[Cite as *Bethel v. Bethel*, 2011-Ohio-2747.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Geri S. Bethel,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-989 (C.P.C. No. 00 DR 2101)
Brian Bethel,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 7, 2011

Vincent A. Dugan, Jr., for appellee.

Gregg R. Lewis and *Eric E. Willison*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations

TYACK, J.

{¶1} Appellant, Brian Bethel, appeals from the Franklin County Court of Common Pleas' judgment granting a contempt motion for failure to pay Geri S. Bethel for satisfaction of attorney fees resulting from the parties' divorce. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Brian Bethel assigns two errors for our consideration:

> I. The Trial Court erred when it found that Appellant's obligation to pay attorneys fees was not discharged in

> bankruptcy given Appellee's failure to raise the issue before the bankruptcy court.
>
> II. The Trial Court erred when it found that the requirement that Appellant pay Appellee's attorneys fees was in the nature of spousal support and therefore not dischargeable in bankruptcy.

{¶3} The parties, Geri S. and Brian Bethel, were divorced by way of an "Agreed Judgment Entry-Decree of Divorce" effective October 11, 2001. Paragraph 9 specifically addresses regular monthly spousal support to be paid by Brian to Geri. Paragraph 21 of the decree requires Brian to pay $10,000 to Geri towards the satisfaction of the approximately $18,000 of outstanding attorney fees incurred from the divorce. Geri filed a motion in contempt for non-payment of said attorney fees on January 23, 2002.

{¶4} Thereafter, Brian filed a petition for bankruptcy in 2003 and was granted a general discharge of indebtedness on July 27, 2004. The debt is listed in "Schedule F - Creditors Holding Unsecured Nonpriority Claims" as "Claims that could arise as a result of Geri S. Bethel's marriage to the Debtor. $100.00+/-." The bankruptcy court did not explicitly find that Brian's obligation to pay attorney fees pursuant to the parties' divorce decree was discharged, nor was there any indication given as to whether the nature of the obligation was to pay Geri for the satisfaction of attorney fees.

{¶5} On May 27, 2009, the parties entered into a partial settlement of outstanding issues before the Franklin County Court of Common Pleas. The only issue that remained unresolved was whether Brian had discharged in bankruptcy the debt owed to Geri for her attorney fees pursuant to the parties' divorce decree.

{¶6} The magistrate filed a decision on October 2, 2009. Following the test laid out by the Sixth Circuit Court case in *In re Calhoun*, (C.A.6, 1983), 715 F.2d 1103, the magistrate found that the attorney fees were not discharged in bankruptcy court and ordered payment and court costs.

{¶7} Brain filed objections to the decision of the magistrate. On December 15, 2009, the matter came before the court of common pleas which entered its decision on September 21, 2010. The trial court held that the state court had concurrent jurisdiction to decide the matter when the nature of obligation to pay a debt is not raised in bankruptcy court. Then, on a thorough de novo review of the case file, the trial court overruled Brian's objections and approved and adopted the magistrate's decision.

{¶8} The first assignment of error asserts that the debt was discharged due to Geri's failure to raise the issue within the first 60 days following the first date set for the first meeting of creditors in bankruptcy court. Therefore, the obligation was discharged under the general discharge granted to Brian in the bankruptcy proceedings.

{¶9} We first address the issue of jurisdiction in the domestic relations court. While federal law is controlling, state courts have concurrent jurisdiction when addressing this issue. *Barnett v. Barnett* (1984), 9 Ohio St.3d 47. An obligation to pay a debt to a former spouse for alimony, maintenance or support in connection with a divorce decree is not discharged in bankruptcy. See 11 U.S.C. 523(a)(5) and (a)(5)(B). This includes any debt that is *actually in the nature of* alimony, maintenance or support even when not specifically labeled as such. The Supreme Court of Ohio has held that when there is a dispute as to whether a particular debt obligation is in nature of alimony,

maintenance or support, state courts have concurrent jurisdiction with bankruptcy courts to make that determination. Id. at 49.

