

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

MELVIN ROGER MITTAN,

DEBTOR

ARDYCE A. MITTAN,

Plaintiff

vs.

MELVIN ROGER MITTAN,

Defendant

CASE NO. BK81-619

A81-303

MEMORANDUM

The matter before this Court is a complaint to determine the dischargeability pursuant to 11 U.S.C. §523(a)(5) of a debt owed by Melvin Roger Mittan, debtor in this bankruptcy proceeding, to his former spouse, Ardyce A. Mittan. That section of the Bankruptcy Code excepts from discharge debts owed to a former spouse, ". . .for alimony to, maintenance for, or support of such spouse. . .in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that. . .such debt includes liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance or support." As previously determined by this Court in the case In Re Stranathan, 8 B.C.D. 472, 15 B.R. 223 (D. Neb. 1981), a determination of those debts which meet the requirements of §523(a)(5)(B) is to be made on a case-by-case basis.

At issue here is a judgment in the principal amount of \$18,274 plus interest at 8% per annum on the unpaid principal balance ordered to be paid pursuant to a decree of dissolution dated the 12th of February, 1980. Although the decree refers to the amount due as a "property settlement", the determination of the nature of the debt is to be made without regard to the specific language of the decree. Accordingly, the practice in this court has been under the Code as it was under the Bankruptcy Act, to look to the nature rather than the form of the obligation.

In the instant case, the decree of dissolution, in addition to establishing child custody and payment of child support, divides the marital estate of former spouses in the following manner. The petitioner in the dissolution proceeding, plaintiff in this action, Ardyce Mittan, received a 1979 Ford Mustang, her checking account, all household goods and furniture except a television set and the personal property owned by their son, and the parties' residence subject to first and second mortgages. Mr. Mittan, debtor and defendant in this action, was awarded Oldsmobile and Mercury automobiles, a life insurance policy, a television set, the property belonging to the parties' son, his personal checking accounts, and all stock and assets of Carsten's Sanitary Service, Inc. Further, the debtor was ordered to pay all business indebtedness of Carsten's Sanitary Service, Inc., and the encumbrance upon the Mercury automobile. The stated "property settlement" figure was to be amortized over a period of approximately ten years and was ordered paid regardless of the contingency of death or remarriage of either of the parties.

The evidence before me reveals that the division of property is essentially equal. Carsten's Sanitary Service, Inc., a garbage hauling service owned by the former spouses, rarely had over \$1,000 cash on hand at any given time, and at the time of the divorce, the business listed indebtedness of approximately \$20,000. The second mortgage on the house, the parties' former residence, was given to put cash into that business.

By her own testimony, the petitioner admits that she worked approximately 75% of her married life, primarily in bookkeeping and secretarial endeavors. This employment was largely outside the scope of the parties' jointly-owned business. At the time of the divorce, the petitioner was earning \$175 a week as an employee of Carsten's, but at the time of trial was otherwise employed and was earning \$212 a week. Her former husband currently realizes an income of approximately \$175 a week from the garbage-hauling business. Cross-examination of Ms. Mittan reveals that in negotiating the property settlement document she asked for cash payments on a monthly basis to equalize the division of property and not for the purpose of supporting herself.

It is the position of the plaintiff that given the long-term marriage of the parties (over 20 years) and given the fact that Mr. Mittan received an income-producing business and further that a second mortgage on the parties' residence was taken for the benefit of that business, the \$18,000 property settlement debt is a judgment "in the nature of" support for Mrs. Mittan. The defendant/debtor counters by arguing that the only property which he received was, in essence, a business which became defunct.

Having reviewed the testimony at trial and documents presented by both parties which include the dissolution decree, tax returns, and partial transcript of the dissolution proceedings, I find as fact that the sum of \$18,274 plus interest ordered paid pursuant

to the dissolution decree and encaptioned "Property Settlement", is a property settlement only and not in the nature of alimony, maintenance or support. To the extent Ms. Mittan points to the business becoming the separate property of her husband to justify the characterization as alimony or support, I disagree. The business would have value only so long as it was profitable. It had no separate, intrinsic value in and of itself. To characterize the husband's obligation as support requires something more tangible which can be said to flow from him and not from a business. Accordingly, the indebtedness does not meet the requirements for exception to discharge stated in 11 U.S.C. §523(a)(5)(B); therefore, the debt is dischargeable in this bankruptcy proceeding. A separate judgment is entered in accordance with the foregoing.

DATED: August 19, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

Copies to:

Daniel A. Fullner, Attorney, 114 West 3rd Street, Madison, Ne. 68748

Jewell, Otte, Gatz, Collins & Domina, Attorneys, 125 Norfolk Ave. Bldg.,
Norfolk, Ne. 68701