IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
JEROME M. McCOLEY,	)	**Case No. 99-12711**
	)	**Chapter 13**
Debtor.	)	
	)	
	)	
PATRICIA LOUISE EDWARDS,	)	
f/k/a PATRICIA LOUISE McCOLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adv. No. 99-5219**
	)	
JEROME M. McCOLEY,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF DECISION

Plaintiff, Patricia Edwards, formerly known as Patricia McColey ("Patricia"), and debtor/defendant Jerome McColey ("Jerome") were divorced in December 1981. They had one daughter, Jennifer Amalia McColey ("Jennifer"). According to the Divorce Decree, Jerome was to pay child support in the amount of $100.00 every two weeks, and deposit $1,200.00 per year in a trust account to be used for Jennifer's college education. Jerome testified that although he had established and maintained the trust account for his daughter's education, he had depleted the account following his second divorce.

Jerome filed his bankruptcy petition on July 23, 1999. Thereafter, Patricia filed this adversary proceeding seeking a determination that Jerome's obligation to contribute to the "educational fund" established by their Divorce Decree was non-dischargeable child support

under 11 U.S.C. §523(a)(5).[1] The parties tried this matter to the Court on August 14, 2000, and the following shall constitute this Court's findings of fact and conclusions of law, as required to be submitted under Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52.

JURISDICTION

This proceeding is properly before the United States Bankruptcy Court for the District of Kansas and is a core proceeding of which this Court has jurisdiction. 28 U.S.C. §157(b)(2)(I); 28 U.S.C. §1334(a). Venue is properly laid in the District of Kansas, Wichita Division. 28 U.S.C. §1409.

FACTS

Patricia Louise Edwards, formerly known as Patricia Louise McColey, and Jerome M. McColey were married prior to 1981. They had one child, Jennifer Amalia McColey. Patricia and Jerome divorced on or about December 14, 1981, pursuant to a Journal Entry and Decree of Final Settlement and Divorce ("Decree") entered that day in Sedgwick County, Kansas, case number 81 D 3256, Jerome Madison McColey v. Patricia Louise McColey. The parties' final divorce settlement provided for a minimal child support payment of $100.00 every two weeks by Jerome McColey, a division of the parties' respective assets, the placement of Jennifer in Patricia's custody, and the provision for an educational fund into which Jerome McColey was to deposit $1,200.00 annually to be used for Jennifer's college education.

Both Patricia and Jerome were separately represented in their divorce case and, according to both parties' testimony, the educational fund was the product of a suggestion by Jerome that he

[1] Neither party pleaded for a determination of the dischargeablity of the educational fund provision were it to be held a property settlement under 11 U.S C. §523(a)(15). The sixty day period provided for by Fed. R. Bankr. P. 4007(b) has run and presumably such claim is barred.

make a provision to fund the education of Jennifer, then an infant. The journal entry was apparently drafted by Jerome's divorce counsel, Richard Ebersole, Esq., of Mulvane, and in any event, appears on Mr. Ebersole's imprinted stationery.

With respect to custody, support, and the educational fund, the journal entry provides as follows:

> "3. That there was one child born of this marriage, JENNIFER AMALIA McCOLEY whose care, custody and control shall be with the Defendant, subject to the rights of the Plaintiff to reasonably visit with her upon giving reasonable advance notice.
>
> 4. The Plaintiff is to pay as and for child support the sum of $100.00 every two (2) weeks until further order of the Court. This money is to be paid to the Clerk of the District Court, Sedgwick County, Kansas, beginning on the 18th day of December, 1981 and provide health insurance and to pay all medical, dental and hospitalization expenses.
>
> 5. The Plaintiff is to provide an educational fund for the minor child by establishing a Trust Account with the Trust Department of a bank, or by a joint account of Defendant and the minor child, and to deposit therein the sum of $1,200.00 per year. Said sum to be used for the college education of JENNIFER AMALIA.
>
> 6. The Plaintiff is to pay the insurance premiums on the existing life insurance that is jointly on the Plaintiff's and Defendant's lives and the parties do agree to maintain said life insurance with the minor child being the beneficiary."

Paragraph 7 and 8 of the Decree relate to a division of real and personal property. Paragraph 9 addresses Jerome paying Patricia's reasonable attorneys fees and expenses. Paragraph 10 states:

> "The payments and provisions provided for herein are in lieu and instead of alimony or any other obligations which either party may have to the other."

The parties' testimony reveals that at the time of the divorce, there was a substantial discrepancy between the incomes of Jerome and Patricia. Patricia was a part time nurse at Wesley Medical Center, earning approximately $5.80 per hour. Jerome was employed full-time as a

respiratory therapist earning approximately $5.00 per hour, more or less depending on what shift he worked and overtime compensation.[2] Jerome introduced evidence which included a social security earnings record.[3] Interlineated on the earnings record for the year 1981 is a handwritten entry of $19,250.00. Jerome testified that this was likely an accurate approximation of his pay for that year. Patricia did not offer similar evidence concerning her income in 1981. Additionally, each party sought to introduce evidence bearing on their present financial circumstances, however, such evidence is deemed not material with respect to determinations of the respective intentions of the parties concerning support at the time of the divorce.[4]

Although both parties agree that Jerome proposed and Patricia accepted the educational funds provision, they differ significantly in whether the educational fund was intended as "support." Patricia testified that she considered the educational fund as additional support. Patricia maintained that had Jerome not offered the $1,200.00 annual contribution to the educational fund, she would have sought additional child support from him in 1981. Patricia also offered the testimony of Susan McColey, a later wife of Jerome, who testified that Jerome referred to the educational fund contributions as support in her negotiations with him in a subsequent divorce proceeding. Susan McColey identified a Child Support Worksheet dated April 9, 1990, which reflected that Jerome paid $300.00 per month in child support to Patricia ($200.00 monthly child support plus $100.00 monthly to the educational fund).[5] Jerome, however, testified that he

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[2]Debtor testified that he is currently employed as a registered respiratory therapist on staff at Wesley Medical Center.

[3]Defendant's Exhibit 4.

[4]Sampson v. Sampson (In re Sampson), 997 F.2d 717 (10th Cir. 1993).

[5]Plaintiff's Exhibit 2.

never intended the fund to be considered as support; if he had so intended, the fund would have been labeled as support in the decree.

The evidence shows that an educational fund existed at one time. The fund consisted of savings bonds purchased by Jerome, however he depleted the fund for personal expenses. Jerome testified that he was forced to utilize the proceeds "to avoid bankruptcy." Neither Patricia nor Jennifer had any knowledge of how much money the fund contained or how it was being invested. While the Decree provided for the educational fund to be maintained either as a trust account or a joint account in the name of Patricia and Jennifer, Jerome preferred to contribute to his own account. He further stated that he had been unable to save any more money due to poor money management on his part. At one time, the fund contained as much as $5,500.00 in the form of savings bonds.

Jennifer matriculated at the University of Kansas in the fall of 1999 and her education to date has been financed by loans and Patricia's savings.

DISCUSSION

In determining the dischargeability of Jerome's obligation to contribute to Jennifer's educational fund, the Court looks first to the express provisions of 11 U.S.C. § 523(a)(5) which except from discharge any debt "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..." Making this determination for bankruptcy purposes is a matter of federal, not state, law. In re Goin, 808 F.2d 1391, 1392 (10th Cir. 1987) (per curiam). The party seeking to have the debt declared nondischargeable has the burden of proving by a preponderance of the evidence that the parties intended the obligation as support and that the obligation was, in substance, support. See Jones v. Jones (In re Jones), 9 F.3d 878, 880

(10th Cir. 1993)(citing Grogan v. Garner, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)).

The Court finds that Patricia has borne her burden of proof and that the educational fund obligation is nondischargeable support under § 523(a)(5). This conclusion is the result of two inquiries: (1) what was the shared intent of the parties *at the time the obligation arose*; and (2) is the obligation, in substance, support. See Sampson v. Sampson (In re Sampson), 997 F.2d 717, 725 (10th Cir. 1993). In determining the intent of the parties entering into their agreement, the Court may not only rely on the Decree itself as persuasive evidence, but the Court may also look beyond the Decree to extrinsic evidence to discern the true nature of the obligation. See In re Yeates, 807 F.2d 874, 878 (10th Cir. 1986).

Patricia offered the Decree as evidence in this matter and its contents are not disputed. The educational fund is not specifically labeled as support in the Decree. Even if the obligation was labeled, the label is not binding on the Court's determination. In re Sampson, 997 F.2d at 722. The fund is established in a paragraph immediately succeeding the child support paragraph and immediately preceding a paragraph which provides for Jerome to fund life insurance on himself with Jennifer as the beneficiary, arguably another support-like provision. There are two specific paragraphs at the end of the document which are plainly property settlement provisions, allocating the parties' few assets between them. Finally, paragraph 10 which states the payments provided for are "in lieu" of alimony, appears to apply to the educational fund. After analyzing the language within the four corners of the Decree, the Court concludes that it is more likely than not that the parties intended the educational fund to be additional support for Jennifer.

A review of the circumstances surrounding the entry of the Decree as testified to by the parties buttresses this conclusion. In Sampson, the Tenth Circuit instructed that "the critical

question in determining whether the obligation is, in substance, support is 'the function served by the obligation at the time of the divorce.'" 997 F.2d at 725 (quoting In re Gianakas, 917 F.2d 759, 763 (3d Cir. 1990)). In In re Goin which is cited with approval by the Sampson court, the Tenth Circuit suggested four factors which were to be considered by courts in answering the "critical question:" (1) if the agreement fails to provide explicitly for support, the Court may presume that settlement provisions were intended as support where spouse appears to need it; (2) where there are minor children and an imbalance of income, payments are likely to be support; (3) support is indicated when payments are made directly to a spouse; and (4) the obligation terminates upon death or remarriage. 808 F.2d at 1392-93. Considering the presence of the first three of these factors as indicated by the Decree and the evidence, the parties shared intent in 1981 becomes more clear.

The testimony at trial establishes that at the time of the divorce, Patricia worked part-time at a nurse, earning roughly $5.80 per hour. The Court can extrapolate that her income per year was less than $11,600.[6] Patricia became the custodial parent and received the parties' home subject to a mortgage. Based upon the above calculation, Patricia's income would have been less than $1000 per month and her testimony indicated that the house payment alone was $550 per month.

Jerome earned roughly $19,250 in 1981 based on his testimony and his Social Security Earnings Record admitted at trial. Although Jerome testified that his hourly rate of pay was lower than Patricia's, he had substantial overtime and earned a different wage depending on what shift he worked. Jerome was also indemnified by Patricia against the mortgage payment and he did not furnish any evidence that his expenses were equal to or greater than hers.

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[6]2000 hours multiplied by $5.80/hour.

Given these circumstances, the Court concludes that Patricia was unlikely to be able to save money for college in her financial condition without substantially impinging on her ability to support her daughter. Thus, the relative positions of the parties and Patricia's need for support suggest that the obligation was indeed in the nature of support.

The Decree provided for direct payments to the fund to be deposited either in a trust account at a bank or a joint account in the names of Patricia and Jennifer. The fact that Jerome never set up either account (notwithstanding Patricia's request) has no probative impact on what the character of his obligation was.

The Court is also cognizant of, and the parties have cited to, a number of courts holding obligations to pay higher education expenses in the nature of support and not dischargeable. See Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984); Portaro v. Portaro (In re Portaro), 108 B.R. 142 (Bankr. N.D. Ohio 1989); Bush v. Bush (In the Matter of Bush), 154 B.R. 69 (Bankr. S.D. Ohio 1993); Sylvester v. Sylvester 865 F.2d 1164 (10th Cir. 1989)(per curiam). In these cases no specific educational fund was created, but the rationale is the same. In the Decree, Jerome committed himself to fund Jennifer's college education intending this provision as additional support. The Court also notes that the Bush and Portaro cases cited by the parties employ the Calhoun[7] analysis derived by the Sixth Circuit as a way of finding support obligations partially dischargeable if the obligation is found to be not necessary as support at the time of the determination. The Tenth Circuit expressly rejected this approach thus precluding the parties' testimony concerning their current financial positions. See Sylvester v. Sylvester, 865 F.2d at 1166.

[7]In re Calhoun, 715 F.2d 1103 (6th Circuit 1983).

The Decree is less clear concerning the duration of Jerome's obligation and the manner in which the saved funds could be utilized by Jennifer. These matters are best determined by the state court having jurisdiction of the divorce case and not by this Court. Patricia did not demand judgment in this matter beyond a determination of the dischargeability of this obligation and the state court is in the best position to determine the degree and extent of her claim.[8]

For the foregoing reasons, the Court finds that the provision in the Decree requiring Jerome to make annual contributions to an educational fund for Jennifer's college education is in the nature of support and is therefore excepted from Jerome's discharge pursuant to 11 U.S.C. § 523(a)(5).

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. The Judgment on Decision based on this ruling will be entered on a separate document as required by Fed. R. Bank. P. 9021 and Fed. R. Civ. P. 58.

[8]A no-asset report has been filed by the Trustee in Jerome McColey's bankruptcy case and no bar date has been set. Presumably as a result thereof, no claims have been filed by anyone, including Patricia Edwards.

IT IS SO ORDERED.

Dated this 30th day of August, 2000.

ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **MEMORANDUM OF DECISION** was deposited in the United States mail, postage prepaid on this 30th day of August, 2000, to the following:

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