

June 8, 1998

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LONNIE GENE HAUGHEY,
JR.,

Debtor.

BAP No. EO-97-076

BETTI HAUGHEY,

Plaintiff—Appellant,

v.

LONNIE GENE HAUGHEY, JR.,

Defendant—Appellee.

Bankr. No. 96-72562
Adv. No. 97-7029
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before PUSATERI, ROBINSON, and MATHESON, Bankruptcy Judges.

MATHESON, Bankruptcy Judge.

BACKGROUND

In 1991 the parties to this appeal were divorced. At that time the family court entered a decree that provided:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff be and she is hereby awarded a judgement [sic] of Twenty-Three Thousand, Four Hundred Twenty-One Dollars (\$23,421.00) as alimony in lieu of property. This judgement [sic] should bear interest at the statutory rate, and be calculated to pay out in ten years. Defendant could pay said judgement [sic] sooner, if he so desires.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

IT IS FURTHER ORDER, ADJUDGED AND DECREED by the Court that the Plaintiff be and she is hereby awarded support alimony in the amount of Twenty-One Thousand Six Hundred Dollars (\$21,600.00) payable at Three Hundred Dollars (\$300.00) per month for six years.

In addition the court ordered Lonnie Haughey, Jr., the husband and the debtor in the bankruptcy case (“Debtor”), to pay child support. The Debtor has paid his child support obligations. He also, for some period of time, made payments on the support alimony obligation. He apparently never made any payments on the obligation for alimony in lieu of property division.

In December 1996, faced with a possible contempt citation by the family court for his failure to pay the awards under the divorce decree, the Debtor filed his Chapter 7 bankruptcy case. Thereafter, Betti Haughey, the Debtor’s former wife (“Wife”), commenced an adversary proceeding seeking a determination by the court pursuant to 11 U.S.C. § 523(a)(15) that the award of alimony in lieu of property division was a non-dischargeable debt of the Debtor. The remaining obligations owed by the Debtor pursuant to the divorce decree are recognized by the parties to be non-dischargeable pursuant to the provisions of section 523(a)(5). The bankruptcy court heard the evidence and determined that the Debtor did not have the ability to pay the award of alimony in lieu of property division from income of the Debtor not reasonably necessary to be expended for the maintenance or support of the Debtor or a dependent of the Debtor. The court therefore determined that the obligation was dischargeable. This appeal followed.

The Wife argues that the bankruptcy court erred in the first instance in determining that the Debtor had an average monthly net income of \$2,386.72. In addition, the Wife argues that the Debtor’s expenses include items that are not reasonably necessary for the maintenance or support of the Debtor or a dependent of the Debtor. Finally, it is argued that the bankruptcy court failed to consider

potential changes in circumstances that would further enhance the Debtor's ability to pay.

After the filing of the bankruptcy case, the Wife returned to the state court and there obtained an amended and supplemental decree that changed the obligations of the Debtor. The Wife also obtained a judgment against the Debtor for attorney's fees incurred by the Wife in pursuing the supplemental decree. The Debtor has appealed the award by the state court specified in the supplemental decree. This fact was disclosed at the argument on this appeal and does not appear in the record. We do not know whether the bankruptcy judge was advised of the pendency of the appeal. The resolution of that appeal may affect the ability of the Debtor to pay, a factor that was not considered by the bankruptcy court. We, therefore, vacate and remand so that the bankruptcy court can reconsider its determination that the Debtor's obligation to the Wife is dischargeable in light of the possible impact of the pending state court appeal.

JURISDICTION AND STANDARD OF REVIEW

A Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this circuit. 28 U.S.C. §158(a), (b)(1), (c)(1). As neither party has opted to have this appeal heard by the District Court for the Eastern District of Oklahoma, they are deemed to have consented to jurisdiction. 10th Cir. BAP L.R. 8001-1(d).

