

Voigt v. Voigt, Adversary No. 94-6483-fra
Wallace Voigt, Case No. 694-62911-fra7

8/10/1995 FRA

Unpublished

In 1986 a judgment was entered in Texas dissolving the parties' marriage and providing for a judgment in favor of plaintiff and against defendant in the sum of \$20,000. The purpose of the judgment was to "partially compensate petitioner and her attorneys in their protection of the community estate."

The defendant filed his Chapter 7 case in July 1994 and plaintiff filed this adversary proceeding seeking a declaration that the Texas judgment is nondischargeable under 11 U.S.C. § 523(a) (5).

Even though alimony is void as against public policy in Texas, it is federal bankruptcy law, as opposed to state law, which must be used to determine whether a debt is in the nature of alimony or support and thus nondischargeable. By examining Texas case law, the court determined that a Texas divorce court is obligated to take such factors as financial need and other support factors into account when making an equitable division of the marital estate.

As it was fairly clear from the record that the plaintiff was at a financial disadvantage as opposed to the defendant at the time of divorce, the court held that the award of attorney fees had been awarded to the plaintiff because of her relative financial need. As such, the debt was in the nature of alimony or support and thus nondischargeable under 11 U.S.C. § 523(a) (5).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE)
)
WALLACE D. VOIGT,) Case No. 694-62911-fra7
)
_____ Debtor.)
)
DELORES VOIGT,) Adv. Proc. No. 94-6483-fra
)
Plaintiff,)
)
v.)
)
WALLACE D. VOIGT,)
) MEMORANDUM OPINION
_____ Defendant.)

Plaintiff alleges in her complaint that a money judgment for attorneys fees in her divorce from Debtor is not dischargeable, under 11 USC §523(a)(5).¹ Debtor claims that the award is a dischargeable property division. The case was tried on

¹ Debtor's petition for relief was filed prior to the effective date of the 1994 amendments to the Bankruptcy Code, and §523(a)(15) is not applicable.

stipulated facts, supplemented by testimony at a brief hearing.²
Based on the record presented, I find that the debt is not dischargeable.

I. FACTS

The parties were married in 1955. On April 21, 1986 the District Court for Travis County, Texas, entered a Decree of Divorce terminating the marriage, and dividing the parties' community and personal property. Included in the decree was the following provision:

The court finds that to partially compensate Petitioner [Plaintiff here] and her attorneys in their protection of the community estate, that Petitioner ought to recover judgment in the amount of Twenty Thousand Dollars (\$20,000.00)... [plus interest at the rate of 9% per annum from the date the judgment was entered].

Facts stipulated to in this proceeding demonstrate that, at the time of the divorce, Debtor's financial condition was considerably healthier than Plaintiff's. For example:

1. Throughout the course of the marriage Debtor was employed or engaged in business ventures, while Plaintiff "stayed home and raised the children";

² The pending bankruptcy case is the debtor's second since the divorce decree was entered. This court has previously determined that the failure to determine this issue in the prior case did not, by itself, render the debt dischargeable.

The issue was also litigated in the Circuit Court for Marion County, Oregon. The Circuit judge indicated in a letter opinion that the debt had been discharged; however, no judgment or order based on that finding was ever entered.

2. At the time the parties separated, Debtor commenced making support payments of \$5,000 per month (later reduced to \$3,500 per month) through entry of the Decree;

3. At the time the decree was entered, Debtor was leasing and operating heavy construction equipment at a construction site, while Plaintiff was doing clerical work (the record is silent as to their actual incomes at the time); and

4. At the time of the decree Debtor was living in a large home in Salem, Oregon, worth about \$150,000; Plaintiff was living in "a small rental house in Austin, Texas that her mother paid for."

III. APPLICABLE LAW

11 USC §523(a) (5) provides that a debt is not discharged if it is :

(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 402(a) (26) 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;

Whether a debt is subject to discharge is a matter of Federal bankruptcy law, and this court is not bound by the characterization of the obligation by the divorce court. In re Williams, 703 F.2d 1055 (8th Cir. 1983). It is, however, necessary to consider the decree in light of the legal standards that gave rise to it in order to determine the nature of the obligation under the bankruptcy code.

Texas law prohibits awards of alimony. See, e. g. Cunningham v. Cunningham, 515 S.W.2d 345 (Tex. Civ. App. 1974). However, this does not mean that divorcing spouses in Texas are to be left without support. The Texas Family Code requires the divorce court to "order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party...." Tex. Family Code §3.63. While alimony *per se* cannot be awarded, Texas courts do consider "alimony factors" in dividing property. Harris v. Harris, 605 S.W.2d 684 (Tex. Civ. App. 1980). In making the determination "an important factor, if not the most important factor, is the parties' probable respective needs for future support." Goren v. Goren, 531 S.W.2d 897 (Tex. Civ. App. 1975), Pickett v. Pickett, 401 S.W.2d 846 (Tex. Civ. App. 1966). One method of dividing property in a manner which reflects the parties' relative needs for future support is the award of attorneys fees. Fortenberry v. Fortenberry, 545 S.W.2d 40 (Tex. Civ. App. 1976).

The use by Texas courts of property division to assure future support has been recognized in the context of discharge in bankruptcy: "support in the future can play a significant role in the divorce court's property division and ... what may appear to be a mere division of assets may in fact... contain a substantial element of alimony-substitute, support or maintenance, however termed." Nunally v. Nunally, 506 F.2d 1024, 1027 (5th Cir. 1975), Joseph v. O'Toole, 16 F.3d 86, 87 (5th Cir. 1994).

IV. DISCUSSION AND CONCLUSION

The court awarded to Debtor the Salem home and his business; Plaintiff received about \$21,000 in certificates of deposit, the Austin home, a 1976 Mercedes, and her one-third beneficiary's interest in a family trust. (The trust holds real property in Colorado. Debtor testified that Plaintiff was one of three beneficiaries, and that her interest would be vested upon her mother's death. The trust itself is not in the record, and there is no evidence as to whether or not the trust is revocable.)

Except as noted in the parties' stipulation, the record here does not reveal the value of the non-cash assets distributed in the decree. However, it is clear enough that Plaintiff was at a disadvantage, and that the attorneys fee award was part of an

"overall economic arrangement"³ to provide Plaintiff with some future support. The decree itself states that the court took into account the "circumstances and needs of the parties" in making its decision. My conclusion is that the award was made in contemplation of Plaintiff's needs at the time, and in furtherance of Texas' policy that property divisions take such need into account. As such, the award is not subject to discharge in bankruptcy.

This opinion contains the court's findings of fact and conclusions of law, which will not be separately stated. FRBP 7052. Counsel for Plaintiff shall prepare a judgment consistent with this opinion.

FRANK R. ALLEY, III
Bankruptcy Judge

³ From Joseph, 16 F.3d at 87.