{¶10} State courts may decide whether an obligation to pay a debt is in the nature of alimony, maintenance or support after discharge in bankruptcy if the issue was not raised in the bankruptcy court. *Kassicieh v. Mascotti,* 10th Dist. No. 06AP-1224, 2007-Ohio-5079, ¶23. Further, the question of whether a debt is in the nature of support must be specifically raised in bankruptcy court to be ruled on. "The question of whether or not a certain debt is discharged is normally not ruled on until specifically raised." *Loveday v. Loveday,* 7th Dist. No. 02 BA 13, 2003-Ohio-1431, ¶14. For a question about the nature of a debt to be specifically raised, there must be some evidence in the record before the trial court that a determination about the specific obligation was made by the bankruptcy court. *Markley v. Markley*, 9th Dist. No. 07CA0085, 2008-Ohio-3208, ¶19.

{¶11} The bankruptcy court in this case did not make any specific ruling if the obligation to pay Geri for satisfaction of her attorney fees was in the nature of alimony, maintenance or support. Nor did the bankruptcy court specifically rule that this debt was generally discharged. In fact, there is no indication that the bankruptcy court considered the matter specifically. Without any evidence that the issue was specifically raised, it is clear that the state courts have jurisdiction to consider whether Brian's obligation to Geri was in the nature of alimony, maintenance or support.

{¶12} Brian argues that the issue was raised when Geri and her attorney were listed as creditors and that Geri's failure to respond in bankruptcy court is evidence that the issue was raised. However, Brian failed to point to any evidence that the

bankruptcy court made a specific determination about the obligation to pay Geri for satisfaction of her attorney fees. This court, as well as others appellate courts, have claimed jurisdiction to decide the nature of an obligation to pay a debt to a party when that party is listed as a creditor and fails to respond in bankruptcy court. *Kassicieh* at ¶9; *Loveday* at ¶1; *Markley* at ¶10. *Horvath v. Horvath*, 3d Dist. No. 14-09-22, 2010-Ohio-316, ¶5.

{¶13} It is the nature of the obligation that is important. Simply, if the obligation is in support of a spouse, then it cannot be discharged. Brian's listing Geri and her attorney as creditors is not determinative as to the nature of the obligation; it is simply one party labeling the obligation. Only a court can make the determination as to the nature of the obligation, and if the bankruptcy court has not done so, the duty falls to the state courts.

{¶14} As noted earlier, the nature of the obligation to pay attorney fees was not determined by the bankruptcy court. Therefore, by means of the state courts' concurrent jurisdiction, the trial court could make a determination after the general discharge. The nature of the obligation will determine whether the debt has been discharged or not, Geri's failure to object to its discharge in bankruptcy court is not determinative.

{¶15} The first assignment of error is overruled.

{¶16} The second assignment of error asserts that the trial court erred when it found that the payment of the attorney fees was in the nature of spousal support and therefore not dischargeable in bankruptcy.

{¶17} The trial court undertakes the equivalent of a de novo determination, in light of any filed objections, when independently assessing the facts and conclusions contained in the report of a referee. *Holland v. Holland*, (Jan. 29, 1998), 10th Dist. No. 97APF08-974.

{¶18} The trial court's judgment cannot be disturbed on appeal absent a showing that the trial court abused its discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Id. at 219. This is due to a trial court's general broad discretion in determining the equitable distribution of property in divorce cases. *Horvath* at ¶30.

{¶19} An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89; *Wise v. Ohio Motor Vehicle Dealers Bd.* (1995), 106 Ohio App.3d 562, 565; and *In re Ghali* (1992), 83 Ohio App.3d 460, 466.

{¶20} The Sixth Circuit in *Calhoun* established a four-part test to determine when an obligation "which is not specifically designated as alimony or maintenance, is nonetheless in the nature of support and thus nondischargeable." *In re Goans* (2001), 271 B.R. 528, 532. One, the obligation must have been intended either by the parties or the court as support. Two, the obligation must have the actual effect of providing necessary support to ensure that the daily needs of the former spouse and any children are satisfied. Three, if the first two tests are satisfied, the court must determine that the amount of support is not so excessive that it is manifestly unreasonable under

traditional concepts of support. Four, if the amount is unreasonable, the obligation is discharged to the extent necessary to serve the purposes of federal bankruptcy law. *Calhoun* at 1109-10.

{¶21} The trial court in this case used the *Calhoun* test and determined that Brian's obligation was in the nature of support and that it was not excessive.

{¶22} The trial court properly relied upon *Calhoun* and went through the four-part test to determine if Brian's obligation to pay attorney fees was in support of Geri.

