IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 99-30474

GLENN P. BURDETTE
PENNY L. BURDETTE
a/k/a PENNY L. FULLER

Debtors

REBECCA HUTCHINS GUY

Plaintiff

v. Adv. Proc. No. 99-3067

GLENN P. BURDETTE

Defendant

M E M O R A N D U M

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding was commenced on May 18, 1999, by the Plaintiff's filing of a Complaint to Determine Dischargeability. All issues have been submitted to the court by the Parties' Stipulation of Facts and Documents filed on October 4, 1999, and on briefs.[1] The court is called upon to resolve whether the Debtor's obligation under a Marital Dissolution Agreement to pay the educational expenses of his two children after they reached their majority is a nondischargeable support obligation under 11 U.S.C.A. § 523(a)(5) (West 1993).

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Plaintiff and Debtor were married on June 2, 1973. Two sons were born to the parties, one on February 23, 1979, and the other on May 8, 1981. The parties were divorced by a Final Judgment of Absolute Divorce entered in the Chancery Court for Knox County, Tennessee, on January 10, 1990. Incorporated into the Final Judgment of Absolute Divorce is a Marital Dissolution Agreement dated October 19, 1989. Pursuant to the Marital Dissolution Agreement, the parties shared joint custody of their sons, who at the time of the divorce were minors, with the Plaintiff being the ?residential custodian." The Marital Dissolution Agreement contains the following provisions material to this adversary proceeding:

[1] The parties stipulate two documents, a Marital Dissolution Agreement dated October 19, 1989, and an Agreed Order which, the parties stipulate, was entered by the Chancery Court for Knox County, Tennessee, on August 27, 1998. These documents were not attached to either the Parties' Stipulation of Facts and Documents or to the Plaintiff's Complaint to Determine Dischargeability. They are, however, appended to the Trial Brief filed by the Plaintiff on November 3, 1999, and it is upon these documents that the court will rely. Although the copy of the Agreed Order bears the approval signature of an attorney for each party, it is not signed by the Child Support Referee and is not dated for entry. Nonetheless, the court will consider the Agreed Order as having been entered in the manner to which the parties stipulate for the purposes of this action.

> 3. CHILD SUPPORT: The Husband shall pay all medical, dental and educational expenses on behalf of the parties' minor children in lieu of child support.
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> 4. CHILDREN'S MEDICAL EXPENSES: The Husband shall maintain major medical and hospitalization insurance on the parties' minor children until each child attains majority. All medical pharmaceutical, orthodontic, psychological and dental expenses not covered by said insurance shall be borne by the Husband.
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> 5. CHILDREN'S EDUCATIONAL EXPENSES: The parties agree that the Husband shall bear the expenses related to providing the parties' minor children with a college education, including the costs of books and tuition at the University of Tennessee or other institution of higher education with comparable tuition rates. In the event that said minor children attend another college or university with higher tuition, the Husband's tuition obligation shall be limited to the cost of tuition at the University of Tennessee at that time.

On August 27, 1998, an Agreed Order was entered in the state court disposing of a Petition for Contempt filed by the Plaintiff. The Agreed Order provides in material part:

> 2. The Defendant/Respondent, Glenn Parrish Burdette, II, shall pay to the Plaintiff/Petitioner, Rebecca Hutchins (Burdette) Guy, contemporaneous with the entry of the this [sic] order the sum of Fourteen Thousand Dollars ($14,000.00). The payment of said sum and its receipt constitutes full and complete compliance with the Defendant/Respondent's obligation pursuant to provision 3 of the parties' Marital Dissolution Agreement past, present, and future. Specifically, the parties agree that the payment and receipt of the aforesaid settlement amount constitutes full, final and complete obligation of the Defendant/Respondent as to the minority support of the parties' minor children.
>
> . . . .
>
> 4. The parties further acknowledge that the Defendant/Respondent's obligations pursuant to provision 4 and 5 of the Marital Dissolution Agreement remain in full force and effect.

