UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

RICHARD M. HAWLEY Case No. 95-11315 K

Debtor

REID A. WHITING

Plaintiff

-vs- AP 95-1220 K

RICHARD M. HAWLEY

Defendant

ELAINE A. HAWLEY

Plaintiff

-vs- AP 95-1221 K

RICHARD M. HAWLEY

Defendant

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These are two adversary proceedings in which the former wife of the Debtor and her attorney seek a determination that debts that are owing to them pursuant to judgments entered by a matrimonial court are non-dischargeable under 11 U.S.C. § 523(a)(5) or (15). Elaine Hawley seeks a determination that judgments against the Debtor, Richard Hawley, for $9,135 for mortgage arrearages on the former marital residence, and for $720 for maintenance arrearages are non-dischargeable. Reid Whiting, Esq. seeks a similar determination as to his judgment against Mr. Hawley for $3,500. These proceedings are "core proceedings" under 28 U.S.C. § 157.

The Debtor responds, by his attorney, that the counsel fees, payments of the mortgage, and payments of the maintenance arrears, were all listed in separate and distinct decretal paragraphs in the State Supreme Court Order, and that the judgments for mortgage arrears and counsel fees were part of an equitable distribution award, and as such were separate and apart from any award of maintenance, alimony or child support.

Debtor's counsel's legal arguments reflect what is a widespread misunderstanding among family law practitioners about what 11 U.S.C. § 523(a)(5) and (a)(15) are all about. Family law practitioners naturally tend to think that the words "alimony," "maintenance," and "support," as used in those Bankruptcy Code provisions have the same meaning that they have in state law matrimonial proceedings. The fact is that what constitutes "alimony, maintenance, or support" for purposes of 11 U.S.C. § 523(a)(5), and particularly the broader question of what is "in the nature of" alimony, maintenance or support, is a matter of federal not state law. To

dramatize how well-settled that fact is I am attaching a photocopy of one publisher's "string-cite" for that proposition, as Appendix A to this decision. The reason that federal law, not state law, governs that question, is that the Bankruptcy Court is a unit of the United States District Court, and it is the Bankruptcy Court that grants discharges of debt in bankruptcy proceedings. It is federal law, consequently, that defines the scope of a bankruptcy discharge. In most regards (but arguably not all), the Bankruptcy Code is true to the Constitution's suggestion that bankruptcy laws should represent a "uniform system of bankruptcy."

Although addressing a separation agreement rather than a matrimonial court adjudication, the dictum in the case of *Brody v. Bro*dy (*In re Brody*), 3 F.3d 35 (2d Cir. 1993) cannot be ignored by this Court. "[A]n obligation's status as alimony, maintenance, or support exempted from discharge by section 523(a)(5) is a question of federal bankruptcy law separate and distinct from state law, and any label given the obligation, whether by the parties *or the state court*, is not dispositive." *Brody*, 3 F.3d at 39 (emphasis added).

Furthermore, 11 U.S.C. § 523(a)(5) deals with debts "in the nature" of alimony, maintenance, or support, and thereby further distances the scope of a discharge from state law terms of art, and further roots that scope in generic usage of those terms. As hard as it may be for family law practitioners to accept (given the zeal with which they pursue those distinctions on a daily basis), bankruptcy courts in general do not really see any decisive difference between a "property distribution" and a "support" or "maintenance" provision, if the fact is that the non-debtor spouse cannot maintain the intended level or quality of subsistence (whether intended by the parties or by an adjudication) for such spouse and any dependent children residing with such

spouse, absent compliance by the Debtor with the provision in question.

Thus, for example, the award of the marital residence in the present case presumably falls well within the state law definition of "property division" or "equitable distribution." But if the fact is that that award sought to establish a quality or level of subsistence for Elaine Hawley (and some of the children) that she was found not to be able to sustain absent the award of mortgage arrears against Richard Hawley, then Richard Hawley's obligation is "in the nature of support" in the present Court's view.