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." "

Pierce v. Underwood, 487 U.S. 552, 558 (1988). In reviewing factual findings, a finding is “clearly erroneous” when the reviewing court “is left with the definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), cited in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

DISCUSSION

In reaching its decision under 11 U.S.C. § 523(a)(15), the bankruptcy court was first required to ascertain the amount of the Debtor’s available income. The court found that the Debtor had available average net monthly income of \$2,386.72. The Wife contends that the court erred in its finding because the court failed to recognize that the Debtor’s payroll deductions included amounts for voluntary contributions to the Debtor’s Thrift Savings Plan (“Thrift Plan”). The Wife’s analysis is incorrect.

As evidence of his income, the Debtor introduced at trial his first fourteen pay stubs for the year 1997. At the start of that period, the Debtor had deductions of \$94.60 per month for contributions to his Thrift Plan. By the end of the period, the Debtor had ceased making those contributions. The Wife asserts that the bankruptcy court failed to recognize this change and, as a result, the average net income figure used by the court included deductions for a contribution no longer being made.

The Debtor’s brief in this appeal, at page 7, accurately sets forth how the net income was calculated. The calculation was made from Exhibit D-8, which was the last pay stub. That pay stub summarizes the Debtor’s income for the year to date, and also summarizes the various deductions. The \$2,386.72 figure is arrived at by deducting from gross income the amounts shown for federal taxes, state taxes, retirement (other than Thrift Plan contributions), Medicare, union dues, life insurance, health insurance, and deductions made to cover

repayment of an obligation to the credit union secured by the Debtor's truck and repayment of a loan from the Debtor's Thrift Plan. The resulting net income figure is then adjusted to a monthly average, which is \$2,386.72. There are no deductions for any contributions to the Thrift Plan for the pay periods encompassed in Exhibit D-8.

Having determined the income that was available, the bankruptcy court then focused on the Debtor's budget. The court concluded that certain expenses either should not have been included in the budget at all (such as various payments he was making on behalf of his new wife), or were too high. Even after making these adjustments, the court still found that the Debtor was going to have a monthly shortfall of \$116.07, and concluded that the Debtor did not have the means available to pay the Wife the court-ordered alimony in lieu of property settlement.

The Wife does not complain about the adjustments made by the court to the Debtor's budget. The Wife's complaint is that the court did not go far enough. In particular, the Wife complains that the court erroneously allowed the Debtor to continue making payments to his government retirement account (other than the Thrift Plan), allowed the Debtor to take a deduction for payments being made on a loan the Debtor had obtained from his Thrift Plan, permitted the Debtor to pay for his son's car insurance, and allowed a deduction of \$88.83 per month on a new life insurance policy for the benefit of the Debtor's current wife. All told, the Wife asserts that these excess deductions amounted to \$986.53 per month. Thus, the Wife concludes that the court should have found that the Debtor had some \$870.00 in monthly income that was available to be used to pay obligations owed her. In addition, the Wife argues that the court failed to consider possible near-term adjustments to the Debtor's budget that might occur either by way of possible pay increases or by a reduction in child support to the extent of

approximately \$215.00 a month when his daughter reaches the age of 18 later in 1998.

The biggest adjustment argued by the Wife relates to the challenged deductions for retirement and Thrift Plan contributions totaling \$696.90 per month.¹ The analysis urged by the Wife is incorrect.

First, as has already been explained, there was no continuing deduction for contributions to the Thrift Plan. The Debtor had ceased making these contributions, and they were not included as a part of the total deductions on Exhibit D-8 from which the net wages were calculated by the court. The so-called deduction designated as “C100” was never a deduction, but was simply an indication of which investment fund the actual contribution ended up in. In any event, that line item on the pay stubs also was not included in the deductions shown on Exhibit D-8. The remaining retirement deduction of \$132.45 per pay period is not, as the Wife argues, a voluntary contribution made by the Debtor. The evidence shows that this is a contribution mandated by statute under the Civil Service Retirement System. *See* 39 U.S.C. § 1005; 5 U.S.C. § 8334. The bankruptcy court did not commit reversible error in failing to increase the Debtor’s available net income by these amounts.

As to the argument that the court should have considered possible increases in the Debtor’s income, there is simply nothing in the record to support the argument. To the contrary, the Debtor testified that he anticipated having less income in 1997 than in 1996. (Tr. p. 145; Appellant Appendix p. 66).