On February 8, 1999, the date the Debtor filed his petition under Chapter 7, his older son, who reached his majority on February 23, 1997, was a sophomore at Maryville College in

Maryville, Tennessee. The younger son, who reached his majority on May 8, 1999, was a senior at Notre Dame High School in Chattanooga, Tennessee.

II

The sole issue the court is called upon to resolve is whether the Debtor's obligation under paragraph 5 of the Marital Dissolution Agreement to pay the college education expenses of his two sons beyond the age of their majority is in the nature of support such that it is nondischargeable under 11 U.S.C.A. § 523(a)(5), which provides in material part:

> (a) A discharge under section 727 . . . 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—
>
> . . . .
>
> (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.A. § 523(a)(5)(B) (West 1993).

The Plaintiff bears the burden of proof on nondischargeability by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991). "The burden of demonstrating that an obligation is in the nature of support is on the non-debtor." *Fitzgerald v. Fitzgerald (In re*

Fitzgerald), 9 F.3d 517, 520 (6th Cir. 1993) (citing *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1111 (6th Cir. 1983)).

In its *Calhoun* decision, the Sixth Circuit provided a framework for declaring when obligations are **?**actually in the nature of alimony, maintenance, or support" and thus nondischargeable under § 523(a)(5). *See Calhoun*, 715 F.2d at 1109-1111. The court set forth a four-step analysis for determining whether an obligation, which was not designated as alimony, maintenance, or support, was nonetheless in the nature of support and therefore nondischargeable. *See id*. The first step is to determine whether the parties or the state court intended to create an obligation to provide support. *See id*. at 1109. Second, the obligation must have the effect of actually providing necessary support. *See id*. Third, if the first two conditions are satisfied, the court is required to determine whether the obligation is so excessive as to be unreasonable under traditional concepts of support. *See id*. at 1110. Fourth, if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of bankruptcy law. *See id*.

In its *Fitzgerald* decision, the Sixth Circuit revisited *Calhoun* and held that when an award is denominated as alimony, maintenance, or support in a divorce decree, the sole question is limited to whether the award is really support and not a property settlement in disguise.[2] *See Fitzgerald*, 9 F.3d at 521.

[2] *Fitzgerald* dealt with an agreement where the defendant agreed to pay the plaintiff a periodic sum specifically designated as **?**alimony." *See Fitzgerald*, 9 F.3d at 518. The *Fitzgerald* analysis, however, extends to the broader language of § 523(a)(5) to include **?**a liability designated as alimony, maintenance, or support." *See id*. at 520-21.

Under Tennessee law, there is no statutory duty to provide support for children who have reached the age of majority. *See Prager v. Prager (In re Prager)*, 181 B.R. 917, 920 (Bankr. W.D. Tenn. 1995). Any duty to provide such support in Tennessee is wholly contractual. *See id*. The dischargeability of a contractual obligation to support a child post-majority is determined by federal law. *See Calhoun*, 715 F.2d at 1108; *Prager*, 181 B.R. at 920. Obligations to provide post-majority support, in the form of child support payments or educational support, have been held nondischargeable support obligations under 11 U.S.C.A. § 523(a)(5) in a number of cases. *See Prager*, 181 B.R. at 920 (collecting cases). However, in the Sixth Circuit, the nondischargeability of such obligations can only be made upon application of the *Calhoun* or *Fitzgerald* analysis. *See Prager*, 181 B.R. at 919-21 (Debtor's obligation to pay post-majority education expenses of child denominated in Property Settlement Agreement as ?support" was nondischargeable under *Fitzgerald* analysis.); *Bush v. Bush (In re Bush)*, 154 B.R. 69 (Bankr. S.D. Ohio 1993) (Debtor's obligation to pay college education of adult children was nondischargeable support upon application of *Calhoun* analysis where debtor conceded that his intention was to provide support to his children.).

In the present matter, the court does not find *Fitzgerald* applicable because the parties do not denominate the Debtor's obligation at paragraph 5 of the Marital Dissolution Agreement to pay his children's post-majority college education expenses as support. The court must therefore look at the Debtor's obligation under paragraph 5 of the Marital Dissolution Agreement within the context of the *Calhoun* analysis. The first prong of that test is to determine whether the parties

intended the Debtor's obligation to pay his children's post-majority education expenses to be an obligation of support. *See Calhoun*, 715 F.2d at 1111.

