased the monthly child support to $908.64, nunc pro tunc February 1, 1990. The provision for spousal support was changed from $100 per month to the provision "[Defendant] shall not pay spousal support to [Plaintiff]. [Defendant's] spousal support obligation is terminated."

The modified decree provided:

> "2. Effective Date. By agreement of the parties, the judgment of dissolution of marriage signed by Circuit Court Judge Donald C. Ashmanskas on February 22, 1990, shall govern the parties respective child support, insurance and spousal support obligations through June, 1990. The provisions of this modified judgment shall govern the parties' respective obligations and entitlements with respect to child support, spousal support, and insurance commencing July 1, 1990. It is the intention of the parties that this modified judgment delete Respondent's obligation for spousal support to Petitioner in its entirety. . . ."

The modified judgment changed the attorney fee and costs award to provide as follows:

> "5. Attorney fees and costs: $1,900.00 payable on March 1, 1991. Interest at 9% per annum after March 1, 1991."

The award contained no provision for termination upon an event such as the remarriage of the plaintiff, which would be a factor suggesting that the provisions were intended as spousal support. See Stout v. Prussel, supra. Further, there is no indication that the plaintiff needed the award of fees as spousal

support to enable her to obtain representation of her interests in the dissolution under the provisions of O.R.S. 107.095(a). In addition, the modified judgment in clear language evidenced the intent of the parties that there was to be no award of spousal support.

Another factor indicating that the award was not intended as support is the relative income and resources of the parties. The plaintiff's income was enhanced by $300 monthly from her roommate (as reflected by the decree). The defendant's income was reduced by the substantial child support and insurance payments called for in the modified decree. After taking those adjustments into account, the disparity is substantially reduced.

Viewing the record as a whole, the plaintiff has failed to meet her burden of proof that the award was for alimony, maintenance or child support. While there is some ambiguity in the colloquy between the court and counsel on January 5, 1990, that discussion does not compel the conclusion that the attorney fees were awarded as spousal support, particularly considering the language of the nunc pro tunc modified judgment expressly excluding spousal support. Attorney fees nondischargeability can only be related to an appropriate determination of spousal support, a concept based upon need, which the plaintiff has not demonstrated on this record. The fact that the award was not based upon financial need is shown by the divorce court's

determination that the plaintiff no longer required spousal support based upon her share of the own division of proceeds from the house sale and her other resources.

Accordingly, the court concludes that defendant is entitled to determination that the attorney fee obligation is dischargeable, and that in these dischargeability proceedings each party shall bear his or her attorney fees and costs. A separate order will issue. This Memorandum Opinion contains the court's Findings of Fact and Conclusions of Law and pursuant to Bankruptcy Rule 7052, they will not be separately stated.

DATED this _____ day of July, 1991.

_____
C. E. LUCKEY
Bankruptcy Judge