As to the remaining factors, it is true that there is authority to support the view that a Debtor’s voluntary repayment of a loan from his personal retirement account ought not to be considered a reasonably necessary expense (*Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775 (6th Cir. 1995)). There is also

¹ The Debtor is paid every two weeks.

authority to support the argument that the court should consider possible near-term adjustments that may be forthcoming to the Debtor's income or expenses. *Humiston v. Huddelston (In re Huddelston)*, 194 B.R. 681 (Bankr. N.D. Ga. 1996). On the other hand, there is nothing in the record to support the conclusion of the bankruptcy court that certain of the expenses claimed by the Debtor in his budget were excessive.

In the final analysis, it is the obligation of this Court to consider whether the bankruptcy court was clearly erroneous when it concluded that the Debtor did not have the ability to pay the ordered support in lieu of property division out of income not reasonably necessary for the maintenance or support of the Debtor and his dependents. This requires an evaluation of the overall conclusion of the court, and not necessarily a line-by-line determination. This Court is unable to conclude that the ultimate finding of the bankruptcy court, on the basis made, was clearly erroneous. There are other factors, however.

Pursuant to the original divorce decree, the Debtor was to pay the Wife support alimony of \$21,600.00 at the rate of \$300.00 a month, plus the support in lieu of property in the amount of \$23,421.00. As noted above, after the bankruptcy case was filed the Wife returned to the state court and sought an amendment to the decree in light of the changed circumstances occasioned by the bankruptcy filing. Having heard the evidence, the state court agreed with the Wife, stating:

The Defendant [Debtor] has completely defeated the Courts [sic] attempt to treat the parties equitably. There is no question that he had the right to file bankruptcy and seek to discharge the debt created by the property division award. However, by doing so he has drastically altered the equitable positions of the parties envisioned by the Court in determining all of the issues at the time the divorce was granted. This resulted in extreme undue hardship upon the Plaintiff. I believe that this is a substantial change in circumstances such that a modification of the support alimony is warranted. An additional amount of support alimony of \$23,200.00 should be awarded Plaintiff making the total amount due as of July

1, 1997, is \$25,000.00. This should be paid at the rate of \$500.00 per month beginning July 1, 1997.

The state court also increased the child support from \$467.00 to \$615.00 a month and ultimately entered judgment against the Debtor for \$3,360.00 for the Wife's attorney's fees in connection with the supplemental proceedings. At oral argument in this appeal this Court was advised that the state court's increased award of support alimony had been appealed by the Debtor, and the appeal remains pending.

The record reflects that the Debtor had made some of the payments required on the original \$21,600.00 award of support alimony, but the exact amount is not disclosed. The supplemental award is confusing, at best, in determining that it was to be an "additional amount" of \$23,200.00, which makes the "total amount . . . \$25,000.00." In any event, what is clear is that the Debtor's budget, relied on by the bankruptcy court in making its findings, is premised on the obligations represented by the supplemental decree---that is, the Debtor has scheduled his child support obligation at \$615.00 a month and his support alimony payment at \$500.00.

The state court obviously believed that the \$23,421.00 property division award was dischargeable and considered that its amended award of "additional support" was meant to compensate the Wife for what she had lost by reason of that discharge. If the Wife now prevails in her action in the bankruptcy court, she will be twice made whole because she will both be able to collect the \$23,421.00 and to collect the increased support awarded by the supplemental decree of the state court. On the other hand, if the Debtor prevails in the pending appeal of the state court's supplemental decree, his monthly expenses for support alimony will be reduced by \$200.00 and, by then, his child support obligations will also have been reduced, leaving him with available funds to apply toward the

\$25,000.00 obligation even according to the findings of the bankruptcy court.

The bankruptcy court did not consider, in its findings, the possible effect on the Debtor's budget of the pending appeal. In truth, there is no indication in the record that the bankruptcy judge was ever made aware of the appeal. Because the impact of this factor is so significant, it is appropriate that the judgment of the bankruptcy court be set aside and the matter remanded so that the court can consider the effect of the appeal of the supplemental decree.

CONCLUSION

For the reasons stated, the judgment of the bankruptcy court is vacated and remanded for further proceedings in accordance with this order and judgment.