{¶23} Applying the first prong, whether the parties to the divorce or the trial court *intended* to create an obligation to provid support. The trial court may consider any relevant evidence to make a factual determination of intent to create support including factors such as the nature of the obligations assumed; the structure and language of the parties' agreement; whether other lump sum or periodic payments were also provided; length of the marriage; the existence of children from the marriage; relative earning powers of the parties; age, health and work skills of the parties; the adequacy of support absent the debt assumption; and evidence of negotiation or other understanding as to the intended purpose of the assumption. *Calhoun* at 1108-09.

{¶24} The trial court considered different factors and evidence noting that Brian's obligation of the debt was agreed to by both parties, and that Geri was already paying $300 a month towards the remaining balance of the assessed attorney fees. The trial court also stated that "the attorney fee provision is yet another means of providing support by easing a significant financial burden between Plaintiff and her attorney." *Bethel v. Bethel* (Sept. 21, 2010), Franklin C.P. No. 00 DR 2101, 8.

{¶25} The trial court is correct in that payment of attorney fees can be in the nature of support. Courts within the Sixth Circuit have found that attorney fee awards constitute support under the *Calhoun* test. *In re Ker* (2007), 365 B.R. 807, 813. Further, an obligation to pay a debt arising from attorney fees in a divorce judgment is usually found to be in the nature of support and thus nondischargeable. *In re Goans* at 534.

{¶26} The trial court found that the parties had created the intent that this obligation be in the nature of support.

{¶27} Second, the trial court examined whether such assumption of a debt has the *actual effect* of providing the support necessary to ensure that the daily needs of the former spouse and any children of the marriage are satisfied. *Calhoun* at 1109. *Calhoun* allows for trial courts to consider many factors when determining the actual effect of an obligation, including the length of the marriage; the existence of children from the marriage; relative earning powers of the parties; age, health and work skills of the parties; the adequacy of support absent the debt assumption. Id. at 1108, fn. 7.

{¶28} The trial court made its decision, relying in part on the length of the marriage and the difference in earning powers of the parties as well as the disparity between incomes. At the time of the divorce, Geri was the homemaker with an income of $14,000 per year and Brian was a pilot with an income of $136,400 per year. The monthly financial needs of Geri, who had custody of the two children, was about $5,400 at the time of the divorce. The trial court also noted the awarding to Brian of the income tax dependency exemption for the minor children on an annual basis. The court found

that the obligation of the debt would have the actual effect of providing necessary daily support to Geri and the minor children.

{¶29} Under the third prong, the trial court determined whether the amount of support was not so excessive that it was unreasonable under traditional concepts of support. The trial court noted the vast disparity in the incomes and the length of marriage. The court also noted that the debt was agreed to by Brian in the divorce decree. The court found that the amount was reasonable.

{¶30} The fourth prong test was not necessary for the trial court as the amount of support was found to be reasonable.

{¶31} Using an abuse of discretion standard of review, we find that the trial court applied the correct law and had a reasonable basis for each of its findings. The *Calhoun* test was applied reasonably to the facts in this case and the finding was not arbitrary, capricious, or unconscionable. Brian's obligation to pay attorney fees is in the nature of support of Geri.

{¶32} Brian's argument focuses on the first *Calhoun* test, that the evidence cuts in his favor that parties did not intend the payment of the attorney fees to be in the nature of spousal support. Both the magistrate and the trial court disagreed finding sufficient evidence examining multiple factors to hold that it was the intent of the parties to have the assumption of the debt be in support. The trial court was allowed to, under *Calhoun*, and did consider multiple factors when examining intent of the parties of which the decree of divorce was one.

{¶33} The trial court was not unreasonable in its conclusions in that it was the intention of the parties to create a debt in the nature of support and did not abuse its discretion.

{¶34} The second assignment of error is overruled.

{¶35} Based on the foregoing, the trial court did not err when it exercised concurrent jurisdiction, or when it found that the nature of the debt was in support of Geri and thus not dischargeable in bankruptcy.

{¶36} The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

FRENCH, J., concurs.
BROWN, J., concurs separately.

BROWN, J., concurring separately.

With regard to the second assignment of error, I am troubled by the lack of language in the provision ordering attorney fees that would indicate the fees were in the nature of support when other provisions in the decree specifically indicate such. However, considering the disparity of the income between the parties and other factors set forth in *In re Calhoun* (C.A.6, 1983), 715 F.2d 1103, and as our standard of review is abuse of discretion, I would affirm the trial court's finding that the attorney fees ordered were in the nature of support.

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