The Court has read the transcript of proceedings of September 9, 1993, before Referee Rosalie M. Stoll Bailey; her report; the Order of Justice Wolf; and that of Justice Mahoney. The fact that the obligation to pay mortgage arrears was intended by the Referee and by Justice Wolf to define a quality or level of maintenance is manifested in the following quotations from the Referee's report:

> "Defendant [the debtor] was the main breadwinner for the family, and he worked overtime and did major repairs and heavy farm chores during this off-work hours. Plaintiff [Elaine Hawley] cared for the children, the home and also did farm work. She grew vegetables in a garden and canned them for year-round use.
>
> On the 26 acre Coward Road farm, there are horses, two dogs, a sheep, rabbits and cats. One acre is used for the residence. Part of the remaining 25 acres are under pasture and the rest is barren. A small portion of the property is marshland.
>
> The youngest three children have been involved in the past with 4-H and have exhibited in previous years at the County Fair. They have won premiums and ribbons.
>
> The two dogs are family pets. The upkeep cost for the sheep is minimal. Todd [one of the children] takes a special

interest in the rabbits and cares for them. All children have responsibilities for caring for the animals.

. . . .

Prior to defendant's moving from the home in March 1993, he paid for the mortgages and loans. [He] paid for the telephone bill, the horse expenses, children's odds and ends and her car. Although he earlier stopped paying the electric and groceries, defendant continued to pay the mortgages until June 1993. He did not pay for the June mortgage bill and on June 30 gave plaintiff a check for $1,000 and the June bills for the home insurance, the Empire mortgage and the HFC bill. Plaintiff used that money to pay the June mortgage and HFC which were overdue, but had no money to pay the July bills. She did eventually pay the July bill, but was unable to pay August, September or October.

The first mortgage on the marital residence is in arrears and $29,000 is owing. The second mortgage from HFC is also owing in the amount of $13,815 plus other costs. Plaintiff says that as long as the mortgage is in arrears that [sic] she cannot refinance.

There is an outstanding bill to Dave Reisdorf for fuel in the amount of $461.92 and an electric bill of $600. . . .

. . . .

Plaintiff would like to refinance and remain in the Coward Road home. However, she is not eligible to refinance until the mortgage is paid up.

Plaintiff would like to retain the farm and the horses. . . .

. . . .

It is my recommendation that under the circumstances, plaintiff should receive maintenance of $60 per week for a period of six years. . . .

. . . .

> It is my recommendation that defendant shall be responsible to immediately bring the past due mortgage and HFC payments on Coward Street current. He shall be responsible for any interest and costs which have occurred by virtue of the failure to keep the mortgage and HFC payments current. Because of the children's [sic] ties to the farm and desirability of their remaining there, I feel plaintiff should have the opportunity to remain there. . . .

Referee's Report at 3-9 (Feb. 4, 1994).

As pointed out in Mr. Whiting's letter of September 16, 1996, the bare assertion by the Debtor's counsel that "[Judge Mahoney] did not intend that the mortgage arrears and the counsel fees be lumped together as maintenance payments and/or child support payments" does not suffice to raise a triable issue of fact, in light of the federal question of whether any such distinction is relevant.

As to the attorney's fees, this Court is clearly bound by the Second Circuit's decision in the case of *Pauley v. Spong* (*In re Spong)*, 661 F.2d 6 (2d Cir. 1981). While it seems assured that some attorney's fees awarded against a client's former spouse might not be "in the nature of alimony, maintenance or support,"[1] such situations are not likely to be encountered where the party against whom the award was made also has been found (or has agreed) to be liable for some form of ongoing obligation that is in the nature of support, maintenance, or alimony. In other words, an award of any form of maintenance, support, or alimony suggests that

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[1]For example, in a divorce proceeding that involves only a property division (and no alimony, maintenance or support) as among two persons of substantial independent means, such an award might be akin to a simple award of costs that are otherwise readily affordable to the spouse by whom they were incurred.

the non-debtor spouse cannot maintain the specified level or quality of subsistence for that spouse, or for children residing with that spouse, without the Debtor's ongoing assistance. It flows therefrom that the specified level or quality of subsistence would fall if the attorney fees obligation were discharged and the non-debtor spouse were forced to pay it himself or herself.

Apparently, the dollar amount of Reid Whiting, Esq.'s claim under *In re Spong* was not fixed until he had to go back to court on his client's behalf and obtain Justice Mahoney's award. Attorney's fees incurred in enforcing a non-dischargeable support obligation are themselves also non-dischargeable.

The Summary Judgment Motions of Elaine Hawley and Reid Whiting, Esq. in these adversary proceedings are granted. The judgment granted by Justice Mahoney on October 5, 1994, is declared NOT DISCHARGED in this bankruptcy. Judgment will enter accordingly.

SO ORDERED.

Dated: Buffalo, New York
September 26, 1996

/s/Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.