

July 20, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE RICHARD A. CLINE,
Debtor.

BAP No. WO-04-069
BAP No. WO-04-071

DONNA R. CLINE,
Plaintiff – Appellee –
Cross-Appellant,

Bankr. No. 04-10824-BH
Adv. No. 04-1129-BH
Chapter 7

v.

ORDER AND JUDGMENT*

RICHARD A. CLINE,
Defendant – Appellant –
Cross-Appellee.

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

Before McFEELEY, Chief Judge, CLARK, and McNIFF, Bankruptcy Judges.

PER CURIAM.

The United States Bankruptcy Court for the Western District of Oklahoma entered a Judgment excepting a portion of the Chapter 7 debtor's divorce-related debts to his former spouse from discharge pursuant to 11 U.S.C. § 523(a)(5).

Both the debtor and the former spouse have timely appealed this final Judgment.¹

The parties have consented to this Court's jurisdiction because they have not

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

elected to have this appeal heard by the United States District Court for the Western District of Oklahoma.² The bankruptcy court's Judgment is AFFIRMED.

I. Discussion

The question in this case is whether the bankruptcy court erred in applying § 523(a)(5) to debts owed by the debtor to his former spouse under a Decree of Divorce and Settlement Agreement. Section 523(a)(5) states:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . . .

- (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 . . . divorce decree . . . , 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[.]³

A judgment defining or refusing to define a divorce-related debt as “support” for purposes of § 523(a)(5) is reviewed for clear error.⁴ A factual finding is clearly erroneous when “it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.”⁵

² 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

³ 11 U.S.C. § 523(a)(5).

⁴ See, e.g., Sampson v. Sampson (In re Sampson), 997 F.2d 717, 721 (10th Cir. 1993); Brasher ex rel. Turner v. Turner (in re Turner), 266 B.R. 491, 494 (10th Cir. BAP 2001).

⁵ LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1987) (citation omitted).

In this case we are unable to review the evidence that was before the bankruptcy court because the Appellant and the Cross-Appellant have failed to include in this Court's record documents admitted into evidence below, most notably the Decree of Divorce and Settlement Agreement.⁶ As a result, we are compelled to affirm the bankruptcy court.⁷

II. Conclusion

The bankruptcy court's Judgment is AFFIRMED.

⁶ The debtor's Supplemental Designation of Record designates all trial exhibits. But, copies of the documents admitted into evidence below are not included in any Appendix filed with the Court. Accordingly, they are not part of our record. *See* Fed. R. Bankr. P. 8006 & 8009(b); 10th Cir. BAP L.R. 8006-1(a) ("Once a party has designated the record on appeal in accordance with Fed. R. Bankr. P. 8006, . . . [t]he record must be brought before this court in the appendices required by Fed. R. Bankr. P. 8009(b) and 10th Cir. BAP L.R. 8009-1(b)."); *see generally*, Arkla Energy Res. v. Roye Realty & Developing, Inc., 9 F.3d 855, 865 (10th Cir. 1993) (cross-appellant also has duty to provide adequate record on appeal).

⁷ *See, e.g.*, Veile v. Martinson, 258 F.3d 1180, 1186 (10th Cir. 2001) (appellate court must affirm lower court when record before appellate court is insufficient to permit assessment of claims of error); Scott v. Hern, 216 F.3d 897, 912 (10th Cir. 2000) (same); Ewers v. Bd. of County Comm'rs, 802 F.2d 1242, 1250 (10th Cir. 1986), *cert. denied*, 484 U.S. 1008 (1988) ("[w]e are unable to review [cross-appellant]'s contention that the court erred in dismissing his property interest claim inasmuch as the evidentiary matters . . . relied on by the court . . . are not included in the record on appeal.") (Citation omitted).