

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 09-18090
)
PETER S. HOLLINGTON,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
_____))
)
PETER S. HOLLINGTON,) Adversary Proceeding No. 09-1424
)
Plaintiff,)
)
v.)
)
MARGARET RUF fka) **MEMORANDUM OF OPINION**
MARGARET RUF HOLLINGTON,)
)
Defendant.)

Plaintiff-debtor Peter Hollington and his former wife Margaret Ruf divorced before the debtor filed this bankruptcy case. The debtor filed this adversary proceeding against Ms. Ruf seeking a determination that his obligations under their judgment entry of divorce to pay tuition for their children and to make payments on a note secured by a mortgage on the former marital residence are dischargeable under Bankruptcy Code § 523(a)(15). The parties submitted the matter for decision on stipulated facts and briefs. For the reasons discussed below, the debts are not dischargeable and Margaret Ruf is entitled to judgment on the complaint.

I. JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. STIPULATED FACTS¹

Defendant Margaret Ruf filed a complaint against the debtor for divorce and other relief in the Cuyahoga County Domestic Relations Court: *Margaret Ruf Hollington v. Peter Hollington, et al.*, case no. DR-04-301269. On July 29, 2008, the domestic relations court entered a judgment entry of divorce (divorce decree), which dissolved the parties' marriage. The divorce decree requires the debtor to pay these amounts and to take these actions:

- a. Child support in the sum of \$1,000.00 plus poundage per month until their children, now ages 7 and 9, are 18 years old.
- b. Spousal support in the sum of \$4,000.00 plus poundage per month for 48 months commencing September 1, 2008.
- c. The sum of \$225,000.00, payable to Ms. Ruf at the rate of \$50,000.00 per year commencing July 17, 2008 and a final payment of \$25,000.00. The final payment is specifically characterized as spousal support, due and payable July 17, 2012.
- d. With respect to the children's education, one-half of the private school tuition and fees through the time that each child completes sixth grade, after which time the debtor shall pay tuition and fees for such schooling.
- e. The debtor is required to obtain and maintain a policy of life insurance upon his life with a death benefit of at least \$500,000.00 and with the children designated as beneficiaries.
- f. The debtor is required to make all payments upon a mortgage obligation on the marital residence owed to Huntington National Bank and he is required to satisfy that debt.

¹ Docket 9, 11. The debtor filed an affidavit in connection with his reply brief (exh. A, docket 17), but the court has not considered it because the parties submitted the matter on stipulated facts.

The divorce decree also provides that:²

- (g) the debtor is to “indemnify, defend, and hold [Ms. Ruf] harmless” on the mortgage debt;
- (h) the debtor “shall pay, indemnify, and hold [Ms. Ruf] harmless on the (sic) all his debts and obligations associated with SkyBank, now known as Huntington National Bank, including but not limited to the mortgage on the marital residence[.]”
- (i) certain financial accounts which the debtor holds at Huntington National Bank “shall be used as security for the payment of lump-sum payments and the payment of the mortgage . . . [and that he] is prohibited from having his account balances below the level to pay the lump sum payments to [Ms. Ruf] . . . and to pay the mortgage obligations[.]” The accounts are currently valued at more than \$900,000.00.

The debtor has not met his obligations under the divorce decree in these respects:

1. The debtor’s payment of child support is in arrears \$4,000.00 plus poundage, representing payments due for the months of January 2010 to the present date.
2. The debtor’s spousal support payments are in arrears in the sum of \$40,000.00, with eight months arrearage existing in post-petition payments.
3. The debtor failed to make the \$50,000.00 payment due July 17, 2009.
4. The debtor has failed to pay for schooling for either child since the filing of this case.

On March 17, 2009, the Cuyahoga County Support Enforcement Agency filed a motion in the domestic relations court to liquidate the child and spousal support arrearages. Ms. Ruf filed a motion to show cause and for attorney fees on July 28, 2009 and the matter was set for hearing on October 21, 2009. The debtor filed his chapter 11 case on August 27, 2009.

² Exhibit A to the complaint at 14, docket 1.

III. DISCUSSION

A.

Bankruptcy code § 523(a)(15) provides in relevant part that:

(a) A discharge under section . . . 1141 . . . of this title does not discharge an individual debtor from any debt –

* * *

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.]

11 U.S.C. § 523(a)(15). The party contesting dischargeability has the burden of proof, *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998), by a preponderance of the evidence, *Grogan v. Garner*, 498 U.S.279, 291 (1991).

As the party contesting dischargeability, Ms. Ruf must establish that the debts at issue (1) are to a spouse, former spouse, or child; (2) are not domestic support obligations under § 523(a)(5); and (3) were incurred in connection with a separation agreement, divorce decree, or other court order. *Damschroeder v. Williams (In re Williams)*, 398 B.R. 464, 468 (Bankr. N.D. Ohio 2008). The only disputed element here is whether the debtor's obligations to pay for his children's schooling and to pay the mortgage debt are owed to his former spouse and his children. If they are owed to Ms. Ruf and the children, the debts are not dischargeable. Conversely, if the debts are owed to the schools and to Huntington, they are dischargeable.

B.

When Congress adopted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)³ it made several changes to section § 523(a)(15), one of which was to add the requirement that a debt must be “to a spouse, former spouse, or child of the debtor.” The changes to § 523(a)(15) were made in conjunction with changes to § 523(a)(5) and other Bankruptcy Code provisions dealing with domestic debt. To interpret this new language, the court is required to apply its “plain meaning . . . unless its literal application would produce a result demonstrably at odds with the intent of Congress.” *Chase Manhattan Mortgage Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 470 (6th Cir. 2008).

The legislative history behind the changes regarding domestic debt is sparse, but others have noted that “[o]ne of Congress’s overarching themes in enacting BAPCPA was to redefine and reinforce the ability of non-debtor former spouses to recover both support and property settlement obligations from debtors in bankruptcy.” *Wodark v. Wodark (In re Wodark)*, 425 B.R. 834, 838 (B.A.P. 10th Cir. 2010); *see also* 4 COLLIER ON BANKRUPTCY ¶ 523.23 (16th ed. 2010) (noting that “the increase in the scope of the discharge exception effected by the 2005 amendments expresses Congress’s recognition that the economic protection of dependent spouses and children under state law is no longer accomplished solely through the traditional mechanism of support and alimony payments”).

The question under the plain meaning of the new statute is whether the divorce decree creates a debt owed by the debtor to Ms. Ruf and the debtor’s children, or whether the decree simply provides Ms. Ruf and the children with a claim against the debtor. *Cheatham v.*

³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1501(b)(1), 119 Stat. 23, 216.

Cheatham (In re Cheatham), Adv. No. 09-6034, 2009 WL 2827951 at *5 (Bankr. N.D. Ohio Sept. 2, 2009).

C.

Under the Bankruptcy Code, “[t]he term ‘debt’ means liability on a claim.” 11 U.S.C. § 101(12). The term “claim” is defined in relevant part as a “right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]” 11 U.S.C. § 101(5)(A). A right to payment “is nothing more nor less than an enforceable obligation[.]” *Pennsylvania Dep’t of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1990), *superseded by statute on other grounds by* Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865. State law determines whether a divorce decree creates a debt. *Grogan*, 498 U.S. at 283-84.

The Bankruptcy Appellate Panel of the Sixth Circuit discussed the effect of an Ohio divorce decree in *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998). In that pre-BAPCPA decision, the BAP held that a debtor’s obligation to pay existing third-party obligations under an Ohio divorce decree was debt incurred by the debtor in connection with the divorce decree. In that context, the BAP noted that:

the liability of each party to Mr. Perdue under the original Note was unaffected by the Dissolution Decree. Ms. Gibson and the Debtor remained jointly liable on the Note to Mr. Perdue exactly as they had been prior to the dissolution. *As between the Debtor and Ms. Gibson, however, the domestic relations court's entry of the Dissolution Decree had significant new legal consequences.* The entry of the Dissolution Decree extinguished all pre-existing obligations of the parties to each other, whether those obligations existed under the Separation Agreement or otherwise. The Separation Agreement incorporated into the Dissolution Decree replaced those obligations with new ones fully enforceable as a

judgment of the domestic relations court. Further, in the Dissolution Decree, the Debtor incurred an additional obligation in favor of Ms. Gibson to pay any and all debts to his parents, including the Note to Mr. Perdue. This obligation is fully enforceable by Ms. Gibson against the Debtor. Finally, and most significantly, Ms. Gibson obtained, as a result of applicable Ohio law, a new right to payment and related enforcement rights, all of which were incurred by the Debtor in connection with the parties' Separation Agreement as incorporated into the domestic relations court's Dissolution Decree.

In re Gibson, 219 B.R. at 204-5 (emphasis in original).

As the *Gibson* discussion illustrates, the divorce decree created new rights to payment and to enforcement. With respect to the mortgage debt, the divorce decree requires the debtor to pay this debt and to indemnify and hold Ms. Ruf harmless with respect to it. The debtor argues that he owes the debt to Huntington, that Ms. Ruf does not, and that the obligation to indemnify and hold Ms. Ruf harmless is meaningless because she has never been liable to Huntington. The court concludes, however, that the indemnity provision is a debt to Ms. Ruf within the meaning of the Code.⁴

Indemnity is defined as:

the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement . . . In general, to indemnify is to make whole and has been defined to mean to save harmless by giving security for the reimbursement of a person in case of anticipated loss . . . The nature of an indemnity relationship is determined by the intent of the parties as expressed by the language used.

Worth v. Aetna Cas. & Sur. Co., 513 N.E.2d 253, 256 (Ohio 1987) (internal citations omitted). A party may indemnify another against liability or against actual loss or damage. A right of action based on indemnification for liability accrues when the liability of the indemnitee arises.

⁴ As a result, the court need not determine the parties' rights with respect to this obligation in the absence of such a provision.

Parkhurst Mall Corp. v. Taneyhill, No. 2006-T-0082, 2007 WL 210781 at *4 (Ohio Ct. App. Jan 26, 2007). A right of indemnification for loss, on the other hand, accrues when the indemnitee suffers a loss within the scope of the agreement. *Fabe v. Am. Druggists' Ins. Co.*, 591 N.E.2d 835, 840 (Ohio Ct. App. 1990).

The debtor's argument that the indemnity provision is meaningless assumes that the indemnity provision is surplusage. Under Ohio law, however, the provision must be interpreted so as to give it effect if possible. *See Ward v. Ward*, 468 N.E.2d 1132, 1134 (Ohio Ct. App. 1983) (noting that a divorce decree which is susceptible to two possible interpretations must be interpreted to give effect "to the judgment in its entirety without eliminating a part of the judgment"). Assuming that Ms. Ruf is not liable for the mortgage debt (a fact not in evidence), the indemnity provision is properly read as serving to ensure that she is made whole for her loss if the debtor fails to pay the debt. As such, the provision creates a direct, enforceable liability from the debtor to Ms. Ruf; that direct liability is a debt to Ms. Ruf within the meaning of § 523(a)(15). *In re Cheatham*, 2009 WL 2827951 at *6; *Schweitzer v. Schweitzer (In re Schweitzer)*, 370 B.R. 145, 154 (Bankr. S.D. Ohio 2007). The debt is not, therefore, dischargeable.

As to tuition, the debtor argues that his obligation to pay tuition is dischargeable because it is owed to the schools, rather than to Ms. Ruf or his children. Payments for the tuition of minor children are a form of child support under Ohio law.⁵ *See Rand v. Rand*, 481 N.E.2d 609, 613 (Ohio 1985) (concurrency) (noting that a non-custodial parent's agreement to pay tuition "is an acceptable form of child support designed to partially reimburse the custodial parent for

⁵ Ms. Ruf has not, however, argued that the tuition payments were support which would qualify as a domestic support obligation under 11 U.S.C. § 101(14A).

expenses incurred in rearing the child”); *O’Brien v. O’Brien*, No. 2003-CA-F12069, 2004 WL 2496808 at *9 (Ohio Ct. App. Nov. 2, 2004) (stating that such payments are “a permissible form of financial child support”); *Mencini v. Mencini*, Nos. 83638 and 83820, 2004 WL 1364402 at *2 (Ohio Ct. App. June 17, 2004) (same). Where specific child support benefits are provided for a child as part of a divorce decree, the child is a third-party beneficiary to that provision. *Smith v. Smith*, 218 N.E.2d 473, 476 (Ohio Ct. App. 1964). The support provision may be enforced by the child or a parent may enforce it for the child. *Id.* at 476; *see also Lindsey v. Lindsey*, No. 06CA3113, 2007 WL 2163985 at *3 (Ohio Ct. App. July 19, 2007) (“A parent has concurrent standing, along with his or her child, to enforce a decree’s provisions that are intended to benefit the child.”).

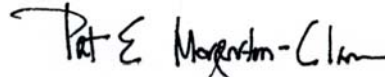
To be a claim, the tuition provision must be enforceable. Clearly it is. The domestic relations court has “all powers necessary” to enforce the support provision. OHIO REV. CODE § 3121.35. Enforcement can be obtained through contempt proceedings. *Rand*, 481 N.E.2d at 612; *Wesselman v. Wesselman*, 623 N.E.2d 1300 (Ohio Ct. App. 1993). Additionally, the domestic relations court can issue a separate judgment for the unpaid support. *See for example Williamson v. Williamson*, No. 04CA008441 2004 WL 1836996 (Ohio Ct. App. Aug. 18, 2004) (affirming lump-sum support judgment for children’s unpaid medical expenses); *Moore v. Moore*, No.18674, 1998 WL 332949 (Ohio Ct. App. June 24, 1998) (reversing trial court decision not to grant ex-spouse judgment for unpaid tuition); *Hewitt-Totten v. Holt*, No. WD-95-112, 1996 WL 748177 (Ohio Ct. App. Dec. 20, 1996) (affirming trial court’s award of a lump sum judgment in favor of ex-spouse for child’s unreimbursed medical bills which had not been paid as required under the parties’ divorce decree); *Evans v. Brown*, 491 N.E.2d 384 (Ohio

Ct. App. 1985) (sustaining objection to trial court's decision to deny ex-spouse judgment for tuition arrearages).

As beneficiaries, the children have an enforceable right to the payment of their tuition and Ms. Ruf has standing to seek enforcement on their behalf. That enforceable right to payment constitutes a claim under the Bankruptcy Code. Consequently, the debtor's tuition obligation is one to his children as required under § 523(a)(15).

IV. CONCLUSION

For the reasons stated, the debtor's obligations to pay the mortgage debt and his children's tuition under the parties' divorce decree are determined to be nondischargeable under 11 U.S.C. § 523 (a)(15). The court will enter a separate judgment in favor of the defendant Margarte Ruf in accordance with this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 09-18090
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PETER S. HOLLINGTON,) Chapter 11
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Debtor.) Judge Pat E. Morgenstern-Clarren
_____)
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PETER S. HOLLINGTON,) Adversary Proceeding No. 09-1424
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Plaintiff,)
)
v.)
)
MARGARET RUF fka) **JUDGMENT**
MARGARET RUF HOLLINGTON,)
)
Defendant.)

For the reasons stated in the memorandum of opinion entered this same date, judgment on the complaint is entered in favor of defendant Margaret Ruf. The plaintiff-debtor's obligations to pay the mortgage debt and his children's tuition under the parties' divorce decree are determined to be nondischargeable under 11 U.S.C. § 523(a)(15).

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Pat E. Morgenstern-Clarren". The signature is written in a cursive style with a large, stylized initial "P".

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge