IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3826

Summary Calendar

IN THE MATTER OF: HOLICE TOLER JACKSON, JR.,
Debtor,

LINDA KAY SHARKEY JACKSON,

Appellee,

v.

HOLICE TOLER JACKSON, JR.,

Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-93-615-A)

(April 20, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Mrs. Linda Kay Sharkey Jackson filed an adversary proceeding alleging that her claim against the debtor, her former husband, was not dischargeable under § 523(a)(5). The bankruptcy court determined that the claim was not dischargeable. The district

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

court affirmed the bankruptcy court's decision. Holice Toler Jackson, the debtor, appeals. We affirm.

I.

In March of 1983, Linda Jackson filed a petition for separation in Louisiana state court. Linda and Holice Jackson entered into a consent judgment of separation from bed and board on the grounds of mutual fault. The separation judgment provided that Linda and Holice Jackson would enter into a community property partition agreement. The separation judgment provided that as a part of the community property partition agreement, Holice Jackson would convey to Linda Jackson his interest in the community residence and "pay to Linda Kay Sharkey Jackson . . . the sum of SIX HUNDRED AND NO/100 DOLLARS ($600.00) per month, said payments to be terminated only if Linda Kay Sharkey Jackson dies or remarries . . . ." The parties eventually entered into a community property partition agreement which provided that "Holice T. Jackson, Jr. agrees to pay to Linda Kay Sharkey Jackson the sum of SIX HUNDRED AND NO/100 DOLLARS ($600.00) per month until her remarriage or for the remainder of her life if she remains unmarried . . . ."

Subsequently, Mr. Jackson filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Mrs. Jackson filed an adversary proceeding seeking a determination by the bankruptcy court that the $600 monthly obligation was nondischargeable under § 523(a)(5). The bankruptcy court determined that Mr. and Mrs. Jackson intended for the $600 monthly payment to be a support

obligation and therefore nondischargeable under § 523(a)(5). Mr. Jackson appealed to the district court, and the district court affirmed the bankruptcy court's determination.

II.

This court reviews findings of fact by the bankruptcy court under the clearly erroneous standard and decides issues of law de novo. Haber Oil Co. v. Swinehart (In re Haber Oil Co.), 12 F.3d 426, 434 (5th Cir. 1994). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.'" Wilson v. Huffman (In re Missionary Baptist Found. of Am., Inc.), 712 F.2d 206, 209 (5th Cir. 1983) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). The burden is on the person who asserts nondischargeability of a debt to prove its exemption from discharge. Benich v. Benich (In re Benich), 811 F.2d 943, 945 (5th Cir. 1987). The bankruptcy court must determine the true nature of the monthly payments regardless of the characterization placed on the payments by the parties' agreement or the state court proceeding. Id. The bankruptcy court must evaluate the intent of the parties at the time they entered into the agreement. In re Davidson, 947 F.2d 1294, 1296-97 (5th Cir. 1991). We review the bankruptcy court's determination that Mrs. Jackson satisfied her burden in proving that the payments were nondischargeable under § 523(a)(5) under the clearly erroneous standard. Id. at 1296 n.4.

III.

Generally, a discharge under § 727 of the Bankruptcy Code discharges a debtor from all prepetition debts. However, § 523 provides for certain exceptions to discharge. In this case, Mrs. Jackson has asserted that payments which Mr. Jackson was to make to her under a community property partition agreement are nondischargeable under § 523(a)(5). Section 523(a)(5) provides:

> (a) A discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debtsQ
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> . . . .
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement, but not to the extent thatsQ
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
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> (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[.]

The bankruptcy court determined that the parties intended the $600 monthly obligation to be a support obligation. First, the bankruptcy court noted that Mr. Jackson testified that he voluntarily offered to pay Mrs. Jackson $1,000 per month in child support. Mrs. Jackson testified that she demanded that the $1,000 payment be characterized as $400 for child support and

$600 for alimony. In response to her demand, Mr. Jackson stated that he did not care how the children received the $1000 a month, as long as any part of the payment was not labeled as alimony. Mr. Jackson also testified that he presumed that Mrs. Jackson needed support. Mr. Jackson further testified that he did not want the payment to be characterized as alimony because he was concerned about the effect of the payment of alimony to his reputation, and he believed that Mrs. Jackson was at fault in the marriage and not entitled to alimony. Mrs. Jackson testified that she always considered the payment to be alimony. The bankruptcy court determined that "Mr. Jackson's unwillingness to subject himself to the perceived derision from the community if he owed the money under the label of 'alimony' . . . is not credible evidence of intent that the obligation not be in the nature of alimony or support."

Further, the bankruptcy court determined that Mrs. Jackson was in need of support at the time that the agreement was entered into. The bankruptcy court noted that at the time of the agreement all three of the couple's minor children were living with Mrs. Jackson, and she was unemployed. She did not have a college education and possessed no special skills or expertise. Also, Mrs. Jackson had not worked in some years because she had decided to stay home with the children.

The court was also persuaded that the $600 monthly payment was a support obligation because Mr. Jackson's income tax returns for 1984 and 1986 listed the monthly obligation as "alimony

paid." In response to the bankruptcy court's reliance on his characterization of the monthly payments as alimony in his 1984 and 1986 tax returns, Mr. Jackson asserts that he "should not be penalized if he got improper advice." Mr. Jackson's argument is, to say the least, lame. He also asserts that at a minimum the evidence regarding his tax returns is contradictory because he did not characterize the monthly obligation as alimony in his 1985 tax return. The bankruptcy court also noted that a true property settlement agreement was more commonly represented by a promissory note.

Mr. Jackson asserts that the bankruptcy court's determination that the payments were intended as support was clearly erroneous. First, Mr. Jackson notes that because this was a divorce based on mutual fault he had no legal obligation, under Louisiana law, to provide Mrs. Jackson with alimony. However, the mere fact that state law would not obligate Mr. Jackson to make alimony payments does not forego a conclusion by the bankruptcy court that the parties intended the payments to be for support. See In re Benich, 811 F.2d at 945 (noting that even though Texas law would not permit an award of permanent alimony, the bankruptcy court's determination that monthly payments for the rest of the spouse's life or until she remarried were for alimony or support was not clearly erroneous). Mr Jackson also asserts that the separation decree and the property partition agreement clearly provide that the $600 monthly payments are to divide the community property and that neither document mentions

alimony or support. Mr. Jackson and Mr. Carmichael, Mr. Jackson's divorce attorney, both testified that the $600 monthly payments were not intended to be support. Rather, they asserted that the payments were intended to split up the community property. In fact, Mr. Jackson testified that the present value of the $600 payments over Mrs. Jackson's life essentially made the community property division equal. However, contrary to Mr. Jackson's assertion in his brief, Mr. Jackson testified that he did not make a present value calculation of the $600 payment over the life expectancy of Mrs. Jackson at the time that he agreed to make the monthly payment. Therefore, we do not consider the bankruptcy court's determination that his testimony concerning the essentially equal division of the community property was not particularly relevant as to the parties intent at the time that they entered into the agreement to be in error. Also, Mr. Jackson's assertion in his brief that he was of the opinion that Mrs. Jackson would be married in a year and that he would then be able to discontinue the payments does not support his assertion that the $600 monthly obligation was designed to make the community property division equal.

We conclude that the bankruptcy court's determination that the parties intended the $600 monthly obligation to be in the nature of support and and therefore not dischargeable is not clearly erroneous.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.