

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

RALPH L. WEDGEWOOD,

DEBTOR

KATHERINE WEDGEWOOD,

Plaintiff

vs.

RALPH WEDGEWOOD,

Defendant

CASE NO. BK88-370

A88-183

MEMORANDUM

Hearing was held on the above complaint on December 2, 1988. Appearing on behalf of plaintiff was Steven M. Watson of Marks & Clare, Omaha, Nebraska. Appearing on behalf of defendant was Michael L. Getty of Omaha, Nebraska.

Debtor/defendant's (debtor) marriage was dissolved in December, 1987. The state court awarded custody of a minor child to debtor, did not require his former wife (plaintiff) to pay child support, awarded the house to debtor subject to a lien for one-half of its value in favor of plaintiff, awarded debtor all vehicles, awarded plaintiff an interest in debtor's pension benefits, awarded plaintiff \$650 per month in alimony, awarded plaintiff \$1,000 in attorney fees and required defendant to pay court costs of \$1,200 which included the cost of filing fees and expert testimony presented to the court in regard to plaintiff's health and ability to work.

Debtor then filed a Chapter 7 bankruptcy. Plaintiff brought this adversary proceeding to stop the discharge of the attorney fee and court cost obligation under 11 U.S.C. § 523(a)(5), alleging that such obligations are in the nature of support and not dischargeable.

At trial, the parties presented a transcript of the state court findings, the decree of dissolution, deposition of plaintiff's physician, an employability affidavit prepared by an expert concerning plaintiff's job potential, information

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DISTRICT OF NEBRASKA
DEC - 5 1988
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By Deputy

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concerning debtor's income, the value of the assets, expenses of the parties and attorney's itemized statement for services. All of the evidence (except, of course, the transcript and decree) were presented to the state court judge.

Although that court as well as this one had contrary evidence available, it specifically found plaintiff unable to be gainfully employed. The state court judge, in his findings read into the record, considered plaintiff's health and found that plaintiff "is not equipped to go out into the labor force and be successful." (Ex. 2, Transcript p. 10, lines 3-5). The court then awarded her \$650 per month as alimony plus attorney fees and court costs. The court costs include fees charged by experts whose evidence the court considered in making the alimony determination. The court specifically found plaintiff to be without income or assets and, considering the financial circumstances of the debtor as well as plaintiff, awarded plaintiff only part of the attorney fees she incurred during the litigation.

The Bankruptcy Code, at 11 U.S.C. § 523(a)(5) excepts from a Chapter 7 discharge debts to a former spouse for alimony or support. In general, the award of attorney fees or court costs is for the purpose of supporting the spouse in litigation, including the divorce. Stranathan v. Stowell, 15 Bankr. 223, 226-227 (Bankr. D. Neb. 1981). However, in each case a factual determination must be made. In re Williams, 703 F.2d 1055, 1057 (8th Cir. 1983).

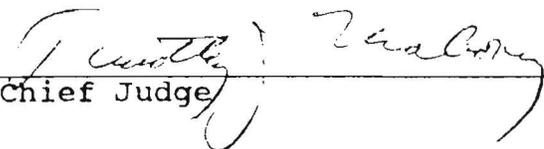
It is clear that plaintiff on the day of the dissolution hearing had no means to pay for legal representation and an award of the attorney fees and court costs was in the nature of support so she would be able to at least chip away at those expenses directly related to litigation expenses. Those expenses were incurred in order for her to obtain an alimony judgment and are, therefore, "support" as that term is used in 11 U.S.C. § 523(a)(5).

The state court judgment awarding \$1,000 in attorney fees from debtor to plaintiff and \$1,200 in court costs is nondischargeable as "in the nature of support."

Separate journal entry shall be filed.

DATED: December 5, 1988.

BY THE COURT:


Chief Judge