Thus, the court must determine whether the parties intended to create a support obligation when they agreed that the Debtor would pay the expenses related to the children's college educations. This determination is factual in nature. *See id.* at 1109. The court may consider any relevant evidence in making the determination, including factors employed by state courts in deciding whether an obligation constitutes support or a property settlement.[3] *See id.* In the present matter, the crucial factor is **?**the structure and language of the parties' agreement or the court's decree" because there is little evidence before the court apart from the parties' Marital Dissolution Agreement and Agreed Order. *See id*. at 1108 n.7 (listing factors used by state courts in determining whether an obligation represents support).

The court cannot find from the record before it that the Plaintiff and Debtor intended paragraph 5 of the Marital Dissolution Agreement to create a support obligation. While paragraph 3 of the Marital Dissolution Agreement required the Debtor to pay the educational expenses of his children while they were minors **?**in lieu of support," there is no language in paragraph 5 to suggest that the Debtor's agreement to pay his children's post-majority education expenses was intended as support. The division in the Marital Dissolution Agreement of the various obligations assumed by the Debtor evidences the parties' intention to separate the Debtor's child support obligation from his obligation to pay his children's post-majority college education expenses. In

[3] Although federal law governs the determination of whether an obligation is in the nature of support, state law may **?**provide a useful source of ‹guidance.'" *Calhoun*, 715 F.2d at 1108.

fact, a contrary finding is required because the parties agreed pursuant to paragraph 2 of the Agreed Order entered by the state court on August 27, 1998, that the $14,000.00 obligation imposed upon the Debtor ?constitutes full and complete compliance with the [Debtor's] obligation pursuant to provision 3 of the parties' Marital Dissolution Agreement past, present, and future" and that ?the payment and receipt of the aforesaid settlement amount constitutes full, final and complete [satisfaction of the] obligation of the [Debtor] as to the minority support of the parties' minor children." Furthermore, at paragraph 4 of the August 27, 1998 Agreed Order, the parties agreed that ?provision . . . 5 of the Marital Dissolution Agreement remain[s] in full force and effect." The parties' agreement memorialized at paragraphs 2 and 4 of the Agreed Order clearly establishes the parties' intent that the Debtor's ?CHILD SUPPORT" obligation under paragraph 3 of the Marital Dissolution Agreement was separate from the ?CHILDREN'S EDUCATIONAL EXPENSES" obligation imposed upon the Debtor under paragraph 5 of the Marital Dissolution Agreement.

In summary, the only evidence before the court from which the parties' intention can be determined is found in the October 19, 1989 Marital Dissolution Agreement and August 27, 1998 Agreed Order. From those documents, the court can only conclude that the parties did not intend the Debtor's obligation under paragraph 5 of the Marital Dissolution Agreement to pay his children's post-majority education expenses to be an obligation of support. Under the Sixth Circuit precedence established by *Calhoun* and *Fitzgerald*, the court's analysis cannot proceed further. The Debtor's obligation to pay his children's post-majority education expenses is dischargeable.

An appropriate judgment will be entered.

FILED: January 5, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendant

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by FED. R. CIV. P. 52(a), incorporated into this adversary proceeding by FED. R. BANKR. P. 7052, it is ORDERED, ADJUDGED and DECREED that the obligation of the Defendant under paragraph five of the Marital Dissolution Agreement entered into by the Plaintiff and Defendant dated October 19, 1989, incorporated into the Final Judgment of Absolute Divorce entered in the Chancery Court for Knox County, Tennessee, on January 10, 1990, in the matter of *Rebecca Hutchins Burdette v. Glenn Parrish Burdette, II*, No. 101710-2, requiring the Defendant to pay the college educational expenses of his two children after they

reached their majority, is not a nondischargeable support obligation under 11 U.S.C.A. § 523(a)(5) (West 1993) and the Defendant's obligation is accordingly DISCHARGED.

ENTER: January 5, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE