United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Teri Lynn Brock**
Case Number: **01-10989**
Chapter : **7**
Judge Code: **SA**
First Meeting Location: **Albuquerque**
Reference Number: **7 - 01-10989 - SA**

Document Information					
Number:	65				
Description:	Memorandum Opinion re: [17-1] Motion For Relief From Stay As To allow continuance of garnishment for child support and spousal support by Margaret Brock, Margaret Brock .				
Size:	15 pages (27k)				
Date Received:	04/12/2002 01:24:50 PM	**Date Filed:**	04/12/2002	**Date Entered On Docket:**	04/15/2002

Court Digital Signature View History

7d b5 02 bd 93 71 89 71 b0 25 40 9a c7 94 22 c8 0f 4c cc 5c c5 53 c8 0f 4a fa e9 1a 0d 38 da 6f 77 97 c5 b6 1e ed b8 81 d5 73 42 3d 94 e4 30 77 79 6e a0 69 24 9d 4e f2 2f ee 17 6c 17 fb 45 91 f5 72 ee 86 ba 72 8d 02 50 da 00 78 fc 52 fc 6f ce 35 aa 95 74 83 2e 72 f8 06 25 d5 bc 20 43 8e 73 64 fc 45 5b 79 5b e2 43 4d f5 17 53 b5 da 06 83 26 ff 5c 23 03 32 b0 d1 7d ba 77 d4 a8 a6 1c

Filer Information	
Submitted By:	
Comments:	Memorandum Opinion on Motion for Relief from Automatic Stay filed by Margaret Brock

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
GEORGE BROCK and
TERI BROCK,
Debtors.

No. 7-01-10989 SA

MEMORANDUM OPINION
ON MOTION FOR RELIEF FROM AUTOMATIC
STAY FILED BY MARGARET BROCK (Doc. 17)

This matter came before the Court for final hearing on the Motion for Relief from Automatic Stay filed by Margaret Brock. Margaret Brock was represented by Shay Meagle. Debtor was represented by Steve Mazer. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

Facts

George Brock ("Debtor") and Margaret Brock ("M. Brock") were married in 1971. They became the parents of four children between 1982 and 1988. On January 10, 1995 they filed a chapter 7 bankruptcy, which they converted to chapter 13 on April 20, 1995. M. Brock was a homemaker during the marriage. Debtor was the finance manager for a car dealership. They divorced on February 2, 1999. The Marital Settlement Agreement ("MSA") awarded each of them primary custody of two of the children. Debtor was to make child support payments in the amount of $750 per month until July,

2006. Debtor's wages were $75,532 in 1998, $76,878[1] in 1999, and $63,057 in 2000. M. Brock's wages were $9,555 in 1998, $18,922 in 1999, and $27,532 in 2000.

The MSA awarded M. Brock a 1990 Dodge Caravan and her individual items of personal property. Debtor was awarded a 1997 Ford Expedition, mobile home and property located in Torrance County, New Mexico, the parties' home located in Albuquerque, New Mexico, and his items of personal property. M. Brock agreed to transfer her interest in the Torrance County and Albuquerque properties to Debtor by quitclaim deed. Debtor agreed to refinance the Albuquerque property and use the equity obtained from the refinancing to pay off the chapter 13 bankruptcy and to pay the remaining funds to M. Brock; then, Debtor was to pay M. Brock the amount required to payoff the chapter 13 to M. Brock over a four year period. Finally, Debtor was to pay M. Brock $3,000 at the time of entry of the divorce.

The MSA provided that M. Brock was responsible for her student loan in the amount of $17,000. Debtor assumed and was responsible for the debt on the 1997 Ford Expedition, the mortgage on the Torrance County property, the mortgage on the

[1] The 1999 W-1 in exhibit 5a is virtually unreadable.

Albuquerque property, taxes to the IRS, and a debt to Sunwest Bank.

In July, 1999, Debtor filed a motion to amend the divorce decree because he had been unable to refinance the Albuquerque residence. This motion was not opposed by M. Brock, and an amended final decree was entered by the Court on July 22, 1999. The Amended MSA awarded M. Brock the Albuquerque residence, and awarded her an additional $10,000 payable $3,000 upon entry of the Amended MSA and the balance of $7,000 in monthly installments of $100 each without interest. M. Brock was to be responsible for the first mortgage on the residence, and the Debtor was to be responsible for the second mortgage (to Chase Mortgage) on the residence. Debtor also agreed to pay M. Brock the amount of any income tax refunds due her that were intercepted by the IRS. The rest of the Amended MSA is the same as the original MSA.

Both the MSA and Amended MSA were prepared by Debtor's attorney. M. Brock was unrepresented in the divorce until after July 22, 1999. Both the MSA and Amended MSA are silent regarding alimony, support or maintenance for M. Brock. M. Brock was a student at the time of the divorce, pursuing her Bachelor's Degree in accounting. Debtor testified that he

believed M. Brock would be self-supporting when she obtained her degree in December, 1998.

On October 5, 1999, M. Brock, through her attorney, filed a Motion for an Order to Show Cause due to Debtor's failure to comply with the Amended MSA. The Motion alleged that Debtor had failed to pay the Chase Mortgage debt, failed to pay $1000 of the $3000 cash due (M. Brock's affidavit states that she was paid $2000 upon entry of the divorce and that this $1000 is that balance; the $3000 due upon entry of the amended decree is presumably still owed), failed to pay pre-1998 tax debt, and failure to pay $4,274 that had been retained by IRS and applied to taxes. The state court set the Order to Show Cause for hearing on January 24, 2000. On that date the court referred certain issues regarding the children to the Court Clinic. In connection with this referral the parties completed a Court Clinic Information Sheet which listed Debtor's monthly income as $5,000 and M. Brock's monthly income as $1,666. On May 22, 2000 the Court entered an Order and Judgment to reflect the January 24, 2000 hearing, and a Stipulated Minute Order that awarded an additional amount against Debtor and incorporated that Order and Judgment. The Order and Judgment awarded M. Brock $28,297.59 for the Chase Mortgage, $5,298.76 for payments to the Chapter 13 Trustee,

$4,274.00 for the tax intercept, $150 for "delinquency", and $1,000.00 for the lump sum payment, plus $500 in attorney fees, for a total judgment of $39,520.35, to bear interest at 8.75%. The Order and Judgment provided that Debtor was to pay $650.00 per month on this Judgment. The Stipulated Minute Order awarded further judgment as follows: $2,914.48 for payments to the Chapter 13 trustee, $400.00 for "delinquency", $3,614.01 for another tax intercept (for 1999) and $125.00 in attorney fees, for a total judgment of $7,053.49. Paragraph 4 lists the total judgment as $46,753.86, and paragraph 5 orders Debtor to pay $1,000 per month toward the judgment. The Stipulated Minute Order also reduced child support to $246.00 per month, and stated that Debtor agreed to pay child support and payments toward the judgment by wage withholding.

Debtor and M. Brock received discharges in their chapter 13 proceeding on February 26, 2001. The chapter 13 was closed on that same date.

On February 16, 2001, Debtor and his new spouse filed a Chapter 7 bankruptcy. They listed M. Brock as an unsecured nonpriority creditor holding a claim of $45,623.00. On March 19, 2001, the Court entered a stipulated order allowing Debtor's employer to continue wage withholding in the amount

of $246 per month, which represented child support not protected by the automatic stay.

The issue remaining for the Court at this point is whether the $1,000 per month that the state court ordered to be withheld from Debtor's wages toward satisfaction of the May 22, 2000 judgment is a priority claim pursuant to 11 U.S.C. § 507(a)(7) for alimony, maintenance, or support that is not subject to the automatic stay by virtue of 11 U.S.C. § 362(b)(2)(B).

Conclusions of Law

Bankruptcy Code Section 362(b)(2)(B) provides, in part:

> The filing of a petition ... does not operate as a stay--
> ...
> (B) of the collection of alimony, maintenance, or support from property that is not property of the estate[2].

The Bankruptcy Code does not define "alimony, maintenance, or support." However, there are numerous decisions construing the same terms under Bankruptcy Code sections 523(a)(5)[3].

---

[2] A chapter 7 debtor's postpetition wages are not property of the estate. See 11 U.S.C. § 541(a)(6).

[3] Section 523(a)(5) states, in relevant part, that:
> (a) A discharge ... does not discharge an individual debtor from any debt--
> ...
> (5) to a ... former spouse ... of the debtor, for alimony to, maintenance for, or support of such spouse ... in connection with a ... divorce decree

See, e.g., Dewey v. Dewey (In re Dewey), 223 B.R. 559, 563-64 (10th Cir. B.A.P. 1998) aff'd 1999 WL 1136744 (10th Cir. 1999)(citing cases.) The definitions developed under 523(a)(5) apply to 507(a)(7), see id., and should also apply to 362(b)(2)(B).

The terms "alimony" and "support" are to be given a broad construction to support the Congressional policy that favors enforcement of spousal and child support, thereby overriding the general bankruptcy policy which construes the exceptions to discharge narrowly. Collier ¶ 523.11[2], at page 523.78, citing Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993)(the term "support" as used in § 523(a)(5) is entitled to a broad construction); Dewey v. Dewey (In re Dewey), 223 B.R. 559, 564 (10th Cir. BAP 1998), aff'd 1999 WL 1136744 (10th Cir. 1999) ("Dewey") (the term "support" is to be read broadly and in a realistic manner).

Whether an obligation to a former spouse is in the nature of support is resolved according to federal bankruptcy law,

---

> ..., 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.

not state domestic relations law. Young v. Young (In re Young), 35 F.3d 499, 500 (10th Cir. 1994) ("Young"); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989)(per curium) ("Sylvester") (citing Goin v. Rives (In re Goin), 808 F.2d. 1391, 1392 (10th Cir. 1987)) ("Goin"). That determination is made as of the time of the divorce, not later, Sampson, 997 F.2d at 725-26, regardless of the ex-spouses' current needs or circumstances. Young, 35 F.3d at 500; Sylvester, 865 F.2d at 1166. On the other hand, nothing about the federal basis for making the dischargeability decision precludes either party from returning to State Court to pursue a change in the substance of the support obligation as may be permitted under state law. Federal courts should not put themselves in the position of modifying state matrimonial decrees. Sylvester, 865 F.2d at 1166.

In Young the Tenth Circuit Court of Appeals gave clear guidance to the Bankruptcy Courts in making 523(a)(5) determinations through analyzing its earlier Sampson case:

> In re Sampson ... held that a bankruptcy court must conduct a two-part inquiry when resolving the issue of whether payments from one spouse to another incident to divorce settlement are in the nature of support. In re Sampson, 997 F.2d at 722-23. First, the court must divine the spouses' shared intent as to the nature of the payment. Id. at 723. This inquiry is not limited to the words of the settlement

> agreement, even if ambiguous. Id. at 722. Indeed, the bankruptcy court is required to look behind the words and labels of the agreement in resolving this issue. Id. Second, if the court decides that the payment was intended as support, it must then determine that the substance of the payment was in the nature of support at the time of the divorce – i.e., whether the surrounding facts and circumstances, especially financial, lend support to such a finding. Id. at 725-26.

In re Young, 35 F.3d at 500.

First Element - Parties' Intent

The Sampson Court held that the "critical inquiry" with respect to the first element is the "shared intent of the parties at the time the obligation arose." Sampson, 997 F.2d at 723. (Citation omitted.) "A written agreement between the parties is persuasive evidence of intent." Id. (Citation omitted.) In that case the Court examined a marital settlement agreement that contained an Article I denoted as Maintenance and Spousal Support, and an Article III that addressed the property settlement. The Court found that this structure in the agreement provided "compelling evidence" that the parties intended the obligation as maintenance.

We have no such compelling evidence in this case. The MSA has a section labeled property and one labeled debts, but none labeled support or alimony. The MSA is silent on support. The parties testified that alimony was not

discussed. Debtor's divorce attorney also testified that, in his experience, support was awarded only if there was sufficient income generated by the parties to ensure payment of child support and debts. In this case the divorce attorney warned the husband that there was not enough income to pay the debt and the $750 per month child support. Therefore, the Court must look elsewhere to determine what the intent of the agreement was.

Collier lists eight factors that courts have typically considered in inferring intent. 4 Lawrence P. King, Collier on Bankruptcy, ¶523.11[6] at 523-82 (15th ed. rev.)("Colliers")

1. Labels in Agreement.

As discussed above, the agreement contains no labels reflecting an intent to support or not support. Furthermore, the MSA and Amended MSA were negotiated documents, not specific findings of fact by the divorce court.

2. Income and Needs of the Parties at the Time.

The Court finds that M. Brock was in the need of support at the time of the divorce. She earned $9,555 in 1998, the year before the divorce. She had two children living with her and was receiving $750.00 in child support. She was liable for her student loan. Pursuant to the Amended MSA she was

also liable for the first mortgage on the residence, about $900 per month. Debtor's wages were $75,532 in 1998. As in Sampson, 997 F.2d at 725, M. Brock's obvious need for support at the time of the divorce is enough to presume that the obligation was intended as support.

3. Amount and Outcome of the Property Division.

M. Brock received a vehicle and her personal items in the MSA, and was to receive the net equity from the residence partly in a lump sum. When a payment obligation is directly linked to the sale of identifiable property, the obligation is more likely to have arisen from a property settlement. Colliers, ¶523.11[6][c] at 523-85. It appears to the Court that this part of the transaction was a property settlement. The amended MSA instead had Debtor quit claim the residence to M. Brock because he could not refinance it. Furthermore, it appears that by that time there was no equity in the residence. $28,297.59 of the judgment reflects M. Brock's payment on the second mortgage to save the house from foreclosure. All things considered, this part of the transaction appears to be a dischargeable property settlement rather than support. Tied in with the residence, however, is Debtor's obligation to pay off the Chapter 13 bankruptcy with a portion of the net proceeds of refinancing and repay this

amount to M. Brock over a four year period. The Court finds this amount to be in the nature of support - it was an obligation of the community in the approximate amount of $425 per month to pay the Chapter 13, and clearly M. Brock did not have the ability to pay this amount from her income.

4. Whether the Obligation Terminates on Death or Remarriage or on Emancipation of the Children.

The child support portion of the MSAs terminate in 2006, when the youngest child turns 18. The MSA is otherwise silent as to when it would terminate.

5. Number and frequency of payments.

Debtor had to make a $3,000 payment upon entry of the divorce, but paid $2,000; Debtor needed to pay $10,000 upon sale of the Torrance County property per the Amended MSA. The remaining $1,000 of the $3,000 and the $10,000 appear to be a property division.

Debtor's obligation to make monthly payments to the Chapter 13 is discussed above, and looks more like support than a property division. If Debtor did not make these payments to the Trustee, M. Brock would have had to make these payments from her monthly income. The Amended MSA calls for Debtor to reimburse M. Brock for tax intercepts. M. Brock's tax refunds would be part of her disposable income, i.e., if she had claimed more exemptions she would have had more

monthly income to support herself and would have received a smaller refund. The Court finds that the tax intercepts were support despite the fact that they were in the form of a single payment.

6. Waiver of Alimony or Support Rights.

There is no explicit waiver of alimony or support in the agreement.

7. Availability of State Court Procedures to Modify and Enforce.

There was a modification to the original MSA, then various hearings on Orders to Show Cause. This demonstrates that the state court retained jurisdiction to modify and enforce the agreements. This indicates support, to some extent.

8. Tax treatment of obligation.

Debtor has not filed tax returns since the divorce. The MSA is silent on the tax treatment of the Debtor's payments.

Second Element - Substance of the Obligation

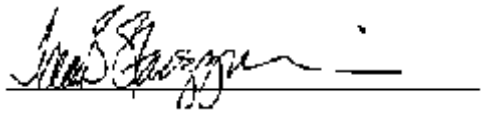
The Sampson Court held that the "critical inquiry" with respect to the second element is the "function served by the obligation at the time of the divorce." Sampson, 997 F.2d at 723. (Citation omitted.) "This may be determined by considering the relative financial circumstances of the parties at the time of the divorce." Id. As discussed above,

there was a large discrepancy in incomes at the time of the divorce. The Court finds that some of the amounts payable were support, and some were property settlement, as follows:

Chase mortgage	$ 28,297.59	property settlement
Chapter 13	5,298.76	support
Tax intercept	4,274.00	support
Delinquency	150.00	support
Lump sum payment	1,000.00	property settlement
Attorney fees[4]	500.00	support
Chapter 13	2,914.48	support
Delinquency	400.00	support
Tax intercept	3,614.01	support
Attorney fees	125.00	support

Conclusion

The total amount of support is therefore $16,876.25, which bears interest from May 22, 2000 at the rate of 8.75%, and is not subject to the automatic stay.



Honorable James S. Starzynski
United States Bankruptcy Judge

[4] Attorney fees are nondischargeable when in the nature of support. Champion v. Champion (In re Champion), 189 B.R. 516, 518(Bankr. D. N.M. 1995). M. Brock's attorney fees are all related to her motions to enforce provisions of the MSA which the Court finds contained some provisions for support.

I hereby certify that on April 12, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

Steve H. Mazer
122 10th Street NW
Albuquerque, NM 87102

Shay E. Meagle
PO Box 30707
Albuquerque, NM 87190

Linda S. Bloom
PO Box 218
Albuquerque, NM 87103-218